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MAKING THE CONSTITUTION SAFE FOR DEMOCRACY
(Marbury vs Madison)

By Robert L. Archer

In the closing days of John Adams' administration the defeated and desperate Federalist Congress passed a new Judiciary Act reducing the number of the Supreme Court Justices from six to five, and increasing the number of district and circuit judgships. John Adams immediately appointed members of his own party to the newly created positions. At this time John Marshall was Secretary of State.

The first Chief Justice of the Supreme Court was John Jay, appointed by Washington in 1789. He was succeeded by Oliver Ellsworth in 1795, and who resigned in November 1800. President Adams again offered the Chief Justiceship to Jay who declined because he said "the Court under a system so defective would never obtain energy, weight and dignity which were essential &c." President Adams then without consulting him, sent to the Senate the name of John Marshall as Chief Justice. He was almost immediately confirmed, and accepted the appointment on Febryary 4th. 1801, just one month before Thomas Jefferson was inaugurated as President. These two men, Jefferson and Marshall, were party and political antagonists; they were both Virginians; and between them there existed a considerable degree of personal animosity. We wonder what were the thoughts of each on the two occasions on which Marshall as Chief Justice took the oath of Jefferson as Chief Executive to uphold the Constitution.

Thus began the career of John Marshall as Chief Justice of the Supreme Court. A career that was to extend for thirty-four years until his death in 1835, and during which he as Chief Justice was to hand down that remarkable line of decisions which have made the Constitution safe for democracy, and welded the so called "sovereign states" into a Nation.

The enactment of the Alien and Sedition Laws in 1798 had intensified the hostility of the Republicans led by Thomas Jefferson, and provoked the claim put forth by the Kentucky and Virginia Resolutions of which Jefferson and Madison were supppsed to be coOauthors. These resolutions were to the effect that interpretation of the National Constitution was lodged with the state legislatures.

Thus we have a glimpse of party politics in 1801, and witness the early emergence of the doctrine of states' rights which was later to

provoke the mighty conflict of 1861-65.

The dominant question of public discussion at this time (1801) was what power, if any, could declare Acts of Congress unconstitutional. Jefferson now sat in the Presidential Chair, and his party was in control of Congress. Congress had repealed the Judiciary Act of 1801, and that action was construed also as a vote against the power of the Federal Courts over Acts of Congress. The repeal act also restored the size of the Supreme Court to its former number.

Among the last acts of President Adams was the appointment of forty-two Justices of Peace for the District of Columbia. The appointments were confirmed by the Senate, and commissions issued and signed by the President and the then Secretary of State, John Marshall. However, they had not been delivered to the appointees when Jefferson was inaugurated. The non-delivery was largely owing to the carelessness of Secretary John Marshall, and the fact that his Clerk had been appointed by Jefferson to other duties.. Jefferson directed the new Secretary of State, James Madison, to deliver twenty-five of the commissions, but to withhold the other seventeen. Among those withheld was that of William Marbury. He and three others in like case applied to the Supreme Court for a writ of mandamus compelling Madison to deliver the commissions. The positions were of insignificant importance, and the remaining thirteen appointees apparently did not consider the appointments worth the expense of litigation, or else they relied on what might be the decision of the Court in the Marbury suit as being also applicable to them.

Justice Marshall in December 1801 issued the usual rule to Madison ordering him to show cause at the next term of Court why the writ of mandamus should not be awarded against him. Soon thereafter Congress abolished the June term of the Court, so that the matter could not come to a hearing until February 1803.

The time was one of heated political controvery. All men, Federalists and Republicans, lawyers and laymen, fully expected the Court would issue its writ of mandamus against Secretary Madison; that Madison would refuse the writ, and the Court would be powerless to enforce it. Threats of impeachment were freely made if the writ was issued. As stated the dominant subject of public discussion was as to who had authority to declare

Acts of Congress to be unconstitutional. Jefferson and his followers believed such authority rested in the state legislatures, and denied that the Federal Courts had such jurisdiction. The Republicans, led by Jefferson, did not hesitate to attack the integrity of the judiciary throughout the country. The unaninous opinion of the Court, was pronounced by Chief Justice Marshall. Its scope and ultimate effect was entirely unexpected by all.

In his opinion Marshall said that he would follow points of counsel in the order in which they had been raised.

1. Did the applicants have a right to their commissions? Yes, they had been appointed by the President, confirmed by the Senate, and the commissions signed by the President and the Secretary of State.

2. Has the Court authority to issus a writ of mandamus against Madison, the new Secretary of State? Yes, under the statute, the Court could issue its mandamus. There was nothing in the exalted position of the Secretary of State that exempts him from being compelled to obey the judgments of law.

But, "if this Court is not authorized to issue its writ of mandamus against Madison, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority". The Chief Justice then boldly held that Section thirteen of the Judiciary Act of 1789 was "not warranted by the Constitution".

The salient points of the opinion are as follows:

"In the United States the powers of the legislature are defined and limited; and that those limits may not be forgotten or mistaken, the Constitution is written. To what purpose are powers limited, and to what purpose is that linitation committed in writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on which they are imposed, and if acts limited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

If then, an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige

them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurbity to gross to be insisted upon. . . . .

It is emphatically the province and the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in oppoistion to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution. disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

However, there are those who maintain that coursts must close their eyes on the Constitution, and see only the law. . . . This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which according to the principles and theory of our government is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature should do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual.

. . . . . .

It is not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void, and that courts as well as other departments are bound by that instrument."

The action of Marbury versus Madison was therefore dismissed, but Marshall had seized the opportunity to assert the authority of the Supreme Court to annul Acts of Congress found to be unconstitutional; and

at the same time the supremacy of written constitutions over legislative acts was firmly established.

It was many years before a case involving the constitutionality of an Act of Congress was again brought before the Court.

Other cases decided by the Supreme Court while Marshall was Shief Justice asserting the supremacy of the Constitution, as well as the supremacy of the National Government were

Fletcher vs Peck, denying the power of the State of Georgia to invalidate a contract.

McCulloch vs Maryland, denying the power of the State of Maryland to tax the branch of the United States Bank located at Baltimore.

Gibbons vs Ogden, denying the power of the State of New York to give and exclusive franchise for the operation of steamboats on the waters of the state.

Cohens vs Virginia, asserting that for the purposes of the Constitution the United States "form a single nation"; and that the National Government may "legitimately control all individuals or governments within the American territory."

Writing in the "Federalist" before the adoption of the Constitution, Alexander Hamilton said "The inerpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, . . the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."

In 1830 and 1831 Alexis de Tocqueville, the French statesman, visited the United States for the purpose of studying at first hand the working of our Constitution after about fifty years of our experience under it. In 1836 there appeared the first volume of his great work entitled "Democracy in America". Of the Supreme Court he said in part "The Peace, the prosperity, and the very existence of the Union, are vested in the hands of the seven Federal Judges. Without them the Consbitution would be a dead letter; the Executive appeals to them for assistance against the encroachments

of the legislative power; the Legislature demands their protection against the assaults of the Executive; they defend the Union from the disobedience of the states; the States from the exaggerated claims of the Union, the public interest against private interests, and the conservative spirit of stability against the fickleness of the democracy."

May we not hope that the Supreme Court will continue to be a bulwark against usurpation of power by the Executive, by Congress, by the States, or by individuals or by corporations.