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John Adams, John Marshall and judicial review

By Robert J. Brink

This year marks the 215th anniversary of President John Adams' momentous appointment of John Marshall as the country's greatest chief justice. Not surprisingly, it is the centerpiece of a national celebration at the U.S. Supreme Court.

Marshall's legacy is most closely identified with his 1803 decision, *Marbury v. Madison*, which is an iconic symbol of American constitutionalism.

Former Chief Justice William H. Rehnquist aptly recognized the historic decision establishing judicial review as "the most famous case ever decided by the United States Supreme Court."

The American Bar Association's Gold Medal for unsurpassed service to American jurisprudence was initially cast nearly a century ago with an image of Marshall, coupled with the inspiring phrase he popularized in *Marbury*: "To the end that it may be a government of laws and not of men."

But as Marshall himself might well have acknowledged, those were John Adams' words — words that enabled the venerated chief justice to embed judicial independence and judicial review as essential elements of American constitutionalism.

'The pride of my life'

On Feb. 4, 1801, the first day he took his seat as chief of the Supreme Court, Marshall wrote to Adams of his "hope never to give you occasion to regret having made this appointment."

Quite the contrary: Adams wrote years later that picking Marshall as chief justice was "the pride of my life." His high praise was not hyperbole.

Adams valued Marshall's contributions as chief so profoundly because they validated his deepest convictions regarding the judiciary's independence as a separate and equal part of government.

We take the intertwined concepts of judicial independence and judicial review for granted today, but they were utopian political theories until Adams drafted the Massachusetts Constitution of 1780.

Chief engineer

If *Marbury* is the capstone of an independent judiciary, then Marshall built it on the cornerstone laid by Adams. He designed "the political architecture of an independent judiciary … that helped make judicial review possible," credits Scott D. Gerber, the author of "A Distinct Judicial Power: The Origins of an Independent Judiciary."

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Marshall may not have expressly credited Adams in *Marbury*, but it clearly appears that he had Adams in mind.

"The Government of the United States has been emphatically termed," Marshall wrote in an opening clause evocative of Adams' zeal, "a government of laws, and not of men."

There was simply no more emphatic proponent of the idea that ours is a government of laws than John Adams.

In fact, according to L.H. Butterfield, Adams "clearly gave the phrase its earliest circulation in America." Editor of the Adams Papers in the 1970s, Butterfield traced its first use to Adams' Novanglus letters in 1776, a series of articles justifying resistance based on core principles he traced to England's constitutional history.

More importantly, Adams memorialized the expression in the Massachusetts Constitution of 1780, of which he appropriately called himself the "chief engineer."

Butterfield notes that the phrase's "next conspicuous use" was when Marshall repeated it in *Marbury v. Madison* as the raison d'etre for asserting the Supreme Court's power of judicial review.

'Ought'

A "government of laws" is a catchy expression, but it is not self-enforcing. When designing the Massachusetts Constitution, Adams engineered an entirely new political architecture to guarantee the judiciary would truly be independent, which theoretically required it to be separate from, but equal to, the executive and legislative branches.

Adams first addressed the idea in his initial draft of the Declaration of Rights: "The judicial department of the State ought to be separate from, and independent of, the legislative and executive powers."

It is intriguing that Adams' early draft used the word "ought," as if expressing a wish, rather than "shall" as a command. If ought is more diffident than declaratory, it may be because it was still a revolutionary idea for the judiciary to be a truly separate and equal branch of government.

This nascent theory gained popularity in 1760 when "the great Montesquieu," as Adams called him, published "The Spirit of the Laws." That seminal work on separation of powers recognized that there would never be true liberty as long as the power of judging is not completely independent from both the contending legislative and executive powers.

Yet Montesquieu's theory simply did not reflect the realities on either side of the Atlantic.

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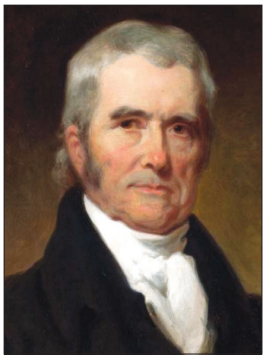
"Among the three powers we have spoken," he acknowledged of the English polity, "that of judging is in some fashion, null."

In 1776, Adams came to the same conclusions in his "Thoughts on Government," which he wrote as a blueprint for the first wave of new state constitutions.

Adams explained that, without a truly independent third branch, the natural struggle for dominance between the executive and legislative branches as two equal powers would inevitably result in the victor emerging as the sole, arbitrary power.

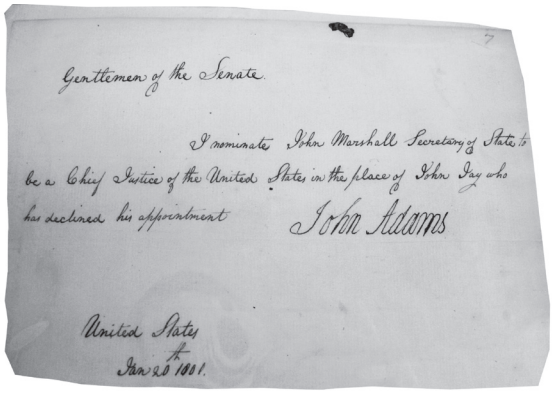
Although Adams idealized an independent judiciary, like Montesquieu he also reluctantly concluded that the "judicial power" simply could not "hold the balance between [the] two contending powers."

The time was not ripe.



JOHN MARSHALL

JOHN ADAMS



Gentlemen of the Senate

I nominate John Marshall Secretary of State to be a Chief Justice of the United States in the place of John Jay who has declined his appointment

John Adams

United States
Jan 20 1801

'Justice will be a Proteus'

Nevertheless, Adams was convinced that a new political architecture needed to be constructed for an independent judiciary to become a reality.

As he confided in Philadelphia in May 1776, just as Massachusetts started its own four-year struggle to adopt a constitution: "But my friend, between you and me, there is one Point, that I cannot give up. You must establish your Judges Salaries — as well as Commissions — otherwise Justice will be a Proteus. Your liberties, Lives and Fortunes will be Sport of the Winds."

The structure of government on both sides of the Atlantic rendered the judiciary a pawn between the Crown (which arbitrarily controlled tenure) and the Parliament (which arbitrarily controlled judicial pay).

For both Montesquieu and Adams there could be no government of laws as long as the judiciary was subservient to either one man in the form of a monarch, or many in the form of a legislature.

Under the 1691 Massachusetts Charter, the royal governor had the authority to remove judges without cause, which would make it appear that the tenure of judges was at the mercy of the Crown's imperatives.

On the other hand, the Crown's nominal power was effectively negated because the General Court historically controlled the salaries of both the royal governor and the bench, which made it impossible for either to enforce unpopular laws without jeopardizing their own livelihoods.

In the same type of tug-of-war with the governor that both Montesquieu and Adams warned always led to absolutism, the General Court wielded judicial salaries as a weapon. It retroactively compensated judges based on their performance the preceding year, a carrot-and-stick method of pay intended to manipulate judicial behavior, leading one hapless judge to liken his ad hoc allowance to the wages of sin.

The practice led to one of the great constitutional crises of the Revolution when Parliament tried to seize complete control of the colony's judiciary by circumventing the Massachusetts Legislature and pledging to pay judges directly from royal revenue.

England's power play incited indignation in all the colonies, crystalizing the concept of "judicial independence" as a fundamental right and as a forceful rallying cry in the Revolution.

As the Declaration of Independence put it, the king "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount of payment of their salaries."

'Fundamental article of liberty'

Needless to say, Adams was at the center of the controversy. When he drafted the Massachusetts Constitution in late 1779, he was determined to put judicial independence on a firm foundation.

"It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will permit," he asserted in his draft of the Declaration of Rights.

The security of that most fundamental right, he emphasized, can only be guaranteed when judges "hold their offices as long as they behave themselves" and "they have honorable salaries ascertained and established by standing laws."

Adams' language ensured that the tenure of the judiciary could no longer be controlled by the imperious will of the executive power, and its salaries could no longer be manipulated by the whims of the legislative power. Those fundamental principles are the cornerstone of an independent judiciary.

"In the government of the Commonwealth of Massachusetts," Adams continued in his draft Preamble to the Frame of Government, "the legislative, the executive, and the judicial power, shall be placed in separate departments, to the end that this might be a government of laws and not of men."

That sentence not only included Adams' celebrated clause, but this time he replaced the hesitant "ought" with an imperative "shall."

The Constitutional Convention went even further. It revised the sentence to make the separation-of-powers provision even more unequivocal, placing it as the concluding Article XXX of the Declaration of Rights.

Thus, the climatic words of the Massachusetts Bill of Rights emphatically provide that Adams' aspiration for an independent judiciary had finally become a constitutional guarantee "to the end it may be a government of laws and not of men."

The impact of Article XXX of the Massachusetts Declaration of Rights was inspirational and consequential. Hailing it a "fundamental article of liberty," James Madison quoted it verbatim in the Federalist Papers.

Adams' notions of judicial independence embodied in the Massachusetts Constitution were incorporated in the U.S. Constitution. And his appointment of Marshall as chief justice of the Supreme Court ensured that judicial review would become integral to American jurisprudence.

So, as the nation salutes the anniversary of John Marshall's appointment as America's greatest chief justice, it is worth giving a toast to John Adams as well. MLW