

UNIVERSITY OF NORTH CAROLINA AT ASHEVILLE

TOO HEARTY FOR AN INTRIGUER:
MODERATE FEDERALISM, THE XYZ AFFAIR, AND
THE INTERNATIONAL JURISPRUDENCE OF THE EARLY MARSHALL COURT

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“I love his laugh. It is too hearty for an intriguer.”

Justice Joseph Story on John Marshall

“The new order of things begins. Mr. Adams I believe left the city at 4 O’clock [*sic*] in the morning & Mr. Jefferson will be inaugurated at 12,”¹ John Marshall wrote to his associate and friend Charles Cotesworth Pinckney. As newly appointed Chief Justice of the Supreme Court, Marshall had been charged with administering the inaugural oath March 4, 1801 to President-elect Thomas Jefferson. The day emerged out of complete coincidence. On the eve of the election of 1800, sitting Chief Justice Oliver Ellsworth retired due to illness acquired while traveling to France.² It was not the first time France would direct Marshall’s political career.

Despite the deep-rooted personal and political animosity with Thomas Jefferson, Marshall ensured that power was able to smoothly change hands in 1801. For him, when so many threats existed, including not just the infancy of America or the looming quasi-war with France but Jeffersonian Republicanism itself, the preservation of the republic was most important. This ardent support of the United States developed early in his life and manifested as his own brand of moderate federalism that lasted throughout his career.³ Marshall gained some limited notoriety as a Virginia attorney and statesman, but he was presented with a decisive opportunity in 1797. The XYZ mission to France was Marshall’s first national appointment, and the exuberant public response that followed his return propelled him into the national political sphere. His time in France proved instructional; Marshall became well-versed in group diplomacy and international *savoir-faire*. It was this experience during the XYZ mission that

¹ John Marshall to Charles Cotesworth Pinckney, Washington, D.C., 4 March 1801, in *The Papers of John Marshall*, eds. Charles F. Hobson et al. (Chapel Hill, N.C., 1974-), 6: 89. Hereafter cited as *PJM*. Other editors of *PJM* include Herbert A. Johnson, Charles T. Cullen, and William C. Stinchcombe.

² Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt & Co., 1996), 283.

³ Even on his death bed, his close friend and colleague Justice Story reported Marshall’s last words July 6, 1835 to be a prayer for the preservation of the union. See Joseph Story, “Address of Joseph Story,” in *John Marshall: Life, Character, and Judicial Services*, ed. John Dillon (Chicago: Callaghan & Co., 1903), 3: 344. Hereafter cited as Dillon.

gave Marshall the essential tools, background, and the much needed thrust to become a national leader. On this expanded stage, he further developed his reputation for political moderation through negotiation. In his final post as chief justice, Marshall employed this keen sense of cooperation, adeptly navigating the fervent partisanship of the early 19th century and firmly establishing a federal judiciary apart from the political sphere that became an authority on international law.

As the longest serving Chief Justice of the United States Supreme Court, John Marshall has been the subject of many scholars' works. There are many helpful biographies of Marshall, as well as a few other books that deal with Franco-American diplomacy in the late 18th century or Marshall a bit more indirectly. Biographies include R. Kent Newmyer's *John Marshall and the Heroic Age of the Supreme Court* (2001), *A Chief Justice's Progress: John Marshall from Revolutionary Virginia to the Supreme Court* (2001) by David Robarge, Frances Howell Rudko's *John Marshall and International Law* (1991), and Jean Edward Smith's *John Marshall: Definer of a Nation* (1996). The contributions of each are discussed later. There are also useful journal articles, "Law Versus Politics in the Early Years of the Marshall Court," published in 1981 in the *University of Pennsylvania Law Review* by George Haskins and G. Edward White's "Review: Reassessing John Marshall," published in the July 2001 edition of *The William and Mary Quarterly*. Both offer deeper analyses of Marshall's jurisprudence and legacy. White's article serves as a review of Robarge's monograph and the published volumes of the *Papers of John Marshall*. Most of the recently published biographies of John Marshall focus only on his time as chief justice. The few that do address his early influences provide much more in-depth analyses of his later accomplishments. None of the sources used make direct connections between Marshall's diplomatic mission to France and its impact on creating his unique ideology

that shaped the early jurisprudence of the United States Supreme Court. Additionally, most scholars only discuss Marshall's constitutional accomplishments and generally ignore some of his other impressive opinions, especially those relating to international jurisprudence.

Addressing this absence of scholarship is the main objective here.⁴

Gordon S. Wood's 2009 work *Empire of Liberty: A History of the Early Republic, 1789-1815* is also valuable. As part of the Oxford University series on American history, Wood's monograph does not solely focus on Marshall. However, Wood covers the few volatile decades, from 1789 to 1815, that transformed America from floundering republic to established democracy, and when John Marshall was most active as an American statesman. Wood does offer a deep look at the role of the French Revolution in American politics, as well as John Marshall's rise to power, always keeping in mind the larger forces at work. Wood's expertise is essential in providing necessary background information for the study of this period in American history. In *Cosmopolitan Patriots: Americans in Paris in the Age of Revolution*, Philipp Ziesche, Assistant Editor of the Papers of Benjamin Franklin at Yale University, also focuses on the development of American nationalism with the backdrop of the American and French Revolutions. Published in 2010, *Cosmopolitan Patriots* juxtaposes the very different ways that Americans and French cultivated national identities after their revolutions. Ziesche uses the ideological writings of both American and French political leaders to illustrate this point.⁵

⁴ R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge, LA: Louisiana State University Press, 2001); David Scott Robarge, *A Chief Justice's Progress: John Marshall from Revolutionary Virginia to the Supreme Court* (Westport, CT: Greenwood Press, 2000); Frances Howell Rudko, *John Marshall and International Law*, Contributions in Political Science Series (New York: Greenwood Press, 1991); **Smith**; George L. Haskins, "Law Versus Politics in the Early Years of the Marshall Court," *University of Pennsylvania Law Review* 130, no. 1 (November 1981): 1-27; G. Edward White, "Review: Reassessing John Marshall," *The William and Mary Quarterly* 58, no. 3 (July 2001): 673-693.

⁵ Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (New York: Oxford University Press, 2009); Philipp Ziesche, *Cosmopolitan Patriots: Americans in Paris in the Age of Revolution* (Charlottesville, VA: University of Virginia Press), 2010.

The Newmyer, Smith, and Ziesche texts cover the rise of partisan politics as an effect of the diplomatic crisis with France. Each does so within the idea that the ideological conflict between the United States and France was augmented by this emerging clash in American politics. They blame the Republicans and Federalists and their inability to reach agreements about foreign policy for the deteriorating relations with France. Newmyer focuses particularly on the differences in the two Revolutions as not only impacting John Marshall's conception of foreign policy, but the political atmosphere of the 1790s as a whole. Newmyer, Robarge, Smith, and Ziesche also detail Americans' diplomatic missions to France. While Ziesche uses the missions as a way to discuss the difference of the national identities that emerged, the biographers emphasize their importance in bringing about ultimate peace during the Quasi-War and XYZ Affair. Though Smith offers a competent section on the XYZ Affair, Newmyer and Robarge are especially useful in this area and make the most inferences about the potential impact of the XYZ mission on Marshall, providing analysis of Marshall's personal attitudes throughout the experience.⁶

The Rudko and Smith texts provide the best discussions of Marshall's jurisprudence. Rudko is particularly useful because his work focuses mainly in international law, and he discusses the XYZ affair as Marshall's introduction to "the law of nations." To some extent, he does aim to make connections between Marshall's service in France, his Federalist leanings, and later work as an American man of law. Smith's biography is a bit more complete, following Marshall from his time as a boy in Virginia, as a soldier and statesman in the Revolution, as a lawyer and legislator, as a diplomat in France, as Secretary of State, and finally, as fourth Chief Justice of the United States Supreme Court. He aims to give a complete picture of Marshall's personality, though he does not seem to make some of the connections to Marshall's early life

⁶ Newmyer; Robarge; Smith; Ziesche.

that other biographers do. Most importantly, Smith regards Marshall as the driving force behind the American democratic system, responsible for pushing the Supreme Court to be an authority equal to the other two branches of government in American politics.⁷

“The Great Chief Justice” was born September 24, 1755 in rural Virginia, later Fauquier County. He found himself to be much more intellectual than others his age, with a rigorously inquisitive mind, and grew very close to his father as a result. Marshall’s father was his “only intelligent companion; and was both a watchfull [*sic*] parent and an affectionate instructive friend.” After some limited private tutoring in the classics of history, literature, and political philosophy, Marshall entered the army at age 18, and was promoted to Captain by age 22. It was this experience that initiated the development of his passionate nationalism. He found his time in the military a useful duty to his country and met his future Federalist mentor, George Washington, while fighting at Valley Forge during the 1777-78 winter.⁸

He was allowed a break from military service for the 1779-80 winter and took advantage of this time to attend George Wythe’s law lectures at the College of William & Mary. Marshall obtained his law license in 1780 and opened a practice in Richmond the next year. Deeply attached to the study of law and his private practice, Marshall was reluctant to enter politics. However, in 1787, with the battle of ratification of the United States Constitution looming, Marshall joined the Virginia political elite. He was a bit surprised at his election victory, remarking, “I was more successful than I had reason to expect,” and bolstered by this triumph, Marshall “entered with a good deal of spirit.”⁹

⁷ Rudko; Smith.

⁸ John Marshall, *An Autobiographical Sketch by John Marshall*, ed. John Stokes Adams (Ann Arbor, Mich., 1937), 3-6. Hereafter cited as Marshall, *Autobiographical Sketch*.

⁹ Marshall, *Autobiographical Sketch*, 6-7.

The Virginia Ratifying Convention met in June 1788, and although the Constitution was technically ratified before Virginia delegates voted, the debate was no less impassioned than expected. The debate over ratification pitted prominent Federalists like James Madison and the leader of the Convention, Richmond lawyer Edmund Pendleton, against the perhaps more well-known Anti-Federalists, led by Patrick Henry and supported by George Mason, James Monroe, and Thomas Jefferson.¹⁰ Marshall attended the Convention as a representative well-versed in *The Federalist*¹¹ and had generally determined his positions beforehand.¹²

The Convention started by examining the need for a bill of rights and moved on to determining proper election and tax collection procedures. These topics, while certainly of interest to Marshall, did not inspire him to join the contest. The discussion then turned to the role of the federal judiciary. Perhaps not surprisingly, this topic elicited Marshall's most memorable contribution at the Convention.¹³ Henry and Mason attacked the federal court system, claiming it was an archaic British institution that would erode civil liberties. The Federalists nominated Pendleton to deliver a response, but he was ill, and his weak argument was all but ignored. Marshall rescued the Federalist cause, delivering impressively crafted claims that turned the Anti-Federalists' logical missteps back on them. Marshall emphasized an early conception of judicial review as necessary to the republic so that liberties would be protected, not destroyed.¹⁴ In his own words, Marshall came to the Convention as a constitutional defender:

In the course of the session, the unceasing efforts of the enemies of the constitution made a deep impression; and before its close, a great majority showed a decided hostility to it. I took an active part in the debates on this question [of ratification] and was uniform in support of the proposed constitution... I [was] disposed to ascribe my devotion

¹⁰ Newmyer, 50-1, 59-60; Robarge, 110.

¹¹ Marshall's purchase of *The Federalist* is recorded in "Account Book," in *PJM*, 1: 409.

¹² This paragraph and the next draw from *The Ratification of the Constitution by States: Virginia*, eds. John P. Kaminski and Gaspare J. Saladino, in vol. X of *The Documentary History of the Ratification of the Constitution* (Madison, WI: The University of Wisconsin-Madison, 1988), 3: 1306-08, 1430-39. Hereafter cited as *VRD*.

¹³ Marshall, *Autobiographical Sketch*, 7-9.

¹⁴ For his speeches, see *PJM*, 1: 252-285, especially "June 20, 1788 Speech," in *PJM*, 1: 275-285.

to the union, and to a government competent to its preservation.¹⁵

Marshall's well-presented opinions on constitutional theory and the judiciary secured a Federalist victory. After his notable performance at the Virginia Convention, Marshall solidified his place among the leaders of the Virginia Federalists. Madison ranked Marshall fifth in overall influence at the Convention, quite an accomplishment for the young lawyer.¹⁶ Marshall emerged as well-liked by both enemies and comrades. Even those who described him as "slovenly dressed" and "convivial almost to excess" were struck by Marshall's natural aptitude and ability to harness such talent.¹⁷ American statesmen from both parties also gained a better understanding of Marshall's political theory from his participation in the Convention.

While considered a stalwart Federalist by some, Marshall began to break off as a moderate member of the party. He endorsed a strong federal government, as all Federalists did, but not necessarily at the expense of state sovereignty. Marshall envisioned a republic where the national and state governments cooperated in the name of public good, in some ways echoing Republican sentiments. In regards to the limits and checks on power he said, "[where] power may be trusted, and there is not motive to abuse it, it seems to me to be as well to leave it undetermined, as to fix it in the Constitution."¹⁸ Marshall did not see a need for major government overreach because of his genuine faith in political leaders. This reputation of moderate federalism came to serve Marshall well in the years following his stand at the Virginia Ratifying Convention.

Marshall was not President John Adams's first choice for the XYZ Mission. In fact, Adams had not planned on sending more than one American representative to France in 1797.

¹⁵ Marshall, *Autobiographical Sketch*, 9.

¹⁶ "Virginia Constitutional Society Subscription Paper," in *PJM*, 1: 140-42.

¹⁷ Hugh Grigsby, Description of Marshall in *PJM*, 1: 252 n. 8.

¹⁸ "Convention Debates" in *VRD*, 3: 1307-08.

Per custom, Charles Cotesworth Pinckney was appointed Minister to France after James Monroe returned in 1796. However, the Directory refused to receive Pinckney, an official declaration of quasi-war. Prompted by the 1794 Jay Treaty with Great Britain, in which American neutrality was assumed by the Directory to be an act of aggression, France began an informal war against American merchant ships in 1795. French sailors treated all Americans with British shipping ties as pirates and searched and seized any American ships they assumed were carrying British goods. By 1797, the French had taken over 300 American ships and more than \$55 million in American property.¹⁹ The French Revolution was recognized as the source for France's hostile actions, and Americans were divided along strict party lines. Two prominent Philadelphia editors, Federalist William Cobbett and Republican Benjamin Franklin Bache (Benjamin Franklin's grandson) exemplified this rift. Bache attacked the American administration in a sarcastic article. "During the American struggle we wanted money and France generously gave it; during her struggle, she...requested only a reimbursement of *a part of the sum lent*, and...that *virtuous and patriotic* body, the SENATE OF THE UNITED STATES, have REJECTED [the request]."²⁰ An anonymous French supporter echoed Bache's attitude during the XYZ affair, claiming that "the conduct of [the American] executive had been a series of ill offices toward France."²¹ Cobbett, in turn, criticized Bache and his supporters, declaring they were merely "fools and idiots" who asserted "that these last rapacious measures [would] have a *good* effect towards" America.²²

¹⁹ Robarge, 183-185; Wood, 239-243; Ziesche, 113.

²⁰ Benjamin Franklin Bache, "Generous, Grateful and Honourable People," *General Advertiser* (Philadelphia), June 13, 1794, in *The Revolutionary Era: Primary Documents on Events From 1776 to 1800*, ed. Carol Sue Humphrey (Westport, CT: Greenwood Press, 2003), 269-70. Hereafter cited as *Humphrey*. Emphasis is Bache's.

²¹ Anonymous, letter to the editor, *Aurora* (Philadelphia), March 6, 1798, in *Humphrey*, 271.

²² William Cobbett, "Their Last Nefarious Measure," *Porcupine's Gazette* (Philadelphia), March 8, 1798, in *Humphrey*, 273-74. Emphasis is Cobbett's own.

President Adams and his cabinet decided a diplomatic mission was required to quell the rising controversy. The cabinet chose John Marshall from a list presented by Adams June 5, 1797. Incidentally, Adams and Marshall had never met at the time of the appointment, but Marshall's reputation as a level-headed federalist, favored by George Washington and devoid of full-blown hostility toward France, preceded him.²³ Upon meeting Marshall in Philadelphia July 1, 1797, Adams was pleased with the choice. Marshall's fellow diplomats were C.C. Pinckney, a stronger southern Federalist than Marshall, and Elbridge Gerry, an arrogant Republican and closet Francophile.²⁴ Marshall was the perfect patriot for the job. He possessed both resolute principles and unwavering rationality that would be useful in balancing the personalities of Pinckney and Gerry in France. Further, while Marshall certainly had some initial attitudes about France, he was not blinded by them. Marshall had an incredible ability to separate his personal opinions from his public duties, and believed that "all [were] strongly attached to France—scarcely any man more strongly than myself. I sincerely believed human liberty to depend in a great measure on the success of the French Revolution."²⁵

Indeed, Marshall was anxious to leave for France. Although he was not quick to consent, he had a variety of reasons, personal and political, to accept the appointment. Of his duty, he said "it was the first time in my life that I had ever hesitated concerning the acceptance of office...I felt a very deep interest in the state of our controversy with France. I was most anxious and believed the government to be most anxious for the adjustment of our differences with that republic."²⁶ Marshall became frustrated when his departure was continually delayed. Foremost, noticing America's delicate position as partisan politics took over, Marshall hoped to suppress

²³ Marshall to Timothy Pickering, Philadelphia, June 6, 1797, in *PJM*, 3: 86.

²⁴ "XYZ Commission" in *PJM*, 3: 91.

²⁵ Marshall, *Autobiographical Sketch*, 13.

²⁶ Marshall, *Autobiographical Sketch*, 21-22.

the radical influence French ideas could have. Marshall finally left Philadelphia July 17, 1797. He sailed first for the Hague and wrote his wife Mary in September after landing there. In that letter, he expressed “how these delays perplex[ed] & mortif[ied]” him. He claimed “a speedy return” to be his “most ardent wish,” but was discouraged of that possibility because of a revolt within the Directory he had just learned of, referring no doubt to the coup of 18 Fructidor.²⁷ Marshall joined Pinckney at the Hague, and they waited together for Gerry. By mid-September Gerry’s arrival seemed unlikely, so Pinckney and Marshall departed for Paris without him. Gerry landed in Paris October 4, and the envoys immediately informed French Foreign Minister Talleyrand of their arrival, expressing their “sincere and ardent desire for the speedy restoration of friendship and harmony.”²⁸

Talleyrand certainly offered some advantages to the diplomats. Talleyrand was well-known for his diplomatic civility. He had spent the two previous years in the United States while in exile during the Terror and had become great friends with Federalist Alexander Hamilton.²⁹ Talleyrand returned to France in 1796 and published a few scholarly papers, condemning the Directory for their paranoia about American neutrality.³⁰ Talleyrand was not threatened by the Jay Treaty, and, once he secured the envoys’ passports to France, even Marshall recognized that Talleyrand’s behavior was “civil and [ensured] the commencement of negotiation.”³¹

Despite the want for peace from both sides, the Directory’s animosity toward the envoys forced Talleyrand to delay meetings with Marshall, Pinckney, and Gerry, ultimately dooming the mission. The envoys arranged to meet with Minister Talleyrand October 8, 1797. Talleyrand

²⁷ Marshall to Mary W. “Polly” Marshall, The Hague, September 9, 1797, in *John Marshall: Writings*, ed. Charles F. Hobson (New York: The Library of America, 2010), 92. Hereafter cited as *Writings*.

²⁸ Marshall to Timothy Pickering, Paris, October 22, 1797, in *Writings*, 102-03.

²⁹ Smith, 192-195.

³⁰ Marshall to Carrington, Amsterdam, September 2, 1797, in *PJM*, 3: 123-27.

³¹ Marshall to Pickering, The Hague, September 2, 1797, in *PJM*, 3: 132-35.

had no time to see them because of other obligations and instead sent a message that he would be preparing a memorandum to convince the Directory of America's positive intentions. Talleyrand continued sending messengers in place of himself. At one point early in negotiations, the diplomats were the fourth party to a message. They learned through James Mountflorencia, who heard from Baron d'Osmond, who was told by Talleyrand, that the Directory would need an apology for some of President Adams's remarks in a speech given May 16, 1797. The specific objectionable statements were not made clear, though it was obvious that the proceedings had no hope without the President's explanation.³² The envoys also learned through Talleyrand's agents, Jean Hottinguer (X), Pierre Bellamy (Y), and Lucien Hauteval (Z), that the French government demanded a loan of 32 million Dutch florins and a personal bribe of 50,000 pounds sterling to pay Talleyrand and French Directory officials.³³ Perhaps outraged by the demands or just by Talleyrand's indirect methods, Marshall became exceptionally impatient, commenting that the "reception is postponed in a manner most unusual and contemptuous...I am willing to wait two or three days longer, but not more. The existing state of things is to France the most beneficial and the most desirable, but to America it is ruinous."³⁴ The American envoys distrusted the messengers and interpreted Talleyrand's stalling as evidence that he lacked authority with the Directory. Marshall urged the other two to join him in writing a letter to Talleyrand that demanded a face-to-face meeting, and while Pinckney was obliged to follow Marshall's lead, Gerry, fearful of the threat of war with France, refused to sign.³⁵

³² Various incidents of Talleyrand's inability to meet and use of messengers are described throughout Marshall's "Paris Journal" in *PJM*, 3: 153-242, especially 3: 159-215. The October 8, 1797 meeting is detailed in the entry of the same date in *PJM*, 3: 159-168.

³³ Marshall to Pickering, Paris, October 22, 1797, in *Writings*, 102-115.

³⁴ "Paris Journal," October 15, 1797, in *PJM*, 3: 162-163.

³⁵ "Paris Journal," November 4, 1797, in *PJM*, 3: 185.

With a forceful nudge from the Directory in the spring of 1798, Marshall and Pinckney left France without Gerry. Gerry remained in hopes of striking an accord with the French leaders, but Marshall and Pinckney determined that outcome impossible for their mission.³⁶ Although the envoys did not achieve peace with France, the mission was not considered a failure. Marshall sent eight dispatches while in France to Secretary of State Timothy Pickering, detailing the events of the last six months. As advised, Pickering deciphered the coded writing and changed the names of the French agents to X, Y, and Z. He passed the dispatches along to President Adams. After review of the content, Adams called an emergency meeting of Congress March 5, 1798 to declare a state of quasi-war with France. He recommended strengthening the American military forces. The Congress demanded copies of the controversial writings to determine the appropriate course of action. Equally outraged, the congressmen quickly passed 20 different defense measures in response.³⁷

This public reaction to the XYZ dispatches proved to be a crucial turning point in Marshall's political career. Through these reports, Marshall became the sole spokesman for the XYZ mission, a role he would later adopt as Chief Justice. Additionally, Marshall began to develop his greatly persuasive legal writing style. Undoubtedly familiar with formal argumentation through his experience as an attorney, Marshall presented the account of the XYZ affair with logic and ample evidence for the purpose of convincing the public of France's missteps. In this experience, Marshall learned the importance of quality writing; in the business of nation building, it was important for official decisions to be written about in thoughtful,

³⁶ "Paris Journal," April 11, 1798, in *PJM*, 3: 239-242.

³⁷ Robarge, 189, 200.

persuasive ways. If this was the case, then often the reaction became more important than the decision itself. No doubt Marshall carried this understanding with him to the Court.³⁸

Perhaps more important than these effects, though, was that Marshall's role in the XYZ affair transformed him from regionally recognized state representative to nationally revered hero. Upon Marshall's return from France, he "found the whole country in a state of agitation on the subject of [the] mission. [The] dispatches had been published and their effect on public opinion had fully equaled [his] anticipation."³⁹ Marshall was correct; America had been impassioned about the French crisis. Ten-thousand copies of Marshall's dispatches were published and widely distributed. The public responded with rallies and petitions, editorials, songs, and plays. They admired Marshall and the other envoys because they had not been seduced by old-world evil and had solidified America as a sovereign, powerful republic. A few months after the open release of the dispatches, the residents of Richmond expressed their support in a public letter written to Marshall.

[We] feel our attachment and respect considerably heightened and increased by your virtuous exertions abroad, in maintaining the dignity, the honor, and independence of your country. We retrace your conduct with pleasure, and rejoice to think that one of our most distinguished patriots went forth at the public call from this city to advocate the cause of his injured country, and that he maintained it with ability, fortitude, and manly freedom, against the insidious designs of her enemies, at the very set of their empire, not withstanding the numerous difficult to which he was exposed."⁴⁰

With his involvement in the XYZ affair, Marshall proved himself to be a defender of American honor and a master of public relations.

Marshall's political success in the late 1790s and into the 1800s was due in large part to his new national reputation, formed in the aftermath of the XYZ affair. In the four years after the

³⁸ Robarge, 189, 258; Newmyer, 117.

³⁹ Marshall, *Autobiographical Sketch*, 25.

⁴⁰ "From Citizens of Richmond," *Virginia Gazette, and General Advertiser* (Richmond), August 11, 1798, in *PJM*, 3: 478-481.

publication of his dispatches, Marshall occupied four different national offices, and it was in these capacities where he excelled as a champion of moderate federalism. Wary to enter national politics because of his devotion to his law practice, George Washington finally convinced Marshall to run for an available federal House seat. Marshall won his first national election in 1799 and reported to the United States House as a Representative from Virginia.⁴¹

Marshall tackled some controversial legislation while serving as a Representative. Provoked by the results of the first XYZ mission, Congress passed the Federalist-introduced Alien & Sedition Acts in the summer of 1798. Many Republicans were outraged, claiming that the acts violated the constitution, and sought to repeal them in the next Congressional session. Amidst the partisan storm, Marshall tried a new public relations technique. He wrote two letters, one to himself from “A Freeholder,” and one back to the “Freeholder” from John Marshall. The “Freeholder” letters addressed federalism and states’ rights, as well as the Alien & Sedition Acts. Marshall skirted the constitutional issue introduced by the passage of the Alien & Sedition Acts by claiming he would not have voted for them not because they violated the constitution, but because in a properly formed republic, they were unnecessary. Echoing Madison’s sentiment in *The Federalist 51*, Marshall deemed institutional protections generally superfluous because government leaders, as the most qualified men, would check themselves.⁴² Despite his denial that he would do so, Marshall later worked for the repeal of the Sedition Act, albeit surreptitiously.⁴³ This was not the only time Marshall strayed from the party line. The Disputed Election Bill was introduced in March 1800 by Marshall’s fellow Federalists in an attempt to

⁴¹ Marshall, *Autobiographical Sketch*, 25-6.

⁴² Marshall to “A Freeholder,” Richmond, September 20, 1798, in *Writings*, 147-150; James Madison, “The Federalist Papers: No. 51,” The Avalon Project: Documents in Law, History, and Diplomacy, http://avalon.law.yale.edu/18th_century/fed51.asp (accessed March 28, 2011).

⁴³ Marshall opposed legislation that would have repealed the Sedition Act. Instead of actively removing the Sedition Act, he allowed it to expire as scheduled March 1, 1801. For more on this, see *PJM*, 4: 37.

control the upcoming Presidential election. Marshall opposed the legislation on political, practical, and constitutional grounds.⁴⁴

During his short-lived term as a U.S. Representative, Marshall proved that his practice of moderate federalism was still intact by voting independent of party expectation. Many delegates from both sides attacked Marshall for dodging the issues at hand. However, “Marshall [did take] a firm stand—with one foot in each camp.”⁴⁵ His fellow Representatives found a paradox at the heart of his ideology of moderate federalism. He consistently supported the public powers of the federal government, all the while valuing the private rights of the individual. While most considered these two ideas to be conflicting, Marshall made a place for both, creating a kind of dual federalism that balanced the sovereign nation and sovereign state. Moreover, in this conception, Marshall considered a strong federal judiciary as the best way to ensure that neither the public nor private spheres trumped the other.⁴⁶ He would soon have the opportunity to strengthen the judicial system he held so dear.

The 1800 election, sometimes referred to as “the Republican revolution,” resulted in a tie between Jefferson and fellow Republican Aaron Burr. The U.S. House of Representatives was left to choose who should become President and who Vice-President. They chose Jefferson. Said Marshall of the contest, “I consider it as a choice of evils and I really am uncertain which would be the greatest.”⁴⁷ Throughout their years, Marshall and Jefferson, second-cousins through their mothers, had developed a serious disdain of the other. The two men represented conflicting political ideologies to each other and to the nation; Marshall was a beacon of nationalist Federalism and Jefferson for Republican liberties and states’ rights. As one

⁴⁴ See “Amendment,” in *PJM*, 4: 128-30 for Marshall’s editing of the Disputed Election Bill.

⁴⁵ Newmyer, 120.

⁴⁶ Newmyer, 345.

⁴⁷ Marshall to Edward Carrington, Washington, D.C., December 28, 1800, in *PJM*, 6: 44-45.

biographer describes their antipathy, “Marshall was aristocratic in his politics and democratic in his behavior; Jefferson reversed the order.”⁴⁸

Perhaps some of the most notable differences between the two statesmen were their conflicting opinions of France and the French Revolution. Both men spent some time in Paris in official capacities, though Jefferson was there significantly longer than Marshall. Jefferson was a confirmed Francophile, and generally championed the goals of the French Revolution, even during the Terror, when the methods arguably strayed from the liberalist principles. Marshall, on the other hand, was an early supporter of France because of its involvement in the American Revolutionary War, but as the French Revolution plunged into chaotic violence, Marshall quickly rescinded his support. Throughout his life, Marshall feared the impact that foreign panic could have on the infant American republic. Writing to George Washington during his mission to France, Marshall warned that “[the French] willingly relinquish national independence for individual safety. What a lesson to those who would admit foreign influence into the United States!”⁴⁹ Conversely, Jefferson worried about *Marshall’s* affect on popular politics, writing to James Monroe in 1800 before Marshall’s Supreme Court nomination, “I [understand there has been] a great deal of federation and Marshallism, and this latter spirit I thought nothing should be spared to eradicate.”⁵⁰

After President Adams’s nomination and Senate approval, John Marshall received a commission to become the fourth⁵¹ Chief Justice of the United States Supreme Court January 31,

⁴⁸ Newmyer, 149.

⁴⁹ Marshall to George Washington, The Hague, September 15, 1797, in *Writings*, 96-97.

⁵⁰ Thomas Jefferson to James Monroe, Washington, D.C., April 13, 1800, in vol. 19 of *The Writings of Thomas Jefferson*, eds. Andrew A. Lipscomb et al. (Washington, D.C., Thomas Jefferson Memorial Association, 1903), 120.

⁵¹ Some historians actually consider Marshall to be the third Chief Justice. Three men technically served before him: John Jay, John Rutledge, and Oliver Ellsworth. However, Rutledge, who took office during a Senate recess after Jay was elected Governor of New York, served for only six months and decided only two cases. When the Senate reconvened, it denied his nomination, and he was forced to resign.

1801.⁵² Once again, Marshall was not President Adams's top choice. He preferred former Chief Justice John Jay⁵³, but Jay was "convinced that under [the current] system..[the court] would not obtain the energy, weight, and dignity...public confidence and respect" necessary for its success. Jay refused the appointment.⁵⁴ Nevertheless, Adams was pleased to have a Federalist, albeit a moderate one, accept the nomination and be approved. The election of 1800 had changed the political tide so that Democratic-Republicans occupied the Presidency, Vice Presidency, and dominated both houses of Congress. The Republicans generally detested the Court because they considered it decidedly against a free popular government. They deemed most judicial power "an absolute negative on the proceedings of the legislature, which no judiciary ought ever to possess."⁵⁵ Adams and Marshall agreed that the Federalists would have to survive by maintaining leadership in the Supreme Court. Marshall understood that he inherited an institution lacking in prestige and authority, one described by Alexander Hamilton as "beyond comparison the weakest of the three departments of power."⁵⁶ Even the President responsible for his appointment had a history of regarding the judiciary as secondary to the other branches. A fairly young John Adams wrote in the *Boston Gazette* that "the first grand division of constitutional powers [were] those of legislation and those of execution...the administration of justice [rests in] the executive part of the constitution."⁵⁷ Marshall wished to revive the federal judiciary, considering it crucial to the nation's success as a counterbalance for the new

⁵² "Supreme Court Commission," in *PJM*, 6: 61-2.

⁵³ Marshall, *Autobiographical Sketch*, 29-30.

⁵⁴ John Jay to John Adams, Albany, January 2, 1801, in vol. 4 of *The Correspondence and Public Papers of John Jay*, eds. Henry P. Johnston et al. (New York: Lenox Hill, 1890), 284-86.

⁵⁵ Richard Dobbs Spaight to James Iredell, Philadelphia, August 12, 1787, in *Life and Correspondence of James Iredell*, ed. Griffith J. McRee (New York, 1857-58), 2: 169-70.

⁵⁶ Alexander Hamilton, "The Federalist Papers: No. 78," The Avalon Project: Documents in Law, History, and Diplomacy, http://avalon.law.yale.edu/18th_century/fed78.asp (accessed March 28, 2011).

⁵⁷ John Adams, *Boston Gazette*, January 27, 1766, in *The Works of John Adams, Second President of the United States*, ed. Charles Francis Adams (Boston: Little, Brown and Co., 1856), 3: 480-82.

Republican leadership, and was excitedly poised to direct constitutional development.⁵⁸ In regards to his new appointment, Marshall was “very fully impressd” [*sic*] of “the importance of the judiciary at all times, but more especially [at] the present” and vowed “not to disappoint [his] friends” in his new office.⁵⁹

Given the unpleasant reputation the court acquired in its first years, Marshall quickly began asserting his particular conception of the role and function of the federal Supreme Court. Influenced by his stay in Paris, Marshall made some of his most direct changes to court opinions and the lives of justices. Marshall moved away from the *seriatim* tradition followed by previous Chief Justices in his very first decision by delivering a singular court opinion. Following his own lead from the official correspondence during the XYZ affair, he decided one “opinion of the Court,” handed down by the Chief, exhibited more judicial power than separate, often incongruent opinions. In this “one voice” writing, he continued to develop the grand, persuasive argumentative style hinted at in his XYZ dispatches. Additionally, just as Marshall had lodged with Pinckney and Gerry in Paris at the home of Madame de Villette,⁶⁰ the Chief Justice arranged for all of the justices to stay at the Conrad & McNunn hotel in Washington, D.C. for the 1801 term. Instead of using the cramped quarters allowed them in the basement of the U.S. Capitol, they presumably reviewed cases with glasses of wine in their cozy boarding house.⁶¹ Marshall’s diplomatic experience had given him an astute understanding of small group dynamics, which made him an ideal leader for the wandering court. By the end of the term, Marshall had created a sort of judicial band of brothers.

⁵⁸ Robarge, 233.

⁵⁹ Marshall to C.C. Pinckney, Washington, D.C., 4 March 1801, in *PJM*, 6: 89.

⁶⁰ Marshall to Mary, Paris, November 27, 1797, in *Writings*, 137-38.

⁶¹ Marshall’s preference to live and dine with his fellow Justices is found in many letters, especially Marshall to Bushrod Washington, Washington, D.C., December 29, 1814, in *PJM*, 8: 63.

With this newfound familial spirit, the function and role of the Supreme Court changed. The justices became more efficient than ever, deciding 46 cases in the first four years under Marshall.⁶² They had a fresh understanding of the absolute import of their work. Marshall relayed a dual identity for the Supreme Court, asserting that the judiciary was the sole protectorate of individual liberties as well as a source of checks on the executive and legislative branches. Long criticized for being too far removed from the public because justices were not popularly elected, Marshall leveled the Court with “the people.” He asserted that they both occupied positions that could determine the government’s direction and power. Public opinion of the Supreme Court soon improved. By about 1805, after a few key Marshall Court decisions and the failed impeachment of Justice Chase, Jeffersonian Republicans accepted the judiciary as a necessary branch of the American government.⁶³

Because the Court was in a transformation process, it was widely recognized that the decisions made set crucial precedent for the direction of the Constitution as a legal document and for the United States as a budding nation. For the preceding decade, Supreme Court Justices were typically revered or reviled, depending on personal political leanings. Marshall, always the moderate Federalist, made distinctions between the legal realm and the political one and sought to securely establish the United States Supreme Court as one only found in the former. Under Marshall’s guidance, the Constitution became like all other laws in the United States—a document in its nature legal, not political, and thus necessarily justiciable. For Chief Justice John Marshall, the Supreme Court alone held the authority to interpret the meaning of the Constitution and all laws of the land for American citizens.⁶⁴

⁶² In contrast, just over 60 decisions were rendered in the previous 12 years of the Court’s existence.

⁶³ Haskins, 8-9; Newmyer, 208; Wood, 447.

⁶⁴ Marshall to Alexander Hamilton, Washington D.C., January 1, 1801, in *PJM*, 6: 46-7.

Though Marshall is typically remembered for his contributions to constitutional jurisprudence, the Chief Justice first affirmed this interpretive power in international law. He assumed international cases would be part of domestic duties and acted accordingly. Because there were not many international precedents, Marshall tended to liken disputes of an international nature to domestic law. The specific laws were different, but he was able to draw on his international experience during the XYZ Affair to keep the methods of interpretation the same. Marshall considered sovereign nations similar to individual parties in controversies, and as such, treaties similar to contracts. Drawing from this parallel, Marshall not only carved a new place for the federal judiciary within America, but also one for America within the world.⁶⁵

Chief Justice Marshall decided *Talbot v. Seeman*, his first case, August 11, 1801. The case involved naval prizes, something Marshall had personally encountered while sailing to France in 1797. In a letter to Edward Carrington, he described the ship he took from Philadelphia to Amsterdam, the *Grace*, as losing its papers “so that the vessel was lawful prize.”⁶⁶ The *Talbot* controversy grew out of legislation created during the XYZ affair. The Directory issued a 1798 decree while Marshall was still in Paris, which basically endorsed open capture of enemy ships. At that time, “enemy ships” included British vessels and those of any nationality in British ports or carrying British goods. Marshall interpreted this action as directly obstructing Article XXIII of the 1788 Treaty of Amity and Commerce because the purpose was to “cut off all direct intercourse between neutrals and Great Britain,” but the three envoys could not agree on a response to send to Talleyrand.⁶⁷ Since this dispute could not be resolved, a perfect situation was set for *Talbot*.

⁶⁵ Newmyer, 274-81; Rudko, 69-70.

⁶⁶ Marshall to Edward C. Carrington, Amsterdam, September 2, 1797, in *PJM*, 3: 123-27.

⁶⁷ Marshall to Charles Lee, Paris, March 4, 1798, in *PJM*, 3: 395-97.

The *Amelia*, a Hamburg-owned neutral ship sailing from Calcutta, was captured by the French privateer *La Dilligente* and sent to France. Captain Talbot, leader of the *USS Constitution* captured the *Amelia* en route and brought the ship to the United States. The Hamburg owners of the *Amelia* petitioned Talbot's seizure.⁶⁸ The American political elite divided severely along partisan lines on their views of the *Talbot* case. Marshall, always mindful of separating the Court from politics, dodged party arguments in his decision. He held Capt. Talbot's seizure to be lawful, which satisfied Federalists, but did not award Talbot a large prize for the capture, which appeased President Jefferson and the Republicans. This first decision set the tone for the tenure of the Marshall Court, during which the authority of the Court was emphasized through politically-removed decisions.⁶⁹

Four months later, Marshall and his fellow justices began the December 1801 Court term. Six cases were on the docket. Reminiscent of the politically heated circumstances surrounding *Talbot*, *United States v. Schooner Peggy* was heard first.⁷⁰ *Schooner Peggy* also arose from XYZ legislation. The *Peggy* was a French ship captured by American vessel *Trumbull*. The captain of the *Trumbull* was given the *Peggy* as a prize of war by a district court, but the French owners of the *Peggy* petitioned, claiming the seizure was illegal under the provisions laid out at the 1800 Convention of Môtfontaine, specifically Article IV.⁷¹ Marshall's reliance on the Môtfontaine Treaty would have been problematic for two reasons. First, there was no precedent or explicit Constitutional power for the judiciary to be able to use treaties as laws in its holdings. Second, the Treaty had not been fully promulgated by the time the *Schooner Peggy* case reached the Supreme Court. Drafted in 1800, then-President Adams and his Senate objected to Article II,

⁶⁸ *Silas Talbot v. Hans Fred Seeman*, 5 U.S. 1 (1801).

⁶⁹ *Talbot v. Seeman*.

⁷⁰ *Smith*, 296.

⁷¹ *United States v. Schooner Peggy*, 5 U.S. 103 (1801).

and though the changes had been made, President Jefferson had not yet brought the revised version to the Senate for approval. The President became personally involved when he expressed his belief that the *Peggy* did fall under Article IV of the Treaty. Out of respect for the President, and potentially agreeing with him personally, the Chief Justice continued the case to allow for more time for the Senate to approve the Treaty.

As soon as the Senate agreed upon the terms, Marshall released his holding. Given his diplomatic experience, Marshall had developed a unique understanding of treaties. He reasoned they were essentially contracts between sovereign nations, rather than individuals, and should thus be treated as justiciable legal documents. From his time in France, Marshall also understood the intentions that accompany treaties and how significant specific language could be. The Court decided that the *Peggy* was protected under the 1800 Treaty. However, still appealing to nonpartisanship, Marshall did not severely penalize the Captain of the *Trumbull*, as Jefferson wanted.⁷² Marshall cleverly stressed the court's unique role, while not undermining the executive power:

If the law be constitutional...I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights...are sacrificed for national purposes...it is not for the court, but for the government, to consider.⁷³

With the *Schooner Peggy* opinion, Marshall offered the first hints at firmly establishing judicial review by crediting the executive with power that was by its nature determined and/or checked by the judiciary.

The 1804 case *Murray v. The Charming Betsey* also developed out of XYZ naval disputes. *Charming Betsey* was a merchant ship owned by American-born Jared Shattuck.

⁷² Rudko, 70; Smith, 297.

⁷³ U.S. v. Schooner *Peggy*.

Shattuck was raised in St. Thomas in the Danish-occupied Virgin Islands, had lived there most of his life, and had pledged allegiance to the Danish crown. Despite his birthplace, he conducted himself as a Danish businessman. Though he was flying Danish colors when the *Charming Betsey* set sail from St. Thomas with American cargo, Shattuck's ship was captured by a French belligerent. The *USS Constellation*, captained by Alexander Murray, then recaptured *Charming Betsey* under the nonintercourse act, which prohibited Americans from trading with the French. Shattuck petitioned the *Constellation's* capture of the *Betsey* on the grounds that he was not an American citizen, and accordingly, the act could not affect his business.

In yet another dexterous opinion, the Marshall Court found in favor of Shattuck, without engaging in the passionate partisan debate surrounding these types of cases. Instead of directly attending to the issue at the center of *Charming Betsey*, a question about expatriation, Marshall focused on more general principles of international law. With a respect for international law initiated by his diplomatic experience, Chief Justice Marshall held that Congress could not pass any legislation that violated the "law of nations." Because Shattuck would be considered a Dane by international standards, Congress could not prevent him from assuming that identity. In this way, the Chief Justice did not answer the political question of expatriation. There was no comment on whether or not Shattuck's actions were acceptable, only that they could not be prohibited by a domestic law.⁷⁴ Marshall dodged even his own personal beliefs,⁷⁵ asserting the Court's political ambivalence by deciding it was "not necessary...to decide" whether or not "a person born in the United States...can divest himself absolutely of that character."⁷⁶

Not quite ten years after *Charming Betsey*, the Marshall Court decided its most important international law case. *The Schooner Exchange v. McFaddon* is often considered for

⁷⁴ Murray v. The Charming Betsey, 6 U.S. 64 (1804).

⁷⁵ Marshall to Timothy Pickering, April 11, 1814, in *PJM* 9: 175.

⁷⁶ Murray v. Charming Betsey.

international jurisprudence what *Marbury v. Madison* was for constitutional jurisprudence—a definitive holding in its field, and more importantly for Marshall, a solid declaration of the Court’s unique legal authority.⁷⁷ The *Exchange* was an American-owned ship, taken by the French military while en route to Spain. It was reappropriated as the *Balaou* warship under Napoleon, and then reclaimed by the original owner, McFaddon, while in port in Philadelphia.⁷⁸ Though the United States and France had settled the XYZ dispute and were allies by the time *Schooner Exchange* arrived on the docket, the case presented similar facts.

Chief Justice Marshall elevated the *Schooner Exchange* decision, welcoming the opportunity to solidify the Court’s international authority. Marshall first outlined the nature of national jurisdiction in international controversies. For Marshall, there was no doubt that the United States Supreme Court could properly decide this case.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. . . . All exceptions [are] up to the consent of the nation itself. . . . [A] mutual benefit is promoted by intercourse with [other sovereign nations] and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation. . . . of that absolute and complete jurisdiction.

Though Marshall confirmed the Court’s power, he found an exception in *Schooner Exchange*, requiring that “relaxation” of jurisdiction. Marshall’s opinion in *Schooner Exchange* introduced sovereign immunity, a key tenet of international law. Because the ship was seized by the Americans as the *Balaou*, a warship and not a merchant ship or other private vessel, McFaddon could not substantiate the same claim. According to the holding, the French government was protected from civil action. Perhaps due in part to the delicate position the case presented, a

⁷⁷ Newmyer, 280-81; Rudko, 113; Smith, 407.

⁷⁸ *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

finding against France could be considered a declaration of war, but more likely a reflection of Marshall's refusal to address political issues, the Court held against McFaddon.⁷⁹

At the time *Schooner Exchange* was decided, Marshall had only spent a decade on the Supreme Court. In that short time, he was able to establish himself as the rational, principled leader of a strong, independent judiciary. Most biographers place emphasis on Marshall's beginnings as a son of the American Revolution and rise to the Virginia legal and political elite. These were no doubt influential. However, his first major national appointment as a diplomatic envoy to France during the XYZ affair was chiefly responsible for boosting Marshall's political career and positioning him for prominence. The experience gained in Paris created a masterful leader, well-versed in group dynamics, international political savvy, and methods of compromise. Even his personal and political rival respected his ability to negotiate and navigate rampant partisanship in favor of an independent judiciary. Thomas Jefferson once told Joseph Story, "when conversing with Marshall, I never admit anything...So great is [Marshall's] sophistry you must never give him an affirmative answer...Why, if he were to ask me if it were daylight or not, I'd reply, 'Sir, I don't know, I can't tell.'"⁸⁰ Coupled with his astute legal mind and adherence to political moderation, Marshall was the prime choice for directing the judicial negotiations required by the intense partisan atmosphere that characterized the early 19th century, and though he is typically remembered for his noteworthy constitutional ideology, his international jurisprudence, directly connected with the XYZ affair, cannot be overlooked.

⁷⁹ Ibid.

⁸⁰ Joseph Story, "Eulogy to Marshall," in Dillon, 3: 370.

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In this early writing, future President Adams admits his own anxieties about the federal judiciary.

Hamilton, Alexander. "The Federalist Papers: No. 78." The Avalon Project: Documents in Law, History, and Diplomacy. http://avalon.law.yale.edu/18th_century/fed78.asp (accessed March 28, 2011).

Hamilton exercised great influence as one of the three authors of the *Federalist Papers*. In No. 78, he offers his negative views of the judicial branch.

Hobson, Charles F., ed. *John Marshall: Writings*. New York: The Library of America, 2010.

As the current editor of the *Papers of John Marshall* in Williamsburg, Virginia, Charles Hobson is certainly qualified to assemble such a collection of Marshall's correspondence. Included are personal letters to Mary "Polly" Marshall and George Washington, as well as more official papers to various American statesmen. Hobson also included two dispatches from the XYZ affair and some of Marshall's major Supreme Court opinions. Most of what is found in this collection can be found in the published volumes of the *Papers of John Marshall*, but Hobson's valuable notes and commentary cannot.

Marshall, John. Marshall to "A Freeholder," September 20, 1798. In *Writings*, 147-50.

Marshall, John. Marshall to George Washington, September 15, 1797. In *Writings*, 96-7.

Marshall, John. Marshall to Mary W. "Polly" Marshall, September 9, 1797. In *Writings*, 92-3.

Marshall, John. Marshall to Mary W. "Polly" Marshall, November 27, 1797. In *Writings*, 137-38.

Marshall, John. Marshall to Timothy Pickering, October 22, 1797. In *Writings*, 102-115.

Hobson, Charles F. et al., eds. *The Papers of John Marshall*. 12 Vols. Chapel Hill, NC: The University of North Carolina Press, 1974-.

This series of 12 volumes is an incredible resource for anyone researching John Marshall. The project began in 1974 under the leadership of Herbert A. Johnson and is now being directed

by Charles Hobson. Other editors include William C. Stinchcombe and Charles T. Cullen. Marshall did not believe his works, personal or private, would be of value to later generations, so he did not intentionally preserve anything. What is published here is what has been salvaged from Marshall's relatives, friends, or those on the receiving end of letters. Perhaps most of note in this collection is Marshall's "Paris Journal," kept while in France, which allows us special insight into the diplomatic mission.

"Amendment." In *The Papers of John Marshall*, 3: 128-30.

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Marshall, John. Marshall to Timothy Pickering, June 6, 1797. In *The Papers of John Marshall*, 3: 86.

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Marshall, John. "Paris Journal." In *The Papers of John Marshall*, 3: 153-242.

Marshall, John. "The Virginia Ratifying Convention." In *The Papers of John Marshall*, 1: 252-86.

"Supreme Court Commission." In *The Papers of John Marshall*, 6: 61-2.

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Humphrey, Carole Sue, ed. *The Revolutionary Era: Primary Documents on Events from 1776 to 1800*. Westport, CT: Greenwood Press, 2003.

This collection provides a wealth of primary documents ranging from the Declaration of Independence to the turn of the 19th century. Most valuable are the many newspaper excerpts Humphrey includes. She also offers commentary of some worth to help place the documents in proper historical perspective.

Bache, Benjamin Franklin. "Generous, Grateful and Honourable People." *General Advertiser* (Philadelphia). June 13, 1794. In Humphrey, 269-70

Anonymous. Letter to the Editor. *Aurora* (Philadelphia). March 6, 1798. In Humphrey, 271.

Cobbett, William. "Their Last Nefarious Measure." *Porcupine's Gazette* (Philadelphia). March 8, 1798. In Humphrey, 273-74.

Jay, John. Jay to John Adams, January 2, 1801. In *The Correspondence and Public Papers of John Jay*, edited by Henry P. Johnston et al. Vol. 4, 284-86. New York: Lenox Hill, 1890.

Jay wrote this letter as a response to President Adams' request that he occupy the position of Chief Justice again. Jay refused because of his serious doubts about the strength and usefulness of the United States Supreme Court.

Jefferson, Thomas. Jefferson to James Monroe, April 13, 1800. In *The Writings of Thomas Jefferson*, edited by Andrew A. Lipscomb et al. Vol. 19, 119-120. Washington, D.C.: Thomas Jefferson Memorial Association, 1903.

In this letter, Jefferson illuminates his views of Marshall and the judiciary as a whole.

Kaminski, John P. and Gaspare J. Saladino, eds. *Ratification of the Constitution by States: Virginia*. Vol. 10 of *The Documentary History of the Ratification of the Constitution*. Madison, WI: The University of Wisconsin-Madison, 1988.

This collection is useful for Marshall's early activities at the Virginia Ratifying Convention. It includes annotated speeches, resolutions, and other documents.

Madison, James. "The Federalist Papers: No. 51." The Avalon Project: Documents in Law, History, and Diplomacy. http://avalon.law.yale.edu/18th_century/fed51.asp (accessed March 28, 2011).

Federalist No. 51, most likely written by Madison (though possibly by Hamilton) outlines a theory of checks and balances and what role, if any, the federal judiciary should hold in that system.

Marshall, John. *An Autobiographical Sketch by John Marshall*. Edited by John Stokes Adams. Ann Arbor, MI: University of Michigan Press, 1937.

Prompted by a lack of Marshall's surviving works, Justice Joseph Story requested in 1827 that he write an autobiography. Although Marshall obliged with this brief account 30 December 1827, the work remained relatively obscure until it was published in 1937 with Adams's commentary. It offers a nice overview of how Marshall viewed his own life, choosing to emphasize his early military service, marriage, private practice in Richmond, diplomatic mission to France, and nomination as Chief Justice. It is especially valuable because this broad picture can sometimes be lost when researching Marshall's individual letters and other correspondences.

Murray v. The Charming Betsey. 6 U.S. 64. 1804.

This case involved the meaning of American citizenship, as well as the rights of ship-owners. It exhibits Marshall's great legal tact.

Silas Talbot v. Hans Fred Seeman. 5 U.S. 1. 1801.

This is the first Supreme Court case Marshall decided. The controversy arose out of XYZ legislation.

Spaight, Richard Dobbs. Spaight to James Iredell, August 12, 1787. In *Life and Correspondence of James Iredell*, edited by Griffith J. McRee Vol. 2, 168-170. New York, 1857-58.

In this letter, Spaight communicates popular Republican opinion about the Supreme Court to future Justice James Iredell.

Story, Joseph. "Address of Joseph Story." In *John Marshall: Life, Character, and Judicial Services*, edited by John Dillon Vol. 3, 344. Chicago: Callaghan & Co., 1903.

Justice Joseph Story wrote and spoke widely about his professional and personal relationship with Chief Justice John Marshall. Many of Story's anecdotes are well known. The one cited here is about Marshall's reverence for a united nation.

Story, Joseph. "Eulogy to Marshall." In *John Marshall: Life, Character, and Judicial Services*, edited by John Dillon Vol. 3, 370. Chicago: Callaghan & Co., 1903.

Another one of Story's stories, this focuses on Jefferson's recognition of Marshall's logical aptitude.

The Schooner Exchange v. McFaddon. 11 U.S. 116. 1812.

Schooner Exchange is most likely Chief Justice Marshall's greatest contribution to international law. It outlined sovereign immunity, a principle still enforced today.

United States v. Schooner Peggy. 5 U.S. 103. 1801.

Similar to *Talbot v. Seeman*, this case was brought to the Supreme Court because of the XYZ affair, and was the second case Marshall decided. It set a precedent for Marshall's impact on international law. He also included a section that alluded to judicial review.

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Haskins, George L. "Law Versus Politics in the Early Years of the Marshall Court." *University of Pennsylvania Law Review* 130, no. 1 (November 1981): 1-27.

Haskins places Marshall's constitutional jurisprudence in the appropriate temporal context. He introduces the early roots of judicial review and discusses mainly *Marbury v. Madison* as the vehicle for the realization of this principle in the republic. Haskins points about Marshall's motivations to join and beliefs about the function of the Supreme Court are particularly useful.

Newmyer, R. Kent. *John Marshall and the Heroic Age of the Supreme Court*. Baton Rouge, LA: Louisiana State University Press, 2001.

Prompted by many unanswered questions from other biographers, namely seemingly personal contradictions in Marshall, Newmyer offers a fresh take. Similar to Robarge, he values Marshall's formative years as crucially important to his later successes on the Supreme Court. He lifts Marshall's experiences as an American Revolutionary soldier and son of Virginia as the most important determining factors. However, Newmyer does discuss Marshall's time in France and possible links to his later jurisprudence. Newmyer's biography elucidates these connections, attempting not only to understand Marshall's personality and political ideology, but to locate them in early America.

Robarge, David Scott. *A Chief Justice's Progress: John Marshall from Revolutionary Virginia to the Supreme Court*. Westport, CT: Greenwood Press, 2000.

Noticing the trend of Marshall's biographers to focus mainly on his time as chief justice of the Supreme Court, Robarge set out to publish an equally well crafted biography of Marshall's early years. Robarge's attitude that too many historians erroneously take Marshall's great

reputation as Chief Justice and then try to analyze his earlier years within that frame of thinking is central to this work. He gives equal space to Marshall's childhood, time as a soldier, lawyer, diplomat, and representative, focusing on how these experiences not only shaped Marshall, his personal identity, and political ideology, but also the identity and ideology of America.

Rudko, Frances Howell. *John Marshall and International Law*. Contributions in Political Science Series. New York: Greenwood Press, 1991.

Rudko's work serves as a biographic study of John Marshall, focusing on his world views. Rudko considers his federalist background and service as minister in France as contributing to Marshall's development as American statesman, lawyer, and Chief Justice. Rudko gives a useful discussion of international law cases Marshall heard in the first few years of service on the Court, many of them arising out of the XYZ controversy.

Smith, Jean Edward. *John Marshall: Definer of a Nation*. New York: Henry Holt & Co., 1996.

Smith offers a complete biography of John Marshall, following his life from beginnings in Virginia, as a soldier and statesman in the Revolution, as a lawyer and legislator, as a diplomat in France, as Secretary of State, and finally, as fourth Chief Justice of the Supreme Court. Smith seems to take the opinion that Marshall was the most important Justice in the history of the Court, attributing its role as a dominant force in American politics to him. Smith also refers to Marshall as a force in shaping the Constitution and the American democratic system as evidenced by Smith quoting Felix Frankfurter (an Associate Justice) that Marshall's "distinction as a great statesman and as a judge...the only judge who has that distinction."

White, G. Edward. "Review: Reassessing John Marshall." *The William and Mary Quarterly* 58, no. 3 (July 2001): 673-693.

White's article is structured as a review of Robarge's monograph and Hobson's editing of the *Papers of John Marshall*. While his comments about both are mostly praise, he does help draw connections that the authors may fail to make clear. White rightfully applauds Hobson and the other editors of John Marshall's, as the published volumes are a most valuable resource. White's most useful section is on Marshall's beliefs about the role of the chief justice to the associate justices, the government leaders, and the country as a whole.

Wood, Gordon S. *Empire of Liberty: A History of the Early Republic, 1789-1815*. New York: Oxford University Press, 2009.

As part of the Oxford University series on American history, Wood's monograph does not solely focus on Marshall. However, Wood covers the few volatile decades, from 1789 to 1815, that transformed America from floundering republic to established democracy. Incidentally, Marshall was most active as American statesman and Chief Justice during these years. Wood does offer a deep look at the role of the French Revolution in American politics, as well as John Marshall's rise to power, always keeping in mind the larger forces at work. Wood's expertise is essential in providing necessary background information for the study of this period in American history.

Ziesche, Philipp. *Cosmopolitan Patriots: Americans in Paris in the Age of Revolution*.
Charlottesville, VA: University of Virginia Press, 2010.

In Ziesche's first book, he aims to examine the development of the practice of nation-building, as seen in both the American and French Revolutions. He discusses American diplomats in Paris, through the writings of Gouverneur Morris, Thomas Jefferson, Thomas Paine, Joel Barlow, and other cosmopolites, as a way of presenting the very different ways the United States and France cultivated national identities post-revolution. As editor of the *Papers of Benjamin Franklin* at Yale University, Ziesche is well-qualified to publish in this area of early American diplomacy. Ziesche's over-arching theme is to show how Americans have historically found their political system to be relevant and appropriate for countries all over the world, as Marshall unquestionably did, and places this idea in the context of these Revolutions and the ideological writings surrounding them.