



THE SUPREME COURT  
HISTORICAL SOCIETY

# Quarterly

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## Society Reaches its Fortieth Anniversary

It was Chief Justice Warren E. Burger's vision of an historical society dedicated to the history and legacy of the Supreme Court of the United States that sparked the creation of the Supreme Court Historical Society. Chief Justice Burger realized that without a concerted effort many of the underlying stories and more ephemeral pieces of the Court's history would be lost to future generations. Such a loss would provide only a limited picture of the institution, and the individuals who were such an integral part of the Court.

In 1900, August G. Feather published a book called simply **The Supreme Court of the United States**. In the foreword, he made this comment: "Were the lives of the men [and now women] who gave dignity and importance to the Supreme Court of the United States, the highest court in American jurisprudence, through their great legal learning, judgment, sound wisdom, and long years of faithful and earnest labors, taken away from it, the history of that august

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Sketch artist Betty Wells captured a casual moment at the Annual Dinner in 1977. Among those pictured are, Chief Justice Burger on the left, with Mrs. Elizabeth Hughes Gossett, first President of the Society, just beyond him. Partially hidden behind the flowers is Mrs. Vera Burger.

## A Letter from the President



As we continue through the year marking four decades since the Society's founding, we will continue to look back at the history and development of this fine organization. The Society's incorporation on November 20, 1974, marked the culmination of three years of planning by an ad hoc committee of distinguished leaders and scholars appointed by Chief Justice Warren E. Burger.

Initial funding for operations was provided by a generous grant from the Morris and Gwendolyn Cafritz Foundation and the incorporators (Earl W. Kintner, Rowland Falconer Kirks and Alice L. O'Donnell—each discussed in my last column) hired the first Executive Director in February 1975. Retired Justice Tom C. Clark was named Chairman of the Board and Elizabeth Hughes Gossett became the first President. A public announcement of the formation of the Society appeared in the May 1975 issue of *The Third Branch*, the newsletter published by the Administrative Office of the United States Courts. This was followed in July 1975 by a press conference attended by reporters from the wire services and several national and local newspapers.

Many of the initial efforts concerned the acquisition of items of historical significance, as mentioned in the story that appears on page one of this Bulletin, so let me focus on our publications. They have always been an essential component of the Society's efforts. At the end of its first year of operation the Society published its first **Yearbook** containing selected, original articles on Supreme Court history. That periodical was expanded from one annual volume to three issues per year in 1990 and renamed the **Journal of Supreme Court History**. Through the years the articles published have covered a wide range of topics, including detailed studies of landmark cases, articles about the first women admitted to the Supreme Court Bar, accounts of the inner workings of the Court as related by people who worked there as clerks or career employees, and personal recollections of Justices by family members.

An article published in 1977 focused on the shooting of a David Terry, a former Chief Justice of the California Supreme Court, by a U.S. Marshal, David Neagle, who was accompanying U.S. Supreme Court Justice Stephen Field on Circuit duty. Terry was defending his wife, Sarah Althea Terry, in a protracted lawsuit which was finally appealed to the Ninth Circuit. Field, sitting as a Ninth Circuit judge, decided against Terry and held Terry in contempt for assaulting a Marshal when that decision was announced. That, alone, was notable since Terry and Field had been colleagues on the California Supreme Court years earlier, but that is the least of the story. Following all of this, the

Terrys encountered Justice Field in a train depot, having issued numerous threats against him while both were cooling their heels in jail. Seeing Field, Terry determined to have satisfaction for his wife and, while it is not completely clear what happened, witnesses all agreed that Terry slapped Field across both cheeks. Marshal Neagle ordered Terry to stop; Terry reached for a weapon; the Marshal fired; and Terry fell to the floor dead. According to the annals of the U.S. Marshal's Service, this is the only death involving the protection of a Supreme Court Justice. But this is by no means all of the story, which contains elements of scandal (involving Mrs. Terry's previous liaison with a U.S. Senator from Nevada), intrigue and drama involving a questionable writ of habeas corpus that led to a case that wended its way up to the Supreme Court. I encourage you to look up the article on the Society's website where you will find the primary account in the 1977 Yearbook, *The Justice and the Lady*, and a follow-up in 1981, *The Justice and the Lady: A Postscript*.

There are many other fascinating articles that have been published in the **Yearbook/Journal**, which are available to you on the Society's website. They are replete with interesting, informative, and scholarly examinations of many elements of Supreme Court history. While I admit that most are not as swashbuckling as the story of Justice Field and the Terrys, every issue contains articles that examine fascinating topics and issues of continuing importance in the fabric of American jurisprudence.

The **Journal** series also contains the text not only of the Leon Silverman lectures but also the text of each of the Annual Lectures delivered in connection with the Society's Annual Meeting each year. It is my great pleasure to announce that our speaker at the June 1, 2015 at the Annual Meeting will be Brenda Hale, Baroness Hale of Richmond, who is the Deputy President of the Supreme Court of the United Kingdom, and the highest ranking female member of the Judiciary of the United Kingdom. Baroness Hale will speak about the Magna Carta and its significance to the legal traditions and systems of the United States and Great Britain. The Baroness joins a list of other distinguished speakers including Chief Justice Roberts; Associate Justice Scalia, who has spoken as the Annual Lecturer twice; Associate Justices Ginsburg, Breyer, Alito and Sotomayor; retired Justice Sandra Day O'Connor

As we continue to celebrate the accomplishments of the first forty years, I invite you to join me in supporting the current programs and activities. Much has been accomplished, but much remains to be done. Your assistance and support are vital to the continuing success.

Craig P. Joseph

body would be robbed of much of its interest and value. Without a study of these lives, apart from the history of the Court itself, no faithful or thorough conception can be had of the great work accomplished, the difficulties met and overcome in the opposition against making it an independent branch of the Government, and supreme over all others. . . . The men and their lives are so interwoven with the records of this great tribunal that they are inseparable. . . .”

Feather’s statement encapsulates the underlying philosophy on which the Society was created. This holistic approach to the study of Supreme Court history has inspired the activities and programs during the first forty years. These activities have included: the collection of artifacts and ephemera related to the Court and its history; the production of publications, seminars and lecture programs; teacher training programs aimed at providing increased understanding about the functioning of the Court and its effect on Americans; the commissioning and acquisition of portraits and busts of past members of the Court. All of these undertakings have provided rich avenues for preserving and fostering the history of the Court and have made the fruits of these efforts available to visitors to the Court, students, scholars and others who utilize the Society’s web site, and through attendance at programs and through distribution of publications.

The acquisition of tangible items related to the history of the Court has been the focus of activity since the Society was created. One early acquisition illustrates literally and figuratively, how this activity has enriched the Society’s efforts. That item is the beautiful drawing (on page one) of the 1977 Annual Dinner of the Society made by professional sketch artist Betty Wells. Mrs. Wells worked for NBC news and its affiliates for thirty years and often sketched the Justices and advocates during oral argument. Her work caught the attention of Chief Justice Burger who invited her to his Chambers to discuss her work. Their shared love of art and history led Burger to extend an invitation to Mrs. Wells to spend a year creating sketches of life at the Court behind the scenes. During that year she created some 200 sketches, including one of the Justices shaking hands in the Robing Room before taking the Bench. Mrs. Wells considered this unexpected opportunity to follow the operations of the Court as the most important work she did in her career. From the sketches made that year she created 60 paintings that provide fascinating images of a very human side of the Justices and provide the viewer a glimpse into the rarefied world that is



**One of the most beautiful acquisitions to the collection is a bronze bas relief of Justice Horace Gray and his wife. The item was acquired through the generosity of donations from Trustees of the Society. (Collection of the Supreme Court.)**

observed customarily in formal portraits.

Interestingly, the fortieth year of the Society corresponds with the 800<sup>th</sup> anniversary of Magna Carta. The confluence of these anniversaries comes together as we celebrate the Fortieth Annual Meeting on June 1, 2015 when the Baroness Hale of the Supreme Court of the United Kingdom will speak about Magna Carta and its influence on the development of the legal foundations of the United Kingdom and the United States. (*See the President’s letter for more detail.*)

Members can take great pride in the many accomplishments of the Society to date, even as we look forward to many more important projects and programs. The list of the programs for the upcoming months appears on the back page of this issue, providing a bridge from the past to the current projects and activities of the Society. The Society remains committed to the exploration of the history and heritage of the Supreme Court because there is valuable insight to be gained through that study. As Cicero observed history “. . . illumines reality, vitalizes memory, provides guidance in daily life and brings us tidings of antiquity.”

## Quarterly

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**Managing Editor Kathleen Shurtleff  
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Advisory Editor Frank D. Wagner**

# John Marshall and Thomas Jefferson

## By Dr. Jude M. Pfister\*

### Editor's Note:

On January 22, 2015, historian and curator Dr. Jude M. Pfister presented a talk titled "John Marshall on George Washington: A Political Discourse." The talk looked at how Marshall, as author of the *Life of Washington*, fought a protracted twenty-six year literary battle with Thomas Jefferson over the fate of not just George Washington's memory and legacy, but the fate of the course of the writing of American history. The setting for the evening talk was the atmospheric Large Dining Room at the John Marshall house in Richmond, Virginia (a must see national treasure for any member of the Supreme Court Historical Society—it is open to the public and operated by Preservation Virginia).

eighteenth century Colonial America, but not everyone was backwoods. The Marshall's were backwoods. The Jefferson's were wealthier; and Jefferson was so far advanced intellectually he made the brilliant Marshall look average. Jefferson graduated (1760-1762) William & Mary a top scholar—having completed his four year program in only two years.

Jefferson spent five years (1762-1767) after William & Mary with George Wythe at his home studying law and visiting the Governor's palace in Williamsburg for concerts (many of which he performed in) and soaking up the enlightened discussion of highly learned and worldly men. Marshall did none of this. By contrast, he attended William & Mary for a



A panoramic view of the parlor in the John Marshall home in Richmond, Virginia. (Photo Dr. Jude Pfister)

Tonight's talk can be called "John Marshall on George Washington—A Political Discourse". Naturally, a discourse generally involves two sides. However, the two sides dealing with Marshall and Washington also involved Thomas Jefferson. There was no greater discourse on George Washington than that John Marshall had with Thomas Jefferson—even though the two never communicated about it. This was not a traditional discourse. It manifested itself through the printed word as we will see.

The acrimony between Thomas Jefferson and John Marshall is well known. By 1800, they had already experienced a long history of tension. Essentially, they differed politically, socially, and intellectually. Not to put too fine a point on it, but most agree Jefferson's animosity for Marshall far outweighed Marshall's for Jefferson. As far as Marshall was concerned, they differed politically, but they could still tolerate one another—usually. They were after all, related, but we know all too well relations don't always see eye-to-eye either.

Some of the differences between the two were rooted in family circumstances. The Marshalls were more country, backwoods even. Just about everyone was country in

few months (May-July 1780); and this time constituted his total exposure to George Wythe, who was teaching law at William & Mary at the time, rather than privately in his home as with Thomas Jefferson. On the personal side, Marshall married the daughter of the woman who had declined Jefferson's advances years before; Jefferson appreciated fine wine, fine dining, fine music, fine architecture, Marshall was happy with the modern equivalent of a hot dog and beer. (He alluded to this in a letter to Charles Cotesworth Pickney in Paris—the hot dog and beer part are exaggerated for affect.) Marshall had a long marriage and produced a large number of offspring, many of who survived him. Jefferson's wife by contrast died very young and many of his children predeceased him. Jefferson was captivated by France, Marshall too, but to a much lesser extent. Marshall was a hero soldier during the Revolution. Jefferson was not so much of a hero (although he was the principal author of the Declaration of Independence—a fact which Marshall buried in a footnote in the *Life of Washington*). In fact, if Marshall had one item with which he judged his distant relative it was over their respective roles during the War. So, condense these feelings and viewpoints (birth, education, and wealth), and more not

mentioned, and by 1800 you have two men who were quite cautious of one another. And, just for good measure, throw in George Washington, who lobbied his good friend John Marshall to run for congress in 1798 thereby bringing him into the federal government where he would serve until his death.

What I thought we could look at is one aspect of that struggle between the two men, Thomas Jefferson and John Marshall, which spilled out from that ball of coalescing grudges and misunderstandings, rather than from the typical perspective of politics. That factors into the story, but let's look at their differences through the prism of publishing and writing as it related to the George Washington memory in the American mind and how their discourse consumed both men for over a quarter of a century.

The new century dawned on January 1, 1800. John Marshall was a Congressman from Virginia—a position, as mentioned, George Washington had encouraged him to seek. John Adams was President. Thomas Jefferson was Vice-President. Remember, Jefferson was Vice-President because he had polled second to John Adams in 1796. And, John Marshall's great friend and George's nephew Bushrod Washington was in his second term on the United States Supreme Court.

1800 would prove a very busy year for Marshall. Marshall's wife Polly gave birth to their son James Keith Marshall in February. Meanwhile, John would go from being a Congressman, to Secretary of State on May 12 (having declined the post of Secretary of War) to arriving with the government at its new permanent home in the District of Columbia in June 1800. Later in November, the presidential election resulted in an electoral tie between Vice-President Thomas Jefferson and Aaron Burr. Toward the end of the year, Chief Justice Oliver Ellsworth resigned in mid-December, leaving a vacancy that President John Adams hoped to fill with former Chief Justice John Jay. (Adams knew by December 1800 that he had lost a second term and wanted to fill the vacancy at the court before March of 1801 when he left office.) Marshall may or may not have had a sense that Adams would nominate him to the Court in the new year when it became clear John Jay was not interested. (Marshall wrote a letter on December 18, 1800, to Charles Cotesworth Pickney, that he expected Jay to decline the offer and for Adams to appoint the senior associate justice—William Cushing—as chief.) Still, there is one more item to squeeze into that year—the first appearance in a letter of a name that Marshall would come to know for the foreseeable future—Caleb P. Wayne. The letter, written October 25, 1800, is the first surviving one from Marshall to Wayne indicating Marshall was about to enter upon a new phase of life as a writer. The letter simply says that Marshall had forwarded to Bushrod Washington, Wayne's letter to Marshall—clearly pertaining to a publishing venture involving the George Washington papers which Bushrod now had possession of

after he received them as a bequest from his Uncle George. What Marshall and Wayne were waiting to hear, was whether Bushrod would agree to allow Marshall complete access to his uncle's papers for the purpose of writing a biography. The news Marshall was waiting for arrived on December 12, 1800, in a letter from Tobias Lear indicating Bushrod Washington had granted full access to John Marshall. Tobias Lear, you might recall, was George Washington's personal secretary off and on for many years, especially at the end in 1799. In his role, Lear knew more about President Washington's papers than anyone other than the President himself.

George Washington died on December 14, 1799. His death sent an unofficial message that American history and writing had entered a new era. From December 14th onward, he would be referred to in the past tense. George Washington's death was a gift in an odd way. It allowed for him to be written about in a way that was not possible while he was living. This had enormous consequences for the historical narrative of the American story which was still trying to find itself at that time.

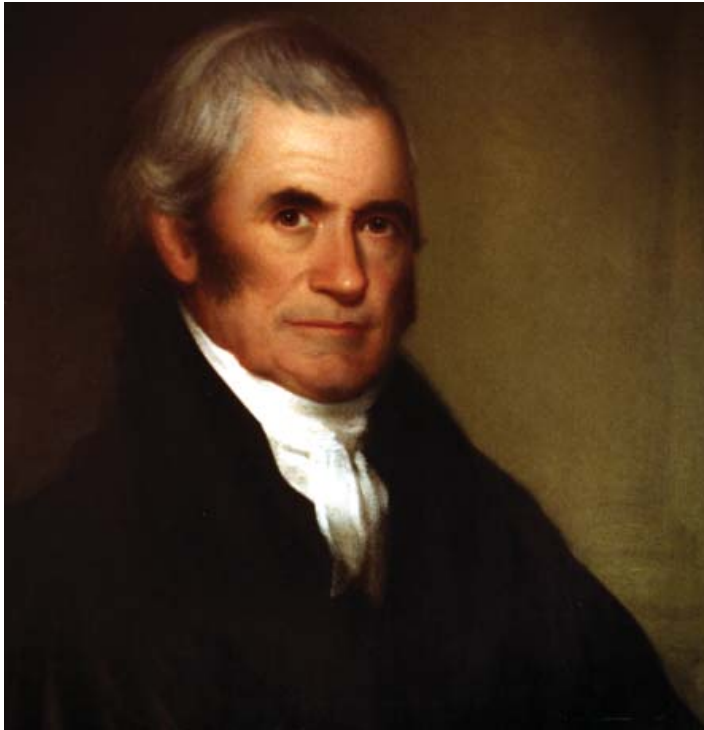
It was widely expected even before he died that an "authorized" biography of George Washington would be written and he himself understood this and was protective of his papers and manuscripts he kept at Mount Vernon. Mount Vernon was stuffed with trunks, boxes, and bundles of all types and anyone who undertook to research that material had quite a task before them. Lear himself was for a time a candidate, but sadly he was dealing with bankruptcy and was unable to participate. Bushrod was a good choice, but he was already working on a publishing venture (*Reports of Cases in the Court of Appeals of Virginia*) and had poor eyesight. That left John Marshall of the original three possible candidates. More than likely the overall plan of a biography was Bushrod's, with some possible input from his Aunt Martha—who was comfortable with all three candidates handling her husband's legacy. The sequence of events leading to the biography happened in quick succession after Washington's death over the course of less than a year. So, overlay the biography plan timeline during the year 1800 with everything else I already mentioned for the year 1800 in Marshall's life, and you can imagine his probable angst for much of the year. And to top everything off, in early 1801, Jefferson and Marshall assume the lead role in two of the three branches of government.

Marshall began work on the *Life of Washington* in the spring of 1801, the same time he started his new job as Chief Justice and Jefferson his new job as President. Bushrod and Marshall (working together) had planned on the entire work (five volumes) being finished by the end of 1802. Needless to say, this was not the case. Delays only multiplied upon delays. Marshall had more than a fulltime job as Chief Justice (with *Marbury v. Madison*, the impeachment of Justice Chase, and

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“John Marshall ...” Continued from page 5

the Burr treason trial, (all three highly charged politically) among many others), plus he had to deal with home matters, his wife, and his expanding family. In a case of gross over-optimism, publisher C.P. Wayne inadvertently went so far as to say in the subscription notice sent through the mail that the work was already well advanced—indicating to subscribers that they would not have to wait long for delivery. No doubt he was trying to increase sales. However, this was a very unfortunate move by Wayne. In reality, the first volume wasn’t ready until the end of 1803, a year after the *whole set* was to have been completed. Volumes II and



Collection of the Supreme Court

**John Marshall was chosen by the Washington family to be the official biographer of George Washington. His interpretation of history was at odds with that of his famous cousin Thomas Jefferson and it was the source of contention between them throughout their lives.**

III were not finished until the summer of 1804, and volume IV in February 1805. Marshall finished volume V in July 1806 and it was published in the spring of 1807. Volume I of Marshall’s *Life* covered the Colonial period of American history and it didn’t even mention George Washington until the very end. Volumes II, III, and IV looked at the War, while leaving volume V for everything else. This left little room for analysis and as one critic noted, “...it is feared that, as an historian, he [Marshall] will add nothing to our literary reputation as a nation.” Marshall had his supporters too: William Johnson, later an Associate Justice, wrote a review of volume 1 and concluded:

“...whoever expects to see in a work thus rapidly written every sentence highly polished, who looks,

in every page, for the splendid ornament of Gibbon, or the continued elegance of Hume, may not have their expectations answered, but it has nevertheless, conspicuous merit. The style is chaste, energetic, and elevated....”

In all, Marshall spent six agonizing years of work on the first edition—years that he may very well have questioned the wisdom of committing to. He endured errors, criticisms, delays, and constant work. There were reputations at stake; there was the failure Marshall felt at not doing justice to his revered friends and colleagues, George Washington, Bushrod Washington, and Martha too. Finally, there was the embarrassment Marshall felt, imagining Jefferson somehow thinking himself victorious against him (Marshall) and the biography. Why would Marshall feel that way about Jefferson anyway—especially in terms of this book? That was the essence of the discourse that would involve these men till they died.

Turning to Thomas Jefferson:

By the late 1770s, Jefferson was writing enthusiastically about preserving America’s story—much of which he was helping to create at the time. Jefferson encouraged early writers such as Ebenezer Hazard and Jeremy Belknap. Early on, Jefferson saw a “social utility” to history (which immediately put the genre at odds with objective research). Think about the Declaration of Independence which is part historical treatise and part propaganda. Jefferson’s brilliant “Summary View of the Rights of British America” is fashioned almost entirely out of a historical argument. Jefferson would spend nearly fifty years until his death in 1826 toggling between a type of subjective history (what he blamed Marshall for) and objective history—more of what we tend to recognize today.

When Thomas Jefferson learned of his cousin’s plan for the *Life of Washington*, before Marshall’s first volume was published (Jefferson was a subscriber by the way) Jefferson in 1802 (May 3<sup>rd</sup>) contacted the well-known poet Joel Barlow. He wrote to Barlow that the biography was being written “...principally with a view to electioneering purposes.” In fact, when President Jefferson learned about the proposed biography, he was so convinced that Marshall was trying to impact the 1804 election that he gathered his papers during his time as Secretary of State in the President Washington administration to mount a defense. They were never needed.

Jefferson specifically sought out Barlow (author of the long, nationalistic, Virgilian-type poem *Vision of Columbus* published in 1787 and its successor *Columbiad* in 1807). Before his death in 1812 Barlow was shamelessly courted by Jefferson to write a counter-balance history to Marshall’s *Life*. In fact, in 1811, Jefferson, fed up with Barlow’s endless delay’s (he spent most of his life revising the *Vision*), wrote to him in exasperation, asking “What is to become of our past Revolutionary history? Of the antidotes of truth to the misrepresentations of Marshall?” This, I would suggest, is

discourse.

Barlow was not the only anti-Marshall author Jefferson sought out. Another was the Irish rebel John Daly Burk. Jefferson actually became very close to Burk and allowed him access to his precious library at Monticello. Burk had published the well-received *History of Virginia* beginning in 1804 with Jefferson's help. After that success, Jefferson turned up the pressure on Burk to do what Barlow wasn't—write an anti-Marshall history. Sadly, Burk's fiery temper led to a duel in 1808 in which he was killed. Barlow and Burk were just two of the writers approached by Jefferson to counter the Marshall biography during the last 26 years of his life. Marshall too would be consumed until the end of his life with new editions, the second appearing in the early 1830s. He also published a separate history of the Colonies in 1824 which was essentially volume 1 of the *Life*. (It was this volume which Associate Justice Joseph Story encouraged the historian Jared Sparks to review favorably in the *North American Review* if he [Sparks] wished to obtain Marshall's help in his editing project of Washington's papers.) In fact, in the last years of his life Marshall created a one-volume edition for use in schools, which Liberty Fund publishers has in print today. Think about that. Here we have two of the most important men in early America slugging out their differences over a book, over a discourse about George Washington; John Marshall constantly updating, Thomas Jefferson constantly trying to counter it.

What was it that made that book such a flashpoint? In a word—or name—George Washington. Why? Remember I mentioned his death was a boon for history writers. George Washington was our only President not formally affiliated with a political party. Yet, no writing about George Washington could escape the bias or political persuasion of the writer—even now. George Washington's image was so powerful, everyone wanted to claim him. Yet, no one could. Neither Jefferson nor Marshall realized this. They both went to their graves thinking they owned the George Washington memory, and thus the discourse.

In 1823, three years before his own death, Jefferson wrote a long and well-thought out letter to Supreme Court Associate Justice William Johnson. The letter contains a lot to unpack especially as it relates to Jefferson's views of Marshall and history and memory. It should be kept in mind that Johnson did dabble in writing and was interested in political party history. Johnson was also a Jefferson appointee and a stalwart Republican. Johnson however showed little interest in taking up Jefferson's offer against his boss John Marshall. Let me share some of Jefferson's more illuminating comments from his letter to Justice Johnson (and, bear in mind this was twenty years after the Federalists mounted their last serious campaign in 1804):

“our opponents [Federalists] are far ahead of us in preparations for placing their cause favorably before

posterity. Yet I hope from some of them the escape of precious truths, in angry explosions or effusions of vanity, ...will betray the genuine monarchism of their principles.”

Jefferson continued:

“What a treasure will be found in General Washington's cabinet, when it shall pass into the hands of as candid a friend to truth as he was himself! When no longer...it shall be open to the high priests of federalism only, and garbled to say so much, and no more, as suits their views.”

These were quite serious indictments. “Jefferson's whole sorry twenty-year episode of trying to counter Marshall's history shows Jefferson in an unflattering light. Starting in 1804, and lasting until his death in 1826, he seethed over the existence of Marshall's history.” Other historians, such as David Ramsay, Mercy Otis Warren, Hannah Adams, were seemingly free of Jefferson's antagonism.

It's fair to say the entire *Life of Washington* saga was a stain on Jefferson. It showed him to be petty, petulant, and pedantic. Marshall in no way influenced any election through his writing. It was Jefferson's feelings towards his cousin Marshall, and his misunderstanding of George Washington in the America memory, that set him on his Quixotic ruminations to destroy Marshall's windmill. Jefferson felt that an inspirational story about George Washington would energize the Federalists for the 1804 election. It didn't. What Jefferson, Marshall, and many others didn't quite realize yet, was that George Washington was above politics. Or, perhaps he was apolitical by this point. George Washington's memory was morphing into something that politics could not touch. And, both Jefferson and Marshall missed this in their twenty-five year discourse. One who didn't miss this was Parson Mason Weems, the creator of such stories as the wooden teeth, the prayer at Valley Forge, the cherry tree, and many others. But, that, as they say, is another story.

Note: George Washington's papers would continue to be a matter of interest for Supreme Court Justices for the foreseeable future. John Marshall, Bushrod Washington, William Johnson, and Joseph Story, would all continue their involvement with the historian Jared Sparks during the time that he researched and published the first comprehensive collection of the writings of George Washington in the mid-1830s. That story is told more fully in Dr. Pfister's book, *America Writes Its History 1650-1850: The Formation of a National Narrative* (McFarland), from which this talk on John Marshall was adapted.

*\*Dr. Jude Pfister is the chief of cultural resources at the Morristown National Historical Park. He oversees the library, and archival and museum programs. He has worked in a variety of curatorial settings impacting many of our nation's important historic sites and collections.*

# Justice Gabriel Duvall

By James B. O'Hara\*

## Editor's Note:

*On Saturday October 18, 2014, Professor O'Hara spoke at a reunion of the Society of Mareen Duvall Descendants. The Society was founded in 1927, and its original documents outlined the goals of the Society which were to ". . . unite in common bond the descendants of Mareen Duvall for the study of Duvall history, to preserve and restore Duvall relics, to preserve the traditions of our Country and to support the Constitution of the United States." The article below is derived from the talk Prof. O'Hara delivered at the reunion.*

The Society of Mareen Duvall Descendants is truly unique. In an age when most people could find it difficult to name their great grandmother--all of you can trace your lineage to a common 17<sup>th</sup> century ancestor. And all of you can claim quite confidently that you are cousins, not only of each other, but also of two Presidents, a Vice President, a Supreme Court Justice, the Duchess of Windsor and even a King!

Our topic today is Supreme Court Justice Gabriel Duvall who served on the Court for twenty-three years. But since his appointment was by James Madison over 200 years ago, it is not surprising that his name is forgotten now except to legal historians. Indeed, about 25 years ago, a distinguished law professor wrote an article in a learned journal claiming that Justice Duvall was the most insignificant of all of the Justices of the Court.

The author based his argument on the fact that Justice Duvall served over 23 years, and in all those years wrote fewer than 20 opinions. In his later years, he suffered from severe deafness which caused lawyers to complain that the poor Justice was unable to follow oral argument. But the characterization of insignificance is really "unfair when his entire career is considered.

It is somewhat ironic that Mareen Duvall, a French Huguenot, settled in Maryland a Catholic and predominantly English colony, since it is likely that he left France to escape religious persecution. However, Puritan New England was well known for its intolerance to those not of that faith, so

perhaps Maryland provided a more welcoming and tolerant location. Whatever the reason, the Duvall family eventually prospered and thrived in Maryland, became prominent citizens and acquired large tracts of land near what would become the new nation's Capital City. Among the many descendants of Mareen Duvall, there are many named Gabriel. This Gabriel, the Justice, was born December 6, 1752, the son of Benjamin Duvall and his wife Susannah Tyler. Gabriel was thus a grandson of the common ancestor Mareen.

While little is known about the Justice's formal education, he was probably tutored by local clergy who often supplemented their income by teaching the children of landed gentry. As there was no French Protestant community in Maryland, subsequent members of the Duvall family became members of the Anglican Church.

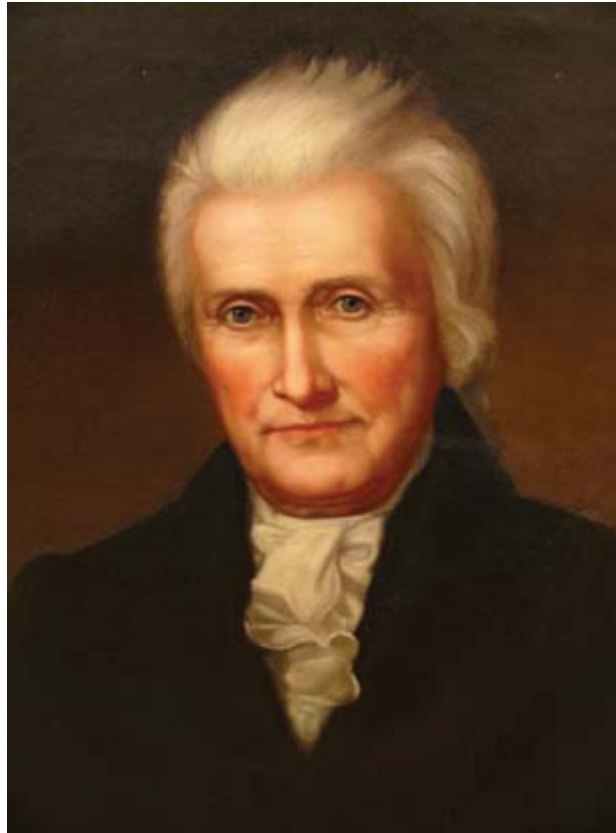
Gabriel was a product of an era of political unrest and upheaval. He served in the State militia during the Revolutionary War with at least two or more of his brothers. We know that two brothers were killed during the hostilities. Toward the end of the Revolutionary War while

preparing for a legal career he was able to serve as a clerk or in some other minor role for a number of governmental assemblies.

In an era before law schools were common, he embarked on a legal career with study under a lawyer in Annapolis, although history does not record his mentor. His efforts were rewarded when he was admitted to practice in 1778. For the next ten years he practiced law not only near his home in Prince Georges County, but also in nearby Anne Arundel County.

His public service began in 1787 when he was elected a member of the House of Delegates representing Annapolis, a position which he held until 1793. The records of the Maryland State Archives also indicate that he was a recorder at Annapolis from 1788 to 1801. In 1794 he was appointed a major in the Anne Arundel County militia, a part-time position.

In November 1794 he was elected to fill a vacancy in the



Collection of the Supreme Court.

**Gabriel Duvall had a long and distinguished career as a public servant which culminated in his appointment to the Supreme Court of the United States in 1811.**



U.S. House of Representatives and served there for a short time until 1796. This election indicates that Duvall was now recognized by his peers as an important figure in the practice of law, an understanding confirmed when he became a judge of the General Court of Maryland, serving from 1796 to 1802. Interestingly, he succeeded Samuel Chase who had been appointed to the Supreme Court of the United States, perhaps a foreshadowing of his own future. The General Court of Maryland was at the time both an appeals and a trial court and it had a varied and interesting caseload. Duvall heard cases in Annapolis and on the Eastern Shore of Maryland. Roger B. Taney, a young Maryland lawyer, argued his first case before Judge Duvall. At the end of his service on the Supreme Court, Duvall agreed to retire when he learned that President Andrew Jackson intended to nominate that same Roger B. Taney as an Associate Justice.

In 1787, Duvall was chosen to represent Maryland at the Constitutional Convention in Philadelphia, but he declined to serve. The reason may have been personal because on July 24, while the Convention was still in progress, he married Mary Brice, the daughter of a wealthy Annapolis family. Three years after they were married, Mary succumbed to complications shortly after the birth of their only child, a son. Five years following her death, he married again. His second wife, Jane Gibbon, was from Philadelphia and that marriage endured 40 years. There is no record of children from that marriage.

During his brief service in the House of Representatives, Duvall met several men who figured prominently in his subsequent career. The two most important were James Madison and Albert Gallatin. In 1801, Thomas Jefferson began his first term as President. He appointed Madison to be his Secretary of State, and Gallatin became Secretary of the Treasury. Gabriel Duvall was chosen to serve in a position called "First Controller of the Treasury." This was a highly important responsibility, which involved day-to-day management of the department. He held that job until 1811, when Madison nominated him to replace fellow Marylander Samuel Chase on the Supreme Court. He was quickly confirmed by voice vote.

The Supreme Court in 1811 was vastly different from the Court today. In its earliest days, the Justices did not live in Washington. Duvall lived at Marietta, his still-standing home in Prince Georges County. But much of the time, Justices rode circuit. That is, they travelled through the country presiding over cases at the Federal District Court level.

Some of the Justices actually thought of this "riding circuit" as more important than their relatively brief gatherings each year to hear appeals at the Supreme Court level. This is why I believe it is unfair to characterize Duvall, or any of the Justices of this era, as unimportant.

The fact that Duvall was chosen to fill important positions by both Thomas Jefferson and James Madison is in itself ample proof of his intellectual gifts. His earlier

responsibilities as a Judge in Maryland, his competent management of the Treasury Department for more than 10 years, the speed of his confirmation, all indicate that he was a well respected and admired public servant.

During his time on the Court, John Marshall was Chief Justice, and wrote a disproportionate percentage of opinions. Duvall himself authored only a few opinions for the Court, but many of his fellow Associate Justices also wrote only a few opinions. For that portion of the year that the Justices actually resided in Washington, they lived together in boarding houses. Each night, at dinner, they discussed cases. Those conversations helped to provide the logic and approach of written opinions. It is simply impossible from this removed vantage point to measure the individual contributions of the Justices to the shape and substance of those decisions, but it is also naïve to discount them as being meaningless. While most of the opinions of the period came from the pen of Marshall, it is not unreasonable to speculate that the substance of those decisions was the result of the collective collaboration of all members of the Court who allowed him to write the opinions to lend them more weight and importance. Perhaps arguments put forth by other



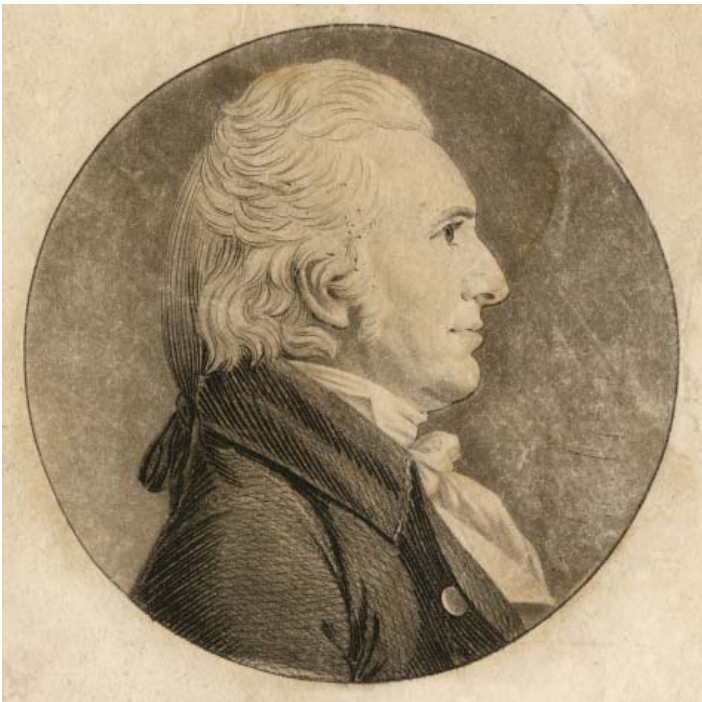
M-NCPPC/Steve Abramowitz

**Marietta, built circa 1813, was the home of Associate Justice Gabriel Duvall. Duvall continued to live in the house throughout the years of his service on the Supreme Court. It is listed on the National Register of Historic Places.**

members of the Court actually formed the basis of many of those great decisions, but there is no way to know. Certainly Duvall and the other Associate Justices played an integral part in the landmark decisions that were handed down in that period.

Records show that Duvall dissented twice. He dissented without comment or separate opinion in the famous *Dartmouth* case. In those early days, it was not uncommon to dissent without opinion. One author observed that he is best known for his support of the rights of slaves. Writing for the Court in the case of *Le Grand v. Darnall* (1829), Duvall

*Continued on Page 10*



LOC PGA - St. Memin, no. 163

Engraving of Associate Justice Gabriel Duvall by Charles B.J.F. Saint-Memin, 1806.

relied on his familiarity with Maryland state law. The case involved the sale of property by Nicholas Darnall, a former slave to LeGrand. Nicholas had received the property from his father, Bennet Darnall, a free man who had also provided for his manumission following Bennet's death. Nicholas had assumed ownership of the property following Bennet's death and subsequently contracted to sell the land to Le Grand. The sale was made and all was well until someone suggested that Nicholas was not really a free man, and therefore did not have right to own or sell the land. Duvall wrote that "[t]here is one question only to be discussed. If the appellee, at the time of the death of the testator, was entitled to his freedom under the will and deeds of manumission before mentioned, then his title to the land sold was unquestionable." Duvall went on to write that "the Court of Appeals of Maryland has

decided that a devise of property, real or personal, by a master to his slave entitles the slave to his freedom by necessary implication. This Court entertains the same opinion."

In his only written dissent, the case of *Mim Queen and Child v. Hepburn* (1812), Duvall objected to the exclusion of hearsay evidence in determining the verdict. The hearsay evidence substantiated the claim of freedom of Queen and her child.

Justices of Duvall's era served in a time period which has been severely neglected by historians. To underscore that point I note that there are no substantive biographies of Justices Livingston, Todd, Thompson, Trimble or Baldwin. There is, of course, also no full-length biography of Justice Duvall.

Gabriel Duvall resigned from the Court on January 14, 1835. As alluded to earlier in the article, he decided to resign when he was assured that President Jackson would nominate his fellow Marylander, Roger B. Taney, someone he considered to be of similar political inclination, as Associate Justice. He resigned, but Taney's nomination was not confirmed by the Senate. However, after a change in the political makeup of the Senate, Taney was nominated and confirmed to serve as Chief Justice of the United States. Duvall returned to Marietta following his resignation from the Bench and lived another nine years until his death on March 6, 1844. He was 92 years old.

Justice Duvall was not a great Justice, but he was an honorable, competent, good man. His service on the Court contributed to the stability that was so necessary to ensure the development and continuance of the Court in those early years. Members of the Duvall Family can be proud of their forebear Justice Gabriel Duvall.

*\*James O'Hara is a frequent contributor to the Quarterly for which he is also an advisory editor. Dr. O'Hara is a Trustee of the Society and Chair of the Library Committee. A specialist in the history of the Supreme Court of the United States in general, he specializes in the backgrounds of the Justices and literature about the Court.*

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*Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences* Lecture by Professor Kevin J. McMahon, Trinity College

### 40th Annual Lecture

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*Magna Carta and its significance to the legal traditions of the United Kingdom and the United States of America.*  
Lecture By The Right Honourable The Baroness Brenda Hale, Deputy President of the Supreme Court of the United Kingdom.

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**May 13, 2015**

*The Forgotten History of the Reconstruction Amendments,* Pamela Brandwien, Professor of Political Science at the University of Michigan

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**October 28, 2015**

*The Supreme Court and the Slaughterhouse Cases,* Randy E. Barnett, Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center.