

JOHN MARSHALL: THE DEVELOPMENT YEARS

1755-1800

by

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TABLE OF CONTENTS

TITLE PAGE i
ACKNOWLEDGEMENTS ii
TABLE OF CONTENTS iii
CHAPTER ONE—YOUTH, EDUCATION, AND MILITARY EXPERIENCE 1a
CHAPTER TWO—LAWYER AND DELEGATE 19a
CHAPTER THREE—THE VIRGINIA FEDERAL CONSTITUTIONAL CONVENTION. 41a
CHAPTER FOUR—STATE AND FEDERAL SERVANT. 60a
CONCLUSIONS 88a
VITA 98

CHAPTER ONE
YOUTH, EDUCATION
&
MILITARY EXPERIENCES

The individuals of the revolutionary generation who gained eminence during the first four decades of the American Republic were not born to power, nor did they achieve it easily. There were many avenues open to them, and their choices sometimes determined not only their own career, but also the course of this new founding nation. Their achievements and their effect in shaping the country's future sometimes exhibit remarkable consistency through varied episodes to their hour of greatness. Of few was this more true than of John Marshall. From his youth, events and his own strong will combined to determine and develop his career in the direction of the pinnacle he ultimately achieved as Chief Justice of the United States Supreme Court.

John Marshall's familial inheritance was of greatest advantage to him before he was thirty years of age; but even then his independence of spirit and dogged self-reliance were of equal value. Born September 24, 1775, he was the eldest son of Thomas Marshall and Mary Randolph Keith.¹ Through his maternal line, he was the great-great grandson of the famous William Randolph of "Turkey Island" and his wife, Mary Isham, and thus a cousin of such contemporaries as Thomas

¹William Meade, Old Churches, Ministers, and Families of Virginia (Philadelphia: J.B. Lippincott Co., 1857.) II, 138-39, hereafter cited as Meade, Old Churches; Philip Slaughter, A History of Bristol Parish (Richmond, Virginia: J.W. Randolph and English, 1879), 212, hereafter cited as Slaughter, Bristol Parish; B.J. Ramage, "John Marshall, Southern Federalist," Sewanee Review, IX (1901), 130.

Jefferson, "Light Horse Harry" Lee, Edmund Randolph, and John Randolph of Roanoke.² His Keith ancestors were noble Scots who, after their immigration into Virginia, took a prominent part in both civil and military affairs, in the ministry and professions, and especially in business.³ The Welsh heritage of the Marshall's was that of honorable, though not prominent, farmers.⁴

His maternal grandfather was an Anglican clergyman. The Reverend James Keith had been well-educated in the methods of a disciplined Scottish college.⁵ Like clergymen of colonial Virginia, in his parish of Tuckahoe just west of Richmond, he taught his own neighbors' children. Besides the three R's such a miniature school drilled into its pupils the habits of personal discipline and religious habits. In her education, Mary Randolph Keith received as much

²Slaughter, Bristol Parish, 214; Henry Flanders, The Lives and Times of the Chief Justices of the Supreme Court of the United States (Philadelphia: J.B. Lippincott Co., 1858, hereafter cited as Flanders, Chief Justices), I, 4; W. Gordon McCabe, "The First University in America," Virginia Magazine of History and Biography, XXX (1922), 135; Lyon G. Tyler, "Washington and His Neighbors," College of William and Mary Quarterly, I, Ser. 1 (1892), 135f.

³Albert J. Beveridge, The Life of John Marshall, (4 vols., Boston: Houghton-Mifflin, 1916, hereafter cited as Beveridge, Marshall) I, 17; Flanders, Chief Justices, I, 1; John S. Wise, review of the The Family of Douglas or Douglass, in the College of William and Mary Quarterly, III (1896), 135; Slaughter, Bristol Parish, 216.

⁴William B. Slaughter, Reminiscences of Distinguished Men (Milwaukee: Godfrey and Crandall, 1878, hereafter cited as Slaughter, Reminiscences), 102; B.J. Ramage, "John Marshall," Sewanee Review, IX, (1901), 130, hereafter cited as Ramage, "John Marshall", John Marshall, An Autobiographical Sketch, (ed. by John Stokes Adams, Ann Arbor: University of Michigan Press, 1937, hereafter cited as Marshall, Autobiography), 1.

⁵Beveridge, Marshall, I, 18.

or more education than other girls of her class in Virginia of her time. Her husband, Thomas Marshall, was not so well educated as she, but he was an avid reader and a methodical thinker.⁶ He was described as a "practical surveyor, adequately acquainted with history, poetry, and general literature, of which he possessed most of the standard in the language."⁷ Like his wife, he was also deeply religious.⁸

One cannot say that the luster of Marshall's ancestry was not as important as the stalwart character traits which he inherited, because in Virginia, kinship opened doors to success which were very difficult for outsiders to breach. It does not appear, however, that John Marshall "traded upon" or placed exaggerated emphasis upon his ancestry or relationship. One of the silent concomitants of his familial status was an impetus toward education and honor.

Many who moved to the frontier, as did the Marshalls, did so because of the press of numbers in prolific families and of soil exhaustion, but some did so in order to avoid social constraints of the echelon bureaucracy. The Marshalls were among the latter. By family tradition and by their own experience they were independent and self-sufficient individualists. The isolation of the frontier added to their individualism. Although backwoodsmen in one sense,

⁶Ibid.; Marshall, Autobiography, 3-4; Joseph A. Story Discourse upon the Life, Character, and Judicial Services of the Honorable John Marshall, LL.D., (Boston: James Munroe and Co., 1835, hereafter cited as Story, Discourse), 9.

⁷Slaughter, Reminiscences, 103.

⁸Beveridge, Marshall, I, 18.

they were not uncouth primitives. Many were engendered with high principles, religious beliefs, and a willingness to work hard.

John Marshall was the son of just such a man.⁹

The virtues of his parents had a great impact on the youthful John Marhsall. As the eldest son, he often accompanied his father on surveying trips--working and exploring the countryside together.¹⁰ John Marshall himself ascribed most of his learning, the development of his character, as well as his love of poetry and history to his father, stating: "He was my only intelligent companion; and was both a watchful parent and an affectionate instructive friend."¹¹

Besides setting for John a good example as a literate, religious and industrious man, the elder Marshall's participation in public life inspired the boy. As a senior vestryman of the newly established Leeds Parish in Fauquier County, Thomas Marshall was an accepted member of the Virginia squirearchy. The strictly religious duties of a vestryman were slight, but he shared in the exercise of considerable power in setting and expending parish tithes for charitable social services as well as maintaining church property. He served as

⁹ Ibid., 30.

¹⁰ Marshall, Autobiography, 4; Story, Discourse, 13; Beveridge, Marshall, 43; Sallie E. Marshall Hardie, "John Marshall, Third Chief Justice of the United States, As Son, Brother, Husband, and Friend," The Green Bag, VIII, (1896), 480.

¹¹ Marshall, Autobiography, 4; Story, Discourse, 13.

Sheriff of Fauquier County as well as Clerk of Dunmore County.¹² On surveying trips, Thomas Marshall appears to have discussed with his first-born son political machinations and controversies of the day.¹³ Thomas Marshall was elected to serve as one of Fauquier County's two members of the Virginia House of Burgesses between 1761 and 1776. Thus, the Marshall name grew in prominence in the political, civil, and religious sectors.¹⁴

Another facet of Thomas Marshall's life became important to his son's development. Thomas Marshall was a friend and associate of George Washington. Both were born in Westmoreland County where they together attended the Reverend Archibald Campbell's Academy, the same school John Marshall would one day attend. They teamed together as surveyors when Washington was appointed a surveyor by Lord Fairfax. They fought together in the French and Indian War.¹⁵ For most Americans, the idealization of George Washington did not take place until the Revolutionary War, but he had been held up as a model to John Marshall from his earliest years. At not less than second-hand, he heard about the British, about the military, about the inept national government. Both Thomas Marshall

¹²William G. Stanard, "Historical Notes and Queries," Virginia Magazine of History and Biography, III (1896), 427; Irwin S. Rhodes, The Papers of John Marshall: A Descriptive Calendar, (Norman, Oklahoma: University of Oklahoma Press, 1969, hereafter cited as Rhodes, A Calendar), 4.

¹³Marshall, Autobiography, 4; Story, Discourse, 13.

¹⁴Beveridge, Marshall, I, 52.

¹⁵Slaughter, Reminiscences, 103; James B. Thayer, et al., John Marshall (Chicago: University of Chicago Press, 1967), 3-4; Rhodes, A Calendar, 3-4.

and George Washington served in the House of Burgesses when independence was so heatedly discussed, when Patrick Henry made his famous "Liberty or Death" speech. These topics were discussed often in the presence of young Marshall and influenced him so strongly that he enlisted in the army at the outbreak of the Revolution at the same time that his father and Washington were commissioned. Many of Marshall's later actions and decisions were influenced greatly by his deep respect for General Washington's advice and beliefs, including his choice of a political party and culminating in his decision to run for Congress in 1799. This decision brought him into contact with the leaders of the national government, which in turn, brought him to be Secretary of State and ultimately Chief Justice of the United States.

The influence of a person's birthplace upon life can be exaggerated, but Marshall's was important. He was born in Germantown, Virginia, in Prince William County.¹⁶ Not only was this an inner Virginia frontier, but it lay in a pocket whose soil was not so rich as the surrounding area. Schools were scarce; neighbors were few and lived great distances from each other; books and newspapers were extremely difficult to procure.¹⁷

Even with the scarcity of printed material in this area, Thomas

¹⁶ Marshall, Autobiography, 3; B. J. Ramage, "John Marshall", 130; Meade, Old Churches, 216; Beveridge, Marshall, I, 34; Flanders, Chief Justices, 4; Rhodes, A Calendar, 3.

¹⁷ B. J. Ramage, "John Marshall," 131; Story, Discourse, 10; Beveridge, Marshall, I, 44.

Marshall succeeded in acquiring works by Milton, Shakespeare and Dryden.¹⁸ John Marshall's favorite author was Alexander Pope, whose "Essay on Man" he especially prized.¹⁹ Marshall's love of the poetry and prose of the English classics made him a gallant young man who won the hearts and respect of many. Without straining after particulars, Pope's general view of an ordered world and universe became Marshall's. Marshall reached maturity as the Age of Enlightenment was giving way to the Romantic era. Pope's classical spirit of moderation, truth, and virtue also embraced sentiment, whereby the emotions of the heart might sometimes triumph over the logical reasoning of the mind. Pope's writing stressed what was common to all men instead of what was distinct about each individual man.

The cultural impact of the American Revolution was international emphasis on individual liberty. The scales became tilted against Reason, which too often had made bad or evil compromises with the established power of the church and state. For Marshall, the war of the Revolution was a training school in nationalism. He was inspired by the realization that he and his fellow fighters for liberty fought for the nation and not just for their own colony. After the Revolution, disillusionment with "man's" inability to govern himself was a logical conclusion for a military man who contemplated upon the sadly ineffective and discordant conduct

¹⁸Story, Discourse, 10; Slaughter, Reminiscences, 105; Beveridge, Marshall, I, 44f.

¹⁹Beveridge, Marshall, I, 44.

of states. To satisfy both the Romantic concept of nationhood and the Rational one of an ordered government, Marshall's primary goals became the structuring of a strong national government. He was not among those who demanded the addition of a bill of rights to the Constitution in 1787 to 1790.

There was less emphasis on formal education than on common sense in the ideals of the Enlightenment philosophy. Marshall shunned reliance on structured learning throughout his lifetime, not remaining long at any institution in which he was enrolled-- from the Reverend Mr. Campbell's Academy to the College of William and Mary. Yet, adverse circumstances did not limit his inquisitive mind. He became an eager and life-long reader. His tender devotion and loyalty to his invalid wife can be attributed directly to this earlier period of Romantic writings which left such a strong imprint on the young Marshall.²⁰

Although Marshall avoided formal education, he did attend an academy which both his father and George Washington also attended-- the Reverend Archibald Campbell's Academy, which was considered to be the "best in the colony."²¹ Another important figure, James Monroe, attended the academy with Marshall and their friendship

²⁰Cynthia L. Vogt, "Alexander Pope and His Relation to the Enlightenment and Romanticism," (unpublished paper, VPISU, 1972), 1-16.

²¹Marshall, Autobiography, 4; Harry Ammon, James Monroe: The Quest for National Identity, (New York, McGraw-Hill Book Co., 1971; hereafter cited as Ammon, Monroe); Meade, Old Churches, II, 159.

lasted many years.²²

Indeed, it was a minimal education, but it did not prevent him from acquiring instruction on his own. After his return from Reverend Campbell's academy, Marshall continued his education under James Thomson, a Scotch clergyman hired by Thomas Marshall and other vestrymen of Leed's Parish.²³ The primary emphasis of Marshall's instruction from Thomson centered on Latin, especially Horace and Livy, which would undoubtedly be an aid in his later reading and understanding of Blackstone's Commentaries of England.²⁴ Thomson proved to be a decisive influence on Marshall and his father during the period that Thomson resided with them. He espoused anti-British sentiments in the Marshall home as well as from the pulpit. In one specific sermon near the outbreak of the Revolution, he urged every man to support a revolution against British tyranny and arbitrary imposition of taxes.²⁵

Marshall's conventional education resumed for a brief time after the Revolution when he enrolled in the College of William and Mary. Marshall was awaiting a new command in the spring of 1780, and in order to remain near his beloved Polly in Williamsburg, he enrolled in a law course under George Wythe, as well as a natural

²²Ammon, Monroe; Daniel C. Gilman, James Monroe: American Statesman (Boston: Riverside Press, 1883), 181.

²³Meade, Old Churches, II, 219.

²⁴Marshall, Autobiography, 4; Story, Discourse, 13; Flanders, Chief Justices, 6.

²⁵Meade, Old Churches, II, 219; Marshall, Autobiography, 4.

philosophy course under Bishop Madison.²⁶ Marshall barely continued through the middle of the summer, but even this short encounter with Wythe cannot be underestimated.

George Wythe had achieved a prominent political standing in Virginia, being considered the most learned man in the State and the life-long rival of Edmund Pendleton. Wythe was the first law professor in America and taught all of the young aspiring lawyers in the last half of the eighteenth century.²⁷ His interpretation of the law strongly influenced Marshall's formative opinions of the legal code which reached into his later years when his decisions on the Supreme Court reflected Wythe's teaching. Wythe asserted that the courts had supremacy over laws--state courts over state laws and federal courts over constitutional laws; Marshall believed courts should review the law. Wythe also upheld the validity of the British treaty and demanded payment of debts when the Virginia

²⁶Frances Norton Mason, My Dearest Polly, (Richmond, Virginia: Garrett and Massie, Inc., hereafter cited as Mason, Polly), 6; Marshall, Autobiography, 6; Robert T. Craighill, The Virginia "Peerage", (Richmond, Virginia: William Ellis Jones, 1880), 241; Beveridge, Marshall, 155. Beveridge states that Marshall was never enrolled in the course of Natural Philosophy. In his own autobiography, Marshall states that he attended Bishop Madison's lectures on natural philosophy. Beveridge bases his decision on the fact that Marshall took no notes in this course, yet took extensive notes in Wythe's law lectures. It is a fact that Marshall did a great deal of scribbling on his notes and daydreaming. He probably found Wythe's lectures interesting and useful, and found just the reverse for Madison's lectures. Marshall did not enroll merely for the education, but also to pass the time for an excuse to remain in Yorktown near the Amblers.

²⁷Dice Robins Anderson, "The Teacher of Jefferson and Marshall," South Atlantic Quarterly, IV (1916), 330.

House of Delegates irresponsibly passed laws to inhibit the repayment of these debts; Marshall believed in upholding the British treaty as well as repaying all British debts.²⁸

When the first rumblings of the Revolution reached the frontier, John Marshall, not yet twenty years old, eagerly joined the Culpeper Minutemen.²⁹ Throughout his boyhood, Marshall's father drilled with him and taught him the fundamentals of soldiering. It was not surprising that the young Marshall became the natural leader of that band of men.³⁰ When the Captain arrived late, Marshall took command and addressed the company for an hour on the war, after which he played quoits and challenged the men to foot races. His athletic stamina was unmatched; he had walked ten miles to the muster field that morning, and after playing these rigorous games, he walked the same ten miles back to Oak Hill that evening.³¹

Marshall moved through the ranks quickly. He was promoted to Captain by 1777, and participated in numerous battles and skirmishes, most notably the battles at Iron Hill, Brandywine, Germantown, Monmouth, and Stony Point. He was also among those who suffered

²⁸Ibid., 337-338; John Truslow Adams, "John Marshall," The American Scholar, I (1932), 261-62; William R. Smith, "John Marshall: National Historian," History As Argument, (The Hague-Paris: Mouton and Co., 1966), 145-47.

²⁹Marshall, Autobiography, 5; Story, Discourse, 15; Philip Slaughter, "The Culpeper Minute Men." Presentation of the Flag, Sept. 6, 1887, (Exponent Print, Culpeper, Virginia), 2; William Slaughter, Reminiscences, 107.

³⁰Marshall, Autobiography, 5; Ramage, "John Marshall," 133; William Slaughter, Reminiscences, 109.

³¹William Slaughter, Reminiscences, 110; Ramage, "John Marshall," 132-33.

through that devastating winter at Valley Forge.³² During the time he spent at Valley Forge, Marshall was in close contact with General George Washington. Washington appointed Marshall Deputy Judge Advocate, not then realizing the profound effect this would have on Marshall's future career.³³ As Deputy Judge Advocate, he made acquaintances with large numbers of men and officers, and was often employed in the settlement of their military disputes. He impressed everyone with his ability, knowledge of the law, and fairness in deciding cases.³⁴ This was the first opportunity Marshall had for practicing his legal skills and knowledge with his background in Blackstone being an important factor in his success.

The time which Marshall spent, and the experience which he acquired from the Revolution, became an irreversible factor in the direction his career was to take. Marshall suffered all the privations of war, and knew many of these hardships were unnecessary. The government was too weak and divided to make any decisions concerning the war, appropriations or provisions, or to legislate any aid for the soldiers' or the country's benefit. While the Revolution taught him how to fight and die for the glory and future of a united country, at the same time, it filled him with disappointment to see the ineffectiveness of the government destroy all respect for that country. Yet, the answer to the problem did not lie with

³² Marshall, Autobiography, 5-6; Story, Discourse, 16; Ramage, "John Marshall," 133.

³³ Marshall, Autobiography, 6; Story, Discourse, 16; Ramage, "John Marshall," 133.

³⁴ Story, Discourse, 16; Ramage, "John Marshall," 133.

the individual colonial governments because they suffered from the same illnesses of jealousy and provincialism. Only a strong centralized government could provide the needed authority and impartiality to administer to a diverse nation, act when necessary, and still protect the rights of the individual. A loose confederation as had existed could not accomplish this so an entirely new type of government was needed. Marshall decided to support the creation of a new constitution.

In the winter of 1779-1780, many of the officers were ordered to return home in order to relieve the surplus of officers.³⁵ Instead of traveling home, Marshall, still hopeful of a new command, visited his father then stationed at Yorktown. He had not planned an extensive stay in Yorktown, but soon found something there which induced him to stay longer than he anticipated.

During his command at Yorktown, Thomas Marshall became closely acquainted with Jacquelin Ambler, State Councillor of Virginia.³⁶ When John Marshall arrived in Yorktown, the Ambler daughters gave a ball in his honor.³⁷ At this ball, Marshall had the great fortune of meeting and falling in love with Mary (Polly) Ambler, then only fourteen years

³⁵ Marshall, Autobiography, 6; Story, Discourse, 17.

³⁶ Beveridge, Marshall, I, 148-49; Marshall, Autobiography, 6; Story, Discourse, 17. Sally N. Robins, Love Stories of Famous Virginians. (Richmond, Virginia: Press of the Dietz Printing Co., 1923, reprinted, 1925), 5.

³⁷ Eliza Ambler Carrington to Mildred Smith, March, 1810, in "An Old Virginia Correspondence," Atlantic Monthly, LXXXIV, 536; Robins, Love Stories, 76; Beveridge, Marshall, I, 150.

old. Marshall lingered in Yorktown, spending as much time as possible with his new-found love.

Searching for something to occupy his time when he was not with Polly, he enrolled at the College of William and Mary. Marshall took extensive notes during his law course under Wythe, but many scribblings of Polly's name interlace the notes, showing his mind was not too often on his classes.³⁸ Marshall was well thought of and respected by his fellow classmates, being selected to Phi Beta Kappa shortly after his arrival. Despite this prestigious position Marshall acquired, this future great lawyer and jurist quit his education abruptly after only a few months at the College to follow his sweetheart to Richmond when her family moved there in the summer of 1780.³⁹

He traveled to Richmond, but since Polly was too young to marry, went on to Fauquier County still awaiting a new command of troops. Marshall was admitted to the bar in Fauquier County on August 28, 1780, and, giving up hope that he would be sent new orders in the Army, intended to set up his legal practice.⁴⁰ The courts had been suspended in Virginia until after the surrender of Cornwallis at Yorktown, after

³⁸Robins, Love Stories, 75; John Marshall Papers, College of William and Mary, Williamsburg, Virginia.

³⁹Robins, Love Stories, 76; Beveridge, Marshall, I, 161; Mason, Polly, 10; Mary Newton Standard, Richmond, Its People and Its Story (Philadelphia and London: J.B. Lippincott and Co., 1923), 89-90.

⁴⁰Marshall, Autobiography, 6-7; Story, Discourse, 17.

which Marshall began his practice immediately.⁴¹ There were many economic and political changes after the Revolution, providing numerous opportunities for litigation. Marshall attributed the early success of his law practice to the patronage of his veteran friends and colleagues, many of whom had been impressed by his ability as Deputy Judge Advocate in the Army.⁴²

Marshall's decision to enter politics was not simply for the glamour, money, or social prestige. Although he did have strong influences from his father, George Washington, George Wythe, as well as his future father-in-law, Jacquelin Ambler, Marshall was still inspired by his feelings for the government and its future. The lawlessness which scarred the Revolution had a strong impact on Marshall's views on government and democracy. He was witness to the human endeavor and human sacrifice spent during the Revolution to free America from British tyranny. Yet, in the succeeding years, he was also witness to Shay's Rebellion in Massachusetts, as well as the Whiskey Rebellion in Pennsylvania, magnified by the irresponsibility of the colonists in refusing to pay their just debts to the British. Marshall grew very distrustful of this new democracy which permitted such lawlessness stating, "I fear . . . that those have truth on their side who say that man is incapable of governing himself."⁴³

⁴¹ Ibid.

⁴² Ramage, "John Marshall," 133; Flanders, Chief Justices, I, 19; Story, Discourse, 16.

⁴³ James Truslow Adams, "John Marshall," The American Scholar (The United Chapters of Phi Beta Kappa, New York), I (1932), 262.

Despite his misgivings about the government, Marshall was deeply moved by the prospect of the newly independent country. He became aware of strong national feelings during the Revolution, when men threw down all provincial barriers to fight for a common, unified goal--a free America. This unifying factor dissipated soon after independence was obtained, giving vent once again to provincial quarrels and petty jealousies. Having felt the exhilarating surge from fighting and striving for one country, Marshall could not just permit the irresponsible to gain control and ruin the dignity which had been attained through the Revolution for this new America. Marshall wanted desperately for the government to succeed. A strong national government would provide a means of repayment of the national debt accrued during the Revolution, since the separate colonies could not be relied upon to pay their portion of the debt voluntarily. The new country had a reputation to uphold, especially in international circles, and repayment of this debt was crucial to its status. Thus, Marshall decided actively to support the national government.⁴⁴

On January 3, 1783, two months after his arrival in Richmond, Marshall married Polly Ambler in a quiet ceremony.⁴⁵ Polly was seventeen--Marshall twenty-seven years old. Although he had minimal financial resources, Marshall began his marriage with a promising

⁴⁴Mason, Polly, 17-18; Marshall, Autobiography, 7.

⁴⁵Ibid.

future--he was a member of the bar, as well as a member of the Virginia House of Delegates. His father made him a gift of one negro and three horses, and Marshall rented a modest four-room house in Richmond.⁴⁶ Being a part of the Ambler family greatly enhanced his prestige and standing in Richmond's social circles, increasing his law practice and reputation immensely.

Marshall was deeply in love with his new bride, but their marriage was to be filled with heartbreaks. Shortly after they were married, Polly succumbed to a nervous affliction which lasted throughout the rest of her life.⁴⁷ Marshall, at all times, attempted to shield her from even the slightest disturbances to insure her comfort--even spreading straw on the stairs to muffle the noise, and using screws instead of hammer and nails to attach the roof to the house.

Marshall remained dedicated to his wife throughout her illness. Many personal tragedies occurred during their marriage, and at times Polly had to face them alone, adding to her mental distress. Each baby to which Polly gave birth drained her both physically and mentally, taking her longer to recuperate after each succeeding birth. In the summer of 1792, Polly witnessed the death of two of her beloved children within a two-week period of each other. While her husband was in Paris, she gave birth to her last son, and even before she was able to recuperate, was sorrowed by the death of her father, Jacquelin Ambler.

⁴⁶Ibid.

⁴⁷Ibid.

Her sister, Eliza, wrote, "My sister fell into a deep melancholy from which no one could relieve her . . . only her husband who might have by his usual tenderness (had he been there) dissipated this terrible gloom."⁴⁸

Although continually devoted to his wife, Marshall sought relaxation and enjoyment in many of the social clubs in Richmond. He joined the Society of Cincinnati, made up of officers of the disbanded Continental Line of the Revolution Army. Marshall was also a member of the "St. Taminy" Society, composed primarily of politicians. He became active in the Grand Lodge of Ancient York Masons, the Jockey Club, as well as the social assemblies and circulating library. He attended races at Broad Rock Track, and meetings at Farmicola's Tavern. He periodically entertained at home, adjourning to the Barbecue Club to pitch quoits, which along with whist and backgammon were Marshall's favorite pastimes.⁴⁹

Marshall established his own reputation and became popular in his own right, being very well thought of by the citizens of Richmond as well as his colleagues in the House of Delegates. He transferred his law practice from Fauquier County to Richmond, appearing in the Richmond courts, enhancing even further the reputation of his ability as a lawyer. Thus, Marshall's entrance into the House of Delegates of Virginia that Fall in 1782 was yet another step of a young aspiring Virginia statesman toward a prominent national career in the new government.

⁴⁸Mason, Polly, 113.

⁴⁹Cassie Moncure Lyne, "John Marshall's Romance," National Republic. XXII (1934), 7.

CHAPTER TWO
LAWYER AND DELEGATE

Because there were no patterns, such as moderately firm political parties, by which one can typify the members of the state legislature of the 1780's, it is almost impossible to evaluate the career of such a man as John Marshall who subsequently became a great national figure.¹ Yet, it should be obvious that a careful evaluation of those years of fruition is essential to comprehending such a man's ideals, principles and manner of doing things.

Even though his legal training had not been extensive, John Marshall's admission to the bar was also official recognition of his eligibility for public service. Thomas Marshall of Fauquier County, urged his son to become active in politics and, as a respected landowner and magistrate, helped him gain election to the Virginia House of Delegates. The younger Marshall's revolutionary service, personality, and charm were great assets in his successful electoral campaign. His biographer, Albert Beveridge, in his 1916 biography, concluded that Marshall won his early following less by his brilliance, congeniality, modesty, sincerity, and parental patronage, than by his appeal to Fauquier's Revolutionary War veterans, many of whom had served under his command.²

¹ Van Beck Hall, Politics Without Parties: Mass. 1780-1791. (University of Pittsburgh Press, 1972).

² Albert J. Beveridge, The Life of John Marshall, (4 vols. Boston: Houghton Mifflin, 1916), I, 201-202. (hereafter cited as Beveridge, Marshall).

When Marshall arrived in Richmond to take his place among the other members of the Virginia House of Delegates, he was not greatly different from his colleagues. At twenty-seven years of age, he was young, but not conspicuously so. He had simple, rustic frontier ways and manners. Like most Virginia gentlemen of that day, he dressed carelessly enough and in clothes enough out of fashion to give strangers the false appearance of being slovenly. He was neither pompous nor self-important as a delegate, but evinced a "simplicity of conduct and demeanor."³

At the time Marshall entered the legislature, both the central government and the state governments were suffering the difficulties of winding down a war and attempting to meet multiplied problems of a ruinous inflation and a devastated economy. After Cornwallis' surrender at Yorktown, 1781, one year before Marshall joined the House of Delegates, many state treasuries, including Virginia's, were under such a heavy strain to pay and supply their militia and to meet current expenses that they believed themselves justified in paying only token sums to Congress for the support of the central government.⁴ After Yorktown, so many veteran officers and enlisted men were nearly destitute that one of the main problems confronting any state government was how to finance back pay for its demobilized militia. While serving

³James B. Thayer, et al., John Marshall (Chicago: University of Chicago Press, 1967) p. 110.

⁴Beveridge, Marshall, I.

in the army, Marshall had become painfully aware of the financial plight of not only the state and nation, but of the people at large. He realized that the Articles of Confederation's method of "voluntary" contributions by states to the central government needed revising. Thus, before Marshall entered upon his civil career, he had formed the opinion that the needs of the central government required that it be strengthened and that this would in turn require some change from the status quo.

Marshall took his seat in the House of Delegates on October 21, 1782.⁵ Although this was the appointed day for the opening session of the legislature, so many of the delegates were late in their arrival that a quorum was not found until November 9. When the House organized itself, Marshall was appointed to the Committee for Courts of Justice. This committee of twelve members had a broader jurisdiction than at first might be assumed. It was authorized to inspect the acts and journals of the previous session in order to ascertain which laws were temporary, and which were due to expire, and to recommend legislative bills accordingly.⁶

The first report of this committee while John Marshall was a member included a recommendation that the House preserve in its existing policy against stay which would forestall foreclosures and sales at public vendue to satisfy debt.⁷ In November, he voted for an unsuccessful

⁵Journal of the Virginia House of Delegates. (Fall Session, 1782), p.3 (hereafter cited as Virginia House Journal).

⁶Virginia House Journal, (Nov. 9, 1782), p. 10.

⁷Ibid. (Nov. 12, 1782), p. 14.

bill to discourage extensive credit and to tighten up requirements for proving debts. Indeed, Marshall's advocacy of strict enforcement of contractual obligations went far beyond mere abhorrence of fraud and deceit in monetary dealings. Undoubtedly, his professional association with the Richmond mercantile interests through his law practice, and his acceptance in this milieu, reenforced the conservative views of the son of the country squire. From the beginning, Marshall espoused social and economic opinions that would secure either the good landlord against the bad tenant, or the good merchant against the fraudulent purchase. It was, however, the day of the debtor, and the House rejected the committee's recommendation.

Marshall also was appointed to committees to "form a plan of national defense against invasion," to evaluate the condition of arms and munitions in the commonwealth,⁸ and to draft a bill for the reorganization of the militia.⁹ He voted with the minority against a motion to postpone the militia bill.

This session was Marshall's introduction to the controversy over the disestablishment of religion. The Committee for Courts of Justice recommended the dissolution of the former vestries of certain parishes which by 1785 had few parishioners and no minister.¹⁰ Unlike Jefferson

⁸ Ibid., p. 13-35.

⁹ Ibid.

¹⁰ Ibid., (Nov. 14, 1782), p. 17; George M. Brydon, Virginia Mother Church. (2 vols. Richmond and Philadelphia, 1947-1952), II, 609-610. These were Antrim and Westover parishes respectively, in Halifax and Charles Counties.

and Madison, who were then his friends, he was an unquestioning Episcopalian.

Marshall also served on a House committee to find a faster method of promulgating laws and the proceedings of the General Assembly.¹¹ In the 1780's, the population of the commonwealth was so widely dispersed and roads were so bad that mail delivery took weeks. There were only three Virginia newspapers between 1781 and 1787, and those few had a limited circulation.¹² He served briefly on two other committees: to supervise privileges and elections, and to examine the books and papers of the state's commercial agent.¹³

On November 20, less than one month after he joined the House of Delegates, Marshall was elected by a joint ballot of the House of Delegates and the Senate, to the Executive Council of State.¹⁴ On November 20, 1782, he gave his oath of office before his father-in-law, Jacquelin Ambler, who was a Richmond Alderman. Among those who served on the council with him was James Monroe. The careers of both had commenced at the College of William and Mary and were to parallel one another throughout their lives.¹⁵ While serving together, the two

¹¹Virginia House Journal, (Nov. 18, 1782), p. 22.

¹²Ibid., (Nov. 20, 1782), p. 27.

¹³Ibid.

¹⁴Virginia Council of State, Journals of the Council of the State of Virginia (1782-1785), p. 184 (hereafter cited as Virginia Council Journal).

¹⁵Harry Ammon, James Monroe: The Quest for National Identity. (New York: McGraw-Hill, 1971), p. 37.

worked closely together on a committee to investigate the settlement of accounts between the commonwealth and the United States. They discovered and reported gross abuses and misapplications of public money.¹⁶ The council also devoted much time to petitions for relief by officers, soldiers, and private citizens for services which never had been remunerated.

The council deliberated at length concerning an Indian peace treaty. After several attempts, a treaty was signed with the Cherokee, Chickasaw, and Creek nations.¹⁷ When the President of the College of William and Mary requested that the commonwealth provide for the education of young Indians at Williamsburg, Marshall suggested and the General Assembly provided, that General George Rogers Clark communicate with the several tribes to secure suitable Indians for students.¹⁸ At the same time, however, a bill to encourage intermarriage between whites and Indians failed of passage. In a letter to Monroe, Marshall declared that that measure would have been "advantageous" but that "our prejudices operate too powerfully."¹⁹

The Executive Council was forced to formulate a temporary policy

¹⁶Virginia Council Journal, pp. 234-235.

¹⁷Ibid., p. 321.

¹⁸Ibid., The President was the Episcopal bishop, James Madison, the kinsman of the Virginia legislator who became the fourth President of the United States.

¹⁹ Marshall to Monroe, December, 1784, quoted in Robert D. Meade, Patrick Henry, (2 vols. Philadelphia: J.B. Lippincott, 1957), II, 265; Thayer, John Marshall, p. 190.

concerning British subjects in Virginia, since the legislature could not agree on a permanent policy. As a general rule, the Council decided that, since most British subjects might form a seditious party dangerous to the commonwealth, they should be seized and delivered to the commanding officer at Richmond for subsequent exchange. Having evolved the general rule, the council promptly created an escape from its harshness for well-behaved former Britons. The instance which occasioned this ruling was the personal petition of John Wormeley to resume his residence in Virginia. Before the war, Wormeley had been a great landowner and a burgess. There was probably no better-known native-born Virginian who had served in the British army during the Revolution, but it was argued that he could not now be considered a traitor, since he was willing to swear allegiance to the commonwealth. Declining to take a stand concerning his past action or on his present or future status as a citizen, the council was able to view Wormeley as an ordinary immigrant and to permit his residence. Forgiveness, amnesty and peaceful citizenship were questions the council was unwilling to answer until some future date when a definitive treaty might have been signed with Great Britain.²⁰ The case of two newly arrived British subjects, Daniel Blair and Joseph Williamson, was not in the same category as that of Wormeley. These two were agents of British merchants seeking repayment.

²⁰Virginia Council Journal. (May 17, 1783), p. 256.

of pre-war debts owed by those planters described in contemporary verse as

Those vaunted demagogues who rose
From England's debtors to England's foes.

Blair and Williamson were granted permission by the council to sojourn in Virginia only one month. During this interval, Williamson was so indiscreet that he gave real or supposed cause for certain Virginia citizens to tar and feather him. Since John Marshall was a strong advocate of law and order, he undoubtedly agreed in the council's advice to the Attorney General that he bring Williamson's tormentors to justice for their "unwarrantable conduct."²¹ This recommendation was rescinded at the first opportunity by a less legalistic and more vindictive House of Delegates. If in the next decade Marshall was to derive substantial political support from Anglophiles, it is only fair to state that the young continental regular, fresh from battle, had been desirous of fair play to his former enemies if, indeed, he was not then ready to forgive them.

An important problem which confronted Governor Benjamin Harrison and the council during Marshall's term, was the right of extradition. While in South Carolina, George Hancock, Jr., then of Chesterfield County and later of Montgomery County, Virginia, assaulted Jonas Beard, a man of high rank and esteem in that state. Governor Benjamin Guerard of South Carolina, requested the extradition of Hancock from Virginia for trial in South Carolina. Neither Virginia's Governor nor her Attorney

²¹ Ibid., (October 15, 1783), p. 294.

General nor her council denied that Article IV of the Articles of Confederation upheld the right of one state to extradite for trial from another persons accused of crimes. In this instance, however, Attorney General Edmund Randolph and the council advised Governor Harrison that the South Carolina's evidence was insufficient to warrant the extradition. They went so far as to allege that Governor Guerard would not have requested extradition except for Beard's eminence.²² It is well known that Marshall detested the selfish kind of independence which often guided the actions of the Virginia General Assembly in derogation of laws and treaties of the central government. Even though there is no record of Marshall's vote in the council, the fact that he already was a staunch supporter of a strong central government makes it evident that his role in this advisory opinion was not prejudiced.

One of the council's most important decisions during the time of Marshall's service, 1782-1785, was to rule upon the authority of the governor to remove magistrates for misconduct. This matter had not been tested before a petition was brought before the council requesting the dismissal of John Price Posey, a Justice of the Peace for New Kent County, on grounds that he had committed "gross misdemeanors disgraceful to the character which should be preserved by a Justice of the Peace."²³ There was on the statute books a law which authorized the governor to

²² Ibid., (February 16, 1784), p. 328; James Madison, The Papers of James Madison. (8 vols. to 1975, ed. by W.T. Hutchinson, and W.M. Rachal. Chicago: University of Chicago Press, 1962...), II, 417.

²³ Virginia Council Journal, (February 20, 1783), pp. 221-222.

examine the conduct of a public official and determine his guilt or innocence without a trial in a court of justice, but it was obvious upon the face of things that Posey would plead that this law violated Virginia's Bill of Rights which was a part of her constitution. Seizing the opportunity to declare the constitution a fundamental law, superior to ordinary legislation, the council speedily advised that the law empowering summary removals by the governor should be set aside as "repugnant to the Act of Government, contrary to the fundamental principles of our Constitution, and directly opposite to the general tenor of our Laws." ²⁴

Marshall was only twenty-seven at the time of his election to the Executive Council of State. Although he performed exceptionally well, some resented such a young man being elected and thought that the Executive Council of State should be comprised of statesmen more advanced both in years and experience. ²⁵ Edmund Pendleton, for instance, wrote to James Madison, shortly after Marshall's election to the council, saying that Marshall "is clever, but I think too young for that department, which he should rather have earned as a retirement and reward by ten or twelve years hard service in the Assembly." ²⁶ This was a common complaint. The truth of the matter was that there were at this moment sufficient inducements to persuade men of the first rank to serve on the council.

²⁴ Ibid.

²⁵ Thomas Jefferson, The Papers of Thomas Jefferson. (19 vols. to 1975, ed. by Julian Boyd. Princeton: University Press, 1950), p. 279.

²⁶ Hutchinson and Rachal. James Madison, II, p. 84.

Its tasks were unending, yet the monetary and other rewards were slight. The competitive lure of the Congress of the Confederation and the general hard times reduced the social, political, and economic value of the post. Although Marshall incurred some criticism from his colleagues for taking unpopular stands, this was not the cause of his resignation on April 1, 1784.²⁷ Marshall resigned for the same reasons that had made room for him: he desired greater rewards.

Marshall's membership on the executive Council of State was, nonetheless, an important step in his political career. At the same time that he gained insights into the workings of both the legislature and executive branches of government, he was afforded an opportunity to discuss matters in a more interpretive and intellectual manner, than if he had served only in the legislature. This experience not only broadened his perspective on politics and government, but it also provided him a springboard for the continuation of his political career.

In 1784, Marshall sought reelection from his home county of Fauquier to the House of Delegates. He admitted to his constituents that he had resigned from the council because it required too much time away from his law practice. Undoubtedly, he or his spokesmen let it be known that as a war veteran who had a family to support, he needed all he could earn as an attorney in Richmond, as well as in Fauquier. But he

²⁷ Irwin S. Rhodes, The Papers of John Marshall: A Descriptive Calendar (Norman, Oklahoma: University of Oklahoma Press, 1969), p. 27; Beveridge, Marshall, I, 211.

did not explain to them his perception that true political power required a power-base. Nor did he disabuse his constituents of their belief either that he was a great man because he had achieved the eminence of a Councilor so young, or that he was their friend because he had cast this honor aside to serve the people more directly.²⁸ Marshall was becoming a shrewd politician indeed.

The Virginia General Assembly convened without John Marshall. As usual, the sergeant-at-arms was instructed to take him into custody; it was ten days before the Delegate from Fauquier quietly took his seat, much as did many others tardy in their attendance, such as Patrick Henry. Marshall was appointed again to the Committee for Courts of Justice and to the Committee of Propositions and Grievances.²⁹ He served on the committee which drafted a bill responding to the Congress of the Confederation concerning the latter's proposal to adjust the debts of the states to congress.

In this session there was introduced a bill instituting for Virginia retaliatory trade regulations and duties against Great Britain, the proceeds of which were to be devoted to the commonwealth's war debt. This bill included a provision granting congress authority to act in the same respect if the several states did not do so. This bill was referred to a special committee of which Marshall was a member. The events of the Revolution were too fresh for any of the committee not to

²⁸ Beveridge, Marshall, I, 211.

²⁹ Virginia House Journal, (May 25-27, 1784), p. 5.

endorse cheerfully the principle of retaliation. Yet, other considerations blunted their willingness to translate the principle into action. Opponents of centralized government had a strong representation on this committee, and their superior numbers balked at delegating power to the central government. At the same time, no amount of persuasion could induce the legislators to raise the cost of living by increasing the state's existing customs duties. A face-saving amendment that rendered the bill impotent by delaying its effect until after all other states had enacted similar legislation was passed.³⁰

In 1782, while serving on the council, Marshall had been a party to the decision to punish vigilantes who tarred and feathered an obnoxious British mercantile agent. In 1783, when lawbreakers petitioned the General Assembly to dismiss charges, the matter was referred to the Committee of Propositions and Grievances of which, ironically, Marshall was a member. Contrary to his earlier opinion, Marshall voted with the majority in approving the plea for clemency, especially since no treaty had been signed with Britain and in recommending that all charges should be dropped "and buried in utter oblivion."³¹ This episode illustrates Marshall's doubts about the effectiveness and responsibility of the state governments, his preference for national solutions instead either to emotional or rational ones. He concluded

³⁰ Beveridge, Marshall, I, 234-235.

³¹ Virginia House Journal (May 25, 1784), 19-23; Beveridge, Marshall, I, 214-215.

from his fellow delegates' voting record that they were interested less in upholding the laws than in following whims and prejudices with little or no regard for long-range effects. From such experience as this, he concluded that, if the laws of the state and confederation were not upheld, America might be drawn into anarchy, which was to him the ultimate evil. Lacking the finished education of his day which might have given him a broader and more optimistic view of men and of institutions, Marshall's experience in the army and in the Virginia General Assembly produced in him a pessimist who, seeking to insure for his country the blessings of liberty, looked to a paternal application of stern laws.

In order to make a fresh start in the disagreeable tasks of financing both a war debt and current operations, Marshall supported an unsuccessful resolution to repeal all Virginia statutes which concerned pre-Revolutionary debts to British merchants and which limited or prohibited compliance with the recent peace treaty between Britain and America.³² For all that he may have been correct from the pragmatic and legal point of view, his move was not in accord with most Virginians of 1784. For the short-run, it was poor politics. As a representative of small freeholders, Marshall was more or less indifferent about the loss of slaves stolen by the British. He had learned in his study of Blackstone that a debt is a debt, and it should be paid. Blackstone showed the way to force

³²
Virginia House Journal (June 7, 1784), 41.

repayment. It was not a theoretical matter and the majestic dignity of the law did not encourage questioning.

Marshall's impatience with the Virginia legislature grew proportionately to his mounting belief that every bill supporting a good functional government for the nation was doomed. Marshall brooded upon the possibility that the central government would collapse unless the individual states acted positively to uphold its policies, laws, and treaties. He verged close to a belief that the Revolution had been fought for nothing. He feared that, although he and so many others had fought for an independent America, patriots were forced to watch inept lawmakers destroy in the name of Virginia and of each of the other states the goal of a great, peaceful and prosperous nation.

A most important issue before the General Assembly of 1784, was the petition from Augusta County residents that that body alter Virginia's fundamental law. The House Committee of Propositions and Grievances recommended against the petition, saying in effect that the legislature was not competent to debate a proposed change in the manner of its own composition prescribed by the Constitution of 1776. The committee declared that that document could not be changed or altered by the legislature, but only through a constitutional convention, duly elected and representing a majority of the people.³³ Marshall's vote within the committee is not known, but its conclusion was perfectly consistent with his views and those of sound constitutionalists, generally. The

³³ Beveridge, Marshall, I, 216; Virginia House Journal, 70-71.

question of reapportionment of legislative seats and of the tax burden in Virginia were not fully resolved in Marshall's lifetime, even though considerable change was made in 1829-1830. At no time did Marshall endorse the concept that new circumstances might justify departure from the wisdom of Virginia's constitutional fathers of 1776 even though one of the most prominent of them, Thomas Jefferson, long advocated changes to reflect the increased population and wealth of the western part of the commonwealth.

In this session, the Virginia General Assembly granted a charter incorporating the Patowmack Company to oversee and improve the navigation of the Potomac River. With the power to hold property, to exercise the right of eminent domain and to charge tolls, the company could also sell stock to shareholders who would share profits which George Washington and other principal organizers expected would be considerable. Marshall, along with many other members of the General Assembly, not only voted for the bill, but bought shares in the company. Although Albert Beveridge believed Marshall's experience formed the basis for his view that "the nature of a legislative franchise to a corporation acquires the vitality of property interest and personal experience,"³⁴ it is possible that Marshall's abbreviated formal legal studies or his own independent study, especially of Blackstone, was sufficient to buttress his conclusions concerning the nature of corporations.

A major issue in Virginia of the 1780's and 1790's was to define

³⁴ Beveridge, Marshall, I, 218.

what role religion was to play in society. Several bills were introduced in the House of Delegates regarding the religious controversy.³⁵ Marshall's apparent disinterest in the "religious warfare" was probably ingenuous. His education and youth had been subject to considerable religious influence, and there are many proofs that Marshall personally was a religious man. His grandfather, William Keith, was a clergyman of the Church of England; his father was a principal vestryman of his parish; and two of his tutors were clergymen, the Reverend Archibald Campbell, and a man by the name of Thomson.³⁶ Yet, despite this background, Marshall abstained from voting on a bill requiring all persons to pay a moderate tax or contribution for the support of all the denominations of the Christian religions proportionate to their numbers.³⁷ Neither did he vote on a bill concerning any regulation of marriages, nor on another providing for the general incorporation of all societies of the Christian religion which met modest criteria.³⁸ The Committee for Propositions and Grievances discussed, but made no recommendation concerning the petition of the Presbyterian Church against the act which reserved all church buildings and glebes of the former established Episcopal Church. After brief discussion, the House decided that the glebe lands, which were no longer used by an Episcopalian minister,

³⁵ Ibid., I, 220.

³⁶ Dumas Malone, "John Marshall," Dictionary of American Biography, (New York: Charles Scribner's Sons, 1936), 315-316.

³⁷ Beveridge, Marshall, I, 222: Virginia House Journal (November 11, 1784), 19.

³⁸ Virginia House Journal (November 17, 1784); 27.

should escheat to the state and be devoted to public purposes. John Marshall did not register a vote.³⁹ Neither did his father, who recently had moved to Kentucky, whence he was a delegate from Fayette. Yet, Marshall did vote in favor of the bill which incorporated the Protestant Episcopal Church.⁴⁰ It cannot be proved why Marshall avoided voting for the religious tax and the disposition of the glebes, but it is likely that he exercised political prudence by not doing so. It was less a case of courting Episcopalians than of courting Presbyterians.

Marshall served on many committees dealing with the judiciary system. Not only was he on the committee to amend the act establishing a High Court of Chancery, but he presented it to the House and carried it to the Senate.⁴¹ He served also on a committee commissioned to draft a bill establishing district courts and reforming county courts by creating a new system of intermediate courts between the old county court and the court of last resort. Whether because of principle or practice, he voted against the committee's bill.⁴² He served, too, on special committees to frame a bill regulating the jurisdiction of corporation courts,⁴³ and another repealing the establishment of the Courts of Assize.⁴⁴ Marshall presented these bills to the House and then carried them to the Senate. A bill to make "further provisions

³⁹Ibid., (December 4, 1787), 82.

⁴⁰Ibid., (November 17, 1784), 27.

⁴¹Ibid., (November 2, 1787), 27.

⁴²Ibid., (December 6, 1787), 85

⁴³Ibid., (December 22, 1787), 131.

⁴⁴Ibid., (January 3, 1788), 132.

for the Judges of the Supreme Courts" was defeated.⁴⁵

Marshall did not seek reelection from Fauquier in 1785. He next ran for the House in 1787 from Henrico County, where he had moved his residence. In every session in which Marshall served, he was appointed a member of the Committee for Courts of Justice, and he was again appointed to the Committee for Propositions and Grievances. This session proved to be very important in Marshall's career. Many critical issues were discussed, and the ensuing debates helped to mold his political opinions. He was also respected in his own right, and he was considered among the leading figures in the House of Delegates in 1787.

The issue in which Marshall was most actively involved concerned the observance of the British treaty and the payment of British debts. In 1784, Marshall had voted for an "early payment of British debts," as had James Madison, but the bill was soundly defeated.⁴⁶ He realized that the battle over debt repayment would be a difficult one. He may have suspected that more people were eager to escape their financial responsibilities than was the case, but there is no doubt that most Virginia debtors claimed offsets in payment of principal and interest which could not be allowed by any court of law. He supported a bill repealing the "anti-debt" laws, but an amendment was added that the bill should not be operative until Great Britain complied with the terms of the peace treaty, especially the one providing for the return of

⁴⁵ Ibid., (November 9, 1787), 37.

⁴⁶ Beveridge, Marshall, I, 226.

kidnapped slaves to their masters.⁴⁷ This amendment would postpone any early effectiveness of the bill. Another amendment was proposed, declaring the Virginians' intention to repay their just debts as soon as better times permitted. Marshall was appointed to a special committee to reconcile or reject the welter of resolutions on this subject and to take care that no statement conflict with the terms of the peace treaty. When the result was discussed by the House in Committee of the Whole, one new amendment was adopted before passage: a proviso that Virginia would not facilitate collection of the pre-Revolutionary debts of planters to British merchants until British troops had surrendered all the military posts they held within the boundaries of the United States of America. Although Marshall voted against both amendments, they were adopted. Up to this time a majority had supported the bill. After amendments, a majority opposed it.⁴⁸ According to Beveridge, this shilly-shallying confirmed Marshall's already low opinion of most of the members of the House of Delegates. Although that body's vacillation might well have led a lesser man than Marshall to fear for the stability of state government and to doubt the ability of people to rule themselves, such an appraisal seems simplistic and, indeed, derogatory of John Marshall. Many, including notables who later became Republicans, deplored the heedless manner whereby the states seemed to waste the energies of their own government and to sap further that of the already weak central

⁴⁷Ibid., I, 230; Virginia House Journal, 51-52.

⁴⁸Beveridge, Marshall, I, 231.

government. With rhetorical flourishes, a few contended that the Revolution was being mocked. Nearly all agreed that cooperation between and among states had become almost non-existent and that the general public felt animosity toward government on all levels. Marshall's empathy for and confidence in the general public may have been strained, but not even their constant bickering, total self-interest, and narrow outlook could have turned Marshall against them.⁴⁹ His experience as a legislator undoubtedly influenced Marshall to become one of the greatest spokesmen favoring ratification of the federal constitution, but it is equally sure that he had advocated a strong centralized government from the beginning of his political career.

In and out of the General Assembly, the most important topic discussed in Virginia in 1787 was the approaching state convention to consider ratification of the proposed federal constitution. All were agreed in the need to call a convention. The question quickly arose, however, whether the convention should have the power merely to ratify or reject the proposed constitution, or whether it could also offer amendments for its revision.⁵⁰ It quickly became clear that any attempt prematurely to resolve this question would wreck the proposed constitution inside the Old Dominion and, because of her leadership, in other southern states as well. The situation called for great delicacy, which

⁴⁹
Ibid.

⁵⁰
Beveridge, Marshall, I, 246-248; Meade, Patrick Henry, II, 334-335; Kate Mason Rowland, The Life of George Mason (Williamsburg: Holt, Rinehart, and Winston, Inc., 1961), 191.

John Marshall supplied, breaking the deadlock in the General Assembly by an astute compromise. He proposed simply that the convention should have, "the fullest latitude in their deliberations, and that the new constitution should be laid before them (the Convention) for their free and ample discussion."⁵¹ Marshall expressed also the hope that no one should construe that the House of Delegates disapproved of the constitution because some of its members might wish to offer amendments. His resolutions were accepted unanimously.⁵²

As Marshall saw his lofty goal of an efficient and well-organized national government begin to materialize, he fought intensely to be elected as a delegate to the Virginia Ratifying Convention in order personally to make his dream a reality.

⁵¹Rowland, George Mason, 191.

⁵²Beveridge, Marshall, I, 245.

CHAPTER THREE
THE VIRGINIA FEDERAL
CONSTITUTIONAL CONVENTION

A heated debate developed in the 1787 legislature as to whether the convention could or should ratify or reject the constitution in its entirety, or accept it conditionally, subject to certain provisions.¹

Francis Corbin supported the proposal to decide on the constitution in its entirety. George Nicholas endorsed Corbin's view, stating that to place restrictions on the proposed constitution before the convention was called did not truly favor a more perfect and powerful union. Patrick Henry vehemently contested this position, declaring that there were so many and such drastic errors in the proposed document, that careful correction was needed before it would be acceptable. George Mason strongly supported Henry's stand. It was common knowledge among his peers that Mason, the father of the 1776 Virginia Bill of Rights at the Philadelphia Convention, had refused to sign the constitution for the very same reasons.² Now the division was made again. At this point, John Marshall proposed a procedural alternative to a simple yea or nay. He recited the importance of Virginia's acceptance or rejection of the constitution for herself and as one of the most influential states. Because many states would follow her lead, he insisted Virginia had a duty to act in a magisterial fashion, rather than give the appearance of opposing the constitution before even considering it in convention. Otherwise, it would appear that Virginia's opposition was based on

¹Virginia House Journal (October 25, 1787), 15; Beveridge, Marshall, I, 245.

²Beveridge, Marshall, I, 245-246.

principle, was to the document in its entirety, and was not merely to certain sections. Marshall declared it essential that Virginia's convention not be restricted to rejection or ratification. At the same time, he also wished that Virginia permit her sisters to believe that she would not accept it unless she could propose amendments, because it could prejudice the final outcome of the constitution after Virginia might find it acceptable. Marshall wanted the entire question presented to the people without overtones of acceptance or undertones of rejection. He, therefore, proposed that Virginia call a convention before whose members "the new Constitution should be laid ... for their free and ample discussion." Marshall's compromise was so acceptable to all that his resolution passed without opposition.³

Marshall's main purpose in returning to the House of Delegates in 1787, was to insure his own election to the ratifying convention. When the election for Henrico County's two delegates was called, there were three candidates. Besides himself, they were Edmund Randolph, then Governor of Virginia, and William Foushee--one-time mayor of Richmond. Marshall was a strong federalist, and, at this time, Randolph was considered an opponent of the Constitution, which he had declined to sign at Philadelphia, although he had presented in the convention, the "big state", Virginia, or Randolph plan for achieving the more perfect union. Randolph had little trouble getting elected, but it was nip and

³Virginia House Journal (October 31, 1787), 15; Beveridge, Marshall, I, 248; Rowland, George Mason, II, 191; Robert D. Meade, Patrick Henry, II, 334.

tuck between Marshall and Foushee for the position of the second delegate. Theirs was "a deeply emotional contest."⁴

Foushee was an able man who was an ardent anti-federalist in an anti-federalist stronghold; but Marshall was personally more popular.⁵ The election was extremely close, Marshall receiving 198 votes, and Foushee receiving 187 votes.⁶ Marshall's political views most assuredly did not win him the election. When Henrico elected Randolph, he had not declared his final views on ratification. With important assistance from General Washington, Madison was able to convince Randolph to support ratification. That anti-federalist Henrico elected two advocates of ratification was a windfall to the federalist camp.⁷

Everyone knew that ratification in the convention would be close. Federalist strength was strongest in the Tidewater, Northern neck, and the Valley; the anti-federalist sentiment was strongest in the Piedmont counties south of the James River. Thus, Northern Virginia supported the Constitution, and Southern Virginia opposed it, while the middle counties varied in support and opposition.⁸ The leading spokesman of ratification was James Madison. The most radical opponent of the Constitution was Patrick Henry. The latter's oratorical powers were

⁴Mason, Polly, 48.

⁵Beveridge, Marshall, I, 362; Mason, Polly, 50.

⁶Robert Hilldrup, The Life and Times of Edmund Pendleton (Chapel Hill: University of North Carolina Press, 1939), 282. (hereafter cited as Hilldrup, Edmund Pendleton).

⁷Ibid.; Beveridge, Marshall, II, 362-365.

⁸Irving Brant, James Madison (5 vols., New York: Bobbs-Merrill, 1948-1963), III, 193 (hereafter cited as Brant, Madison); Meade, Patrick Henry, II, 346.

legendary in his own lifetime and were sure to win him a popular following on any issue. Whether this following would be large and resolute enough to block Virginia's ratification of the Constitution remained to be seen.⁹ Marshall once stated in relation to both Madison's and Henry's abilities, "If I were called upon to say who of all men I have known had the greatest power to convince, I should perhaps say Mr. Madison while Mr. Henry had without doubt the greatest power to persuade."¹⁰

Marshall has been ranked as one of the leading proponents of ratification in the Virginia Convention, just after Pendleton, Randolph, and Madison in importance, and followed ably by James Innes, Francis Corbin, and George Nicholas. Besides Patrick Henry, the anti-federalists also had influential leaders in William Grayson, George Mason, James Monroe, Benjamin Harrison, and John Tyler."¹¹

The convention was opened on June 2 in Richmond with 170 delegates in attendance from 86 counties.¹² Marshall was appointed to the Committee of Privileges and Elections. After it had examined and reported on the returns of the election of delegates to the Convention and after various preliminaries, the convention got down to the business of discussing

⁹ Beveridge, Marshall, II, 317.

¹⁰ Meade, Patrick Henry, II, 364.

¹¹ Thomas Jefferson to James Madison, March 15, 1789, The Papers of Thomas Jefferson, XIV, 659-662; Madison to Jefferson, July 12, 1788, The Writings of James Monroe; Brant, James Madison, III, 163; Henry Ammon, James Monroe, 71.

¹² Hugh Blair Grisby, History of the Virginia Federal Convention of 1788 (2 vols., ed. by R. K. Brock, Richmond, Virginia: Virginia Historical Society, 1890-1891), II, 363-366.

the proposed Constitution.¹³ For the first several days, the floor was conceded to such worthies as Patrick Henry, Edmund Randolph, George Mason, Edmund Pendleton, and James Madison. Later, younger men had their chance.

On June 10, Marshall followed James Monroe's anti-ratification argument, but directed his remarks primarily to Henry, the most vehement opponent in the convention. He opened his argument by stating, "the object of discussion now before us is whether democracy or despotism is most eligible." Marshall asserted his opposition to monarchy, pointing out that democracy is better able to "secure our liberty and promote our happiness." He stated that justice, virtue, and public faith are necessary for a good government, and these will be found in the new government."¹⁴

Turning from high-flying rhetoric, Marshall directed attention to practical matters. Seizing upon the problem of Mississippi navigation, to which Henry alluded, the younger man denied Henry's allegation that the new, federal government would give away the Mississippi. Instead, Marshall contended that the Congress of the Confederation was so weak that it was unable to protect its rights along the Mississippi. Only a stronger central government would possess diplomatic and military means to protect rights of Virginians and all other Americans to the

¹³ Jonathan Elliot, ed. The Debates in the Several State Conventions on the Adoption of the Federal Constitution (2 ed., Philadelphia: J. B. Lippincott Co., 1836), III, 1,7. (hereafter cited as Elliot's Debates).

¹⁴ Ibid., III, 222-223.

Mississippi's land and navigation.¹⁵

Shifting to the question of amendments before or after ratification, Marshall stated that the "enemies of the Union" would propose amendments which would be so local and so "unreasonable" that even friends of ratification would be alienated. Disunion--not mere rejection of the new document--was their real purpose, he claimed. Marshall took the lead in cultivating the notion that to amend the Constitution afterwards was the moderate, reasonable, and patriotic course. He helped convince his fellows that only ratification could insure "union, safety against foreign enemies, and protection against faction;" and he assured doubters that it would be easy to amend the Constitution after it was adopted by pointing out that the amending process would be less difficult under the Federal Constitution than under the Articles of Confederation.¹⁶

Marshall exhorted his audience to consider the benefits of a republican government, and suggested that they might be lost if the federal constitution did not replace the Articles of Confederation. He denied the charge that too much power was given to the separate powers in general and to the treaty-making process in particular. He asserted that Americans must trust their representatives: Without faith and trust in them, there could be no government. He echoed Madison's contention in the Federalist Papers that the country was not too large to sustain a republican form of government. He admitted that the extent of the country might be an obstacle to enforcing laws, but he quickly pointed

¹⁵Ibid., III, 223, 231, 233-234.

¹⁶Ibid., III, 224, 233-234.

out that this in no way hindered making them. Marshall insisted that the American states would gain more under the proposed government than they had enjoyed in the best years of their British past, in addition to each of them sharing in the governmental process under the new Constitution.¹⁷

Directing his arguments against Monroe, who had stated that Congress should not have the power of taxation, Marshall pointed out that this omission was the chief cause for the downfall of the Confederation: "If a system of government were devised by more than human intelligence, it would not be effective if the means were not adequate to the power." Asserting that, since defense was one of the primary objects of government, taxation was necessary to raise money for its provisions. Only a strong centralized government, said he, could provide the necessary strength or resources to individual states or the nation for defense against civil disorders and especially against foreign intervention. Echoing the phrases of John Paine's Crisis papers, Marshall admitted that there were those who shouted, "Peace, peace, America is in no danger of war," although so long as men are avaricious and ambitious, said he, there will be wars and danger of wars.¹⁸

For the new federal government to possess the power to raise money by taxation was crucial to its success and was close to the center of the storm over ratification, if, indeed, it was not the center itself. Marshall devoted most or at least many of his efforts to sugar-coat this

¹⁷Ibid., III, 225.

¹⁸Ibid., III, 226.

pill which was so bitter to Virginians, who had taxed themselves so heavily for a decade to reduce the Commonwealth's war debt and to establish a sound basis for currency and credit.¹⁹

Another protection against abuse by the central government of its tax powers, Marshall glibly stated, was the nature of a representative democracy. Representatives who enjoyed the confidence of the people because of their merits and trustworthiness, and who must retain that confidence in order to be reelected, were unlikely to resort to confiscatory taxes. Marshall assured his fellow members of the convention that responsible officials with experience and good judgment, not some remote and abstract government, would impose taxes whose amount would be based upon information provided at least in part by the state legislatures. He did not waste time belaboring the truth they all knew: voluntary taxation is not workable. Experience under the Articles of Confederation proved that the states might not contribute any or enough. The example of one derelict state was enough to cause erosion, collapse, and failure of the Union.²⁰

Marshall supported the issue of the payment of debts, as he had done in the House of Delegates numerous times. In reply to Henry's question whether the adoption of the Constitution will pay the states' debts, he stated that it would "compel" the states to pay their quotas. Without inducement, the states would never pay, and unless all the

¹⁹ Ibid., III, 230.

²⁰ Ibid., III, 229-231.

states pay their quota, none can pay their debts.²¹

Rebutting the idea that there are no checks in the proposed system, Marshall questioned, "What has become of his (Henry's) enthusiastic eulogism on the American spirit?" Surely, patriotic wisdom ought not to allow Congressmen to tax the country into bankruptcy. If it alone were not a sufficient safeguard, Marshall slyly added, materialism might provide a check. He reminded all that, when an individual promotes his own interest, he promotes the interest of the community. The individual's good can be equated with the common good. Again Marshall asked, "What has become of his (Henry's) eulogism on the Virginia Constitution?" Answering his own question, Marshall declared that the checks against imprudent taxation contained in the proposed federal constitution not only were as adequate as those found in the Virginia Constitution of 1776, but were in fact superior to them. He insisted that the people themselves are the best insurance against arbitrary government: grant the power and they can easily rescind it. Liberty is more secure in the hands of the people, rather than in a king, for they can delegate their powers cautiously.²²

Because the federal system proposed in the new constitution was an entirely new form of government, many of the delegates had grave reservations. Monroe, for instance, was quite critical of the slowness of the federal system to correct its errors, as compared with the

²¹ Ibid., III, 231.

²² Ibid.

British system. To this Marshall was unable to make a direct reply, because it was true. He fell back on patriotic commonplaces which do not add to his reputation. Because the House of Representatives would not be elected by a minority of people, as in Britain; because the Senators would not be elected for life, as in Britain; and because the Executive would be responsible to the people, unlike the British--therefore, the proposed government would be far superior to the British government.²³ The score of responsibility, and the question of the rapidity or slowness of the American system to correct itself was irrelevant.

This was Marshall's first sustained contribution to an argument which otherwise would have had a rather weak ending. Marshall's phrases were devoid of fancy, classical allusions; his syntax was as simple and straightforward as though he were arguing a case of trespass before the gentlemen and business folk of a Virginia courthouse town. Indeed, such were the men who had been his fellow delegates in the House of Delegates, and who were now his fellow delegates in the Virginia Ratifying Convention of 1788. Marshall excelled in speaking to a large audience. The deficiencies of his education then became assets; his language simple and the construction and argument of his case blunt.

Six days later, on Monday, June 16, Marshall spoke again. This time, he defended the Congress' power over state militia. Almost all of those present must have known of his service in the Culpeper Minute Men and in the Continental Line; and they therefore listened to him as a

²³Ibid., III, 234.

kind of expert. He affirmed that under the proposed constitution, the state governments would retain sufficient authority over the militia, and particularly since they alone could decide when it might be necessary to call out the militia. Marshall denied Grayson's allegation that the ability of the central government to maintain a standing army and to pay and supervise the militia would foster the development of an aristocracy. He argued that, because the basis for power rests with the people, the people will guard against aristocratic and despotic government. To deny the national government use of the militia in emergencies would deprive the nation of adequate support, said he; and the Union would collapse. Repeating: "United we are strong, divided we fall," he insisted that emergency power over their militia must be given to Congress for the purpose of suppressing insurrection, and repelling invasions. Marshall's speech had so strong an impact that not only Grayson, a worthy young man who was to sit in the first federal House, but the ringleaders of anti-ratification, Henry and Mason, felt compelled to clarify their remarks that Congress and an army might beget an aristocracy.²⁴

Perhaps the greatest mark of the esteem in which the Ratifiers held John Marshall was demonstrated when they selected him to defend the burning issue of a federal judiciary.²⁵ On June 20, he began this "critical task" by stating the superiority of the proposed federal "system of courts to the anarchical judicial system from which we are now

²⁴Ibid., III, 419-426.

²⁵Ibid., III, 551; Beveridge, Marshall, I, 450.

departing." He stressed that independence of federal judges would flow from their nomination by the executive and confirmation by the legislative branch of government which was not only not new, but the same manner whereby state judges were appointed. Republican institutions were not threatened; trust in the judges' integrity and ability to give a fair trial and administer justice was merited. Furthermore, said he, insofar as the limited fields of federal jurisdiction were concerned, the creation of inferior courts would bring justice closer to the people. These matters were only preliminary to the judicial question which most concerned the convention; the conflict of state and federal laws.

John Marshall assured the convention that federal laws would not infringe on states' rights and states' laws, because where they are inappropriate, federal judges would declare such laws void. Nor would federal courts undermine the responsibility for the existence of the state courts, he insisted, because the latter were so overcrowded with cases that the delegation of admiralty, foreign, and interstate matters would ease their burden without subtracting any jurisdiction really important to the people of a state.²⁶

It would not be necessary, however, to stipulate in the constitution federal and state jurisdiction in forms of admiralty, chancery, and common law courts Marshall remarked. Congress would without fear of abusing its power be so responsive to the people that it could be trusted to decide such matters later: its members would not "render themselves

²⁶ Ibid., III, 553-554.

hateful to the people at large." ²⁷

In cases of diverse citizenship, Marshall endorsed the right of a state to sue a citizen of another state, but asserted that it was ludicrous to think a state could be dragged before a federal court. He pointed out that it would be virtually impossible for a state to recover claims against citizens of another state except through a federal court system. Because such practices as fixing rates of interest varied from state to state, it would be expedient to have a uniform system of justice on a nation-wide basis which would show partiality to no state or individual. Marshall also contended that not only was it reasonable and just for citizens to have the right to recover claims from those of another state, but that the national economy would be fostered thereby.

In his long exposition of the salient features of the federal jurisdiction and courts, Marshall wasted little time in dealing with the cases between a state and a foreign nation. He pointed out that a federal judiciary system could administer justice, while at the same time protecting the state as well as the country from foreign disputes. ²⁸

Marshall proclaimed his devotion to the right of trial by jury and he seized upon limited examples in his effort to hold up to scorn those who claimed the federal court system would undermine if not replace it with prerogative courts. He denied that a jury chosen within a ten-mile square of the seat of the National Government would be tools of the

²⁷Ibid., III, 555.

²⁸Ibid., III, 555-557.

parties, and he challenged anyone to explain why government officials should be barred from jury duty. Should their success or the confidence of their constituents exclude them, Marshall asked? Looking about him, he suggested by his words that such honorable gentlemen as those of the convention were liable for state jury service, irrespective of their holding or not holding a state office. The conclusion that these active and virtuous men would likewise enhance and secure the federal court system was surely obvious to all. As spokesman for the Ratifiers, Marshall denied the strength of the argument against the constitution that it did not guarantee trial by jury or the right to challenge jurors. In the first place, he stated, neither did the Virginia Constitution nor the British Constitution.²⁹ In both instances, trial by jury is guaranteed in a bill of rights, which is not a part of the fundamental law or constitution, but merely "recommendatory." It would be inconvenient to have it otherwise, he insisted. Not even did Virginia insist on jury trials where they were not essential or where they were waived.³⁰ The question of jury trials was thus treated in terms which satisfied Marshall's fellow delegates, and which in subtle fashion prepared them for ratifying the whole of the proposed federal constitution without conditions.

The title of Lord Fairfax and his heirs to millions of acres in Northern Virginia which he had held at the outbreak of the American Revolution was a complex legal question which influenced the larger

²⁹ Ibid., III, 555-559, 561.

³⁰ Ibid., III, 561.

multi-faceted question of Virginia. Marshall stated that, if Lord Fairfax has no title, then the people in the Northern Neck can not be injured; if Lord Fairfax does have rights and comes to Virginia to press his claims, the case will be decided by state courts, according to state laws, and the citizens will therefore be amply protected.³¹ It is evident that lawyer Marshall had no idea of making a special political case out of Lord Fairfax and his estate, but instead wished to consider Fairfax along with the others whose minority rights needed and deserved protection during the 1770's and 1780's.

Marshall scoffed at the ridiculous belief expressed by the anti-ratifiers that laws might be enforced to punish men of opposing political views. He declared such faith in the virtue of his fellow citizens that he declared it preposterous that anyone should suggest that they might make unjust claims and protract litigation so that the other party would settle rather than go to the Supreme Court. Even if this were true, he asserted, dishonest litigants must run a risk of losing and of having to pay the expenses. Marshall stated sarcastically, "Those who know human nature, black as it is, must know that mankind are too well attached to their interest to run such a risk."³² Insisting that the power of a federal judiciary was essential, he declared that, because government had no motive or reason not to do right, all should place the same faith in the federal as in the Virginia government.

³¹ Ibid., III, 559.

³² Ibid., III, 561-562.

Marshall voted against an unsuccessful proposal to require the other states to approve a "declaration of rights" prior to the approval of the federal constitution.³³ He then voted in favor of ratifying the federal constitution as submitted and of recommending, but not insisting, that Congress and the states amend it to include a bill of rights. None of the arguments presented in the Convention persuaded the most vocal members of the opposition. Most major opponents voted against the constitution.³⁴

Marshall was appointed to the committee to prepare and report a form of ratification of the constitution. Randolph and Madison, supporters of the constitution, were two other members of the committee. Marshall was also appointed to a committee to report on amendments that seemed necessary. The membership of this committee was definitely tipped in favor of the federalists.³⁵ Marshall voted against a motion to omit the article concerning direct taxes and the contribution by states from the proposed bill of rights. The motion was defeated. All business having concluded, the Convention adjourned on June 27.³⁶

Marshall was careful not to disparage publicly those in and out of the convention who insisted on inflicting upon their fellow citizens prolix precedents from the ancient history of Athens, Sparta and sundry other republics. During this period he composed an amusing bit of poetry on this subject, presumably for the amusement of his family.

³³ Ibid., III, 652-656.

³⁴ Ibid., III, 654-655.

³⁵ Ibid., III, 656.

³⁶ Ibid., III, 661-663.

The State's determined Resolution
 Was to discuss the Constitution [.]
 For this the members came together
 Melting with zeal and sultry weather.
 And here to their eternal excuse [s]
 To find its history spared three days.
 The next three days they nobly roam [ed]
 Through every region far from home
 Call [ed] in the German, Swiss, Italian,
 The Roman robber, Dutch Rapsallion,
 Fellows who Freedom never knew
 To tell us what we ought to do.
 The next three days kindli dip yea
 Deep in the river Mississippi--³⁷

Contending historians believe that Marshall's speech on the judiciary was prepared. This is unlikely, since Marshall's arguments were not fluid. He debated an issue, proceeded to another, and then returned to the previous issue. This happened repeatedly, as seen when Marshall argued the issue of taxation in three separate portions of the same speech. Although this technique could have been used for the purpose of emphasis, it seems doubtful. Because of his legal training and ample experience, Marshall's prepared speeches were orderly, one argument carried logically to its conclusion before proceeding to another issue.

Marshall's military background permeated his arguments quite frequently. His support of a strong centralized government for better national defense is a direct reaction to his years fighting in the Revolutionary War, defending America against British tyranny. He fully realized that the rebellious nature of the colonies shown during the Revolution, could easily destroy a new nation with no means of national defense. He felt

³⁷John Marshall Papers, College of William and Mary, Williamsburg, Virginia. A note scribbled by John Marshall during the Virginia Ratifying Convention.

that military protection for the central government had paramount priority.

Marshall also threw his support behind the federal government's right to tax citizens, not only for defense, but also for the payment of national debts. Being a firm believer in justice, Marshall supported the repayment of all British debts in the Virginia Convention, as he did in the House of Delegates.

Marshall's speech on the judiciary was excellent. He used convincing reason and logic, punctuating his remarks with wit and sarcasm for emphasis. Marshall was amply suited to speak on the benefits of a federal judiciary, having a great amount of experience with the court system in Virginia. A federal judiciary which could resolve disputes between and among the states, was a compelling reason to support the new Constitution--avoiding a new civil war before the results of the Revolutionary War could be fully achieved. Marshall's primary concern was the fair administration of justice which explains his concern for the federal court system and especially the Supreme Court, to provide a process of checks and balances for the federal government.

Marshall's sudden profound optimism in democracy, government, and mankind appears to be a paradox. He acquired this optimistic attitude purely for the pragmatic purpose of getting the constitution ratified. Marshall wanted a strong national government because he believed people were untrustworthy and showed provincial favoritism. He wanted the

government to provide protection from exactly this type of threat.

Marshall's assertion that the individual, working for his own good, would inadvertently promote the common good, is a striking parallel to the philosophy of the utilitarians and especially to Adam Smith's philosophy that, if man, left to pursue his private interests, will also pursue the interests of society. He equates private good with public good; what is good for the individual is good for the society.

The Virginia Convention was extremely important in Marshall's career. He proved his leadership ability to some of the leading political figures in the country--Henry, Madison, Jefferson and reaffirmed his ability in the eyes of Washington. Marshall demonstrated that he would command an important role in the political life of Virginia in the years that lay ahead. No one could predict the details of that future, however, and only time would show whether his close cooperation would continue with Madison, Pendleton, and others of the conservative faction which favored ratification.

CHAPTER FOUR
STATE AND FEDERAL SERVANT

John Marshall had fought long and convincingly for ratification in the Virginia Convention, and his belief in favor of a strong national government was stronger than that of most. It is as idle to attempt to pin-point his views on federal-state relations at this time as to seek a definitive analysis of those of James Madison. It should be obvious that the views of both men still were in the process of developing. Both wanted the new government, with its intricate but not wholly resolved balance of federal and state relationships, to succeed. No other reason need be sought to explain why Madison sought reelection to the Virginia House of Delegates.

Unaware of Marshall's decision to run for the legislature, President Washington in 1789 offered to Marshall the post of U.S. Attorney for the District of Virginia. Marshall respectfully declined, stating that the court's circuit was too extensive and that he would be unable to attend to his affairs in Richmond.¹ Besides having decided already to run for reelection, Marshall had strong personal reasons for not wanting to leave Richmond. Polly's recent delivery of another son exasperated her nervous condition, and she needed and demanded more attention. Enjoying as he did a lucrative law practice and close friends, he felt no compulsion to leave Richmond.² Marshall best served his many purposes by

¹Marshall, Autobiography, 12; Marshall to Washington, October 14, 1789, John Marshall Papers, College of William and Mary.

²Mason, Polly, 57.

continued residence in the capital city where he could continue practicing law while serving his country in the Virginia House of Delegates.

Although Henrico County was decidedly anti-nationalist, the popularity and reputation of Marshall were great enough to win him the seat in the House of Delegates. His new term proved to be a busy one. He was once again appointed to the two standing committees on which he had previously served and also to special committees to draft a number of bills.³ He served as a member of the Committee of Privileges and Elections, as well as on a committee charged to study and report on simplifying and removing conflict between Virginia laws. Not only did Marshall take a principal part in drafting the committee's report,⁴ but in 1790 he served on the committee which revised these laws.⁵ Marshall was a member of the special committee to draft a bill granting statehood to the District of Kentucky--then part of Virginia, and where his father, Thomas Marshall, was a resident.⁶ Marshall was appointed chairman of the committee which examined the James River Company of which he was a stockholder.⁷

The importance of Marshall's service in the House became evident when the legislature considered what should be its response to Secretary of Treasury Hamilton's proposals that the national government assume at par the states' remaining revolutionary debts. Many Virginia legislators

³Virginia House Journal (October 20, 1789), 4, 7-16.

⁴Ibid., 19-22; (October 28, 1790), 24-29.

⁵Ibid., (First Session, 1790, 41; 2nd Session, Dec. 8, 1790, 121-122).

⁶Ibid., (1789), 96.

⁷Ibid. (November 27, 1789), 49. (Several of these bills were in Marshall's own handwriting, including two petitions on behalf of John Crane and James Markham.)

of 1790 had opposed ratification in 1788 because they anticipated that such an assumption would give the national government too much power. To these were added now others who concluded that the terms of assumption, i.e., at par, would be unfair to Virginia because she had already liquidated a considerable portion of her debt. Although Marshall did not become embroiled in the assumption controversy, which was mainly fought on the federal level, he did take part in the state legislative debate concerning ratification of the Eleventh Amendment. He took the lead in the lower House in the unsuccessful effort to defeat this most cherished project of the advocates of states' rights: that all powers not explicitly delegated to the central government were reserved for the states. Marshall was unable to alter the conviction among his colleagues that Virginia's ratification in 1788 was given upon the moral obligation to pass just such an amendment.⁸

During his term in the House of Delegates, Marshall emerged as one of the leading adherents of the President and his policies in Virginia. Thomas Jefferson long had been aware of Marshall's ability and he had come to view him as a political threat. Not only had Marshall entrenched himself as a leader from an area which was notoriously opposed to Jefferson's views, but Jefferson learned that Alexander Hamilton would give to Marshall whatever aid he could if the Virginian would run for Congress. For these

⁸Virginia House Journal (1790), 80-81, 141.

reasons, Jefferson suggested to Madison that it would be politically expedient to have Marshall appointed a judge rather than face him as an active political opponent.⁹

Marshall was no more to remain out of public controversy than out of public office. He threw his full support into defending the President on the issue of neutrality. In 1793, France declared war on England. Washington and his cabinet already had determined in such an event to declare American neutrality rather than to become entangled in a foreign war, which at best would be too costly in terms of men and money and which would avail little gain.¹⁰ Some Americans were outraged at this policy of neutrality and attacked Washington with accusations that Washington was untrue to the Franco-American alliance of 1788 and aided the English against the French.

Supported by the commercial and financial interests of Virginia, Marshall rallied support for the Administration's policies. The Republicans immediately launched an attack marked by great virulence against Marshall, using newspapers as well as pamphlets. Marshall was not daunted.¹¹ Instead, he responded by organizing a public meeting in Richmond at which he offered resolutions supporting the President and the policy of neutrality. He was able to get these resolutions passed by a sound majority.¹²

Although the opposition attempted to belittle the success of the meeting

⁹Jefferson to Madison. The Writings of Thomas Jefferson (10 vols., ed. by Paul L. Ford, New York: Putnam's Sons, 1895) VI, 95.

¹⁰Beveridge, Marshall, II, 259.

¹¹Ibid., II, 14.

¹²Story, Discourse, 36; John Carroll and Mary Ashworth, George Washington: First In Peace (7 vols., New York: Charles Scribner's Sons, 1957), August 19, 1793.

by saying the attendance was very poor, in actuality there were approximately 400 people in attendance.¹³ Marshall also took up his pen in defense of Washington. Between October 16 and November 13, Marshall wrote and published four essays under the pseudonym "Aristides" in reply to Monroe's articles under the pseudonym "Agricola" which attacked the Administration for its anti-French policies.¹⁴

When it became known in 1793 that Marshall decided not to run for reelection, his friends refused to accept his decision. Without permission, they entered his name in the race and he was elected easily.¹⁵ Despite his earlier disinclination, Marshall was pleased to be back in the House; for again his services were needed.

When President Washington declared his intention to renew the United States' long-standing efforts to obtain a trade treaty with Great Britain, the time seemed advantageous to gain commercial advantages. Although the leaders of the emerging Republican party, Madison, Jefferson, and Gallatin, favored seeking such a treaty, there were rumblings critical of the Administration's choice of John Jay as the American negotiator, both because of his reputation of being a vain Anglophile and because of the

¹³Harry Ammon, "The Formation of the Republican Party in Virginia 1789-1796," Journal of Southern History, XIX (August, 1953), 283-310, (hereafter cited as Ammon, "Republican Party," Journal of Southern History); Moncure D. Conway, Omitted Chapters of History Disclosed in the Life and Papers of Edmund Randolph (New York: G.P. Putnam's Sons, 1888), 362.

¹⁴Ammon, James Monroe, 7-66; Virginia Gazette and Daily Advertiser (Richmond), Oct. 30, Nov. 13, Nov. 20, 1793.

¹⁵Marshall, Autobiography, 16; B. J. Ramage, "John Marshall, Southern Federalist," Sewanee Review, IX (1901), 138.

fact of his current service as Chief Justice of the United States. Marshall felt the responsibility both as a Federalist and as a friend of the commercial class to rally support behind the President and the Jay Treaty. Again he organized a public meeting in Richmond to express opinions favorable to the treaty and condemn the policy of the Republicans in the House. The meeting was a political success, due largely to his convincing and "masterly" speech.¹⁶ The general sentiment in Virginia, however, was formed by the Republicans who convinced their fellow citizens that the Jay Treaty was insufficient, if not iniquitous.

Although friends cautioned him that to harp on the treaty could be politically disastrous, Marshall also made a concerted effort in the House of Delegates to defend it. Professing that he could not desert his President and party, Marshall took not a nominal, but so outstanding a part in the Virginia debates on the treaty that forty years later Justice Story in his eulogy of Marshall described his speech on the Jay Treaty as "one of the noblest efforts of his genius."¹⁷ The complaint of most Virginians against the treaty was that a commercial agreement of this sort infringed on the Constitutional power delegated to Congress to regulate commerce.¹⁸ Marshall argued only the constitutionality of the treaty.

¹⁶Ammon, "Republican Party" Journal of Southern History. XIX, 307-308; Marshall, Autobiography, 17; Virginia Gazette and Advertiser. (Richmond) August 21, 1793.

¹⁷Marshall, Autobiography, 18-20; Story, Discourse, 37-38.

¹⁸United States Congress, Debates and Proceedings in the Congress of the United States (4th Congress, First Session), 423-1291 (hereafter cited as Annals of Congress); Marshall, Autobiography, 17.

Astutely he asserted that the House of Representatives had complete authority over appropriations and that, if they refused to fund the treaty, they could render it ineffective and inoperative. At the same time he insisted that it was a legal document as it stood, having been ratified by the Senate and signed by the President.¹⁹

The Virginia legislature's resolution to uphold the treaty was defeated, Marshall of course, voting with the minority.²⁰ The next day, the Federalists tried again to push through a resolution supporting the President and his actions. It also failed and the Republicans took occasion to question the use of the word "wisdom" in describing President Washington's course of action in the whole of the Jay Treaty proceedings.²¹

There was a very real possibility that Madison and the Republican majority in the House of Representatives might take up Marshall's challenge that they deny funds to implement the treaty.²² As part of the Federalist program to take their cause to the people, Marshall and Edward Carrington called a citizens' meeting in Richmond on April 25, 1796. It was a great success due largely to Marshall's ability to convince ordinary people that an attack on the treaty was an attack on President Washington. Numerous pro-treaty petitions were signed and sent to the President and

¹⁹ Beveridge, Marshall, II, 11.

²⁰ Virginia House Journal, (Nov. 20, 1795), 28.

²¹ Marshall, Autobiography, 20; Virginia House Journal (Nov. 21, 1795), 29.

²² Annals of Congress, (4th Congress, First Session), 423-1291.

Congress. Such a display of approval coming from Virginia, the most prominent state in the fight against the treaty, had a strong impact on the House of Representatives, which subsequently voted all necessary appropriations for the treaty.²³

Marshall's role in the furor over the Jay Treaty established him as one of the most outstanding Federalists, not only in the Old Dominion, but in the nation.

When his term in the legislature expired, Marshall once again turned his attention to the practice of law, which now included being a Counselor before the United States Supreme Court.²⁴ In the case of *Ware v. Hylton* involving pre-revolutionary debts, Marshall dealt with the constitutional question of precedence of state or national legislation over a national treaty. Marshall contended that because the Virginia law which suspended all payment of British debts was passed before the enactment of the treaty ordering compliance with such payments, the Virginia law took precedence over the treaty.²⁵

To most it has appeared that Marshall demonstrated surpassing abilities as a lawyer in accepting this case and representing his client so convincingly, even though to do so might be unpopular and contrary to

²³ Mason, Polly, 81; Beveridge, Marshall, 81; Marshall to Hamilton, April 25, 1796, John Marshall Papers, College of William and Mary.

²⁴ Beveridge, Marshall, II, 15.

²⁵ Ibid.

his own belief and self-interest. More than once Marshall had defended the provisions of the Jay Treaty, in the legislature and on the hustings, yet in court he argued the contrary. If the Supreme Court had adopted the argument Marshall made, his Fairfax lands could have been in jeopardy. Even though he lost this case, he won the respect of many prominent porary capital of Philadelphia, he won the respect of many prominent New England Federalist Congressmen, such as Cabot, Ames, Dexter, Sedgwick, Wadsworth, and King.²⁶ His reputation spread as such a staunch and able southern Federalist that he was destined to be a future national leader of his party.

Honors became numerous for this champion of the Federalist party. He was offered the post of Attorney General in President Washington's Cabinet in 1795. He declined, reiterating his desire to devote his time to his legal practice in Richmond as well as his growing family.²⁷ In 1796, Washington considered Marshall for the post of minister to France, but Marshall declined.²⁸ Undaunted, the President again considered Marshall for a public office--this time as a member of the commission established by the Jay Treaty to settle British claims. Knowing his past reluctance to accept public offices, Washington inquired through Charles Lee, Attorney General of Virginia, as to Marshall's availability.

²⁶ Marshall, Autobiography, 19; Mason, Polly, 77; Story, Discourse, 39-40.

²⁷ Marshall, Autobiography, 20; Mason, Polly, 56; Story, Discourse, 40.

²⁸ Marshall, Autobiography, 21; Story, Discourse, 41; Mason, Polly, 82; Washington to Marshall, July 8, 1796, and Marshall to Washington, July 11, 1796, John Marshall Papers, College of William and Mary.

When Lee reported that he believed Marshall would refuse the appointment, the matter was dropped.²⁹

Although Marshall's reasons for declining public office were familiar, the fact was that Polly's slowly and continuously declining health had become an over-riding factor. By 1796, she had given birth to six children and suffered the deaths of two of them. From childhood Polly had been high-strung, emotional, and nervous. Her physical condition deteriorated; her mental health diminished; and each fed on the other. Certainly it is not surprising that Marshall was reluctant to leave his ailing wife and his young children under these circumstances.

At this juncture in his life, Marshall was faced with an inescapable and growing financial problem arising from his speculative purchase of a 160,000-acre tract of land from the estate of Lord Fairfax in the northern neck of Virginia.³⁰ John and his brother, James Marshall, borrowed a sum in 1797 from Robert Morris to bind the contract. Out of it, they paid the Fairfax estate one-half immediately--equivalent to \$40,000. Morris' bankruptcy in 1798 placed the sale in danger, since Morris was a security for the payment of the other half of the purchase price. Indeed, what money Marshall got from accepting the next federal appointment tendered him saved him financially; without it, he would have had to sell everything.³¹ He got about \$25,000, more than three times the income from

²⁹ B.J. Ramage, "John Marshall, Southern Federalist," Sewanee Review, IX (1901), 138.

³⁰ Marshall, Autobiography, 21; Beveridge, Marshall, II, 203.

³¹ Beveridge, Marshall, II, 210-211.

his law practice.³² It was financial need as much as the responsibility of public service that prompted Marshall to accept the position as special envoy and treaty commissioner to France in 1797. Marshall in his autobiography declared he had misgivings about leaving before the land purchase was completed. It cannot be assumed that this was the entire truth. He had declined offices under Washington, a man who held his entire allegiance, respect, and devotion. Yet, Marshall accepted the first position offered to him by President Adams, a man with whom he was not very closely associated. It is both fair and reasonable to assume that Marshall accepted this position only to avoid severe financial loss.

Adams had first appointed Charles Cotesworth to be the new minister resident in France. Because the President desired Pinckney to negotiate mutual cancellation of the U.S.-French Alliance of 1778, he adopted the long-standing American practice of a treaty commission, and Pinckney waited in Amsterdam for additional American commissioners to join him. Adams selected Marshall, Francis Dana, and Ellbridge Gerry to be the other treaty commissioners.³³

When Marshall left Richmond, a large crowd of friends and supporters gathered to wish him well.³⁴ Not everyone was pleased by the President's appointments. Because Gerry was an independent, the Republicans complained

³²Ibid., II, 372.

³³John Adams, Works, (ed. by Charles Francis Adams. 10 vols. Boston: Little, Brown and Co., 1854), IX, 111-118.

³⁴Flanders, Chief Justices, 77.

that they were not represented. Declaring that they were under no obligation to support so partisan a commission, the Republicans warned that the French might decline to negotiate with the envoys, particularly because, as the notorious James T. Callender claimed, Marshall was "a professional friend to the government of the rack, of the bastille . . . and of a caterpillar nobility."³⁵

Marshall soon demonstrated that he was able in diplomatic negotiations. Faced with frustrating delays at Paris, he was the author of the commission's demand that the Foreign Minister and Director, Talleyrand, either open negotiations with the American envoys or grant them their passports to return to the United States.³⁶ This letter was an ultimatum. Not only was it thoroughly justified under international law and practice, but it was written in a manner calculated to put the United States, the President and his envoys in the best possible light. When Marshall's letter was published in America a few months later, it brought national acclaim to Marshall for his brilliance and forcefulness.³⁷ The attempt by underlings of the French Foreign Office to extract a substantial bribe from the American treaty commissioners is part of America's folklore and

³⁵ James T. Callender, The Prospect Before Us (Richmond, Virginia: Printed for the author and sold by M. Jones, S. Pleasants, Jr and J. Lyon, 1800), 5. (hereafter cited as Callender, Prospect Before Us).

³⁶ Flanders, Chief Justices, 88-89.

³⁷ John S. Bassett, The Federalist System 1789-1801. (New York: Cooper Square Publishers, Inc., 1968, Originally published in 1906), 232. (hereafter cited as Bassett, Federalist System); American State Papers, Foreign Relations (Washington: Gales and Seaton, 1832), II, 158-160.

needs no recounting here.³⁸

Due to winter storms at sea, the U.S. government did not receive the news from Paris of the attempted extortion of the American emissaries until March--six months after it occurred. Not only did the official dispatches relate the machinations and corruptness of the current French government, but the envoys advised that there seemed to be little if any hope for a peaceful and honorable settlement.

The President was so outraged that he departed from customary practice and made public the whole sordid story. Bitter reaction against the French was the response of all. Republicans experienced the greatest shock at being confronted with proof of French insults and treachery in their negotiations with the U.S. Cleverly, the Federalists argued that France had begun the undeclared naval war in the Caribbean, and many Americans were blinded to the fact that the quasi-war was the logical result of the conflict between the Franco-American treaty of 1778 and of the Jay Treaty of 1794. Thus, the Federalists were able to turn the XYZ affair to their partisan advantage and dodge the blame for loss of American sailors and ships in the Caribbean. In the congressional elections, the citizens of all states showed they approved of the Federalists' actions and gave such great support to the Federalist candidates that they gained a comfortable majority in both houses.³⁹

³⁸ Ibid.

³⁹ Ramage, "John Marshall," Sewanee Review, IX, 141

Marshall had seized on the XYZ affair as an excuse to return home immediately, instead of waiting in hope of making a fresh and better start. He was hailed by the Federalists as a courageous patriot and given a hero's welcome.

Despite this robust welcome, the Republican press lashed out at Marshall, specifically accusing him of deserting his country's interests in France.⁴⁰ Some extremists even insisted that he had gone to France with the explicit intent of starting a war and that he had actually refused to see Tallyrand when proffered an invitation.⁴¹ Such criticism made little if any impression on the patriotically aroused public, which gave Marshall their adulation. As he left Philadelphia to return to Richmond, he was given a great fanfare and gala farewell including a special army escort. His arrival in Richmond was no less grand, being greeted by the firing of cannons and ringing of bells.⁴²

Applause for Marshall had not subsided when President Adams offered to nominate him for an Associate Justiceship of the U.S. Supreme Court. Marshall declined, suggesting instead that Adams name Bushrod Washington.⁴³

For a decade before 1799, Marshall had played so important a role in politics in Virginia that he has been referred to as an "embryonic

⁴⁰ Callender, Prospect Before Us, 18; Donald H. Stewart. The Opposition Press of the Federalist Period (Albany: State University of New York Press, 1969), 543 (hereafter cited as Stewart, Opposition Press).

⁴¹ Callender, Prospect Before Us, 18.

⁴² Beveridge, Marshall, II, 346-347, 351-352.

⁴³ Herbert A. Johnson, "John Marshall: 1775-1835," Justices of the United States Supreme Court, 287.

political boss," playing a leading part in the Federalist "machine."⁴⁴ Riding the crest of the anti-French hysteria, the Federalists went so far as to prepare for a French invasion. Wrapped in the flag, the party was never stronger, and Marshall had by far the best credentials as an ardent Federalist in the Republican stronghold of Virginia. The party needed to keep him in the political arena and its leaders made every effort to persuade him to run for Congress in 1799.

Marshall had no inclination to run for elective office at this time. Not only did he want to return to his lucrative law practice in Richmond, but there were new complications surrounding his beloved Polly. While Marshall was in France, it was bad enough that Polly's father, Jacquelin Ambler, died. Worse, only three days later Polly gave birth to another child. Polly was plunged into a deep depression and the absence of her husband, her only true comfort, deepened her melancholy.⁴⁵ Marshall must have felt compelled to remain by Polly's side, fearful that yet another tragedy might induce a trauma from which she might never recover.

Nonetheless, when the venerable George Washington invited Marshall to visit him at Mount Vernon, he accepted the invitation. The younger man could not have failed to divine the former President's motive--to persuade him to run for Congress. His resolutions not to run were overcome by Washington's persuasion. Needless to say, Marshall's meeting

⁴⁴ Ibid.

⁴⁵ Mason, Polly, 113.

with Washington at Mount Vernon made a lasting impression on the former.⁴⁶

The Republican party had been hurt badly by the XYZ affair and its aftermath. By the same token, the Federalist party was in great favor with the people and was basking in the warmth of this new adulation. In the congressional elections of 1799, Republican candidates had to fight for their political lives, with no chance to increase their popularity or to gain a majority of either the House or the Senate.

On his announcement as a candidate for Congress, John Marshall became the prime target for Republican attacks. He long had been a thorn in the Republican's side, being continually elected in a solidly Republican state. The election was a bitter and hard-fought one, with attacks on personal character and reputations. The opposition press incessantly bombarded the public with stories of Marshall's political activities that varied from being merely shaded to scandalous. He was not immune to such printed attacks by the partisan press, writing to his brother, ". . . the means used to defeat (my election) are despicable in the extreme and yet they succeed."⁴⁷ He was accused of spending thousands of dollars on barbecues to bribe Virginians' votes. The libelous Callender even tried to link Marshall with a woman in Paris and hinted that he was a sexual profligate during his diplomatic mission in France.⁴⁸ The Republicans were so desperate they even spread a rumor that Patrick Henry

⁴⁶ Marshall, Autobiography, 25-26; Story, Discourse, 42.

⁴⁷ John Marshall to James Marshall, April 3, 1799, John Marshall Papers, College of William and Mary.

⁴⁸ Callender, The Prospect Before Us, 127.

opposed Marshall's candidacy. This scheme backfired when Henry scotched the rumor by endorsing Marshall and praising his abilities as a legislator and diplomat.⁴⁹

The Federalists suffered some increased difficulties, but these did not become heavy millstones until after the elections. Before the fall of 1799, the advantage which the Federalists had gained in the XYZ affair had not yet faded. It is true there were domestic problems, but they were light ones--blame for high taxes and for the high cost of the proposed provisional army. In the Virginia General Assembly, friends of the two great Republican leaders of Virginia, Jefferson and Madison, in 1798 had passed the celebrated Virginia Resolutions which objected to the Alien and Sedition Acts and declared they thought them unconstitutional. The Resolutions called also for the people to vote the tyrannical Federalists out of office. To his credit, Marshall never had endorsed the Alien and Sedition Acts, and he carefully disassociated himself from them, without actually denouncing them or breaking with his party. Fortunately for Marshall and most Federalist candidates for Congress, popular opinion had not caught up with the Virginia Resolutions. It was however, an extremely close election in the Old Dominion, where the Republican strategy gave priority to maintaining control of the legislature in order to forestall repeal of the Virginia Resolutions.⁵⁰

⁴⁹Patrick Henry to Henry Blair, Jan. 8, 1799, as cited in Robert D. Meade, Patrick Henry (2 vols., Philadelphia: J.B. Lippincott Co., 1957-1970), II, 591.

⁵⁰Callender, The Prospect Before Us, 260; Stewart, Opposition Press, 471.

Marshall was again elected by a very small majority over strong Republican opposition. The Republicans insisted on having the last word, publishing in the Philadelphia Aurora, "The election of John Marshall is a remarkable instance of popular delusion."⁵¹

After Congress convened in Philadelphia on December 2, 1799, Marshall was so dilligent in his attendance that he was absent for only six roll call votes while a member of the House. He played an unusually prominent role for a freshman in its debates.

Marshall's first important responsibility was to respond for the House to President Adams' opening speech to the Sixth Congress. Marshall's usual logic and persuasiveness did not accomplish the major objective of being a unifying influence on the two parties. The new term was off to a bad start with both parties polarized on the Administration's policies, especially regarding the appointment of a new peace delegation to France.⁵²

News that George Washington was dead cast a gloom of mourning over the Congress and the country. In a moving speech, Marshall introduced resolutions of national mourning.⁵³ Marshall felt Washington's death most acutely as he had been a true father-figure and mentor. The former President's influence on him had become strongest in recent years and was responsible for the presence in Congress of the man now eulogizing

⁵¹ Stewart, Opposition Press, 599-600.

⁵² Annals of Congress (6th Congress, 1st Session), 194.

⁵³ Ibid.

the father of our country. Marshall served as chairman of several House committees. One of these recommended that Congress prohibit militia and regular military forces from the vicinity of polling places; another recommended acceptance of the terms of Connecticut's cession to the United States of her Western Reserve. Both bills passed the House.⁵⁴

Marshall's voting pattern was true to form and along party lines. He voted with the majority to give strong civil and military authority to territorial governors. As a former officer himself, it was natural that Marshall concerned himself with securing federal grants of land to Virginia revolutionary officers. In this he won his colleagues concurrence by a 2 to 1 margin. He voted with the majority of the House to give "pointed disapprobation" to any petitions either to end the slave trade or to abolish slavery.⁵⁵

In January of 1800, Marshall cast the deciding vote in the House to repeal the Sedition Act. The Federalists had hoped for Marshall's vote, even though they knew his views on that subject. However, no amount of party pressure could deter him from voting his conscience and with the vote so close, it is certain there was ample pressure applied.⁵⁶

In February and March of 1800 the House of Representatives debated

⁵⁴Ibid., 522-523, 527, 626, 662.

⁵⁵Ibid., 522, 623-624; Ramage, "John Marshall," Sewanee Review, IX, (1901), 9.

⁵⁶Bassett, Federalist System, 260; Annals of Congress (6th Congress, 1st Session), 404-419; Beveridge, Marshall, II, 451-456.

a most controversial issue: the Disputed Elections Bill. The bill would establish a committee to recommend legislation for deciding disputed elections for the offices of President and Vice President, and for ascertaining the validity of the votes cast in the various states. Marshall disapproved of this Federalist attempt to thwart the Republicans in the forthcoming presidential elections. He did not believe that such blatantly political machinations were in the best interests either of the nation or of the Federalist party. He proposed successful amendments to the bill which would limit the committee's authority to investigating, reporting, and recommending rather than stipulating that its conclusions would be final. Although the amended bill passed the House, once its original objective was thwarted, the Federalist majority in the Senate postponed it indefinitely.⁵⁷

The Federalists were enraged by Marshall's vote, even though he had warned them that he felt bound to represent the wishes of his constituents, even at the expense of the party. Had he done otherwise, it is impossible to say what would have been the result. As it was, however, the Federalists lost their opportunity to manipulate the national election machinery of 1800.

Marshall's greatest hour in the Sixth Congress was his speech on the Jonathan Robins case. A mutineer named Thomas Nash from a British ship was imprisoned in South Carolina by American authorities pending

⁵⁷
Annals of Congress (6th Congress, 1st Session), 670, 674, 668, 687-710; Beveridge, Marshall, II, 452-453.

a decision whether or not to grant a request of extradition by Great Britain. Nash insisted he was an American citizen named Jonathan Robins from Connecticut. Because of the inflamed passions involved, this matter became a partisan issue. The Republicans accepted the seaman's claim of American citizenship and contended that Nash should be tried by the United States courts for piracy. Marshall took the floor to prove that Nash's uncontested murder on a British ship came under the jurisdiction of the Jay Treaty. The future Chief Justice gave his colleagues a lecture on the separation of powers and the exclusive authority of the executive department in the area of foreign affairs.⁵⁸ Not only did he succeed in silencing the Republican Representatives, but Marshall also persuaded many of them to vote against the resolution, which was defeated 61 to 35.⁵⁹ Marshall's speech was praised by the historian Henry Adams as one "that still stands without a parallel in our Congressional debates."⁶⁰ Even Jefferson confided to Madison that Marshall's speech was outstandingly able.⁶¹ The Federalists were quick to recognize Marshall's abilities as a statesman and orator who could provide such a dynamic and persuasive leadership that they were willing to forgive

⁵⁸Ramage, "John Marshall," Sewanee Review, IX (1901), 9; Beveridge, Marshall, II, 464-471.

⁵⁹Annals of Congress (6th Congress, 1st Session), 619.

⁶⁰Henry Adams, The Life of Albert Gallatin (New York: J.B. Lippincott and Co., 1943), 232.

⁶¹Jefferson to Madison, March 8, 1800, as quoted in Thomas Jefferson, Writings of Thomas Jefferson, (20 vols., ed. by Andrew A. Lipscomb and Albert E. Bergh, Washington, D.C.: The Thomas Jefferson Memorial Association, 1903), X, 157.

his refusal to blindly vote for ultra-Federalist follies.

The President was not oblivious to the potential of this able man. Having split with the Hamiltonian wing of the party, Adams looked to the more moderate Marshall to bolster his quarreling Cabinet, and on May 7, 1800, he nominated Marshall as Secretary of War.⁶² Although Marshall declined this appointment, only five days later, the President nominated Marshall as Secretary of State. Two weeks later, Marshall accepted; and on the following day the Senate confirmed his nomination.⁶³

Marshall now found himself in the second-most prestigious office in the land, a position which afforded him the opportunity to increase his national stature. His reasons for refusing the Secretaryship of War were sound. Not only was that department riddled with inner strife, but to a realist like Marshall, the chances of war were becoming slight, if ever they had been serious. Unlike the War Department, the Secretaryship of State was a powerful office which might prove to be a springboard to the Presidency. Marshall understood that this commitment to national politics would end his practice of law in Richmond, which had declined during his service in Congress. Besides, Marshall had paid the greater part of what he had borrowed to buy the Fairfax lands and was no longer

⁶² Andrew J. Montague, "John Marshall, Secretary of State," The American Secretaries of State and Their Diplomacy. (17 vols. ed. by Samuel F. Bemis, New York: Alfred A. Knopf, 1927-1967), 247. (hereafter cited as Montague, Secretary of State); Marshall, Autobiography, 247.

⁶³ Ibid.

hard-pressed for money.

As Secretary of State between May of 1800 and March of 1801, Marshall maintained Adams' policy of peaceful neutrality. With some experience of his own, he had every reason to expect to benefit from the guidance of John Adams who had spent almost a decade as an American diplomat in Europe. This was not to be, however. The President spent the summer of 1800 at his Massachusetts home, where his wife was ill. Even though Adams had set the course for ending disputes with France and inaugurating a new period of cordiality without an alliance, the new Secretary of State was left largely on his own. One of the main things he did concerned the tying up of loose ends of the Jay Treaty. Under the treaty's terms, Great Britain and the United States had established a joint commission to deal with the problem of pre-Revolutionary debts owed by U.S. citizens to British merchants. Because the commission had made little or no headway, Marshall startled the British by withdrawing. When this produced a predictable wave of heated protest, Marshall offered a lump sum to expedite settlement of the debts in classic instructions to Rufus King, the U.S. minister to Great Britain. In this state paper, Marshall displayed no partiality toward any country while treating them with explicit equality. He insisted that England reciprocate the treatment by recognizing America's status as an independent nation with international standing.⁶⁴

⁶⁴Montague, Secretary of State, 259-273; American State Papers, Foreign Relations, II, 486-490.

In another instance, Marshall wrote to King equally eloquent instructions regarding Britain's impressment of American sailors and seizure of non-contraband American goods. Marshall ordered King to continue negotiations while asserting America's rights as a neutral nation to carry on her peaceful commercial endeavors.⁶⁵ The Secretary of State's orders and correspondence have been recognized as models in almost every way: excellence in tone, logic, and dignity.⁶⁶

In February of 1799, President Adams sent a new treaty commission to France, but negotiations became deadlocked over America's demand for cancelling the 1778 treaty and for French damages to American commerce. Marshall encouraged patience in the hope that a settlement could be reached. He pointed out that there was no basis for war since the United States was merely seeking just retribution for past, not current injuries. The French and Americans finally agreed in a convention on September 30, 1800, that both would cancel the 1778 treaty and that the French would not pay the claims.⁶⁷

Although Adams had been interested in the 1780's in the possibility of joint naval action in the Mediterranean to protect U.S. sailors and cargoes from the Barbary pirates, Secretary of State Marshall declined just such an overture from Sweden and Denmark during his nine-month tenure as Secretary of State. Reflecting the President's views and

⁶⁵ Beveridge, Marshall, II, 506.

⁶⁶ Montague, Secretary of State, 258-259

⁶⁷ Ibid., 254-257; Beveridge, Marshall, II, 523.

priorities, he did not wish to give France cause for alarm and disrupt the negotiations, or provide them an opportunity to attack American ships.⁶⁸

A potential "incident" Secretary of State Marshall did not allow to rekindle the quasi-war with France was the case of the French vessel, the Sandwich. An American naval officer captured this ship while in a port which was in the process of being transferred from Spanish to French control. Rather than attempting to solve complicated questions, such as whether the Sandwich was a warship or a merchant vessel or whether the port was under French or Spanish sovereignty, Marshall apologized to Spain for having violated the U.S.-Spanish Treaty of 1795 and ordered the ship turned over to Spanish authorities.⁶⁹

In his actions as Secretary of State, Marshall was not an innovator, but rather a legalistic follower of precedent. He neither expanded nor reduced America's traditional policies. He was very much the agent for and implementer of Adams' foreign policy, which in 1814 the former President counted as the greatest accomplishment of his long and varied career. It may be said of Marshall's nine months as the head of the State Department that the generally Anglophile Federalist foreign policies since the Jay Treaty gave way at least in part to the impartial neutrality characteristic of the first Washington Administration.

In the Presidential election of 1800, Marshall loyally supported

⁶⁸ Montague, Secretary of State, 280.

⁶⁹ Beveridge, Marshall, II, 496.

the Adams-Pinckney ticket and shunned Hamilton's conspiracies to dump Adams. The Virginian was not able to do much for the Federalist ticket, however. On the one hand, he was hard at work in the new capital of Washington with little vacation; and on the other, Federalist strength was eroding in Virginia. In Richmond, the Federalist candidate for Marshall's old seat lost by an immense majority.⁷⁰

When there occurred the deadlock between Jefferson and Burr in the electoral college, Alexander Hamilton tried to influence most Federalist leaders to lobby in favor of Jefferson, considering him a lesser evil than Burr. Marshall declined to lend any support either to Hamilton's campaign or to that of Federalist extremists who favored Burr. If Burr had been elected, some of his Federalist friends expected Marshall would remain as Secretary of State. In this confused period, the Republicans gave some credence to the possibility that, if the deadlock between Burr and Jefferson in the House of Representatives were not broken, the lame duck Federalist majority in Congress would appoint John Marshall as interim President. Marshall never responded to either of these charges, and there is little reason for posterity to give them credence.⁷¹

The harassed President Adams turned to his talented Secretary of State for aid in composing his farewell address. Marshall ended up

⁷⁰ Ibid., II, 514-515.

⁷¹ Monroe to Jefferson, Jan. 18, 1801, The Writings of James Monroe, (7 vols. ed. by Stanislaus M. Hamilton, New York: G.P. Putnam's Sons, 1898-1903), III, 256.

writing the entire speech for him, which emphasized the need for maintaining a strong national defense and expanding the judiciary.⁷²

After the complete defeat of the Federalists in 1800, Adams made a last attempt to leave a Federalist remnant on the American political scene. Although the Federalists had lost both the executive and legislative branches in the election, the judiciary was still safe from Republican in-roads. If the judiciary could be expanded and flooded with Federalist judges, the party would not be completely lost. The Congress passed the Judiciary Act of 1801⁷³ which reduced the Supreme Court to five judges in order to prevent a Republican from being appointed when Jefferson assumed the Presidency. New federal district judgeships were created, including three new judges for each circuit which previously had been under the jurisdiction of the Supreme Court. These judgeships were life appointments which assured a continued domination of Federalists in the judiciary.⁷⁴

Marshall provided a great amount of input into the nominations to fill the newly created judgeships. This was especially true in the appointment of Oliver Wolcott to the bench. Due to Marshall's persuasiveness, Adams nominated Wolcott even though he had been notoriously disloyal to him and though they had been on unfriendly terms for years. In addition,

⁷²Montague, Secretary of State, 282; Beveridge, Marshall, II, 530-531.

⁷³Annals of Congress (6th Congress, 1st Session), 734, 742.

⁷⁴Ibid., 837-838.

Marshall was successful in obtaining the appointment of his brother, James, as well as that of his brother-in-law as judges.⁷⁵

After the resignation of Chief Justice Oliver Ellsworth because of ill health, the Supreme Court was without a Chief Justice. Adams first offered the appointment to John Jay who declined it. Judge William Paterson was the obvious successor to Ellsworth and Marshall recommended his nomination to Adams. With no previous indication of what he would do, Adams nominated to the Chief Justiceship his Secretary of State, John Marshall.⁷⁶

Marshall had not been considered as a potential candidate for the bench by other Federalist leaders. They believed that Paterson was more deserving and a more appropriate choice in view of his ample judicial experience.⁷⁷ However, Adams' choice was accepted and the Senate concurred on January 27, 1801.⁷⁸ Marshall promptly accepted the position in which he was to win fame. Of course, no one knew in 1801 what lay ahead.

⁷⁵ Marshall to Oliver Wolcott, Feb. 24, 1801, as quoted in Oliver Wolcott, Memoirs of the Administrations of Washington and John Adams (ed. by George Gibbs, 2 vols. New York, 1846), II, 495.

⁷⁶ Marshall, Autobiography, 29-30.

⁷⁷ Ibid.

⁷⁸ Montague, Secretary of State, 282.

CONCLUSIONS

In explaining Marshall's rise to prominence, one must view his life in its entirety. Every decision he made, every event which transpired and every personality he encountered became an important component in the structure of his life. An individual's personality and character, the direction in which he channels his talents, and his career choices are all vital in paving a path to greatness.

Although a person's ancestry is not always important, it was a definite asset to John Marshall. It not only gave him the fine personal qualities, but also provided him with good credentials in entering Virginia society. Thomas Marshall played an influential role in his son's career. Due to his father's active role in the community, John Marshall was well-known and respected in Fauquier County. In the House of Burgesses, his father also made important acquaintances of those men who would soon be the leaders of the new government.

Marshall's service in the Revolution was an important period in his life, not only for the friendships he made, but also for the impressions it made on him. He formulated many of his attitudes and beliefs about this new country and government which later motivated many of his decisions as Chief Justice of the United States. Most importantly, he encountered first-hand the sacrifices men were willing to make in order to forge a new freedom for this country. Marshall quickly realized the necessity for a strong constitution of which he was to become a leading proponent.

During the Revolution, Marshall also renewed his friendship with a

man that would ultimately decide the direction of his career. This man was George Washington, a long-time friend of the Marshall family. While they were both encamped at Valley Forge during that devastating winter, they had ample time to establish a lasting friendship and form a strong bond. Marshall's loyalty to this man continued to grow throughout his life and culminated in his inability to refuse Washington's personal request for Marshall to run for the U.S. House of Representatives, a decision which sent him to the Capital City and broke the bonds with his Richmond ties.

Marshall's marriage into the Ambler family provided a key to his easy entry into Richmond society. Jacquelin Ambler's contacts and influence in Richmond benefited Marshall immeasurably, guaranteeing him a successful law career. Ambler's influential reputation also was an important factor in Marshall's election to the executive Council of State shortly after becoming a delegate in the Virginia legislature.

Marshall's first years in the House of Delegates were not noteworthy, but they provided him with an opportunity to build a strong base of contacts, get experience on the floor of the House of Delegates and keep abreast of the politics of the day. He spent six years in the House of Delegates building his reputation when the Virginia Federal Constitutional Convention was convened and Marshall was elected to represent Richmond. This was undoubtedly the turning point in Marshall's career.

The entire country was watching the Virginia Ratifying Convention for their reaction to the Constitution. Thus, it provided Marshall an

almost national platform to test his effectiveness as a speaker and a leader. Marshall rose to the occasion speaking convincingly and forcefully on several vital issues. Marshall's eminent speech on the necessity of a national judiciary was one of the most outstanding given in the convention. Marshall's entire performance during the convention was most impressive, bringing his abilities to the attention of such national figures as James Madison and Thomas Jefferson.

Marshall had no burning desire to continue to politics, but he felt obligated to offer his support to President Washington and his unpopular foreign policy of neutrality. Marshall concentrated all of his efforts and abilities on convincing the people of Virginia of the astuteness of Washington's policy of neutrality through rousing speeches on the floor of the House of Delegates and in citizens meetings in Richmond. His success won him the gratitude of President Washington as well as his Federalist colleagues. Thus, Marshall became the leading and most powerful Federalist figure in Virginia.

Marshall still found no enticements to remain in politics. He had refused many public offices--many were even positions of national prominence. Something changed Marshall's attitude after he accepted the post as special envoy to France. He became an over-night national hero and as such, indispensable to the Federalist party. This fact was not lost on Washington, who, with much persuasion, convinced Marshall to run for the U.S. House of Representatives. His election was to prove a catalyst, catapulting Marshall into the pages of history in only a

few short months.

Marshall's service in the U.S. Congress was not exceptional, but once in the Capital City, the Adams Administration found him too valuable to allow to slip back to Virginia. A Federalist of this calibre would be an obvious asset to the Administration. Only five months after the Congress convened, Adams nominated Marshall as Secretary of War. Marshall refused, but five days later he was again nominated--as Secretary of State. This time, Marshall accepted, and within one day was approved by the Senate.

He proved to be a strong force behind the scenes, taking over the reins of government during Adams' extended absences. Once again, Marshall was not in office long enough to make any great mark in history as the Secretary of State, although he did a more than competent job.

Less than one year after he was appointed Secretary of State, Marshall was nominated to the Supreme Court as the Chief Justice of the United States. This appointment would eventually attain for Marshall the reputation as the most influential and outstanding Chief Justice in America's history.

From the time he was a freshman delegate in the Virginia General Assembly, it was only eighteen years until Marshall accepted the appointment as Chief Justice of the United States. There were many important factors involved in his rise to the highest court, and none can be discounted as too trivial nor singled out as the most important. His life must be seen as a steady progression of uncontrolled events, calculated decisions, and outstanding achievements which enabled him to reach such a high pinnacle.

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JOHN MARSHALL: THE DEVELOPMENT YEARS
1755-1800

by

Cynthia L. Vogt

(ABSTRACT)

This thesis is an interpretive biography of John Marshall focusing on the years prior to his appointment as Chief Justice of the United States Supreme Court.

From his youth Marshall seemed destined to play a role in the formation of the new American republic. Marshall's service to the new republic began with his military service in the Revolutionary War. After America won independence, Marshall began practicing law and was subsequently elected to the Virginia House of Delegates. Marshall was given ample opportunity to further his conviction of the necessity of a strong central government during the Virginia Federal Constitutional Convention of 1788. Marshall's reputation grew in prominence until he was appointed special envoy to France in 1797. Upon his return from France, Marshall was welcomed as a hero because of his staunch refusal to pay a bribe demanded by the French ministers. Marshall was elected to the U.S. House of Representatives in 1799, and before his term expired, President John Adams appointed him Secretary of State. After serving only nine months, Marshall was appointed Chief Justice of the United States.

During these formative years Marshall played a decisive role in the creation of the new American government. At this time, he developed opinions and attitudes which later determined many of the decisions he rendered as Chief Justice. Thus, Marshall's early years were critical in molding the future of a man who was to become one of the most outstanding jurists in American history.