EDMUNDS & WILLIAMS
A PROFESSIONAL CORPORATION
SUITE 400
800 MAIN STREET
P. O. BOX 958
LYNCHBURG, VIRGINIA 24505
TELEPHONE (804) 846-9000
TELECOPIER (804) 846-0337

B. C. BALDWIN, JR.
ROBERT D. RICHARDS
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(1914-1977)
SAMUEL H. WILLIAMS
(1914-1970)

March 20, 1990

Wayne Rhodes
Jones Memorial Library
2311 Memorial Avenue
Lynchburg, Virginia 24501

Re: **Sphex Club**

Dear Wayne:

Enclosed is my latest speech for the Sphex Club which I neglected to send to you.

Sincerely,

EDMUNDS & WILLIAMS, P.C.

By _____
Robert C. Wood, III

RCWIII:mmh
Enclosure
cc: Dr. Julius A. Sigler

SPHEX CLUB

The Architect Who Built A Nation

September 17, 1787 - After a long, hot summer, crowded in a small room where windows were closed to reduce noise and insure privacy, 39 men of reason and creativity signed our constitution. It was to be a momentous day in our history. On a parchment containing just seven articles, these men erected the foundation for a national government, divided into three branches, based on republican principles of representative democracy. According to James Madison, "it was to be a government administered according to the public will by representatives chosen to administer it." And our constitution has served our country magnificently. Our United States has grown quickly into an economic power, second to none (at least until Japan came on the scene) under a free enterprise system nurtured by the rights protected by our constitution. America has survived a civil war, a depression, two world wars, civil rights awaking, Vietnam, Watergate, Irangate, and Wall Streeters. To these 39 founding fathers Americans and these United States are eternally indebted.

Yet, when the Constitution was merely a blueprint, an assemblage of words, these seven articles needed an interpretor - an architect if you allow me an analogy - to construct the perimeters of the three branches of government into a effective system which could operate to preserve the basic freedoms of life, liberty and property envisioned by the framers. There was no clear

delineation among the executive, the legislative, and the judicial departments and their functions. The framers had sought to establish a system of checks and balances among the three branches to insure the political independence of each branch and to prevent the accumulation of power in a single department. Still, there were varying views, strongly held, as to the function of each branch. Would the executive branch have the right to ignore acts of Congress which it determined unlawful or refuse to obey court orders in its sole discretion. Who would have the final say what the law is? Could Congress throw out judges who did not reflect the public will? Of equal import was the political relationship between the national government and the state legislatures and judiciaries. How much power had the people ceded to the national government?

These were other complex questions the debate over which made blood boil, tempers erupt, and everlasting political adversaries. The favorite charge of the time was calumny.

How these issues were answered would have a predominant influence on the ability of a infant government to grow, mature and take its place among the powers of the world - France, England and Spain and at the same time would determine the internal fabric of the several sovereign states. Had the people in this constitution created a more perfect union, established justice and ensured domestic tranquility? (Constitution Preamble)

In 1801, at the urging of his federalist brotheran (Adams and Hamilton), to the suspicion of the antifederalist or "republican" adversaries (Jefferson), a man stepped forward who was bold, smart, and paradoxically modest and who would grasp every opportunity to address these abiding and critical issues. His answers would shape the course of the history of our country. John Marshall was appointed to the Supreme Court in February, 1801 in the waning hours of the administration of John Adams. The Supreme Court at this time was not much; it was the Rodney Dangerfield of its day: "It got no respect." It did not have its own place to meet - it was relegated to the basement of the Senate. It had not issued any opinion worthy of note. It was difficult to get able men to serve as jurists. Many felt that it was a empty shell and that it would never have the guts, much less the power, to decide or sell important questions. Yet 34 years later, when Marshall's term as Chief Justice ended with his death, the Supreme Court had become a vigorous and equal third branch of government. The blueprint for the structure of our government had been made clear through his decisions. Later Supreme Court interpretations have rested heavily upon the strong principles enunciated by Marshall in his opinions. His judicial acumen enabled the United States to survive and to act effectively as a nation in international politics and in the orderly resolution of domestic issues.

In this paper I want to review four of Marshall's watershed opinions and two politically charged trials in which he participated. The questions presented in these cases had enormous consequences: (1) whether the judicial branch had the exclusive right to test the constitutionality of any federal or state law against the constitution, (2) whether a state legislature could abrogate a citizen's right to property, lawful acquired, (3) the extent to which Congress could regulate commerce among the states, (4) the supremacy of federal law over state law, (5) impeachment of federal judges and (6) interpretation of criminal laws.

These cases cannot be separated from the historical setting in which they were presented and argued. In every case, the philosophy of the federalists - champions of a strong national government - were pitted against the republicans or states righters; and Marshall's principal antagonist was Virginia's beloved Thomas Jefferson, the vehement protector of the states rights and the champion of an agrarian economy. Ironically, it was Jefferson who swore in John Marshall as Chief Justice of the United States. But, with the federalists out of power, after the election of 1801, Jefferson was determined to appoint justices who "reflected his political viewpoints" (have we heard of this before) and thereby curtail the authority and dominance in the judicial branch of the federalists. It was a time for "court packing", and Jefferson who was riding a wave of popularity felt he had the upper

hand. Little could have anticipated the course of the judiciary under Marshall's dominating influence.

MARSHALL'S BACKGROUND

Lets take a peak at Marshall's early years before he became Chief Justice. It lends an insight into his judicial philosophy.

He was born in 1755 in the frontier of Fauquier County, Virginia, the first of 15 children of Thomas Marshall and Mary Randolph Keith. He had no formal education until he was 14, but he read the Latin classics and English literature. His father purchased the earliest American editions of Blackstone's Commentaries and thus he was reading law in his early adolescence.

Marshall's father sensed the inevitability of war with Britain and his son responded by dividing his study time between Blackstone and the Manual of Arms. By the time of the Revolutionary War, Blackstone had been placed aside, and Marshall, age 20, became a Lieutenant in the Culpeper Minutemen. Marshall drilled his charges, lectured them at length on British tyranny, and conducted competitive sports such as racing and jumping in which he excelled. He participated in the first revolutionary battle fought on Virginia soil at Greatbridge, where his troops helped repulse British loyalists.

Joining Washington's army in New Jersey, he fought at Brandywine and Germantown and spent the terrible winter of 1777-78

at Valley Forge. In the midst of this misery, Marshall's good humor was a constant source of encouragement for both officers and men. It is recorded that a fellow officer wrote about Marshall "he was the best tempered man I every knew. During his sufferings at Valley Forge nothing discouraged, nothing disturbed him." Many scholars believe that Marshall's strong federalist views in favor of a strong central government had their genesis as he watched Washington's ragged army freeze and starve while a weak Congress failed to coordinate military and economic support from the various states.

In 1779, Marshall was ordered back to Virginia to await further assignment. While in Yorktown, he met a pretty 14 year old young lady named Mary Willis Ambler, the daughter of the treasurer of Virginia. He was star-struck, they fell in love; he married her in January 1783.

Marshall enrolled at the College of William and Mary and attended law lectures under George Wythe while awaiting future military assignment. When the term ended at William and Mary in July 1780, Marshall ended his studies, went to Richmond and obtained a license to practice law from his distant cousin and future adversary, Thomas Jefferson, Governor of Virginia. He intended to practice law, but his legal career was interrupted again by military service. He returned to the revolutionary army to help repulse the invasion of Virginia by Benedict Arnold. In

1781, after the surrender of Cornwallace at Yorktown, Marshall, now 26, began the practice of law in Virginia.

The following spring he was chosen as a delegate from Fauquier to the General Assembly, a development that presaged an eventual permanent move to Richmond. While in Richmond, he was again elected from Fauquier County to the General Assembly, and he continued to reside in Richmond. His law practice blossomed when Edmund Randolph, upon being elected Governor, referred his clients to "the young lawyer from Fauquier".

He became a leader at the Richmond Bar. He was described by William Wirt, a fellow lawyer as follows: "he possesses one original and almost supernatural facility; the facility of developing a subject by a single glance of his mind and detecting at once the very point on which every controversy depends".

After a brief period devoted entirely to his law practice, Marshall returned to the General Assembly, this time as a delegate from Henrico. Immediately he entered into discussions regarding the future of the confederation and particularly the problems with the inept articles of confederation. Marshall was in accord with Madison and others who believe that a stronger union was necessary to achieve a more efficient federal government. When the new federal Constitution was referred to the states for ratification, he was an ardent supporter of the Constitution and urged Virginian's to call a convention to act upon it. A

convention was called; Marshall was a member and he was a strong advocate for ratification despite strong antifederalists sentiment among the majority of the citizens of Henrico. He challenged the antifederalist stances of Patrick Henry and George Mason who attacked numerous provisions of the Constitution particularly the clauses regarding taxation and the powers of the presidency to call out the militia. Marshall spoke from conviction, gleaned from experience when Washington's struggling army had constantly faced defeat during the revolution while an ineffective Congress sought to raise money and troops.

The debate on the judiciary was long and furious. Marshall calmly replied to charges by Henry and Mason that a national judiciary would destroy the state courts and that concurrent jurisdiction for state and federal courts was not possible. The antifederalists had counted upon fear of a national court system to change votes and deny ratification. Marshall calmly explained the need and feasibility of the proposed federal judicial system and how the federal and state systems could work side by side. The new Constitution was approved by a narrow margin and Marshall had distinguished himself as an advocate and orator in a historic arena.

While Marshall accepted the call to public service in the Constitution convention he declined others. In 1789, he declined the nomination from Washington as a United States Attorney. The

same was true when Washington offered him the Attorney Generalship of the United States in 1795 and the post of Minister to France in 1796. However, in 1797 when the need was pressing, President Adams induced him to join C.C. Pinckney and Elbridge Garry on the XYZ Commission that attempted to adjust international differences with France in the days of Talleyran after the U.S. had proclaimed neutrality in the war between England and France. Marshall distinguished himself by standing up to the mercurial Talleyran; he and his fellow commission did not succumb to the blackmail of the Directory under Talleyrand. They were rightfully credited with preserving the dignity and honor of the American people. Throughout these years he remained an active proponent of Washington's policies, although many Virginians were turning to the antifederalist's leanings of Thomas Jefferson.

Ironically, in 1798 he declined an appointment to the Supreme Court of the United States to succeed Associate Justice Wilson. However, in the same year at the urgent request of Washington, he ran for Congress from the Richmond District. He campaigned vigorously, provoked certain federalists by campaigning against the revival of the alien and sedition laws, and paradoxitly with the support of Patrick Henry he was elected in 1799 to the Sixth Congress. He was devoted to Washington and he stood his ground as anti-federalists lambasted Washington unmercifully during the last years of his administration. He performed the painful

duty of announcing the death of Washington on December 18, 1799 in Philadelphia. Marshall offered the resolution, drafted by Lighthorse Harry Lee which described Washington as "first in war, first in peace and first in the hearts of his countrymen."

On May 12, 1800, President Adams named him Secretary of State, and in June he resigned from Congress to assume his duties in the cabinet. Marshall's appointment to the Supreme Court was providential. The former Chief Justice, Oliver Ellsworth had resigned. Adams first offered the position to John Jay, who had served as Chief Justice under Washington, but he turned it down. Most lawyers expected Justice Patterson to be chosen. To the surprise of everyone, Marshall was offered the position of Chief Justice in January, 1801. He accepted after several days of reflection, and he was sworn in on February 4, 1801, although he continued to serve as Secretary of State until Adams left office on March 4, 1801. Jefferson administered the oath of office to Marshall on March 4. Both men were in place to determine the course of our constitutional history at a most critical time. These giants would have dramatically opposing views on nearly every issue; it was to be a clash of the titans.

Marberry v. Madison. Judicial Review

Marshall's first great decision brought him into direct conflict with Thomas Jefferson. It is probably the most important case in our history. A little background. The constitution gives

the Congress the power to establish certain rules and procedures for the operations of the federal courts. Congress did so in 1789 with the passage of a judiciary act. This act established a three tiered system of federal courts, the district, circuit, and supreme courts. However, supreme court justices, in addition to their duties on that court, also joined with locally placed justices to hold circuit courts - in other words they rode the circuit. There were great objections to this by the Supreme Court justices because of the long distances to travel, dangers to health, inclement weather and inconvenience. A conflict of interest was also inherent in this system since justices, while on the supreme court, would hear appeals from cases they had helped to decide while sitting on the circuit court. (The reason behind this was that the supreme court did not have enough business to keep it busy).

Another part of the 1789 Judiciary Act really irked the anti-federalists. Section 25 expressly gave claimants the right to appeal adverse decisions of the highest courts in the state to the supreme court if a constitutional issue was involved. This assured the supremacy of federal law over state law, and this was an anathema to the Jeffersonian Republicans with their strong belief in states' rights.

In the late 1790's the federalists began considering a new judiciary act. One intention of the new act was to relieve the supreme court justices of having to ride circuit which, in turn,

created more federal judgeships. The second intent was to broaden the power of the Supreme Court under Section 25 to review state court decisions. The federalists pushed through the judiciary act of 1801 completing the work a month before Jefferson's inauguration. No one could deny - Politics was very much the motive. It was passed after the federalists had been routed in the elections in 1801. The republicans were now in control of both the presidency and the Congress. The federalists knew that the judgeships would provide positions in government for them, and they looked on it as a direct slap at Jefferson. They had even added a section to the bill reducing the number of Supreme Court justices from six to five at the next vacancy. This would prevent Jefferson from making an appointment. When Jefferson took office, he was very much concerned about the federalists' power play, and one of his first priorities was to repeal this wicked judiciary act of 1801.

In the meantime, after the passage of the 1801 act, Adams rushed to fill the new judgeships and magistrates with his own kind - federalists - with the cooperation of the moriband federalist Congress. These appoints were confirmed only two days before Jefferson took office. They became known as the "midnight judges".

Ironically, the task of sending out the commissions fell to Marshall who was continuing to serve as Secretary of the State. The formal appointments of the magistrates were made by delivery

of sealed commissions, signed by the President and by the Secretary of State. Adams and Marshall had executed these commissions and had sought to deliver them before the expiration of Adams' term, but there remained a few undelivered on the night before Adams left office. Once in office, Jefferson instructed his new secretary of state, James Madison, not to deliver the remaining commissions. One of these abandoned magistrates was William Marberry and because of Marshall's own dereliction, his name is indelibly imprinted in our nation's history.

On December 16, 1801, more than ten months after Jefferson's inauguration, Marberry went directly to the Supreme Court, asserting original jurisdiction under the Judiciary Act of 1789 and praying for "a rule that Secretary of State Madison show cause why a mandamus should not be issued commanding to deliver the commission as a justice of the peace". Two days later on December 18, the Supreme Court directed Madison to appear and show cause why a mandamus should not be issued. It is interesting that Marberry waited such a long time to bring the action, and it is felt by most historians that he was the dupe of the federalists who wanted to embarrass the Jefferson administration. The order to Madison, a prominent member of Jefferson's administration, was considered an attack upon the president and indeed it certainly gave added impetus to Jefferson's crusade to repeal the Judiciary Act of 1801. Jefferson believed that the Court lacked the power to require

Madison to appear and show cause; and upon instruction from Jefferson, Madison failed to show. During this time the republican Congress was in the process of debating the repeal of the 1801 Judiciary Act, the inquitous federalist statute, and it was repealed in March, 1802. This in turn, eliminated the 1802 term of the Supreme Court. Thus, the next session of the Supreme Court was not held until February, 1803, more than a year later.

On February 9, 1803, Marberry v. Madison was argued for two days. Marshall delivered the court's opinion on February 24, and it was a remarkable stroke of judicial acumen and creativity. Marshall began by recognizing "the particular delicacy of the case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it". (Marshall knew that Jefferson would not obey any order from Marshall's Court to deliver the commission to Marberry).

Marshall stated the case revolved around three questions: (1) Did Marberry have the right to the commission? (2) If he had such a right which had been violated did he have a remedy under law? (3) Finally, if the laws did afford him a remedy, is it a mandamus issuing from the court?

Please notice that the issues are reversed. Logically, the court would consider whether it had the right to hear the case before it decided the other questions. If the court didn't have the power or right to hear the case, then it was over. However,

Marshall realized that he had been given an extraordinary opportunity, and he was not going to let the sequence of issues preclude him from adjudicating a critical issue - judicial review, and at the same time lecturing Jefferson on the rule of law.

Marshall said that once President Adams signed the commission after the senate approved the nomination, there was left nothing more to be done. He rejected Jefferson's view that the process was not finished until the appointment had been actually delivered. During the discourse on Marberry's right to the commission, Marshall lecture the president and the secretary of state on what the law was. In four paragraphs of the decision, Marshall gives a discourse on the rule of law that all men obey the law, even the president of the United States and the secretary of state, that all men understand that law is not capricious, and that it may not be bent to suit one person's bias or political fortunes.

In answering the first question in favor of Marberry, Marshall said, "To withhold this commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right".

Marshall then moved to the next question. Did Marberry have a remedy?

In answering this question again in favor of Marberry, Marshall speaks in lofty terms of civil liberty:

> "The very essence of civil liberty 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".
>
> He quoted Blackstone:
>
> "It is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded".
>
> Probably his most famous quote:
>
> "The government of the United States has been emphatically termed a government of laws not of men. It will certainly cease to deserve this high appellation if the law furnishes no remedy for violation of a vested legal right".

Then Marshall considered whether the withholding of the commission was a political act for which the executive branch could not be questioned. Now, Marshall, after recognizing that Marberry had a right to receive the commission, was questioning whether Jefferson and Madison had a right to refuse to deliver it. Marshall made a differentiation between political acts of the President and his aides for which he is answerable only to the voters, and duties imposed upon him by law, for which he is an officer of the law and is answerable to the law for his conduct and therefore cannot ignore the vested rights of others. This concept was critical to Marshall's jurisprudence: "the law was above any office holder."

This brought Marshall to the last question: Was Marberry's remedy a mandamus issued by the Supreme Court? Before answering this question, Marshall again addressed a political

question. He acknowledged that the question of whether to issue a writ of mandamus to a member of the president's cabinet is "irksome as well as delicate" and raised some doubts as to the propriety of considering such an action. Marshall stated that some people may have the impression that this is nothing more than an intrusion into the president's business and intermeddling with the priorities of the executive. Marshall said he would never do anything like intrude or intermeddle with the president. He disclaimed all pretensions to such jurisdiction saying:

> "An extravagant so absurd and excessive could not have been encountered for a moment. The providence of the court is solely to decide on the rights of individuals, not to require how the executive or executive officers, perform duties in which they have a discretion. Questions, in their nature are political, or which are, by the constitution and laws, submitted to the executive can never be made in this court".

Marshall was sincere in this discourse because he always believed in using the powers of the court to their utmost, but he did not believe in using powers that did not belong to the court.

Marshall returned to the real crux of the case - the judiciary act of 1789, a provision of which authorized the Supreme Court to issue writs of mandamus. Marshall said, "If this court is not authorized to issue a writ of mandamus to the secretary of state, it must be because the law is unconstitutional".

And this is what Marshall held - the judiciary act of 1789 was unconstitutional on the ground that the constitution did

not assign original jurisdiction to the Supreme Court where an individual seeks a writ of mandamus against a federal office holder. The constitution only gave the Supreme Court original jurisdiction "in all cases affecting ambassadors, other public ministers and councils, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction". Article III, §2.

How clever. The Jeffersonians had just been waiting for Marshall to issue a writ of mandamus requiring Madison to deliver the commission to Marberry for they would have been quick to decline to obey the order and challenge the authority of the court to enforce it. But Marshall had turned the tide on Jefferson. He had scolded him in refusing to deliver the commissions to Marberry, but at the same time he found the Supreme Court had no original jurisdiction to order Madison to do so. Marshall had forever embedded judicial review in American jurisprudence.

Marshall's words are worth quoting:

(Copy page 407 of Baker's book on Marshall)

Jefferson was aghast over the Marberry decision. He was inheritantly fearful of judicial power but at the passage of the constitution he thought of the judiciary as a safeguard against the greater present danger of legislative or executive tyranny especially the legislature, and he thought the judiciary could be a particular guardian of the rights of the individuals. Jefferson

never denied that the judiciary had to square its decisions with the constitution, and he agreed with Marshall that all three branches of the government must do that, that is, must act within the bounds of the constitution. Where he disagreed with Marshall was that the judiciary had the exclusive right to rule on questions of constitutionality. Jefferson's constitutional interpretation allowed for the participation of all three of the branches - what has become known as a tripartite theory. Jefferson had trust in the legislative branch (particularly after the republicans gained control of Congress). He believed that Congress reflected popular opinion to a greater degree than the other two branches, and he viewed it as a genuinely deliberative body. Accordingly, he was convinced that the federal legislature had a vital part to play in constitutional interpretation. He believed that the executive had the power to declare a law in contradiction of the constitution. As an example of this concept was in his granting pardons of those suffering under the penalties of the sedition act. Jefferson acted under his authority to grant pardons, but he did not justify these actions afterwards as an exercise of executive clemency. His explanation was that the sedition act was an unqualified contradiction of the constitution and he was duty bound to disregard it. Jefferson reaffirmed his belief in the tripartite theory in a letter to Abigail Adams a year

and a half after the Marberry decision. In speaking about the sedition act he vehemently said:

> "I considered and now consider that law to be a nullity as absolute and as palable as if Congress had ordered us to fall down and worship a golden image; and that it was as much my duty to arrest its execution in every stage as it would have been to have rescued from the firery furnace those who should have been cast into it for refusing to worship their image".

Jefferson never abandoned his tripartite doctrine, but he never really had the opportunity to present it in a full bodied exposition. His basic beliefs were summed up in a letter he wrote six years after his retirement. He said that there was no word in the constitution which gave the judiciary, more than the executive or legislative branches the right to decide on the constitutionality of a law. Jefferson followed the concept that matters assigned to each branch of government should be decided upon by that branch of government and one branch of government should not interfere with another branch's proceedings and powers.

However, if there had to be an " exclusive expounder of the sense of the constitution", Jefferson believed the legislature had the best claim, because alone of the three branches it had the right to impeach and punish members of the other branches and also because it was most subject to the control of the people. Between these two views, he saw no meritorious alternative, and the idea

of an exclusive authority of an irresponsible judiciary was never one that he could tolerate.

Marberry v. Madison is one of the crucial points in American history. No one knew when such a case would come before the court again to enable it to speak. As a matter of fact such a case did not rise again until half a century later in the Dred Scott matter in which the Supreme Court of the United States declared a law unconstitutional, "the Missouri Compromise". Thus, if Marshall had dismissed the Marberry case, a period of more than fifty years would have elapsed from the adoption of the constitution during which period the Jeffersonian theory that the courts have no power over legislation would have been admitted, and the history of this country and the jurisprudence of America would have been exactly the reverse of what it was. Marshall used this case to declare from the bench by unanimous opinion of the judges that the only power in America that can say what is or is not the law is the judiciary; and that in the last analysis the Supreme Court can alone announce whether or not Congress or anybody else has violated our fundamental law.

IMPEACHMENT OF SAMUEL CHASE

Marberry v. Madison fortified the resolve of the Jeffersonians to remove the federalists from the bench and replace them with republicans. Jefferson's resolve was simple:

> "We have been elected to affect great reforms. The judiciary stands in the way; the judiciary must be consistent with the will of the people

> so as to become an assistant instead of an obstacle to the great reforms the people want. Therefore, every man on the bench the prevailing party does not approve of shall be removed, and those places be filled with those who are in accordance with the drift of the times".

The first attack was on Samuel Chase, a federalist Supreme Court justice who never hesitated to express his partisan views in carrying out his duties as a jurist - he was a judicial loud mouth. Republicans in the House led by John Randolph and William Branch Giles, a staunch and fiery Jefferson supporter, filed articles of impeachment against Justice Chase of Maryland for high crimes and misdemeanors. Please remember that under the constitution that a person can only be impeached for high crimes and misdemeanors. (Article II, Section 4) The charge was that Chase delivered an improper charge to a grand jury in Baltimore. He allegedly stated that universal suffrage and the repeal of the judiciary act of 1801 all were meant to imperil justice and civilization and our nation, instead of being a democracy would develop into a mobocracy. (This was not uncommon thinking among federalists.)

Giles led the attack with Jefferson's blessing. Giles abhorred an independent judiciary. In his judgment courts were an arm of the party which controlled the executive and legislative branch. He did not even pretend that the impeachment was a criminal prosecution. His point was direct: "a 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. We want your offices, for the purpose of giving them to men who will fill them better." Giles never failed to speak his mind.

Chase mounted a defense. Impeachment was inappropriate. He employed the leading lawyer of his generation, Luther Martin, a renown boozer with a penetrating mind and an acerbic tongue - the perfect combination for a lawyer of the 1800's. Martin lead an attack on the anti-federalists which ultimately dissolved and eviscerated Jefferson's plan to scold the judiciary by the impeachment of Chase. Martin's plea came straight from the constitution - a judge may be impeached only for an offence for which he can also be indicted.

Nevertheless, the trial of Chase had Marshall nervous and a bit frightened. Please remember the position of the Supreme Court in the constitutional scheme of the three branches of government was far from secure. Many prominent leaders felt, as Giles did, that if the judges held opinions contrary to the popular will, you filed articles of impeachment and ran them out of office. If this attack on Chase was successful, Marshall felt he was next on Jefferson's hit list. Marshall wrote a remarkable letter to Chase in which he proposed a most radical departure for correcting

judicial systems. It was in direct conflict with his decision in Marberry v. Madison. He proposed that, instead of impeaching judges, if anybody was dissatisfied with an opinion of the Supreme Court, there should be an appeal to Congress. Congress would have the final authority on the matter. Marshall was conciliatory, most commentors believe because of his concern for Jefferson's obsession to remove federalist justices. If Jefferson succeeded, Marshall had no doubt Jefferson would appoint Spencer Rhone of Virginia to be chief justice and this would have been a catastrophe in Marshall's opinion. The concept of a nation with national purposes would have been in jeopardy.

Marshall even appeared as a witness in the case to comment upon Chase's charges to the jury, the subject of the impeachment case. His answers indicated a desire to please the prosecution, and the commentors believe that his answers were not entirely accurate. All in all it was not a very sterling performance, but in Marshall's defense, he never was willing to join battle with his opponent outside the court room.

Chase was acquitted, but the case has three important aspects of historical significance. First, federal judges should not be impeached for frivolous actions, as Giles and others had wanted to do. Second, it established that federal judges should not use their positions on the bench for partisan purposes as Chase had done. Finally, it established that the Senate as a body could rise to heights of non-partisanship.

At the time this trial ended, Marshall had been Chief Justice for four years.

TRIAL OF AARON BURR

Strict Construction of Criminal Laws

I shall comment only briefly on the trial of Aaron Burr for it is a long, intriguing, and controversial episode in our history which could be the subject of a paper.

When Burr left office of Vice President in 1805, he was in sad shape. His money was gone. His law practice had evaporated. Disgraced in the north for having killed Hamilton, he was under indictment, in New York and New Jersey. Still, he was filled with energy and nerve and was fearless. So Burr went west and he was received triumphantly - dueling was no disgrace in the west. Many thought war with Spain was imminent. Burr announced plans to settle on the Washita River in Southern Arkansas. If war developed, he proposed to lead an expedition into Mexico. Towards this project he made plans to meet with his fellow adventurers at Blennerhassett Island, though now in Ohio, was then Virginia territory.

Rumors ran rampant. Was Burr organizing a force for severing part of the southwestern territories from the United States? If so, this was an act of treason? Jefferson received reports from a General Wilkerson, who commanded the army in the southwest, that Burr planned an attack. Jefferson reacted by

warning faithful citizens to withdraw from any attack without mentioning Burr's name, but from the details of the warning the public knew that Burr was the offender. Instantly poplar opinion turned against Burr.

On December 2, 1806, upon a directive igniated by John T. Randolph, Jr., a Jefferson supporter, Jefferson in his annual message to Congress revealed all of the details of Wilkerson's report, and assured Congress that "Burr's guilt is placed beyond question." Amazingly, the President of the United States had placed the stamp of traitor on the brow of Burr.

That was enough for a country dominated by Jeffersonian democrats, Burr was arrested, captured and brought back east to Richmond where his trial was held and over which John Marshall was the presiding judge. (Remember Supreme Court judges still sat as trial judges in the district court).

The trial was sensational. Thousands of people flocked into Richmond. It was held in the Chamber of the House of Delegates. Burr pleaded not guilty. A jury was enpaneled which included several members who admitted they had to come to Richmond to see the defendant hanged. (Treason is a capital offense.) The trial lasted from May, 1807 through October. The indictment charged Burr with treason: levying war against the United States on Blennerhassett Island by the assembly of 30 men, armed and arrayed in a warlike and hostile manner. (Note, treason is the

only crime singled out in the constitution: the reason lies in the revolution - we were all traitors.) Subpoenas were sent out for anybody suspected of knowing anything about the gathering on Blennerhassett Island; Jefferson himself, through letters, help direct the prosecution. All the power of his administration was brought to bear to convict Burr. Marshall's task as trial judge was awesome, how to conduct a fair and proper trial in such a perfervid atmosphere. The opposing lawyers - the big hitters of their day were charged and ready; names you recognize today: George Hay, Edmund Randolph, John Wickham, Charles Lee and the boozer, Luther Martin. (He drank to the Samuel Johnson maxim "Wine for women, whiskey for men, and brandy for heros". Martin was a hero)

Of historical precedent on the motion of Burr, Marshall issued a subpoena for documents to President Jefferson. Marshall believed he was constitutional bound to issue the subpoena, but he recognized that it was for the President to determine whether his executive privilege would require him to refuse to deliver the documents. The issue never came to a confrontation since the government's lawyer said he had the papers in his pockets.

Under the constitution treason must be proved by two witnesses to the same overt act (Article III, Section 3). Remember the charge against Burr was that he had levied war against the United States on Blennerhassett Island. The prosecutions only proof was the assemblage there of 16 to 20 young men who were to

accompany Burr to Washita land, and who possessed a few rifles and fowling pieces when they went out to hunt. That was all the government's evidence; there was no proof that Burr was even present on the island. There was a great deal of testimony as to collateral matters. There was no proof of any overt act of treason committed by Burr or any other person on the Island. The government contended as an alternative theory that it could prove treason by showing that Burr had advised and procured the assemblage on the Island and this assemblage constituted levying war against the United States.

Marshall delivered his final opinion in the Burr case in which he rejected the prosecution's argument. Marshall was clear; under our Constitution, constructive treason cannot exist. A man accused of the blackest of all crimes, treason, must be indicted for this offence, and this offense must be proved at trial before a jury. The proof must meet the requirements under the Constitution; that proof must consist of two witnesses to the same overt act; circumstantial evidence was not good enough. Since two witnesses had not testified that Burr was present on Blennerhassett Island, he could not be guilty of treason. Responding to the government theory of constructive treason, Marshall's answer was trenchant: if procurement of treason was the overt act, that is procuring the treasonous act to be done - then that also must be proven by two witnesses. It had not; the jury was so instructed,

and it returned a verdict of not guilty. This was a strict interpretation of the crime of treason under the constitution which protected the rights of an accused. His basic stance was that "the interest which the people have in this prosecution has been stated, but it is firmly believed that the best and true interest of the people is to be found in a rigid adherence to those rules, which preserve the fairness of criminal prosecution in every stage."

The public's reaction was one of outrage. So was Jefferson's. Marshall was assailed more than any judge in our history. Newspapers from Richmond to Philadelphia ridiculed and denounced him as a traitor. He was hung in effigy. But I submit this country should be eternally grateful that we had a chief justice at this period of time when passions of the multitudes were boiling over who saw and had the courage to declare that liberty and law must prevail, no matter what the consequences to himself might be.

Fletcher v. Peck

The Contract Clauses; and State Power over Private Property

In Marshall's day, many federalists perceived that a great threat to a citizen's interest in property lay in the action of state legislatures. Marshall himself owned a lot of land (he was a speculator) and he had a personal interest in property the ownership of which was an issue in a case which came before the court - Martin v. Hunter's Lessee (her recused himself).

In colonial times, state legislatures were the standing enemy of the creditor and the money class and they had the unseeming habit of being responsive to the economic plight of the common man. The case of Fletcher v. Peck presented the court with the opportunity for Marshall to construe the contract clause and invoke its primacy over an act of a state legislature which had abrogated citizens' rights to their property. It was a classic clash between state power versus federal power and contract rights against public policy as viewed by a legislatial body.

The facts underlying this case are malodorous, involving one of the sorriest episodes in American history - the Yazoo land frauds. The Georgia legislature in the 1796 disposed of a strip of Indian land half the size of New England - 35 million acres for $50,000 - about one and one-half cents an acre. This was even cheap for Indian land. Something smelled fishy and it was. Every legislator except one had received a large bribe of land stock which could be disposed of for cash. When the scandal broke the people of Georgia were furious and responded by writing a new Constitution, electing a new legislature and rescinding the corrupt act. It was the only moral thing to do. Right - well lets examine what happened in the meantime.

The original landowners had in many cases resold parts of their tracts before the original act was repealed. Subsequent purchasers believed that they were engaging in a legitimate

business transaction. Thus, when the new Georgia legislature replaced the prior fraudulent act and wrote a new constitution, these owners were left with no land, although they had paid for it in good faith. A dilemma. There were appeals to Congress for compensation, but to no avail. Finally, in what was an "arranged" - some have even called it a "trumped up" suit, Fletcher and Peck brought their case before the Supreme Court in 1809 - a decade after the original fraud.

Marshall's decision is controversial. Dumas Malone reflecting Jeffersonian's notions of judicial power, wrote that Marshall "rendered disservice to his country" - representing federalist policies at their worst. But there were countervailing factors - what about the rights of the bona fide purchasers for value?

In his opinion Marshall did not deny the fraud, the critical point was that the sovereign state of Georgia had, through the original legislative grant, entered into a contract the obligation of which could not be impaired by another legislative act. Marshall was clear - a person who enters a contract in good faith, fulfills his responsibility and possesses a legal right (or title) should not be stripped of that right by some action which occurred prior to his contract and for which he had no responsibility. While Marshall's opinion ignored several contemporary principles - such as the contract clause did not apply

to public contracts and the English common law that held a legislature could rescind any act procured by fraud - Fletcher v. Peck serves as the basis for our country's economic stability. The ability of man to buy and sell goods, develop land and engage in commercial enterprises was secured and insulated from a state legislature's power to abrogate contracts or divest property owners who had acquired their property in good faith. This, to Marshall, was a higher morality and took precedence in the national ordering of man's rights in a society over any absolute power of a legislative body when such action would trample over property rights previously acquired. Marshall had forbidden under the provisions of the contract clause a state from passing any law impairing a citizen's contractual rights or obligations and Marshall clearly understood what he was doing - this is he was establishing a precedent for the guidance of the future generation in the arena of commerce and contract law. Marshall's belief espoused in Fletcher v. Peck is repeated again and again in his later opinion. The United States is a nation where the rule of law prevails over the passions or strong prejudices of individuals and institution - where no governmental body has absolute power and the supreme law of the land could not be abridged by the states. And if the states tried, the Supreme Court had not only the power but the duty to declare such laws unconstitutional.

McCulloch v. Maryland - The Supremacy of Federal Law

Some Background - When the constitution was adopted, the question was immediately posed - who should settle what it meant. Jefferson and his school were for a narrow or strict constitution - the federal government could exercise only those powers given to it. Others believed there should be a broader interpretation of what is "necessary and proper" action of our government under the constitution. One of the first conflicts surfaced during Washington's administration over whether Congress had the authority to organize a national bank. The issue was in doubt - Jefferson said no - Hamilton said yes. Washington adopted Hamilton's view, and the bank was chartered.

National bank stirred up a hornet's nest. Jefferson railed against it as "money power" and local and state bank officials agitated "central money power". In 1811, on the eve of war with England, Congress refused to recharter the bank.

Over the next four years there was an erosion of the economy fueled by the War of 1812 and a burgeoning of "easy money". By 1816, Congress was compelled as a matter of economic self-preservation to charter the second bank of the United States.

Yet, the second bank did not instantaneously resurrect our economy from its doldrum, and controversy continued to rival. It was an "octopus" - it was the ~~course~~ cause of the people's money problems - if the people had no money it was the bank's fault, and

they should not have to pay their debts. States enacted laws suspending the obligations to pay lawful debts, and at the same time they attempted to choke to death the octopus by a clever scheme - taxation.

Several states, including Maryland, enacted laws placing a tax on branches of the bank located within the state. Maryland went even further - it required a stamp on every note which went out from the bank and levied a fine of $500 for every violation.

The branch at Baltimore refused to pay the tax. Maryland brought suit in a state court to collect the tax, and quite naturally Maryland won. But the case was not over.

In 1819, McCulloch v. Maryland was argued before the court by the great lawyers of the day; Samuel Webster, William Pickney and William Wirt for the United States; Luther Martin, a veteran of he Burr trial, for Maryland. On the surface the issue was the constitutionality of the second United States bank, and the question whether a Maryland state tax on its bank notes was valid. Lurking below the surface, was the relation of national power to the scope of industrial development, particularly with regard to a national banking system and a national transportation system. Could Congress use every means at its disposal to insure favorable conditions for the newly emerging capitalistic class.

In this case Marshall had to answer two questions. (1) did Congress have the power to charter a national bank and (2) did

Maryland have the power to tax it? The first question turned on what powers the constitution gave to the federal legislature. First, Marshall in his ineluctable logic reasoned that the constitution stemmed from the people of America, not the states, and when the people affirmed it, the states could not negate the constitution; accordingly the states were bound by its terms. Next, Marshall turned to what powers the constitution gave the federal legislature. Marshall declared that, though the union's powers were limited to those granted by the people, the laws of the Union are supreme within their sphere. What did this sphere include? Did it include the power to establish a bank - where there was no reference to the bank in the constitution itself. Marshall's answer

> "A constitution to contain in accurate detail all subdivisions of which its great powers will admit, and of all means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind."

He saw the framers only giving the general outline and objectives in the constitution and the ingredients which compose the objects can be deduced from the objects themselves.

Yet, how far could the federal government go in exercising its powers when there was no direction or authorization

for the act, as in the case of a national bank. The state of Maryland argued that a national bank could not be chartered because such a specific power was not listed in the constitution and the "necessary and proper" clause should be interpreted in a restrictive sense.

Not so said Marshall. If the federal government has the power to act, it has the right to select the means by which it acts; and opponents have the burden to prove otherwise. Marshall said necessary is any means calculated to produce the end. The authors of the constitution intended such a meaning, opined Marshall, and he knew these men well. Madison in the Federalist papers had unequivocally given this broad meaning: "No axiom is more clearly established in law or in reason than that wherever the end is required the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."

In upholding the constitutionality of the bank, Marshall enumerated the great powers listed in Article 1, Section 8 and declared "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".

Marshall then turned to the issue of Maryland's power to tax the bank. He conceded that a state had concurrent power with the federal government to tax property and person within its jurisdiction. However, the constitution was paramount to any state law and the constitution could and had in fact withdrew certain subjects from taxation by the state - such as placing taxes on imports an exports. Since the constitution had directly withdrawn the power to tax imports and exports, the same paramount character of the constitution could restrain a state from taxing in other areas if the exercise of this power was incompatible with and repugnant to the constitution. Restating the supremacy of laws made by the federal government under a constitutional mandate "they control the laws of the respective states and can not be controlled by them." A state was not going to be allowed to tax a federal installation. Marshall, adopting a maxim from Webster, ruled the power to tax is he power to destroy. The Maryland law was unconstitutional as a violation of the supremacy clauses of the constitution. Marshall closed: "The question is in truth a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution and the laws made in pursuance thereof, shall be the supreme law of the land is empty and unmeaning declaration". Article VI

The Jeffersonians were outraged by the McCulloch decision and the republicans cried out against Marshall's "two-way stretch": interpreting national powers broadly and state powers narrowly. Spencer Roane attacked Marshall in a series of letters in the Richmond newspaper. Marshall responded by writing letters to the Philadelphia Union under a fictitious name in which he made a lengthy defense of his decisions. Jefferson wrote to Roane, blasted Marshall, and again accused him of the usurpation of the exclusitivity of explaining the Constitution. Popular hostility against the court was renewed. Jefferson, unrelenting, called the judges "a subtle corp of sappers and miners, constantly working underground to undermine the foundations of our confederated fabric. The battle of Bunker Hill was not fought to set up a Pope." Still, Jefferson and his colleagues were not able to do anything about Marshall's size of power in the judiciary. It was the wrong time in history. First, there was no clear consensus of what would take the place of the Supreme Court on the expounder of the constitution. Second, Marshall's judicial nationalism was mixed up with too many issues that were already splitting the country - the money power as represented by the bank of the United States - the slave power involved in the congressional attempt through the Missouri compromise to regulate slavery in the territories, and finally, government interventionism through subsidies, which meant a great deal to the western states.

Gibbons v. Ogden - The Commerce Clause

The origins of Gibbons v. Ogden go back to the end of the eighteenth century when the New York State legislature gave an exclusive right to Robert R. Livingston to run steam boats on state rivers. It was commonly understood at this time that a state had absolute control over the waters within its boundaries. Gibbons mounted a challenge to this monopoly, and the New York state court enjoined him from operating a federally licensed steamboat on the waters of New York on the ground of the state granted monopoly. Thus, began a commercial war as other states conferred monopolies. The free flow of ships from one state to another was under attack, and it threatened to fracture the U.S. into separate entities and empires.

In the New York court, the issue was whether Congress, in licensing ships of certain sizes, had authorized these ships to trade between ports of different states. If Congress had done so, then New York conceded that the monopolies granted by it could not be upheld. The New York court found that Congress had not done any such thing, and held a state retained a right to grant monopolies over its internal waters. Thus, when the case came before the Supreme Court, the issue squarely was one of the power of Congress to regulate commerce on the nation's waterways.

The state's position was simple. There were two kinds of power given to the federal government: exclusive and

concurrent. Concurrent powers did not, of itself, divest the states of a like power. Quoting John Marshall in previous cases, New York argued that a state could legislate when ~~current~~ concurrent powers are involved if it did not come into any actual collision in practice with the federal government. William Wirt, for the United States, told the Court that if "the state of things which has already commenced is to go on, a civil war might erupt". At this time, New York, New Jersey, and Connecticut were at odds with one another, and the animosities were growing more and more raw.

Marshall handed down the decision for a unanimous court. (All of the opinion we have discussed were unanimous) Marshall began his opinion by paying sincere deference to the New York court, in particular its renown judge, Chancellor Kent, the most prestigious judge in New York and one of the most respected jurists in the United States. Marshall in his flattering manner said, "No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority, but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which providence has bestowed upon them, with that independence which the people of the United States expect from this department of government". It was Marshall's way of saying the Court was not going to bow to the pressures of the state legislatures.

Then Marshall's fist struck quickly. The constitution contained a list of enumerated powers granted by the people to their government. He again shunned aside the argument that these powers "ought to be construed strictly", asking why these powers should be so construed when he could find no one sentence in the constitution calling for such a construction. In a question which has stirred debate over and over again in the history of our jurisprudence, Marshall queried:

> "What do gentlemen mean by strict construction?"

His answer is considered one of the best offered.

> "If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, is fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded".

In effect, Marshall was following what he had said earlier in McCullogh v. Maryland, if the end was legitimate and the means used to achieve that end were within the scope of the

constitution, then there was nothing the Supreme Court would do to block the action.

The next question Marshall addressed was whether a constitutional issue was involved. Marshall pointed out that the constitution says that:

> "Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes".

The issue was whether this included navigation on the waterways. To answer this question commerce must be defined. Of course, the lawyers for Ogden and the state of New York argued for a narrow definition, a definition which Marshall said "would restrict a general term, applicable to many objects, to one of its significations". Marshall said that commerce was more than traffic:

> "It describes the commercial intercourse between nations, and parts of nations, and all its branches, and is regulating by prescribing rules for carrying on that intercourse".

He continued that the mind "can scarcely conceive" a system for regulating commerce that did not include navigation laws and at which commerce would be limited to actions in buying and selling or merely trading of goods. He insisted that the authors of the constitution must have understood that commerce included navigation:

> "The power over commerce including navigation was one of the primary objects for which the people of America adopted their government and must have been contemplated in forming it".

After establishing that commerce included navigation, Marshall went on to affirm that the federal government has authority over areas in which more than one state is involved.

> "The subject to which the power is next applied, is to commerce among the several states. The word among means intermingled with...commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior".

In Marshall's definition it is clear that the term "commerce" among the states was comprehensive. He was saying that the federal powers apply not only to the external relations of the states, but also to those internal concerns which affect the states generally. Marshall simply did not believe, as evidenced by this decision, that the United States could exist if each state possessed the powers New York was claiming for itself, and he could not believe that the constitution intended New York to have such powers. (Of note, Marshall was simply limiting the powers of the state to control commerce, but later decisions of the Supreme Court have interpreted Marshall's language in an expansionistic manner, bringing under federal government's control almost anything that could be construed as commerce).

Accordingly, if Congress had the power to regulate commerce, that power is complete in itself and may be exercised to its utmost extent and acknowledges no limitations other than those prescribed in the constitution. This was a bold statement at the

time, and it rejected prior law which had recognized New York's right to exercise control over its waterways. Marshall held that New York had no right to grant such a monopoly even if there was no federal law because the power of Congress is complete and acknowledges no limitations.

> "When a state proceeds to regulate commerce of foreign nations or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do".

This Marshall said the constitution does not permit.

The Gibbons case ranks today as one of the most important in history. In it, Marshall laid the basis for later justices to uphold a federal power to deal with national commerce and social problems.

The effect of Marshall's watershed opinions which we have looked at tonight was to assure the evolution of the ~~United~~ several sovereign States fiercely protective of their own rights and powers ~~united~~ into a giant, prosperous common market and from the long range political effect to insure the continued growth of the United States constitution as a spacious document sufficiently powered to guide the people in their quest for a nation under law. To those critics, who had just about had as much of the Supreme Court as they could stomach, Marshall was a power hungry politician who stepped on and abused the rights of the states, rights which many of his fellow Americans felt were solely matters of local legislatures. Yet these critics were short sighted - guided by

regional interests and passion - who lacked view that people of America on September 17, 1789 created one nation composed of sovereign states - a federalist political system which granted to a national government power to build a nation. Under Marshall's leadership, he was forging a nationalism and forcing the United States to acknowledge that it was one nation, and to live up to the goal that our founding fathers had set for themselves. While Thomas Jefferson and John Randolph and their coharts thought of themselves as Virginians, their children - yours and my great, great grandfathers - were growing up as Americans - Americans who would be protected in the ownership and use of their property, free to engage in business ventures across state lines, secured in the knowledge that all Americans, including its President and legislature, were bound by the same obligations and duties under law and sheltered by the rights and protections provided in one of the greatest documents in the history of mankind - the United States Constitution.