

## I Think I Shall Nominate You

The date was January 17, 1801. John Adams was in the final days of his presidency. He had been defeated in the election of 1800; however, it was uncertain who was going to be the next president. Thomas Jefferson and Aaron Burr had each received 73 electoral votes and Adams had received 63 votes. The constitution provided at the time, that each elector had two votes. The second most vote getter would be the vice-president. Although, it was intended that Aaron Burr be the vice president, he would not give up a claim for the presidency. The presidency would be decided by the outgoing Federalist House of Representatives in February of 1801. Jefferson would win in the 36th ballot over seven days.

Oliver Ellsworth, the Chief Justice, resigned in October of 1800 as the third Chief Justice of the Supreme Court, due to poor health. Adams offered John Jay, who was the first Chief Justice, the position. Due to the delay in the mail, Jays' letter declining the position did not arrive until January 14, 1801:

I left the bench perfectly convinced that when a system so defective, the Court would not acquire the public confidence and respect which, as the last resort of the Justice of the Nation, it should possess.

Jay had resigned as the Chief Justice in 1795 to become Governor of New York. John Rutledge, the second Chief Justice, served less than a year on an interim appointment from George Washington but was not confirmed by the Senate after publicly criticizing the Jay Treaty with England. He was followed by Oliver Ellsworth.

In the first decade, the Court reported only 63 cases, most were not significant. The Court's first opinions were inserted in the back of a volume of the Pennsylvania state reports.

It is telling that in the plans to move the capitol that same year, from Philadelphia to Washington, D.C., there were no provisions for a courtroom or a building for the Supreme Court. Jay was correct that the Court had not gained public confidence and respect.

Adams had no intention of allowing the new Republican administration to appoint the new Chief Justice. However, there were few days left in his presidency. Adams asked his Secretary of State, who delivered Jay's letter, "Who shall I nominate now?" His Secretary of State suggested Justice Paterson, a current member of the Court. Adams objected and replied "I shall not nominate him". After a moment of hesitation, Adams said "I think I shall nominate you". "I had never before heard myself named for the office and had not even thought of it" John Marshall remembered. "I was pleased and well surprised". On January 27, 1801, thirteen days later, John Marshall was confirmed unanimously as Chief Justice of the United States by the Senate. He would serve for 35 years, the longest of any Chief Justice. In 1825, John Adams, looking back on his years of public service, called his appointment of Marshall as Chief Justice his greatest gift to the nation and the pride of my life. Oliver Wendell Holmes, a Justice of the Court, said that "if American law were to be represented by a single figure, skeptic and worshipper alike would agree that the figure could be one alone and that one John Marshall".

When you visit the United States Supreme Court building, which I did in August for this paper, you see that on the first floor is a T shaped hallway. At the middle of the T there is a large bronze statue of John Marshall. The statue places John Marshall as the central figure representing American law. John Marshall sits in this big chair. See Photos #1 & #2 attached.

I, first, became interested in John Marshall when I heard Jean Edward Smith, his biographer; speak at the Fourth Circuit Judicial Conference. I was a guest of Spheeris member

Judge Norman Moon. I had read opinions of John Marshall in law school, but I realized I knew very little about him. Apparently, I am not alone. Albert Beveridge, who wrote a four volume set of the life of John Marshall in 1919, lamented that less is known of Marshall than any other of the great Americans. American History magazine has stated he is one of the most underappreciated figures in American history.

I will first examine his background. What were his qualifications for being Chief Justice? How was he able to establish the Supreme Court as a separate branch of government? Why is he the representative of American law? Why is he sitting in the big chair?

John Marshall was born on September 24, 1755, in Germantown, Virginia (Fauquier County). The area was barely settled and was the frontier. His family lived in an abandoned cabin. His father, Thomas Marshall, served as a surveyor and land agent for Lord Fairfax who owned about 5.2 million acres, the Northern Neck, encompassed by the Potomac and Rappahannock Rivers. The land covered about one-fourth of Virginia. George Washington also served as a surveyor and land agent for Lord Fairfax. Marshall would describe his father as possessing "scarcely any fortune and had received a very limited education but was a man to whom nature had been bountiful and had assiduously improved her gifts . . . he was my only intelligent companion and he was both a watchful parent and an affectionate instructive friend".

His mother, Mary Keith, was a descendant of the Randolph family, one of the most prominent families of Virginia. It is believed that he acquired his temperament and intellect from his mother.

At age 8, his family moved 30 miles to Leeds Manor in the northern part of Fauquier County. The cabin built by Thomas Marshall known as "The Hollow" had two rooms with a half story room loft. It was about 30 feet long. Thomas Marshall leased about 300 acres and farmed enough to feed his family. John Marshall spent his formative years at The Hollow.

At age 18, Marshall's family moved to "Oak Hill", a large two story house on a seventeen acre farm. John Marshall would later become the owner of Oak Hill when his father moved to Kentucky.

I traveled to Fauquier County for this paper. I found the location of historic road signs for Marshall. Photo # 3 is the sign for Germantown. Photo #4 is the sign for his birthplace. I followed the directions on the sign to the John Marshall Birthplace Park. I did not know it existed (Photos #5 & #6). I walked the half mile trail (#7) and found the stone marker at his birthplace in the woods (Photos #8 & #9) I drove about 30 miles to the Hollow. (Photos #10, #11 & #12). I also located Oak Hill a few miles away. (Photos #14 & #15). Photo #16 is a map of the locations.

John Marshall was the oldest of fifteen children. All of his siblings would live to adulthood. While his father was limited in education, he placed high value on education. He maintained an extensive library for the frontier. He obtained many books from Lord Fairfax. He sent John Marshall to an academy owned by Archibald Campbell, "a clergyman of great respectability". The Academy had about 25 students and was located 100 miles away in Westmoreland County. A fellow student was James Monroe who was a lifelong friend of Marshall.

From growing up on the frontier of Virginia, Marshall was detached from the established families of Virginia. In his father, he had an example of a person strong in character. He watched his father's progression from Germantown to The Hollow to Oak Hill. He saw the importance of financial independence and the American dream. He also learned to accept responsibility early as the oldest of 15 children with his father often away.

Marshall was a young man of the Revolution. At age 18, he would join the Fauquier Rifles and become a part of the Culpeper Battalion in 1775. He would serve in many battles including Great Bridge, Brandywine and Monmouth. He would also spend the winter of 1777 in Valley Forge and be exposed to the unspeakable conditions there. He was promoted to Captain in 1777. He was noted by his mentors to be an optimistic, cheerful leader. He was athletic, excelled as a runner and was able to high jump over 6 feet which was a remarkable accomplishment in that era. He told his fellow Justice, Joseph Story, later that the war confirmed his habit as considering America as his country and Congress as his government. "I had imbibed these sentiments so thoroughly that they constituted a part of my being".

In May of 1780, Marshall while on leave from the military attended lectures at William & Mary. A student could attend lectures from two professors. He chose to attend the lectures by George Wythe in law and Reverend James Madison, the cousin of the future President, in natural philosophy. Wythe, a signer of the Declaration, was a famous legal scholar and taught Jefferson, Monroe and Henry Clay. (Photo #17 is the statue of Marshall and Wythe at the Marshall-Wythe School of Law at William & Mary). Before attending William & Mary, Marshall read law in an attorney's office in Warrenton. He walked the 18 miles from Oak Hill carrying legal books. He would later write "from my infancy, I was destined for the law". He would pass

the bar exam, 2 lawyers appointed by the Governor examined him, and he was sworn in as a lawyer on August 28, 1780, at the Fauquier County Court.

During this time he would start courting Polly Ambler. She was from a prominent Tidewater family. Her father was the long standing treasurer for Virginia and one of the most influential people in Virginia. Marshall attended a ball held by the Ambler family in Yorktown. Polly's older sister, Elsa, initially thought Marshall to be an awkward figure with unpolished manners. It was a hasty assessment that she would soon regret. "Under the slouched hat there beamed an eye that penetrated at one glance the inner most recesses of the human character; beneath the slovenly garb there dwelt a heart complete with every virtue". Polly Ambler was smitten and so was John Marshall. They would soon marry in 1783 and would have 10 children, 6 would live to adulthood.

He was elected to the House of Delegates in 1782 and would serve until 1789. He later served another term from 1795 to 1796. He started practicing law in Fauquier County. Upon his election, he would spent his summers in Oak Hill and the rest of the year in Richmond. His law practice grew steadily. He had a lot of contacts from the military, the Randolph Family, and through his father in law. "I was more successful than I had reason to expect", Marshall wrote. He specialized in appellate cases and federal cases. Photo #18 is the statue of Marshall at the courthouse in Warrenton. Photo #19 is the location of his law office in Warrenton. The actual building burned down in the early 1900s. Photos #20 and #21 are of the John Marshall Park in D. C.

Marshall was known to be able to digest a complete factual record, deploy the legal principles and fashion a tight, logical argument. He handled two significant cases with Patrick

Henry as his co-counsel. Marshall developed the strategy and the logical argument while Henry, the orator, was eloquent and provided the electricity. They represented a member of the Randolph family in a very sensational murder trial. The jury found the accused not guilty. They also teamed together in a complicated case involving pre-war British debt for thousands of Virginians. The case dealt with the Virginia law and the provisions of the Jay Treaty with England. The case would ultimately go to the United States Supreme Court. This would be the only case that Marshall would appear as an advocate before the U.S. Supreme Court.

In 1788, Marshall purchased a half acre lot in the court section of Richmond. He built a home that was substantial but not elaborate. It was a brick house in the Federal style of the period. It took almost two years to complete. It would cost a little more than 1,200 pounds which was one year's income. It had nine rooms with a large dining room. Marshall would have monthly "Lawyers' Dinners" for his colleagues in Richmond. See Photos of Marshall House #22, #23 & #24. Photo #25 is a portrait of Marshall. Photo #26 is of his wife Polly. Next to the house is the Richmond courts building, the John Marshall courts building (#27).

During the summer of 1788 he organized Richmond's first social club, the celebrated - Quoits Club or the Barbecue Club. They met every Saturday afternoon from May through September. They would barbecue a pig and throw quoits. Each player had his own set of quoits. Marshall would concoct a potent Madeira punch. Marshall would be a club regular until he died and he relished the Saturday afternoons with his friends and neighbors. It was often said that Marshall was raised on "Federalism and Madeira."

The climax of Marshall's young career was when he was elected to serve at the Virginia convention for the ratification of the Constitution. He was elected from Henrico County.

Virginia was anti-Federal, but he was personally popular and was elected by a vote of 198 to 187. In 1787, the Federal convention in Philadelphia met to amend the Articles of the Confederation. Instead, it passed a new Constitution. It provided that nine states would have to ratify for it to go into effect. At the start of the Virginia convention, eight states had ratified. Public opinion was volatile. Virginia had one-fifth of the population of the country and one-third of the commerce. Federalists felt that the fate of the Union depended on how the Old Dominion voted in June of 1788. The Constitution was debated clause by clause. Patrick Henry, George Mason and James Monroe spoke against the Constitution. James Madison, Edmund Pendleton and John Marshall would speak for the Constitution. Patrick Henry, who had just served his second term as Governor, would give a 3 hour speech. The Constitution's ratification was in peril. John Marshall made a point by point defense of Article III of the Constitution addressing the Federal Judiciary. The Virginia Convention voted 89 to 79 to ratify the Constitution. John Marshall was now marked as the leading authority on the Federal court system in Virginia. With the exception of James Madison, his contributions to the ratification in Virginia were considered the most significant.

Marshall's name became nationally known in 1798. The Country was what was called a "Quasi-War" with France. French privateers had been preying on American shipping. The French were also in a continual war with Great Britain which placed America in the middle.. France was unhappy with the Jay Treaty which favored Great Britain. John Adams selected Marshall as one of three special envoys to France along with Elbridge Gerry of Massachusetts and Charles Pinckney of South Carolina. Adams did not know Marshall, but he wanted a Virginian and Marshall was a Federalist. Marshall left in July of 1797 and did not return until

April of 1798. The French foreign minister named Talleyrand continually delayed negotiations. He sent ministers to talk to the Americans. They requested large bribes and loans from the Americans. This went on for months. The ministers would later be referred to as X, Y and Z and this would be known as the X, Y, Z Affair. Marshall would take the lead in writing a memorial to Talleyrand, setting forth his view of the differences and setting forth America's neutrality. The hope was to convince the French of the sincerity of the Americans and show how the envoys had tried to negotiate. The memorial and his dispatches concerning the negotiations were published months later in American newspapers. This would stir anti-French sentiment across the country. Marshall returned with a hero's welcome in Philadelphia. One of the toasts by a congressman, Robert Harper, "Millions for defense not a cent for tribute" became a famous Federalist battle cry.

Marshall's hero was George Washington. While on the Supreme Court he would write a five volume biography "The Life of George Washington". In September of 1799, Marshall visited Washington at Mt. Vernon. He pressed Marshall and his nephew, Bushrod Washington, to run for Congress. There were 19 representatives from Virginia and only 4 were Federalist. (There were 106 seats in the entire house). Washington had retired from the Presidency in 1797 and was concerned about the future of the Federalist Party. Over three days, Washington delivered a stern direction for Marshall to run. Marshall was anxious to return to his family and practice law. Finally, Marshall yielded. The campaign was difficult as Marshall ran against a Republican incumbent who had served for 4 years. Marshall won a narrow victory by 114 votes. At the very end of the campaign, Patrick Henry's letter declaring that he supported

Marshall, would tipped the scale towards Marshall. Henry said he would prefer Marshall for congress "to any citizen in this state at this juncture with the exception of George Washington".

While serving his term in Congress, Marshall would deliver the eulogy for George Washington on December 20, 1799.

First in war, first in peace, first in the eyes of his countrymen.

The words were written by Richard Lee but read by Marshall.

During his congressional term, Marshall distinguished himself as a supporter of John Adams. The Federalist Party was splitting between the High Federalists of Alexander Hamilton and the more moderate Federalists supporting John Adams. After dismissing his Secretary of State in 1800, Adams named Marshall Secretary of State. He was responsible for a lot of the day to day responsibilities of the Executive.

That brings to his appointment as Chief Justice. What were Marshall's qualifications to be Chief Justice? He was an accomplished lawyer who specialized in the appellant cases and federal court cases. He was a strong advocate of the Constitution. He had served in the state legislature and in Congress. He had represented the country as an envoy to France and he had experience in the executive branch as secretary of state. Most importantly, he was a leader who was very much a people person.

How was he able to transform the Supreme Court? One of the first things he did was start the practice of wearing black robes. Previously, the justices had worn the scarlet and rich purple robes of the King's Bench. By wearing black, Marshall was making a quiet statement. He preferred simplicity to pomp. The black robes symbolize that the Justices carried no colors in making their decisions.

He started the practice of the Justices living and eating together in the same boarding house. This created “a band of brothers” that unified the Court. To this day, the court continues customs that promote congeniality. Before the judges enter the courtroom the practice of each judge is to shake the hand of the other justice. After oral argument, the justices eat lunch together. They do not discuss the cases during lunch.

Marshall’s leadership and persuasive skills would flourish with the other justices. Time and time again Republican presidents would appoint justices only to find them voting with Marshall in court opinions.

Marshall started the practice of the court speaking in one voice. Previously, each justice would write an opinion on each case. It was difficult to understand the decision of the court. Through Marshall’s leadership, most of the Court’s opinions were unanimous. During the period 1811-1823, of 457 opinions, 437 were unanimous.

Marshall wrote for the Court most often. The Marshall Court would hand down 1,180 decisions with Marshall writing 549 of them.

However, the most important factor in Marshall transforming the court was the strength and brilliance of his opinions. Many of the opinions provide the foundation for constitutional law. I do not think you can talk about Marshall without at least talking about some of his opinions but which ones to talk about? Behind Marshall’s statue in the U.S. Supreme Court building are quotes etched on the wall from some of his opinions. (Photo #28) Why did these quotes make the wall? The first quote is from the famous quote of Marbury v. Madison, 1803. Before discussing the case I will discuss section III of the constitution. It provides for the establishment of the United States Supreme Court and such other inferior

courts that Congress may establish. Justices are served under good behavior and their salary should not be reduced. The Court shall hear “cases and controversies”. There are some clauses about the jurisdiction of the court. However, the constitution does not define what power the court has.

Marbury was appointed by President Adams for a 5 year term as a Federal Justice of the Peace. The appointment was approved by the Senate and the Secretary of State sealed his commission. However, his commission had not been delivered before the change in presidency to Thomas Jefferson. Jefferson’s Secretary of State, Madison, following the direction of Jefferson, did not deliver the commission. Marbury asked the Supreme Court to order his commission be delivered to him. This was not heard until 1803 because the sessions of the Supreme Court had been suspended by Congress. Marshall was in a no win situation. No one from the Jefferson administration appeared before the Court. Most assuredly, Madison through Jefferson would not abide by the Supreme Court’s order to order the commission be delivered. The U.S. Supreme Court would further lose respect. So what does Marshall do? He first answers the questions whether Marbury has a legal right to the commission. He decides that the commission is a right once the Secretary seals the commission. The delivery is not the significant act that makes it a right. He then asks whether there a remedy. Marshall concludes the writ of mandamus is the remedy. The Judiciary Act of 1789 provided that the Supreme Court has original jurisdiction for writs of mandamus. However, Article III of the constitution provides that in only in certain cases, the Court shall have original jurisdiction. Writs of mandamus are not listed. In all other cases, the Court shall have appellate jurisdiction. He declares the portion of the act granting jurisdiction to be unconstitutional. “It is emphatically

the province and duty of the judicial department to say what the law is.” Marbury does not get his commission, but Marshall establishes that the Court has the power of judicial review of as whether a law is unconstitutional.

The power of judicial review was not a novel idea. Hamilton argued for it in Federalist Paper Number 78. However, it was by no means agreed upon. In response to the Alien and Sedition Acts, Jefferson and Madison drafted the Kentucky and Virginia resolutions asserting that the states have the right to refuse to comply with federal legislature if deemed unconstitutional.

Marbury v. Madison case has endured. In February of 2017, Federal Judge Leona Brinkema granted a preliminary injunction on the President’s travel ban. In response to the Justice Department argument that the court did not have jurisdiction, she wrote “[A]t least since Marbury v. Madison, (1803), the Supreme Court has recognized that when government action is alleged to be in conflict with the constitution, it is emphatically the province and duty of the Judicial Department to say what the law is.” Marbury v. Madison.

There are a few more thing I learned about the Marbury case. It was the only time that the Marshall Court declared an act of Congress unconstitutional. The opinion does not name the Secretary of State that sealed the commission. It was John Marshall.

Another quote on the wall is McCulloch v. Maryland, 1819. Congress established a National Bank in order to provide a stable national currency. Maryland started taxing the National Bank. The issue was whether it was constitutional for Congress to establish a National Bank and whether Maryland could tax it. A clause in the constitution gave the Congress the powers to make all laws that are “necessary and proper” to effectuate the government.

Maryland argued that necessary and proper meant required. It also argued that establishing a National Bank is not listed as one of the powers in the constitution. Marshall replies that the constitution is a frame work for the government. It is not a legal code. It was not intended that all powers be listed. "Never forget that it is a constitution we are expounding." It must be interpreted carefully. He looks at the text, the history and asks practical questions. Implicit in opinion is that the Court is the entity that must interpret the constitution. He finds that it is within the powers of Congress as a good and reasonable action to establish a National Bank. "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 consist with the letter and spirit of the constitution, are constitutional." He then says Maryland cannot tax the bank. "The power to tax is the power to destroy."

The last case quoted on the wall is from Cohens v. Virginia, 1821. Congress established a lottery in Washington, D.C. Cohens sold these lottery tickets in Virginia. Virginia law prohibited selling lottery tickets in Virginia. Cohens appealed the Virginia Court decision to the Supreme Court. Virginia argued that the U.S. Supreme Court could not review the constitutionality of the Virginia Court decision. Marshall said yes it could, otherwise, thirteen states could have thirteen versions of the constitution. While this may result in disputes between states, the Supreme Court is supreme and the constitution is intended to last. "A constitution is framed for ages to come is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil." It is the people's constitution and not the states' constitution. "The people made the constitution, the people can unmake it. It is a creature of their will and lives only by their will." The decision marked the

decline of the “compact” theory that the Constitution was formed by a “compact” of the states. Marshall ultimately determined the Virginia statute was not inconsistent with the federal law establishing the lottery.

There are more cases which the Marshall Court addressed whether a state law was unconstitutional. In particular, there are cases that the Court held that a state law violated Congress’ power to regulate commerce or impaired the obligation of contract. An example is Gibbons v. Ogden, 1824. The New York state legislature granted a monopoly to two individuals to operate steamboats on its waters. Gibbons started a competing ferry service between New York and New Jersey. Gibbons’ steamboats were licensed under a federal act. The State court granted a restraining order against Gibbons for violating the monopoly. Gibbons appealed to the Supreme Court. Marshall wrote the opinion of the Court; ruling that the New York law must yield to the federal act under the commerce clause. The decision would be known as “the emancipation proclamation of American commerce”.

By the end of the era of the Marshall Court, the Court had emerged as a powerful source in American society. The legacy of the Court’s constitutional jurisprudence was considerable. However, while claiming the power to limit the reach of the other branches through the interpretation of the Constitution, the Court’s leading opinions had taken care to emphasize the limits of its own reach.

There are three stories about Marshall that exhibit Marshall the person. As I say, he was a very social person. In the boarding house, the Justices usually ate together. It was their custom to allow themselves wine only when it was raining. Occasionally, on a sunny day he would say to his fellow justice Story, “Say Brother Story, will you step up to the window and see

if there are signs of rain.” Reluctantly, Story would be obliged to report there was none. Whereupon, the Chief would cheerfully reply, “Well this is a large territory which we have jurisdiction. I feel sure it is raining in some of it.”

A second story exhibits his humility. A young man was visiting the Richmond Farmer’s Market and Marshall routinely went shopping early in the morning. Marshall’s dress was often informal. The young man, described as a dandy, asked Marshall if he would deliver a turkey to his house. Marshall delivered the turkey. The dandy was astonished to later find out the Chief Justice of the United States Supreme Court had delivered his turkey for a small coin.

A third story relates to his wit. A lawyer lavishly praised Marshall for having attained the “Acme of Judicial Distinction”. With a sober face and quick reply Marshall said “Let me tell you what that means, young man. The Acme of Judicial Distinction means the ability to look a lawyer straight in the eyes for two hours and not hear a damn word he says.”

I have spent a lot of time at Mr. Jefferson’s University. At UVA, Mr. Jefferson is referred to in the present tense as if he is still walking the grounds. Unsettling to me in my research on John Marshall is that the Expounder of the Constitution and the author of the Declaration of Independence had a deep hatred for each other. Some of this may have been personal. They were cousins. Both of their mothers came from the Randolph family. Marshall’s grandmother had been disowned by the family due to an unfavorable marriage. Marshall’s mother in law was Jefferson’s first fiancé and spoke freely of Jefferson’s foibles. Beveridge, the early biographer of Marshall, believed that Jefferson’s lack of military service contributed to their hatred. Marshall was at Valley Forge; Jefferson did not serve and he was also criticized for fleeing Richmond as governor when Benedict Arnold approached with British troops.

When Jefferson and Burr tied for the Presidency, Marshall stayed neutral. "The morals of the author of the letter to Mazzei cannot be pure." Jefferson wrote a letter to an old friend, Phillip Mazzei, that Mazzei published. It contained a reference that many considered to be a criticism of George Washington.

Marshall sometimes called Jefferson, "the great lama of the mountain". Later in life, Marshall would say, "I have never believed firmly in Jefferson's infallibility. I have never thought him a particularly wise, sound and practical statesman and I have not changed this mode of thinking."

Jefferson felt Marshall was a hypocrite. "When conversing with Marshall, I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry, you must never give him an affirmative answer or you will be forced to grant his conclusion. Why, if he were to ask me if it were daylight or not, I would reply Sir, don't know, can't tell."

They had sharp political differences and they were leaders of their respective parties. Their hatred would reach a climax in 1807. In 1806, Aaron Burr set out west and made plans to liberate Mexico from Spain and settle lands west of the Mississippi. Whether he intended to detach the western states was unclear. Jefferson was convinced Burr was committing treason. He sent a special message to Congress that Burr was committing treason. Burr was indicted by a Richmond Federal Grand Jury for treason. The former vice-president was generally despised after shooting and killing Alexander Hamilton in a duel in 1804.

Marshall presided over a jury trial as a Justice riding the circuit. Burr's attorneys subpoenaed documents from President Jefferson, claiming them to be relevant. Marshall ruled

that the President was not above the law and Jefferson provided the documents. The trial commenced in August of 1807 and lasted a month. The trial was moved to the chamber of the Virginia House of Delegates to accommodate all the spectators. Jefferson publicly pronounced Burr's guilt. The procedural guarantees afforded Burr, he said showed "the original error of establishing a judiciary independent of the nation. Stop citing Marbury v. Madison as authority", he wrote George Hay, the attorney prosecuting Burr.

The evidence was ambiguous against Burr. Marshall excluded some of the evidence and declined the prosecution's request to give an expansive definition of treason. After the jury found Burr not guilty of treason, Jefferson was incensed. He sent the trial record to Congress to review for possible impeachment of Marshall. He told Hay that the trial record would be "laid before Congress, that they may . . . provide the proper remedy". Congress became preoccupied with imminent war with Britain and never addressed the trial record. After the Burr trial was over, the break between Jefferson and Marshall, so long in the making, was now complete. Marshall considered the Burr trial to be the most disagreeable experience of his 35 years on the bench.

In June of 1835, Marshall collapsed on his two mile walk to visit his wife's grave in Shockoe Hill Cemetery. She died 4 years earlier. He went to Philadelphia to be treated for liver disease. On July 6, 1835, he would die in Philadelphia. His oldest son, Thomas, would die on the way to Philadelphia when a building he was occupying was struck by lightning. Marshall was never advised of his son's death. The Liberty Bell cracked while tolling for his funeral.

A Richmond paper reflected the feelings of the country:

No man has lived or died in this country save his father George Washington alone, who united such a warm affection for his

person with so deep and unaffected respect for his character and admiration for his great abilities. No man ever bore public honors with so meek a dignity . . . it is hard . . . to conceive a more perfect character than his, for who can point to a vice, scarcely to a defect or who can name a virtue did not shine conspicuously in his life and conduct.

His friend and colleague, Justice Story, delivered a eulogy in Boston:

Ambition never seduced him from his principles amid the extravaganzas of party spirit. If we were tempted to say in one word what it was in which he chiefly excelled other men, we should say wisdom . . . the Constitution, since its adoption, owes more to him than any other single mind, . . . whether it lives or perishes his exposition of its principle will be an ending monument to his fame.

I visited his grave at Shockoe Hill Cemetery this year. (Photos #29, #30, #31 & #32). I had some difficulty in finding it. The sign on the gate is faded and not legible. My immediate reaction was "wow" he left no monument for himself or his accomplishments. It is another example of his humility. His legacy is the quotes etched in stone and the other cases that endure.

One take away, I have in researching Marshall is that it easily could have been different. What if he had not won a position as a delegate to ratify the constitution (11 votes)? What if Virginia voted against the constitution (10 votes)? What if George Washington did not convince Marshall to run for Congress? What if Adams had not appointed him Secretary of State or Chief Justice at the eleventh hour?

Would our Supreme Court have become a powerful, separate branch of government? Would our nation have been able to flourish as a nation? Would we still have all the landmark opinions of the Supreme Court? Lastly, how would our country be different without a powerful Judiciary?

John T. Cook

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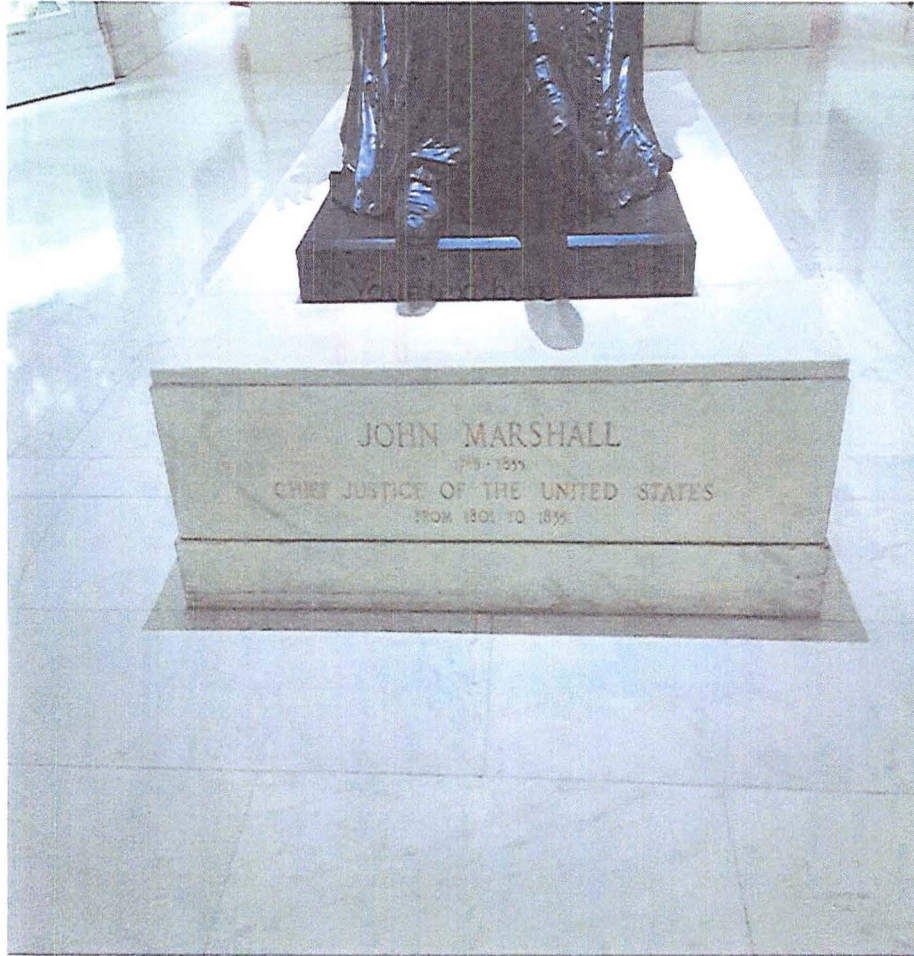
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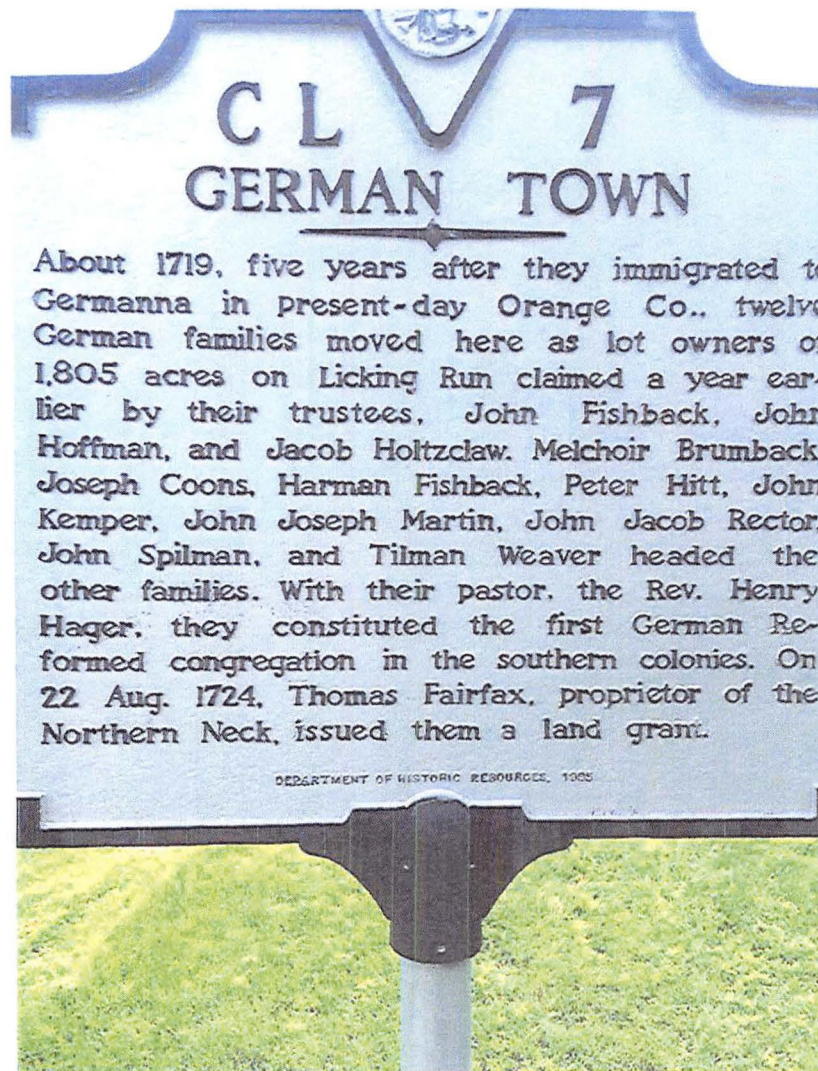
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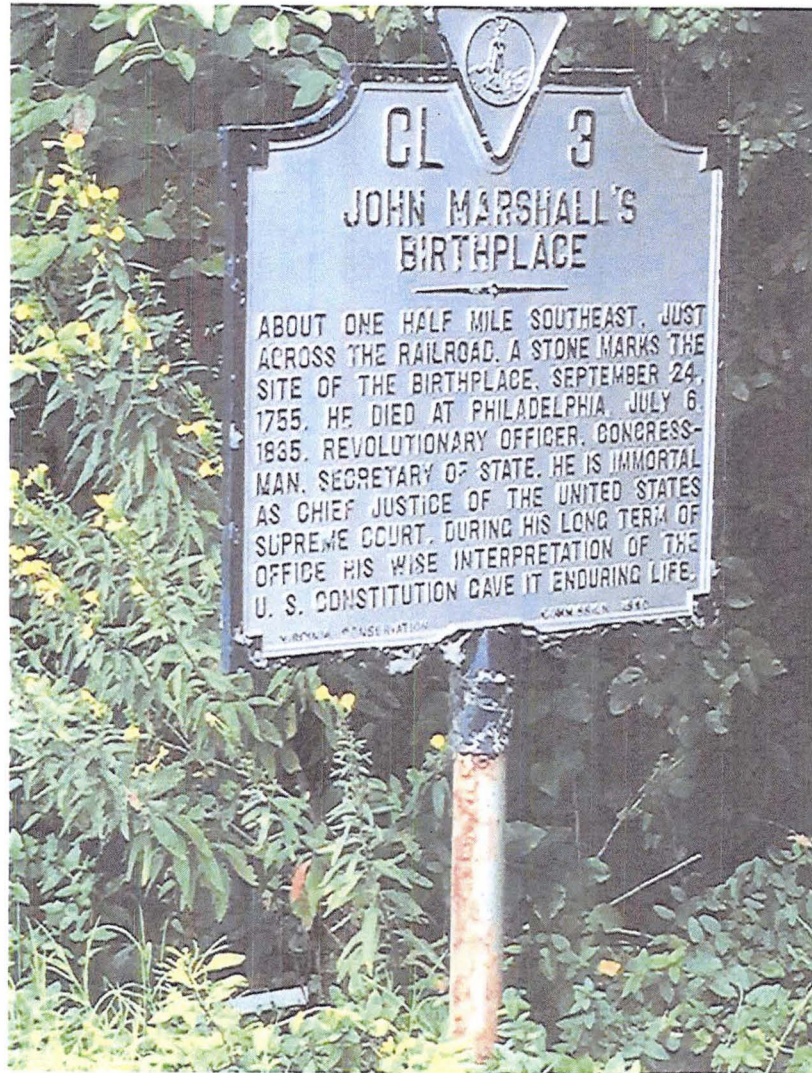






About 1719, five years after they immigrated to Germanna in present-day Orange Co., twelve German families moved here as lot owners of 1,805 acres on Licking Run claimed a year earlier by their trustees, John Fishback, John Hoffman, and Jacob Holtzclaw. Melchoir Brumback, Joseph Coons, Harman Fishback, Peter Hitt, John Kemper, John Joseph Martin, John Jacob Rector, John Spilman, and Tilman Weaver headed the other families. With their pastor, the Rev. Henry Hager, they constituted the first German Reformed congregation in the southern colonies. On 22 Aug. 1724, Thomas Fairfax, proprietor of the Northern Neck, issued them a land grant.

DEPARTMENT OF HISTORIC RESOURCES, 1905









# Marshall

## Monument Trail

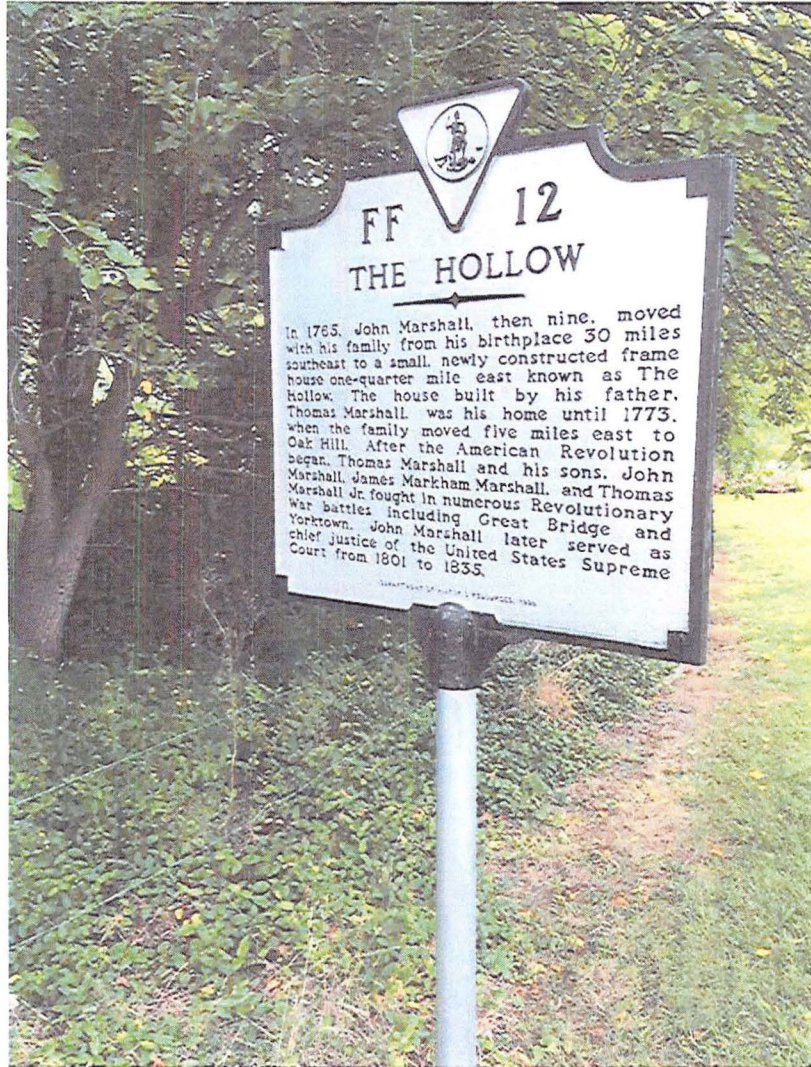


This path identifies landmarks of significance to a small monument marker indicating the birthplace of John Marshall. As you walk back through the landscape of John Marshall, you will see the birthplace of the first Chief Justice of the United States. The trail is a testament to the legacy of our country and the values that define it.





NEAR THE SCOT  
ON SEPTEMBER 6, 1928  
WAS BORN  
JOHN MARSHALL  
FOURTH CLASS JUNIOR  
OF THE THIRD STATES  
THE MARSHALL SCHOOL IN  
MARSHALL, W. VA.  
OF THE SCOT PROPERTY  
OF THE 21ST DISTRICT  
1928

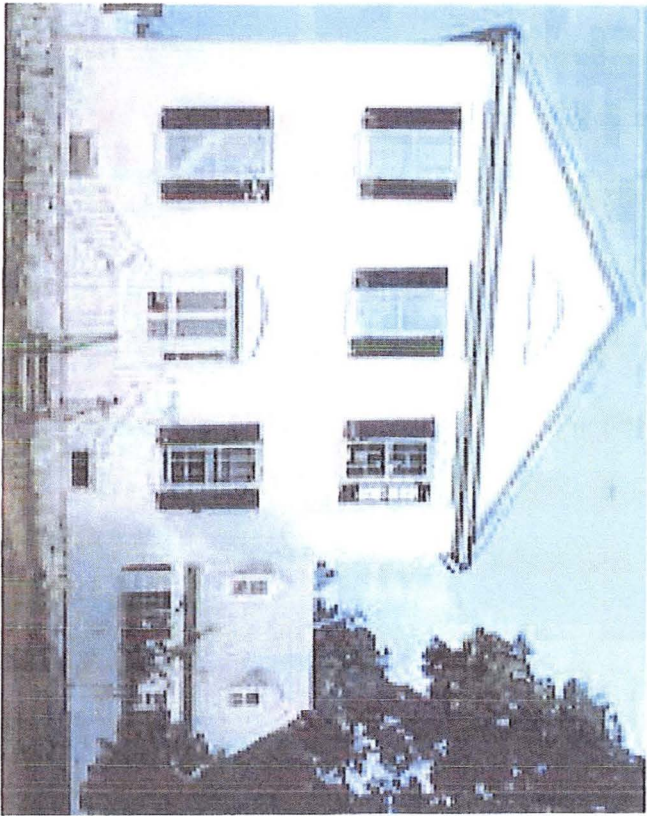














Data from Wikipedia

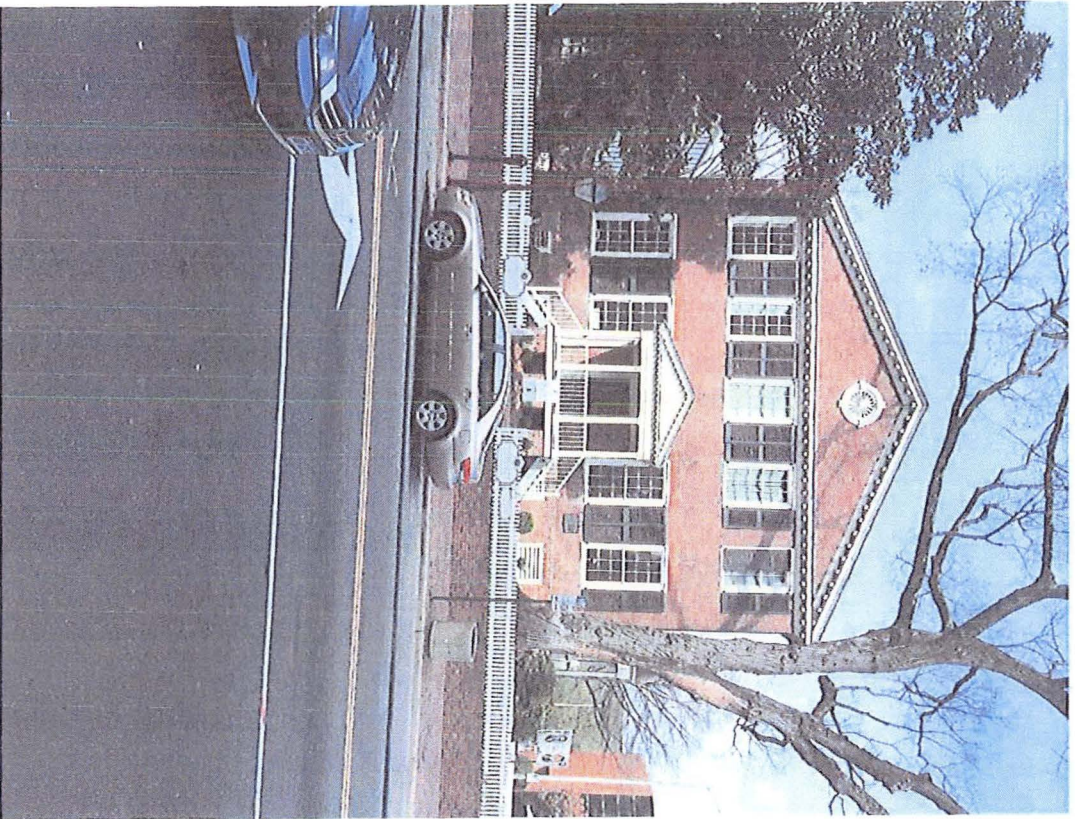


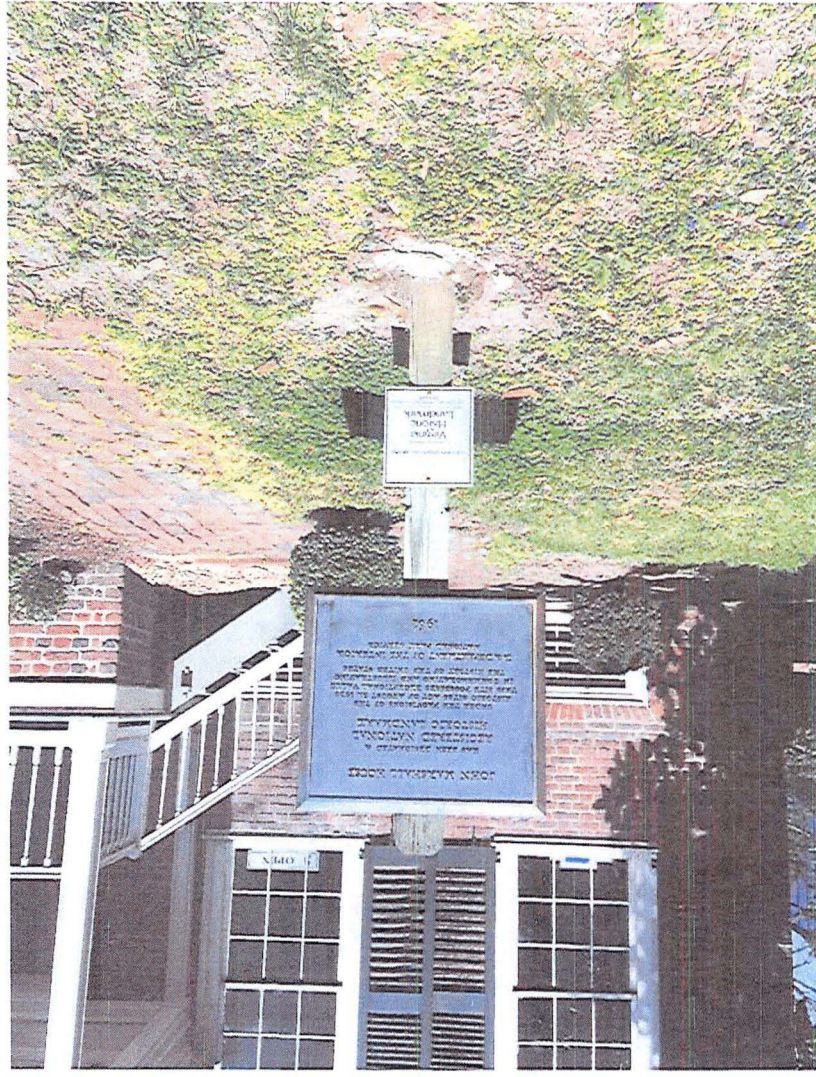




















IT IS EMPHATICALLY THE  
PROVINCE AND DUTY OF  
THE JUDICIAL DEPARTMENT  
TO SAY WHAT THE LAW IS.

MARSHALL V. MADDISON  
1803

-A CONSTITUTION IS FRAMED  
FOR AGES TO COME, AND IS  
DESIGNED TO APPROACH  
IMMORTALITY AS NEARLY  
AS HUMAN INSTITUTIONS  
CAN APPROACH IT.  
ITS COURSE CANNOT ALWAYS  
BE TRANQUIL.

COHEN V. VIRGINIA  
1821

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 CONSIST  
WITH THE LETTER AND SPIRIT  
OF THE CONSTITUTION,  
ARE CONSTITUTIONAL.

M'CALLOCH V. MARYLAND  
1819

-NEVER FORGET THAT IT IS  
A CONSTITUTION WE ARE  
EXPOUNDING.

M'CALLOCH V. MARYLAND  
1819

THE PEOPLE MADE THE  
CONSTITUTION, AND THE  
PEOPLE CAN UNMAKE IT.  
IT IS THE CREATURE OF  
THEIR WILL AND LIVES ONLY  
BY THEIR WILL.

COHEN V. VIRGINIA  
1821

