To Be Continued

On June 19, 2001, Mr. Schmeiser appealed from the judgment at the Federal Court of Appeals. As we can read in the Notice of Appeal, his appeal will be heard by the Court at a time and place which will be decided by the Judicial Administrator. Unless the Court decides otherwise, the place of hearing will be as requested by the appellants. The appellants request that this appeal be heard in Saskatoon, Saskatchewan.

[1] Canola is a kind of a rape seed.

[2] *RWDSMU v. Dolphin Delivery Ltd.*, (1986) 2 S.C.R. 573, pp. 593-604, 33 D.L.R. (4th), *City of Mascouche v. Houle et al.* (1999), 179 D.L.R. (4th) 90 (Que. C.A.).

[3] We need to add that the gene itself was not invented by Monsanto. Inventing new genes is far beyond anyone's capabilities. Monsanto only inserted known gene into the genomic structure of canola.

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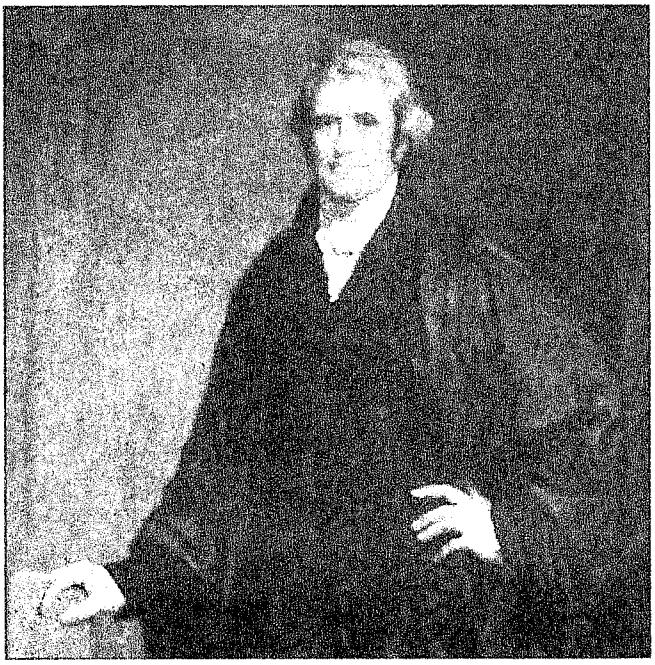
Marbury v. Madison

The Birth of Judicial Review in the USA

Michal Bobek

The power of judicial review upon the acts of other branches of government is nowadays understood as an indispensable component of modern constitutional theory. It entrusts the "least dangerous branch" of the government[1] with the power to examine acts of the executive or legislative branches regarding their conformity with the constitution and to declare them void if found inconsistent. The impact of this prerogative is immense.[2] We will take a further look at the establishment of this principle in the United States in the case of *Marbury v. Madison*.[3] First, it is essential to examine the setting of the case in its historical and political background. Second, the judgment itself will be discussed in depth followed by a historical evaluation of its importance. Finally, the impact of the decision on the American constitutional system will be addressed.



John Marshall (1755 - 1838)

Historical and Political Background

We find ourselves in the autumn of 1800. The Federalist Party, which was in control of the national government since the adoption of the **U. S. Constitution**, was defeated by the Republicans. Although the Federalists were facing the end of their era of power, the Federalist administration headed by president Adams remained in office until the end of their term on March 4, 1801.[4]

Being afraid of loss of their political influence, the Federalists decided to create a fortress for Federalist principles against those "dangerous radicals-freethinkers in matter of religion, friends of French revolution,"[5] which would last for a long time following their departure from power. Accordingly, the Federalist-controlled Congress passed in February 1801 the **Judiciary Act of 1801**, which gave president Adams, *inter alia*, the power to nominate 16 new federal judges. Moreover, two weeks later, Congress passed an act providing that the President might appoint for the District of Columbia as many justices of the peace as he thought necessary.

A busy two weeks followed in the Adams *"lame duck"* administration.[6] President Adams filled these newly created vacancies with loyal Federalists. These appointees received their confirmation only two days before Jefferson was to take office and thus became known as *"midnight judges."*[7] Federalists justified these appointments on the grounds that

the expanding nation required a larger judiciary. "Jefferson, however, understandably saw matters differently. 'The Federalists, defeated at the polls, have retired into the Judiciary' he fumed, 'and for that barricade... hope to batter down all the bulwarks of Republicanism.'"[8]

Among the judicial appointments made by Adams in the closing weeks of his administration was one for John Marshall, a leading figure in the Federalist Party, as the fourth Chief Justice of the United States. Only a month remained, at that time, until Jefferson would take the office and, at President Adams' request, Marshall continued to serve as Adams' Secretary of State for the rest of Adams' term.

The task of signing the commissions of the new judges kept President Adams and his Secretary of State busy long into the very night before Jefferson's inauguration. After the Senate's approval of the last group of judicial appointments on March 2, Marshall was hard at work signing and sealing this last batch of judicial commissions. After finishing his work, he mistakenly left some of them on his desk.

On the next day, as the newly inaugurated President Jefferson surveyed his office, he discovered several undelivered commissions lying on the desk. No one knows what happened with these appointments, but they were never delivered. The new President Jefferson, through his Secretary of State, James Madison, refused to deliver the remaining commissions and the President chose to treat these appointments as a "nullity." As a result of mounting hostility to the Judiciary, and especially towards the Supreme Court, Congress - now Republican - abolished the June and December (1802) terms of the Supreme Court's sitting and for that reason, the *Marbury* case didn't appear in the Court before February 1803.

Setting of the Case

William Marbury was one of those justices of the peace appointed by Adams to a judgeship in the District of Columbia who had failed to receive his commission. He brought suit against the new Secretary of State, James Madison, for delivery of his commission by filing an *original action*[9] in the Supreme Court seeking a *writ of mandamus*[10] to Madison to compel delivery. The right to issue such a writ had been conferred upon the Court by a provision of the **Judiciary Act of 1789**.

The Court faced a dilemma: if it granted Marbury his writ, the order would probably be disregarded because President Jefferson made fairly clear that he had no intention of delivering the commission, even if the Court ordered him to do so. But if Marshall bowed to the reality and the political situation and refused the writ, he would be seen as a coward among the Republicans. Other problem, which may raise doubts in the *Marbury* decision, is Marshall's obvious personal involvement in the controversy. He was the person who signed and sealed the commissions. Therefore, it was partially his fault that the delivery was not made. Should not Marshall, on behalf of a fair process, have disqualified himself from participation in the decision?

Under such problematic circumstances, Chief Justice Marshall delivered the opinion of the Supreme Court in *Marbury v. Madison* on February 24, 1803. Some sources call his decision a "masterful sense of strategy."[11] We will question this later on. "However, Marshall was able to establish the claim to judicial authority without taking actions, which would provoke political reprisals against the Supreme Court."[12]

Opinion of the Court

Marshall began the opinion by framing the case into three issues:

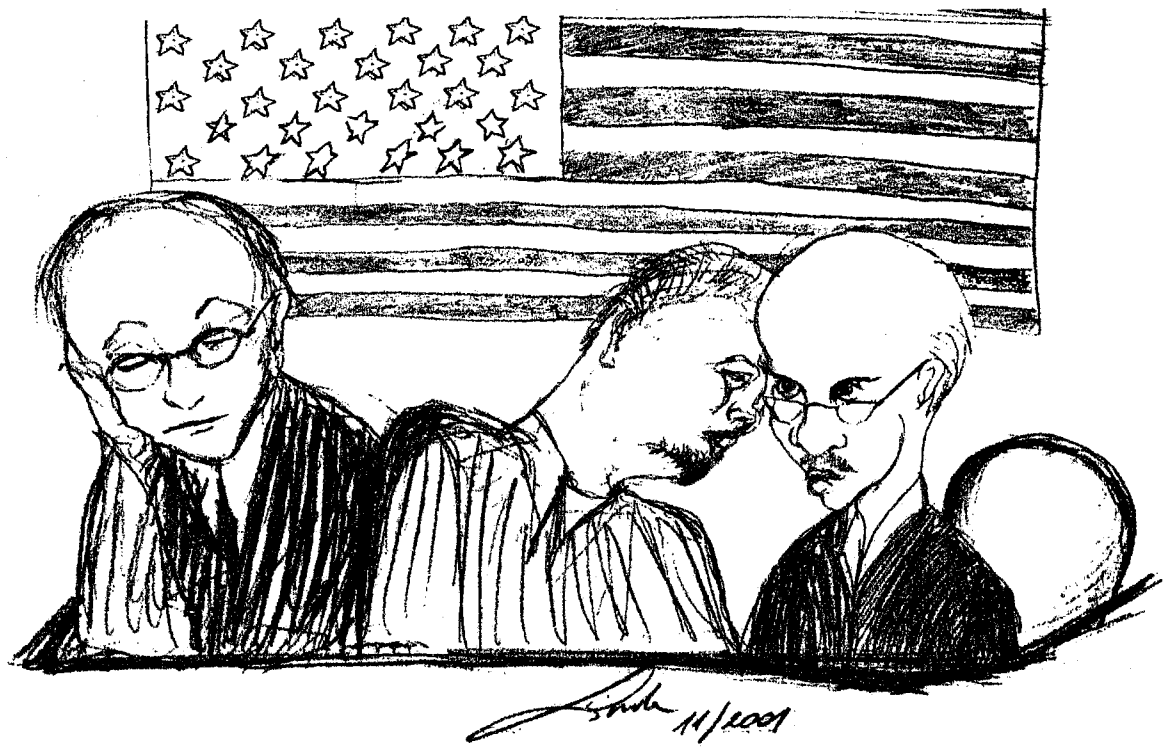
(1) whether Marbury had a right to the commission;
(2) whether the laws of the country established a remedy for the deprivation of that right; and
(3) whether a *mandamus* could be issued from the Supreme Court.

Regarding the first question, Marshall found that *"when the president has signed a commission, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state."*[13] Despite the following non-delivery of the commission, *"Mr. Marbury was vested with an irrevocable right to his office, which is protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of vested legal rights."*

Concerning the second question, the Court found that the very essence of civil liberty required a legal remedy for a legal wrong. Simply put, every right has to have a remedy or there is no point in having that right. Since the government of the United States is one of laws and not of men it must grant a remedy for violation of vested legal rights. Furthermore, Marshall had drawn a distinction between legal and political acts of the executive. Marshall noted that there would be no judicial remedy for a wrong that was political or in the exercise of which the president is to use his own discretion. But where individual rights depended on a duty established by law, there was a remedy that could be judicially enforced to protect the injured individual.

To the final point, whether the *mandamus* against the executive should be issued in this particular case, the court held that it could not do so. The very eloquence of the *Marbury* judgment and its political wisdom rests in the following, prima facie step aside. Marshall made reference to a conflict between the Court's statutory and constitutional original jurisdiction. The point is simple: Article III, Section 2 of the **U.S. Constitution** gives to the Court original jurisdiction in "cases affecting ambassadors, other public ministers, and consuls" and cases "involving the separate states." Section 13 of the **Judiciary Act of 1789** considerably enlarges the powers of the Supreme Court in its original jurisdiction. It gives it, *inter alia*, the power to try the case of Mr. Marbury.[14]

Marshall interpreted the Article III of the **Constitution** strictly, as fixing exclusively and enumeratively the original



"Do you ever have one of those days when everything seems unconstitutional?"

jurisdiction of the Supreme Court, saying that *"...affirmative words are often, in their interpretation, negative of other objects than those affirmed. The authority, therefore... to issue writs of mandamus to public officers appears not to be warranted by the Constitution..."* So construed, Marshall found a clear conflict between a provision of the **Constitution** and the **Judiciary Act of 1789**. Further inquiries led Marshall to deliberation about whether an act, repugnant to the **Constitution,** could really become the law of the land.

The basis for his further ruling was the concept that the people of the nation had the right to establish binding principles on the government, which have the character of enforceable law. In Marshall's opinion they had two choices in establishing their type of government. They might have either chosen a government provided with general powers, or to create one of defined and limited powers.[15] *"The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"* Marshall didn't find any middle category between those types of government.

This conclusion led, in Marshall's opinion, to only two choices: either declare the **Constitution** *"a superior paramount law"*, or allow the legislature unlimited power in the creation and passage of laws. If we accept the latter choice, then *"written constitutions are absurd attempts."* Marshall found the former choice the more desirable considering the fact that the nation had sought to establish a written constitution with fundamental principles to bind the government in the future. Therefore, Marshall held that any act of the legislature repugnant to the **Constitution** is void.[16]

In the rest of the opinion, Marshall asserted his basis for judicial review of the constitutionality of the acts of the federal legislature. Marshall declared that *"[i]t is emphatically the province and duty of the judicial department to say what law is."* Marshall continued, *"...the courts are to regard the Constitution and the Constitution is superior to any ordinary act of legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."*

Although Mr. Marbury's *writ of mandamus* had to be rejected on the grounds that the Court lacked jurisdiction under Article III of the **U.S. Constitution**, to the extent that Section 13 of the **Judiciary Act of 1789** was contrary to the **Constitution** it was rejected by the Court.[17]

The Impact of *Marbury* Decision

Despite its great importance, Marshall's decision caused little stir at that time.[18] One of the reasons may be that although the *Marbury* case is often schematically presented as the founding stone, the idea of judicial review wasn't such an astonishing one at the time of John Marshall. Legal scholarship has traced four main sources of this concept[19] which may have influenced Chief Justice Marshall in framing his reasoning in *Marbury*. We will briefly mention the main ones.

There is, however, no certainty which of them was the genuine source of ideas for Marshall, since he did not make one single reference in his reasoning.

The first source may be the English legal influence. The British Parliament, being the imperial Parliament vis-à-vis the colonial (American) legislatures, remained the power that kept the colonies within the bounds of their founding charters.[20] All colonial legislation had to be submitted to England for acceptance or rejection - on the basis of the *ultra vires* doctrine.[21] Rejection (exercised by the Privy Council) made the colonial legislation void.

The second stream of historical inquiry leads us to the conviction mostly favored by American legal scholars. Since the **U. S. Constitution** is, strangely enough, commonly regarded as a masterpiece of legal drafting, great attention is paid to the intent of its framers. The evidenced statements of the framers at the Constitutional Convention led to the conviction that "the framers must have intended to create a new form of judicial review under the constitution."[22]

Third, a reference to the **Federalist papers** is often made. As argued by Hamilton, the American **U. S. Constitution** is by its very nature a limited one. "...Every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."[23]

Fourth and finally, the actual situation in the state courts before and shortly after the *Marbury* decision shows that judicial review on the state level was no foreign concept.[24] It may be argued that with *Marbury* a mere elevation of the principle on the federal level occurred.

Marshall's decision that the **Constitution** forbad the Court to issue a *writ of mandamus* would have pacified the Republicans had he not gone clearly beyond the necessary limits of this particular case. Although not fully relevant to the case, Marshall pointed out that Marbury was entitled to his commission and that the executive would had been subject to a *mandamus* if the case had been started in the proper court. In addition, he openly criticized the administration for not delivering the commission. In the stormy reaction of the Republicans, the judicial review aspect of the decision escaped attack, thus tipping the balance of powers between the judiciary branch vis-à-vis the other branches by granting to the judiciary the right to restrain the work of the other branches. As pointed out by Robert McClonsky, "Marbury's holding that Congress could not constitutionally expand the Supreme Court's jurisdiction put the Court in the delightful position ... of rejecting and assuming power in a single breath."[25]

Final Remarks

There are many parts of Marshall's decision that may be criticized. This criticisms, unfortunately, are beyond the scope of this paper. The most serious, however, is worth mentioning. It appears to be the simple observation, which becomes obvious while reading the reasoning in *Marbury* that the basis on which Marshall builds up his reasoning is a simple bundle of assertions and statements regarding the nature of the **Constitution.** Moreover, the assertions do not inexorably lead to the conclusion Marshall draws from them. Does the assertion, that the people have established a government with limited powers necessarily mean they established a single document to control the actions of their own democratic process indefinitely? Does a written constitution mean that the judicature is the sole chosen interpreter of it? It is unclear where Marshall obtains his authority for such an interpretation of the judiciary's role in the relatively new American democracy. Is such an interpretation ultimately binding on other branches of the government?[26]

Marshall's decision should be regarded as one of choice. In the world of law, every lawyer arrives at a legal crossroad from time to time where different directions can be taken, all of them based on sound legal reasoning although using different sets of values. When once one is taken by many, subsequent usage of the road turns it into the main highway, ignoring the fact that there were other paths now invisible and covered with weed. And if the lawyer in question happens to be the fourth Chief Justice of the United States, his choice moves the whole nation. As argued eloquently by Justice Frankfurter, "The courage of *Marbury v. Madison* is not minimized by suggesting that its reasoning is not impeccable and that its conclusions ... not inevitable. I venture to say this but fully aware that, since Marshall's time and largely, I suspect, through the momentum of experience which he initiated, his conclusions in *Marbury v. Madison* has been deemed by great English speaking Courts as indispensable, implied characteristics of a written Constitution."[27]

The principle of judicial review has shaped the law and policies in the U.S. in a unique way. It allowed the Supreme Court to enter the world of politics and transform itself from the already mentioned "least dangerous branch" into a real player in the American government. There were plenty of occasions in which a Court's ruling, based on the ratio in *Marbury*, shaped the nation such as in *Roe v. Wade*,[28] *Brown v. Board of Education of Topeca*,[29] and *McCulloh v. State of Maryland*.[30]

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1 In: Hamilton, A., The Federalist No. 78 (On The Judiciary Department).

2 It is definitely not by chance that every respectable treatise on the American Constitution starts with the origins of the judicial review - i.e. with the case *Marbury v. Madison*. See i.a. Tribe, American Constitutional Law; Nowak, Constitutional Law et al.

3 5 U.S. (1 Cranch) 137, 2 L.ED. 60 (1830).

4 The *"lame duck"* (see infra) or *"presidential"* amendment of the U.S. Constitution - the XX Amendment - was passed in 1933.

5 In: McKenna, The Drama of Democracy, p. 326.

6 According to McKenna: The Drama of Democracy, p. 326, the Adams' administration was called *"lame duck"* because it was *mortally wounded but still flying.* Mortally wounded by the lost in the presidential election, where it was made clear it is over, but still flying - having nominally the power.

7 In: Dowling, Cases and Materials on Constitutional Law, p. 42.

8 In: Davidson et al.: Nation of Nations, p. 305 and 306.

[9] I.e. addressing the Supreme Court of the U.S. as the *court of the first instance*, as opposed to an *appellate action*.

[10] Since the common law lawyers need something to earn their money with, it is a well-established custom to use as many as possible legal terms in Latin (with, however, English pronunciation - i.e. no Latin in fact) to hide the true meaning of the often simple terms. A *writ of mandamus* is simply a court's order to a public officer to take a specific action.

[11] As e.g. McClonsky, The American Supreme Court, 1960, p. 40: "The decision is a masterwork of indirection, a brilliant example of Marshall's capacity to side-step danger while seeming court to it, to advance in one direction while his opponents are looking in another.", In: Dowling, Cases and Materials on Constitutional Law, p. 44.

[12] In: Nowak, Constitutional Law, p. 3.

[13] All the following quotations in *italics* come from the electronic version of the court's judgment at: http://supct.law.cornell.edu/supct/cases/historic.htm.

[14] As it provided for original actions in the Supreme Court for writs of mandamus to *all officers* holding office under the authority of the United States.

[15] Cf. with Hamilton's Federalist No. 78, supra.

[16] It may be argued that at this point, Marshall's reliance on the classical French doctrine of Abbé Sieyèse of the *pouvoir constituant* and *pouvoir constitué* being distinct categories becomes obvious. It is not surprising if we are aware of the historical background and the thus following departure from the British constitutional principles (i.e. the Sovereignty of Parliament).

[17] One should not be mistaken at this point as regards the effect of a judgement of unconstitutionality by a court of the United States, which is different from the Czech one. The Supreme Court of the United States has no power to revoke an Act passed by the Congress. Its judgement on constitutionality is binding only *inter partes* and *erga omnes* is valid as a mere precedent. Compare the Czech Constitutional Court Act (No. 182/1993 coll. of laws) with e.g. Tribe, American Constitutional Law, p. 27 f.

[18] In: McKenna, The Drama of Democracy, p.323.

[19] In: Nowak, Constitutional Law, p. 11 f.

[20] Basically the same approach Britain applied to all its colonies, thus restricting the doctrine of Parliamentary Sovereignty exclusively to the Westminster Parliament. See e.g. *Manuel and Others v. Attorney General* (1982) 3 All ER 822, *Blackburn v. Attorney General* (1971) 2 All ER 1380 or any English textbook on the British Constitution (e.g. Wade, Bradley, Constitutional and Administrative Law, 11th Ed., Longman, 1993; Barnett, H., Constitutional and Administrative Law, 2nd Ed., Cavendish Publishing Ltd., 1998 etc.).

[21] A widely elaborated doctrine, which is the foundation of the today's judicial review (largely administrative) in the United Kingdom (*Ultra vires* = beyond, outside the scope of the conferred powers). Further see e.g. Craig, P.P., Administrative Law, 3rd Ed., Sweet & Maxwell, 1994, or textbooks mentioned supra in fn No. 20.

[22] In: Nowak, Constitutional Law, p. 12.

[23] In: Hamilton, The Federalist No. 78.

[24] See i.a. *Holmes v. Walton*, 4 Am. Hist. Rev. 456 (1899) - a New Jersey case, where a statute providing for different jury setting than the state's constitution was invalidated, *Trevett v. Weeden 2* Chandler's Crim. Tr. 269 (1844) - Rhode Island, *Kamper v. Hawkins*, 1 Va.Cas. 20 (1793).

[25] In: Tribe, American Constitutional Law, p. 26.

[26] For seriously discussed challenges to Marshall's judgment, please see: Nowak, Constitutional Law, p. 6; Tribe, American Constitulional Law, p. 23; Van Alslyne, A Critical Guide to Marbury v. Madison, Duke L.J. 1., 1969.

[27] In: Frankfurter, F., John Marshall and the Judicial Function, 69 Harv. L. Rev. 217, p. 219, 1955.

[28] 410 U.S. 113 (1973).

[29] 349 U.S. 294 (1955).

[30] 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819).

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