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## Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace

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## ARTICLES

### MARBURY'S TRAVAIL: FEDERALIST POLITICS AND WILLIAM MARBURY'S APPOINTMENT AS JUSTICE OF THE PEACE\*

*David F. Forte\*\**

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\* The author certifies that, to the best of his ability and belief, each citation to unpublished manuscript sources accurately reflects the information or proposition asserted in the text.

\*\* Professor of Law, Cleveland State University. A.B., Harvard University; M.A., Manchester University; Ph.D., University of Toronto; J.D., Columbia University. After four years of research in research libraries throughout the northeast and middle Atlantic states, it is difficult for me to thank the dozens of people who personally took an interest in this work and gave so much of their expertise to its completion. I apologize for the inevitable omissions that follow.

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Of all the disappointed office seekers in American history, only William Marbury obtained the honor of having his portrait hang in the chambers of the United States Supreme Court. In the Justices' small dining room designated by Chief Justice Warren Burger as the "the John Marshall room," Chief Justice Burger placed the portraits of Marbury and James Madison, Marbury's legal adversary, as if the two men, in partnership, had given the Chief Justice his commission to practice judicial review.

The portraits hang side by side, their styles, frames, and expressions in marked incongruity with one another. Marbury, painted it is thought by Rembrandt Peale, a cousin of his wife's, sits corpulently self-satisfied.<sup>1</sup> He returns the viewer's gaze pleasantly, comfortable in the social and financial status he has achieved. Compared to the soft, almost sepia tones of Marbury's portrait, the smaller Madison painting by James Frothingham has sharper contrasts. Madison looks past the observer, with an intelligent, almost combative intensity.

Both portraits reflect aspects of their subjects' characters. Madison was indeed the driving force of the Republican party, and would have been its standard-bearer had not Jefferson been held in such awe by his followers, Madison included. More than any man, Madison made the Republican party a reality, organizing it as the opposition in Congress, and giving Jefferson's party a structure and rhetorical energy that eventually carried it to victory.<sup>2</sup>

In contrast, William Marbury sought the security and the social prestige that came with wealth. His portrait belies the drive and financial acumen that brought him worldly success. He had been trained in private and governmental finance, and had become used to demanding payments and obligations on behalf of the state. He helped his friends, and they helped him, but Marbury possessed a reputation for probity. Hundreds of thousands of dollars passed through his hands in all of his offices of public trust, with little suggestion that he had diverted any money to his own pocket.

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1. Guy Castle, *Blue Plains and Bellevue: Two Early Plantations of the Washington Area*, 63-65 REC. OF THE COLUM. HIST. SOC'Y 25 (1966); see Rembrandt Peale, 1778-1860, A Life in the Arts 36 (1985) (Exhibition Catalogue, Historical Society of Pennsylvania). A portrait of Chief Justice Marshall by Rembrandt Peale also hangs in the Supreme Court, but in a different room.

2. See generally NOBLE E. CUNNINGHAM, JR., THE JEFFERSONIAN REPUBLICANS: THE FORMATION OF PARTY ORGANIZATION, 1789-1801 (1957) (discussing Madison's role in the Republican Party).

The story behind the case of *Marbury v. Madison*<sup>3</sup> often begins with John Adams' appointment of Marbury as justice of the peace and President Jefferson's decision to withhold delivery of Marbury's commission a few days after Jefferson's inauguration in 1801.<sup>4</sup> But Jefferson's order is, in fact, only the middle of the story. This Article tells the first half. *Marbury v. Madison* has frequently been described in terms of a political contest between the Jeffersonians and the Federalists.<sup>5</sup> What has not yet been taken account of, however, is the political contest within the Federalist party that gave William Marbury his erstwhile opportunity. This Article seeks to fill that historical lacuna as well.

The two titular protagonists to the dispute, William Marbury and James Madison, could not have imagined that their original contretemps would ever find its way to litigation, let alone develop mythic significance as the foundation stone of judicial review.<sup>6</sup> Ironically, Madison did not arrive in Washington until long after President Jefferson withheld Marbury's commission.<sup>7</sup> For his part, Marbury was busy building an extraordinarily successful and lucrative career in finance in Maryland. At the time, he had been living in Georgetown for two years. In Maryland tradition, an appointment as justice of the peace was an essential emblem of a man's membership in the political and financial elite. Jefferson's denial of Marbury's appointment was a direct blow to twenty years of work and ambition.

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3. 5 U.S. (1 Cranch) 137 (1803).

4. This is the version nearly all law students receive. See, e.g., JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 12 (4th ed. 1992); PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 77 (3d ed. 1992); WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 25 (9th ed. 1993); DAVID CRUMP, CASES AND MATERIALS ON CONSTITUTIONAL LAW 2 (2d ed. 1993); DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 61-62 (1993); GERALD GUNTHER, CONSTITUTIONAL LAW 10 (12th ed. 1991); WILLIAM B. LOCKART ET AL., THE AMERICAN CONSTITUTION: CASES—COMMENTS—QUESTIONS 1 (7th ed. 1991).

5. See, e.g., ROBERT G. McCLOSKEY, THE AMERICAN SUPREME COURT 24-26 (2d ed. 1994).

6. For a definitive study of how the case of *Marbury v. Madison* grew to be an historical icon, see ROBERT L. CLINTON, *Marbury v. Madison* AND JUDICIAL REVIEW (1989). For an analysis of how that opinion illuminates the political debate of the time as to the role of courts in a constitutional order, see James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992). But see Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329 (defending the interpretation of the case by Robert McCloskey).

7. Madison had to remain in Virginia to help settle his father's estate. The senior Madison died on February 27, 1801, only a few days before Jefferson's inauguration. Letter from James Madison to James Monroe (Feb. 28, 1801), in MADISON PAPERS (Library of Congress, Manuscript Division).

This Article describes how Marbury, the youngest son of an impoverished remnant of a well-known family, elbowed his way to wealth and influence among the Maryland gentry. Further, this Article illuminates Marbury's choice between the two wings of the Federalist party in Maryland—the Hamiltonian elite and the Adams' loyalists—and how Marbury's partisan service brought him to a position earning Thomas Jefferson's disdain and rebuff. In the end, Marbury's appointment and rejection derived from the very different characters of John Adams and Thomas Jefferson.

Part I describes Marbury's youth, his rise to power, and his first contact with the Baltimore financial clique, led by Samuel Chase, that would become his enemy. Part II delineates how Marbury used his considerable financial influence and political position to champion the interests of Maryland's downstate Federalists against the Baltimore elite that became beholden to Alexander Hamilton. Part III details the financial scandals that beset Marbury just before Thomas Jefferson took office. Part IV looks into Marbury's public association with those Maryland Federalists seeking to prevent Jefferson from becoming President. Finally, Part V reveals how John Adams appointed Marbury and his colleagues, why Jefferson rejected them, and the tactics that the rushed Jefferson used to appoint his own favorites.

Before beginning, however, it would be appropriate to describe the office and its powers that William Marbury so very much desired.

On Friday, February 27, 1801, John Adams signed a bill for the governance of the District of Columbia that authorized, among other offices, five-year appointments of justices of the peace for the District's two counties, Alexandria County and Washington County.<sup>8</sup> Adams had but five days left in his administration to make the appointments.

Secretary of State John Marshall had primary responsibility for gathering the names of the nominees. He relied upon Leven Powell, a Federalist congressman from Virginia, and his close friend, who had served with him in the House of Representatives, for many of the names for the Alexandria contingent.<sup>9</sup> Marshall turned also to Secretary of the Navy Benjamin Stoddert, another close friend, fellow Cabinet member and Adams supporter, for nominees for Washington County.<sup>10</sup> Marbury's name was

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8. An Act concerning the District of Columbia, ch. XV, § 11, 2 Stat. 103, 107 (1801).

9. Letter from Leven Powell to John Marshall (Feb. 2, 1801), in ADAMS PAPERS (unpublished manuscript, Massachusetts Historical Society).

10. There is no extant letter from Stoddert to Marshall regarding the Washington County appointments. But inasmuch as Stoddert and Marshall were close colleagues, because Stoddert knew the important persons to nominate on the Maryland side of the Potomac, was assertive on such matters and knew all those who eventually were appointed, it is

included in this latter group. Some of the names, personal friends of Adams, almost certainly came from the President himself. Party allegiance mattered for some of the appointments, but contrary to incoming President Jefferson's assertion—and the presumption of some ever since—party loyalty did not figure in the choice of all the justices.<sup>11</sup> Indeed, some of Adams' appointees were prominent Republicans.

Over the weekend, the nominations for justices of the peace were completed, and on Monday, March 2, President Adams dispatched nominations to the Senate for twenty-three justices of the peace for Washington County, and nineteen for Alexandria County.<sup>12</sup> The Senate approved the nominations the following day, the last day of President Adams' administration.<sup>13</sup>

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a reasonable presumption that he supplied the names. Stoddert did write directly to Adams requesting that he appoint James L. Ligan, Collector of the Port of Georgetown, as marshal for the new district. Letter from Benjamin Stoddert to John Adams, in *ADAMS PAPERS* (unpublished manuscript, Massachusetts Historical Society). Adams made that appointment.

11. Donald Dewey makes the classic error assuming that party loyalty figured into the choice of all of the justices. See DONALD O. DEWEY, *MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND OF MARBURY V. MADISON* 76-77 (1977). Dewey also states inaccurately that the men Adams appointed were unknown or undistinguished. *Id.* at 77.

12. 1 WILHELMUS B. BRYAN, *A HISTORY OF THE NATIONAL CAPITAL* 402 (1914); *SENATE EXECUTIVE JOURNAL: EIGHTEENTH SESSION*, Mar. 2, 1801, at 388, reprinted in 5 *JOURNAL OF THE SENATE* 198 (Martin P. Claussen ed., 1977).

The men nominated for justice of the peace were:

The Hon. Thomas Sim Lee, the Hon. Tristram Dalton, the Hon. Benjamin Stoddert, the Hon. Uriah Forest, Daniel Carroll, John Mason, James Barry, Thomas Beall, William Thornton, Daniel Reintzell, Robert Brent, Thomas Peter, William Marberry [sic], Thomas Addison, John Laird, Richard Forest, Cornelius Cunningham, Marsham Waring, John Threlkeld, Lewis Deblois, William Hammond Dorsey, Joseph Sprigg Belt, Abraham Boyd, Esquires, to be Justices of the Peace for the County of Washington, in the District of Columbia.

William Fitzhugh, Robert Townsend Hooe, Richard Conway, Charles Alexander, George Gilpin, Francis Peyton, George Taylor, Dennis Ramsay, Simon Summers, John Potts, Jonah Thompson, William Harper, Jonathan Swift, Abraham Faw, Charles Alexander, Jr., John Herbert, Cuthbert Powell, Jacob Houghman, and Cleon Moore Esquires, to be Justices of the Peace for the County of Alexandria.

*Id.*

On the same day, Adams also nominated notary publics, registers of wills, and judges of the orphans' courts for each county as well as 15 men for military commissions, two surveyors, a collector and an attorney. *Id.* at 387-89.

13. BRYAN, *supra* note 12, at 402-03. That night, the President signed 68 civil and military commissions, already drawn up, at his residence, and returned them to the office of the Secretary of State where the seal of the United States was affixed. Each commission was then countersigned by Secretary of State John Marshall. The commissions remained that night in the offices of the Department of State. Some of them, including William Marbury's, never left the State Department.

Congress modeled the office of justice of the peace for the District of Columbia after Maryland's version of the position. From colonial times in Maryland, the judicial, executive, and legislative powers of the justice of the peace made that magistrate the primary political force in the community. As in England, the office of justice of the peace was reserved for "men of means and standing."<sup>14</sup> It was the most powerful public office in the lives of the common people. Normally held by men untrained in the law,<sup>15</sup> the justice of the peace was responsible for maintaining order in his community. He was the arresting and arraigning magistrate, and watcher over the morals of the community (drunkenness, gaming, adultery, price evasion, actions of slaves and indentured servants). He bound suspected ne'er-do-wells and required that they obtain sureties. He authenticated deeds and affidavits, and held and advertised lost property — generally horses and slaves. He raised the "hue and cry" against escaped prisoners, and suppressed public disorder of all sorts.<sup>16</sup>

The justices of the peace also staffed the county courts, typically sitting in groups of three or more, hearing grand jury presentments and major civil cases.<sup>17</sup> As the eighteenth century matured in Maryland, the power of the justices increased, both in terms of new criminal, slave, and tax statutes that they were called upon to enforce, and because in each county, some of the justices of the peace also operated as county commissioners or justices of the quorum, staffing the levy court, which was essentially the county legislature.<sup>18</sup> In 1801, Congress similarly authorized the new justices of the peace of the District of Columbia to sit *en banc* as the District's legislature.<sup>19</sup> William Marbury would have been one of those men.

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14. PETER C. HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 3 (1992).

15. It was not until 1786 that the Maryland legislature passed a resolution asking the Governor to appoint only the most fit men to the office. NORMAN K. RISJORD, *CHESAPEAKE POLITICS: 1781-1800*, at 188 (1978). *But see* HOFFER, *supra* note 14, at 27 (stating that justices of the peace "might be trained in the law").

16. *See generally* HOFFER, *supra* note 14, at 7-10 (discussing the role of justice of the peace).

17. *Id.* at 26-27.

18. BRYAN, *supra* note 12, at 285-86; *see, e.g.*, 1798 Md. Laws, Nov. Sess., ch. 34; 1794 Md. Laws, Nov. Sess., ch. 53. A session of the county court could be held only if four (or in some cases, three) justices were present, at least one of whom had to be a justice of the quorum. NEWTON D. MERENESS, *MARYLAND AS A PROPRIETARY PROVINCE* 232 (1901, reprint 1908); C. ASHLEY ELLEFSON, *THE COUNTY COURTS AND THE PROVINCIAL COURT IN MARYLAND, 1733-1763*, at 173-74 (1990).

19. An Act supplementary to the act entitled "An act concerning the District of Columbia," ch. XXIV, 2 Stat. 115 (1801).



## I. YOUTH AND PRIVATION

Although William Marbury had not reached the peak of his career in 1801 when President Adams appointed him as a justice of the peace, he was a long way towards it. He was thirty-eight years old at the time, born on November 7, 1762,<sup>20</sup> most likely on a rude tobacco plantation near the town of Piscataway, Maryland. He passed most of his childhood following his father, also named William, in the elder Marbury's fruitless quest for financial security.

The younger Marbury possessed an aggressive and uncompromising personality, one that bore him from near penury to great wealth. He did so despite the fact that it was a quarter past the hour of opportunity in every place he lived. Marbury spent most of his youth in Charles County, Maryland, just as it was beginning a two-century-long decline. He moved to Annapolis shortly after it lost its commercial prominence to Baltimore. He then moved to Georgetown, which was suffering not only from Baltimore's growing financial dominance, but also from Alexandria besting it as the Potomac's port of entry. In Georgetown, Marbury allied himself with the Federalists and the Adams Administration just as they were on the brink of final and irrevocable defeat. In the end, Marbury would even lose the suit for his withheld commission at the hands of his fellow Federalist, John Marshall.

Despite his poor choice of geographical sites, Marbury became rich and influential. Breaking from his family's tradition, William Marbury found success in the world of finance, not in farming, merchant trade, or even, until late in his career, in land speculation. Ultimately, Marbury's mastery of finance in Annapolis propelled him into prominence in the nation's new capital on the Potomac, where his alliance with the Georgetown and Annapolis merchants against the rising power of Baltimore cast his lot with men who were John Adams' greatest supporters.

William Marbury's respected family name and his character were bequeathed to him by Francis Marbury, who came to the tobacco province of Maryland sometime in the late 1680s while he was still in his 20s.<sup>21</sup>

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20. Mormon Genealogical Library, IGI P0249, U.S., Maryland Surnames; St. John's Church Register, Prince George's County, 144 [hereinafter St. John's Register]; Maryland State Archives, Annapolis; Peabody Room, Vertical File, William Marbury, Georgetown Public Library [hereinafter Peabody Room]. All documentary sources come from the Maryland State Archives in Annapolis, Maryland, unless otherwise noted.

21. Francis was born in either 1661 or 1662, according to his own conflicting testimony. See ELISE G. JOURDAN, *LAND RECORDS OF PRINCE GEORGE'S COUNTY, 1717 to 1726*, at 90, 97 (1991). Others place his birth date in 1663. MEREDITH B. COLKET, JR., *THE ENGLISH ANCESTRY OF ANNE MARBURY HUTCHINSON AND KATHERINE MARBURY SCOTT* 50 (1936).

Francis reached Maryland at a time when plentiful immigration to that province was falling off dramatically.<sup>22</sup> While other English immigrants were heading towards Pennsylvania or to the southern colonies, Francis Marbury struck for the economically troubled Chesapeake region. His gamble paid off and he prospered in the new world. Francis and his grandson, William, seem to have shared a similar drive. Ultimately, Francis achieved recognition and public office, including a position—like that his grandson aspired to achieve—as a justice at the county seat.<sup>23</sup> However, it was from his lands and plantations, rather than public office, that Francis obtained his wealth and distinction. Indeed, his status as a successful planter formed the basis of his rise to public offices.<sup>24</sup> When Francis Marbury established his holdings at the level just below the great proprietary estates, and gained the political recognition of an appointment as a justice at the county court, he had achieved nearly all to which a man of his era and locale could aspire. When he died in 1735, Francis Marbury divided his extensive estates, totalling more than 1,700 acres, among his large surviving family of children.<sup>25</sup>

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22. During the latter decades of the seventeenth century, more than one-third of all English immigrants to the new world went to the Chesapeake. The vast majority had been servants, seeking to work off their indentured status, and, with but an axe and hoe, to become landed yeomen producing tobacco for the English market. However, climate, disease, shortened lifespans, the relatively small population of women, and the resultant late marriages, as well as the physical demands of tobacco cultivation and falling tobacco prices, brought an end to that kind of society. AUBREY C. LAND, *COLONIAL MARYLAND: A HISTORY* 9-17 (1981); Russell R. Menard, *Immigrants and Their Increase: The Process of Population Growth in Early Colonial Maryland*, in *LAW, SOCIETY, AND POLITICS IN EARLY MARYLAND* 88, 94-95 (Aubrey C. Land et al. eds., 1977) [hereinafter *LAW, SOCIETY AND POLITICS*]. Thus, by the end of the century, while New England immigrants had quadrupled in number, the Chesapeake could count only 85,000 white settlers out of an estimated total migration of between 100,000 and 135,000. JOHN J. McCUSKER & RUSSELL R. MENARD, *THE ECONOMY OF BRITISH AMERICA, 1607-1689*, at 103, 136, 226, 228 (1985). The life expectancy of men in seventeenth century Maryland was 43 years. Lois G. Carr & Lorena S. Walsh, *The Planter's Wife: The Experience of White Women in Seventeenth-Century Maryland*, 34 *WM. & MARY Q.* 542, 542 (1977). For an account of the stagnation of the tobacco market, see McCUSKER & MENARD, *supra*, at 119-24.

23. Anne Arundel County Judgments, Marlboro Court, 1721-1722, at 212; see 2 LOIS G. CARR, *COUNTY GOVERNMENT IN MARYLAND: 1689-1709*, at 102 app. III (1987); LOUISE J. HIENTON, *PRINCE GEORGE'S HERITAGE: SIDELIGHTS ON THE EARLY HISTORY OF PRINCE GEORGE'S COUNTY, MARYLAND FROM 1669 TO 1800*, at 18, 123 (1972). He was also a land commissioner for Prince George's County and judge of a survey in Charles County. EFFIE GWYNN BOWIE, *ACROSS THE YEARS IN PRINCE GEORGE'S COUNTY* 549 (1947). When Prince George's County was detached from Charles County in 1696, Francis Malbury [sic] was appointed the first Constable for the Piscattaway Hundred. Court Records of Prince Georges County, Maryland: 1696-1699 (Joseph H. Smith & Philip A. Crowl eds.), in 9 *AMERICAN LEGAL RECORDS* 5 (1964).

24. See HIENTON, *supra* note 23, at 18-19.

25. 2 CARR, *supra* note 23, at 347 app. VI.

It was one thing for an ambitious planter to have achieved elite status. It was another for his family to maintain it.<sup>26</sup> All offspring of the landed gentry faced the task of sustaining the wealth in land bequeathed to them. That was no easy chore. Marital alliances were key stratagems, particularly for children whose properties became burdened with debt. As the eighteenth century progressed, land bequests were concentrated among a few sons to maintain sufficient acreage for viable plantations.<sup>27</sup> Offspring diversified into the merchant trade, grain farming, or simply emigrated to make up for the weakening base of tobacco.<sup>28</sup> The possibility of failure was always present, and failure did not mean merely a fall from the elite into the class of the landless freemen. Adjudged indebtedness brought debtor's prison and ignominy.<sup>29</sup>

As time passed, the Marbury landholdings were divided, sold and transferred. Some of the children expanded their properties while others did not. William Marbury, who was to be favored by President Adams, was the youngest son of the youngest son of Francis. When it came time for his portion, there were no lands left for him to inherit, and, indeed, records show that he inherited nothing, even of his father's moveable estate.<sup>30</sup> He would be forced to succeed by resourcefulness rather than by patrimony.

William Marbury was the son of William Marbury, the only surviving son of Francis Marbury and his second wife, Frances Heard.<sup>31</sup> The elder William was seventeen when his father left him with one-fifth remainder of the Marbury lands in 1735.<sup>32</sup> On that property, he and his wife raised

26. See ALLAN KULIKOFF, *TOBACCO AND SLAVES: THE DEVELOPMENT OF SOUTHERN CULTURES IN THE CHESAPEAKE, 1680-1800*, at 87 (1986) (noting the difficulty youths had in attaining the economic status of their fathers).

27. *Id.* at 200-01; Jean B. Lee, *Land and Labor: Parental Bequest Practices in Charles County, Maryland, 1732-1783*, in *COLONIAL CHESAPEAKE SOCIETY* 306, 316-18 (Lois G. Carr et al. eds., 1988).

28. See PAUL G. E. CLEMENS, *THE ATLANTIC ECONOMY AND COLONIAL MARYLAND'S EASTERN SHORE: FROM TOBACCO TO GRAIN* (1980). See generally Lois G. Carr, *Diversification in the Colonial Chesapeake: Somerset County, Maryland, in Comparative Perspective*, in *COLONIAL CHESAPEAKE SOCIETY*, *supra* note 27, at 342 (discussing the trend away from tobacco farming).

29. "No one's place in society was assured, nor was anyone's wealth safe from catastrophe." HOFFER, *supra* note 14, at 62.

30. Will of William Marbury [father of William Marbury], Charles County Wills, Liber A.K., No. 11, at 23, Dec. 25, 1789, proved Mar. 21, 1791.

31. His first wife, Mary Green, was the granddaughter of a previous Catholic governor of the province. BOWIE, *supra* note 23, at 549. He married Frances Heard the year after Mary Green's death in 1713. St. John's Register, *supra* note 20, at 144.

32. 7 Maryland Calendar Of Wills, 1732-1738, at 124 (1988).

and supported eleven children,<sup>33</sup> while pursuing the false promise of tobacco wealth. For the first fifty years of the eighteenth century, tobacco continued as the unprofitable staple. Tobacco agents from England monopolized trade and forced prices down. In addition, Britain restricted the available markets and imposed heavy duties on the crop. The combined policies stultified the province economically, while at the same time primitive tobacco planting methods exhausted the soil.<sup>34</sup> When Parliament passed the Townshend Acts and instituted duties on colonial goods in 1767, triggering a colonial boycott and embargo, the elder William Marbury's fortunes took a more serious turn.<sup>35</sup> In June of 1767, he sold the remainder of his lands,<sup>36</sup> leaving none of the extensive holdings Francis had accumulated to William Marbury or his issue.

When the Revolution came, all the Marbury men supported the cause. The elder William Marbury took the statutorily required oath of fidelity to the patriot side and his three oldest sons served in the Revolution. The young William, however, did not.<sup>37</sup> Economically, the elder Marbury's fortunes did not improve. So far as can be determined, he never became a landholder again and struggled along on leased acreage. The tobacco market never fully recovered. Overproduction in wheat and tobacco depressed those prices in the early 1780s.<sup>38</sup> With the severe winter of 1784-85, the collapse of the tobacco market prices in November, 1785, and the subsequent depression, the elder William was probably wiped out once

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33. Mormon Genealogical Library, International Genealogical Index P0249, U.S., Maryland Surnames; St. John's Register, *supra* note 20, at 143-44.

34. AVERY O. CRAVEN, SOIL EXHAUSTION AS A FACTOR IN THE AGRICULTURAL HISTORY OF VIRGINIA AND MARYLAND, 1606-1860, at 32-35, 51-52 (1926, 1965). There was a brief upturn in the 1740s. COLONIAL CHESAPEAKE SOCIETY, *supra* note 27, at 10. See generally JACOB M. PRICE, FRANCE AND THE CHESAPEAKE: A HISTORY OF THE FRENCH TOBACCO MONOPOLY, 1674-1791, AND OF ITS RELATIONSHIP TO THE BRITISH AND AMERICAN TOBACCO TRADES (1973).

35. As a result of the embargo, tobacco exports declined over the next three years. See Richard Walsh, *The Era of the Revolution*, in MARYLAND: A HISTORY 1632-1974, at 55, 81 (Richard Walsh & William L. Fox eds., 1974) [hereinafter MARYLAND: A HISTORY].

36. Prince George's County Land Records, Book BB, No. 2, at 61 (1767-1769). He briefly tried farming leased acreage in Virginia before returning to Maryland. Lease from Thomas Ludwell Lee (November 5, 1768) (Loudoun County, Virginia, Deed Book G, at 63-65 located in Leesburg, Virginia courthouse).

37. CALENDAR OF MARYLAND STATE PAPERS—EXECUTIVE MISCELLANEA, No. 5, 121 (1958). The oldest son, Joseph, had a distinguished record serving in the Maryland Line. RIEMAN STEUART, A HISTORY OF THE MARYLAND LINE IN THE REVOLUTIONARY WAR: 1775-1783, at 3, 15, 85 (1969). The next oldest, Francis Heard Marbury, became adjutant to the First Virginia State Regiment. JOHN H. GWATHMEY, HISTORICAL REGISTER OF VIRGINIANS IN THE REVOLUTION: SOLDIERS-SAILORS-MARINERS 1775-1783, at 498 (1938). Henry Marbury served in the Charles County militia. S. EUGENE CLEMENTS & F. EDWARD WRIGHT, MARYLAND MILITIA IN THE REVOLUTIONARY WAR 165 (1987).

38. L. MARX RENZULLI, JR., MARYLAND: THE FEDERALIST YEARS 21 (1972).

again.<sup>39</sup> He died a few years later, landless but possessing a modest estate.<sup>40</sup>

William Marbury grew up in those hard times, spending his young years on both sides of the Potomac in a disrupted, peripatetic childhood. He had seen his father fail at least twice in his attempt to build tobacco plantations. To prosper, the young William Marbury would have to look elsewhere, both in career and venue. The vagaries of tobacco farming, the intensity of the labor required, the quest for the security of land and for slaves to do the labor, and the frequency of economic depressions, one of the most severe occurring during William Marbury's early manhood, made the goal of survival through the individual accumulation of wealth palpably real to one growing up in that place and time. In contrast to the letters of Virginians, New Yorkers, and New Englanders of that era, the extant correspondence of William Marbury is devoid of personal gossip, philosophical observations, or even reports about the weather. The business of William Marbury's missives was business.

In 1781, at age 19, William Marbury began his career in Annapolis as a lowly clerk to Zephaniah Turner, the state's Auditor General.<sup>41</sup> A few years later, when Turner returned to Charles County as Tax Collector, Marbury followed. Marbury spent the decade of the 1780's as Deputy Tax Collector to Turner, to Turner's successor,<sup>42</sup> and in 1788, Marbury returned to Annapolis as deputy to William Campbell, the Tax Collector for Anne Arundel County.<sup>43</sup>

39. See RISJORD, *supra* note 15, at 161-66 (discussing the effects of the collapse in tobacco prices); Edward C. Papenfuse, *The Legislative Response to a Costly War: Fiscal Policy and Factional Politics in Maryland, 1777-1789*, in SOVEREIGN STATES IN AN AGE OF UNCERTAINTY 134, 139 (Ronald Hoffman & Peter J. Albert eds., 1981) (noting the difficulty in paying taxes because of the fall in tobacco prices); Walsh, *supra* note 35, at 134.

40. He gave "three negroes" and all his moveable estate to his wife Martha, and one negro girl to his daughter Sarah. Will of William Marbury, *supra* note 30.

41. 2 A BIOGRAPHICAL DICTIONARY OF THE MARYLAND STATE LEGISLATURE, 1635-1789, at 844-45 [hereinafter MARYLAND BIOGRAPHY]. For evidence of Marbury's employment by Turner, see his copy of a claim on the state treasury drawn from the claimant's daybook (Dec. 1, 1779). MARYLAND STATE PAPERS (Series A), (MdHR 6636-15-33, 1/7/4). Marbury also worked at odd jobs as a clerk for some merchants at the time. See Purchase by William Marberry [sic] of table linens and Queen's Ware from the brig Else Catarina (Oct. 28, 1783). 7 JOURNAL OF CLEMENT BIDDLE, THOMAS A. BIDDLE COLLECTION (Historical Society of Pennsylvania).

42. Turner's successor was Benjamin Cawood, future brother-in-law to William Marbury. List of Civil Officers in Maryland, 1777-1780, Liber C.O., No. 84, Film M1214 [hereinafter Civil List]. Marbury was associated with Cawood in a number of documents which leads to the inference that he was working for Cawood. For example, he formally represented Cawood in agreeing to forego interest due on a mortgage. Charles County Land Records, Liber D, No. 4, folio 29, Jan. 25, 1787.

43. 72 Archives of Maryland, JOURNAL AND CORRESPONDENCE OF THE COUNCIL OF MARYLAND (10), JOURNAL OF THE COUNCIL, 1789-1792, at 3-4 (Mar. 4, 1789) (1972)

While in Annapolis, Marbury first encountered the powerful Chase cabal, a group of prominent men seeking to turn the state's complex and inefficient method of finance to their advantage. The combine's leader was Samuel Chase, future associate justice of the United States Supreme Court, who in 1803, would help decide the fate of Marbury's appointment as justice of the peace. No man was more influential and more self-interested in Maryland politics than Samuel Chase.<sup>44</sup> In the early part of the 1780s, Chase, along with many other Marylanders, was facing financial adversity, and he sought to use his political influence to alleviate his distress.

In 1783, Maryland appointed Chase as its agent to try to recover the state's investment in the Bank of England, which its English trustees had withheld because of the Revolution. Chase needed a quick resolution of the dispute and the commission it promised. He failed in the attempt.<sup>45</sup> Chase, however, had other schemes afoot. One of his allies was Daniel of St. Thomas Jenifer, the Intendent of the Revenue.<sup>46</sup> Part of Jenifer's duty was to make sure the state collected the debts owed to it. But Chase, Jenifer, and another prominent Marylander, Luther Martin, combined on a scheme whereby valuable loyalist property could be purchased at a fraction of its value, delaying payment, and in effect, bilking the state. The maneuver was later exposed in a major scandal.<sup>47</sup>

Chase and Martin operated out of Baltimore, Maryland's boom town of the 1780s, which was seeking to wrest both economic dominance and the capital from Annapolis. Working in Annapolis, the young William Marbury may have become known to the Baltimore cabal's opponents, including men like General Uriah Forrest (later a mentor to Marbury). As head of the Commissioners for Confiscated Property, Forrest con-

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[hereinafter Archives of Maryland]. William Campbell was the son of Isaac Campbell, a Charles County school master who may have been William Marbury's teacher. See James F. & Jean H. Vivian, *The Reverend Isaac Campbell: An Anti-Lockean Whig*, 38 HIST. MAG. OF THE PROTESTANT EPISCOPAL CHURCH 71, 76 (1970) (discussing Isaac Campbell's involvement in Charles County education during the years 1774 to 1784). The evidence of Campbell's employment of Marbury lies in a receipt signed by Marbury in Annapolis on a note drawn on the Treasurer. Sheriffs and local tax collectors turned in their collections to the county tax collectors, often with endorsed notes from taxpayers. Maryland State Papers (Series A), Council to W.S.T., Order to pay Joseph Clark, Jan. 28, 1788, receipt by William Marbury, Sept. 19, 1788 (MdHR 6636-66-137, 1/8/4).

44. See RISJORD, *supra* note 15, at 75.

45. KATHRYN L. BEHRENS, *PAPER MONEY IN MARYLAND: 1727-1789*, at 83-93 (1923). The stock was eventually returned through the work of William Pinkney. *Id.* at 93.

46. Civil List, *supra* note 42.

47. FORREST McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC: 1776-1790*, at 161-69 (2d ed. 1979).

ducted his office honorably and was not a participant in Chase's ploy.<sup>48</sup> Chase and Martin also led the paper money faction in the state legislature and made strenuous efforts from 1785 to 1787 to have the state issue a major new emission of paper money, much to the annoyance of those, like Forrest and Marbury's boss, William Campbell, who were land speculators and holders of federal and state securities. Chase, a debtor approaching bankruptcy, was the most vigorous and prominent supporter of debt relief through paper money.<sup>49</sup> No other issue so polarized the state at the time and in the end, Chase failed here also.<sup>50</sup>

Because of the corruption in Jenifer's handling of his office, the Maryland Assembly did not reappoint him. Subsequently, he became the most prominent Maryland delegate to the Constitutional Convention in Philadelphia, where breaking with his erstwhile allies, Luther Martin and Samuel Chase, Jennifer worked for a strong national government with sufficient power to secure the financial strength of the nation.<sup>51</sup> Jenifer was the leading Maryland delegate solely because other more significant persons, like Charles Carroll, Chase's primary opponent, had to remain in Annapolis to fight Chase and his paper money schemes.<sup>52</sup> In 1788, Maryland's ratifying convention met in Annapolis and approved the new Constitution with Chase in vehement opposition.<sup>53</sup> There, William Marbury witnessed the triumph of the Federalists over Baltimore's anti-Federalist faction, and saw a new national government come into effect.

With a new Constitution and government in power, and the anti-Federalists defeated, Marbury's life changed. In Annapolis, William Campbell was appointed Agent for the State of Maryland, and in 1791, Campbell chose his former assistant, William Marbury, as his Deputy. Meanwhile, in Philadelphia, Secretary of the Treasury Alexander Hamilton induced the First Congress to have the new federal government assume the entire

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48. See *id.* at 161-62 (listing the members); MARYLAND STATE PAPERS, (Series A) (MdHR 6636-3-22, 1/8/1). Forrest resigned as Commissioner for the Preservation of Confiscated British Property in 1781. Letter from General Uriah Forrest to Governor Thomas Sim Lee (Jul. 8, 1781), in ETTING COLLECTION (Historical Society of Pennsylvania).

49. On this critical issue, Daniel of St. Thomas Jenifer broke with Chase. RENZULLI, *supra* note 38, at 54-55.

50. See RISJORD, *supra* note 15, at 169-72 (discussing the debate over paper money). See generally MELVIN YAZAWA, REPRESENTATIVE GOVERNMENT AND THE REVOLUTION: THE MARYLAND CONSTITUTIONAL CRISIS OF 1787 (1975). For a version describing the corrupt political maneuverings behind the debate, see McDONALD, *supra* note 47, at 169-71.

51. McDONALD, *supra* note 47, at 169-71.

52. See JANE S. ELSMERE, JUSTICE SAMUEL CHASE 30-31 (1st ed. 1980); RENZULLI, *supra* note 38, at 41; Philip A. Crowl, *Anti-Federalism in Maryland, 1787-1788*, 4 WM. & MARY Q. 446, 454 (1947).

53. RISJORD, *supra* note 15, at 283-93.

Revolutionary debt of the Continental and Confederation Congresses, and much more controversially, to assume the war debt of the states as well. Hamilton's plan represented a massive transfer of economic power from the states to the federal government. Congress agreed to accept all such debt certificates at face value and to exchange them for federal stock certificates, which paid up to six percent interest. Hamilton succeeded over the well-organized opposition of James Madison in Congress, but only after Hamilton agreed to a *quid pro quo* with Thomas Jefferson whereby Hamilton promised to support the establishment of the national capital on the Potomac.<sup>54</sup>

Although many states, including Maryland, initially opposed the assumption program, it would provide them with a firm source of income for a decade or more. In terms of federal debt alone, Maryland had sunk and therefore held some \$818,000 in federal securities while Maryland citizens retained approximately \$903,000 when Congress passed the funding bill.<sup>55</sup> In addition, Maryland citizens held extensive state debt securities while the state had already retired hundreds of thousands of dollars of her own debt.<sup>56</sup> For Marbury personally, Hamilton's success in Philadelphia provided him with power, wealth, and some extraordinarily influential friends. The bulk of the private holdings of debt securities were in the hands of but a few men, including William Campbell, Uriah Forrest, and Benjamin Stoddert.<sup>57</sup> They all became Marbury's allies.

The same year that he became Deputy Agent, Marbury made another important Federalist contact in James Lingan, from whom he purchased a handsome home in Annapolis.<sup>58</sup> Lingan, a hero of the Maryland Line who fought with Washington at the Battle of Long Island, was a prominent and wealthy Federalist. He held the lucrative and enviable position

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54. For a thorough analysis of the assumption debate, see E. JAMES FERGUSON, *THE POWER OF THE PURSE* 306-25 (1961). The assumption bill was finally approved on August 4, 1790. Ch. 34, 1 Stat. 138 (1790). For a description of the Hamilton/Jefferson compromise on the site of the capital, see Kenneth R. Bowling, Note, *Dinner at Jefferson's: A Note on Jacob E. Cooke's "The Compromise of 1790,"* 28 WM. & MARY Q. 629, 632-34 (1971). For the additional concession to the southern states of a favorable accounting of their war-time contributions, see FORREST McDONALD, *ALEXANDER HAMILTON, A BIOGRAPHY* 181-85 (1979).

55. E. James Ferguson, *Speculation in the Revolutionary Debt: The Ownership of Public Securities in Maryland, 1790*, 14 J. ECON. HIST. 35, 39 (1954).

56. FERGUSON, *supra* note 54, at 307.

57. Sixteen men held over 50% of the debt securities. In addition to Campbell, Forrest and Stoddert, Nicolas Slubey, a business associate of Marbury's, and Randolph Latimer, successor as Agent to William Campbell, held significant sums. See Ferguson, *supra* note 55, at 41-42.

58. Provincial and General Court Deeds, Book J. G., No. 2, at 206, Jul. 25, 1791.



of Collector of the Port of Georgetown.<sup>59</sup> Lingan would also become one of President Adams' "midnight appointments," nominated for the position of Marshal for the District of Columbia.<sup>60</sup> It was Lingan, as marshal, who led Thomas Jefferson into the chamber of the House of Representatives to take the oath as President.<sup>61</sup> And it was Lingan, whose position, in a few days after the inaugural, would share a similar fate as Marbury's.

In 1793, Lingan, Uriah Forrest, Benjamin Stoddert, and William Marbury's cousin, Francis Deakins, Jr., became original incorporators of the Bank of Columbia, which became the most influential financial institution in the new capital. Its board of directors would elect the rising William Marbury to its number a few years later.<sup>62</sup> Five of the original incorporators of the Bank of Columbia would be appointed justices of the peace along with Marbury in 1801.<sup>63</sup>

In 1796, Marbury himself became Agent of the State of Maryland and rose rapidly to become the most powerful unelected official in the state. The Maryland Assembly had instituted the office of Agent to organize the state's disordered finances, and gave it wide-ranging powers to supervise and collect the debts owed to the state.<sup>64</sup> As Deputy Agent and later as Agent, Marbury engaged in complex financial dealings, collecting back taxes, selling estates, exchanging debt certificates for federal stock, and brokering on his own, while his expertise and reputation grew apace. Although Campbell and Marbury did not shirk from using their positions to advance their own and their friends' financial interests, a practice generally accepted at the time,<sup>65</sup> there was little of the scent of corruption

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59. HAROLD D. EBERLEIN & CORTLANDT VAN DYKE HUBBARD, *HISTORIC HOUSES OF GEORGETOWN & WASHINGTON CITY* 5 (1958); J. THOMAS SCHARF, *THE CHRONICLES OF BALTIMORE* 337 (1874). Lingan had been a naval officer and alderman at the port of Georgetown in 1789 when the new Constitution went into effect. At that time, he had asked his Commander-in-Chief to continue him in the Navy, but instead, Washington appointed him Collector of the Port of Georgetown. GAILLARD HUNT, *CALENDAR OF APPLICATIONS AND RECOMMENDATIONS FOR OFFICE DURING THE PRESIDENCY OF GEORGE WASHINGTON* 75 (1901).

60. SENATE EXECUTIVE JOURNAL, *supra* note 12, at 387.

61. ALEXANDRIA TIMES, Mar. 4, 1801.

62. 1793 Md. Laws, Nov. Sess., ch. 30; EBERLEIN & HUBBARD, *supra* note 59, at 25.

63. They were Uriah Forrest, Benjamin Stoddert, Marsham Waring, John Mason, and Thomas Peter. 1793 Md. Laws, Nov. Sess., ch. 30; SENATE EXECUTIVE JOURNAL, *supra* note 12, at 388.

64. 1789 Md. Laws, Nov. Sess., ch. 50, sec. VI.

65. Self-interested alliances among merchants was the norm of the era, and although often resented, such connections were tolerated until the law or the public fisc was turned toward the advantage of a few. FERGUSON, *supra* note 54, at 71, 102-05, 172-74. There is evidence that Campbell and Marbury assisted a business associate named Nicholas Sluby with some inside information in obtaining title to confiscated property. See Letter from Nicholas Slubey [sic] to Captain William Marbury (Aug. 19, 1791), in SCHARF PAPERS (MdHR S1005 19,999-101-144, 1/5/8/74); Certification by Randolph B. Latimer, Agent for

that had surrounded Daniel of St. Thomas Jenifer when he had been Intendent of the Revenue. Marbury successfully rode the wave of the "speculator's windfall"<sup>66</sup> under Hamilton's assumption program, and he prospered while maintaining a reputation for probity.

By the end of 1792, Marbury's financial skills were recognized in the highest places, and he became especially adept at handling state and federal securities. In early 1793, the state of Maryland entrusted him with the responsibility upon which thousands of dollars of equity of the state depended. The state's deadline to exchange its old continental certificates for federal stock was approaching. Marbury was detailed to induce private securities holders (many of them now his friends) to exchange their still valid continental paper for state debt certificates, which the state had made great sacrifices in retiring. Those retired state certificates were piled uselessly in boxes in the capitol. But if they could be made into renewed debt certificates again, they could be exchanged for federal paper. Then both the private holders (with the revived state certificates now in their hands) and the state (with the continental paper it had just traded for) could turn in their respective debt certificates for new valuable federal stock paying up to six percent interest.<sup>67</sup> Everyone (except the federal treasury) would come out ahead. In only one month, Marbury obtained over \$200,000 in federal stock for the state treasury for debts already retired.<sup>68</sup> For the creditor elite of the state, and for the state itself, it was a dazzling accomplishment.

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the State of Maryland, Annapolis (Feb. 7, 1795), in MARYLAND STATE PAPERS, Series F (Confiscation of British properties) (MdHR S1005 19,999-02-52/04, 1/7/3/18); Provincial and General Court Deeds, Book JG, No. 3, at 361, bond dated Feb. 14, 1794; Letter of William Marbury to Nicholas Sluby, MARYLAND STATE PAPERS, Series F (Confiscation of British properties) (MdHR S1005 19,990-02-07/02, 1/7/3/17).

66. Ferguson, *supra* note 55, at 45.

67. On February 15, 1793, the Governor's Council entrusted Marbury with this delicate task, and gave him three weeks to do it. The resolution provided:

[T]hat Captain William Marbury be and he is hereby appointed to exchange liquidated State Certificates now in Possession of the Treasurer, for Certificates subscribeable [sic] to the loan of the United States, and in the hands of individuals; And in such exchanges the said William Marbury may make such allowance for any difference in interest between the Certificates he receives and those he gives in return as he may think right and proper [and that] the said William Marbury proceed to Baltimore and other parts of the State where he may think it probable such subscribeable Certificates may be procured. And the Board will make him reasonable compensation for his trouble.

72 Archives of Maryland, *supra* note 43, at 324. The suggestion for such an exchange originally came from Alexander Hamilton. Letter from Alexander Hamilton to the Governor of Maryland (Dec. 5, 1791) (Archives of the State of New York, Albany, New York). Marbury's title of Captain in the Board's resolution derives from his service with the Annapolis militia at the time. See *infra* note 83 and accompanying text.

68. 72 Archives of Maryland, *supra* note 43, at 326.

## II. MARYLAND POLITICS AND MARBURY'S RISE

The first half of the decade of the 1790s was a period of growing political foment in Maryland. In 1788 and 1789, the outnumbered anti-Federalists (once again led by Samuel Chase) controlled only Baltimore, Anne Arundel, and Harford Counties while the cities of Baltimore proper and Annapolis remained Federalist.<sup>69</sup> The Federalist triumph in the ratifying convention repeated itself in the elections for the Congress, for the Presidential electors, as well as for the United States Senators, whom the state legislatures chose.<sup>70</sup>

Federalist hegemony, however, was soon riven by policy and sectional conflicts. Most of the Maryland delegation in Congress originally had opposed Hamilton's assumption plan, inasmuch as Maryland had made good on sinking its own debt without resorting to paper money.<sup>71</sup> At the time, Marylanders thought that their retired or "dead" certificates would be useless in Hamilton's scheme. Only later would Marbury's actions succeed in resurrecting those certificates to the state's enrichment. Nevertheless, when Hamilton promised Jefferson his support for the Potomac as the site for the nation's capital, two Maryland Congressmen, Daniel Carroll and George Gale, whose districts bordered on the Potomac, changed their votes on assumption and provided the margin for victory.<sup>72</sup> That switch killed an aborning New York/Baltimore coalition seeking to displace the victorious Philadelphia/Potomac combine and bring the capital to Baltimore.<sup>73</sup> It also split Maryland politics between the Chesapeake and the Potomac for the rest of the decade.<sup>74</sup> Annapolis, jealous of its place as the state capital against which Baltimore had ambitions, and resentful of the economic heft of Baltimore that sent the fortunes of Annapolis' own merchants into decline, sided fully with the Potomac faction.<sup>75</sup>

The core of the Chesapeake coalition lay in the original paper money cabal that Samuel Chase led in Baltimore.<sup>76</sup> Eventually, the Chesapeake region became Republican and slowly spread its influence, while Annapolis and the Potomac, especially Georgetown and Charles County, remained conservative and steadfastly Federalist.<sup>77</sup> The Federalists in

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69. RENZULLI, *supra* note 38, at 111.

70. *See id.* at 119; RISJORD, *supra* note 15, at 330-37.

71. RENZULLI, *supra* note 38, at 121-34.

72. Bowling, *supra* note 54, at 633-34.

73. RENZULLI, *supra* note 38, at 135-40.

74. *See* RISJORD, *supra* note 15, at 393.

75. *See* RENZULLI, *supra* note 38, at 154.

76. *Id.* at 151.

77. *See generally* RISJORD, *supra* note 15, at 394-505.

Baltimore City, including men like James McHenry<sup>78</sup> and Philip Barton Key,<sup>79</sup> were isolated in the face of a growing Republican majority, but they remained among the closest allies of Alexander Hamilton and his policies. Meanwhile, the Federalist leaders of the Potomac—later the supporters of John Adams against Hamilton and his Baltimore friends—found an effective ally in William Marbury and ultimately brought him into their circle. By siding with the Potomac party, Marbury joined the most politically successful and influential Federalist element in the state. Thus, the deal with Jefferson that gave Hamilton his economic program brought Marbury wealth and influence. But the same deal guaranteed the nation's capital for the Potomac, and eventually carried Marbury into the arms of the Adams Federalists.

Although Marbury sympathized with the Federalist party and its principles, he took no public stands on the controversies of Washington's administration. While the country became embroiled over the Indian defeat of St. Clair, the French Revolution, Washington's Neutrality Proclamation, Citizen Genet's arrogant procession up the East Coast, the emerging Republican party and its press, the rise of the Jacobin Clubs, the fall from power of Secretary of State John Randolph, and the desertion of the best minds in the country from Washington's side,<sup>80</sup> Marbury remained largely unaffected by issues of national politics, save when they might affect stock prices, as with the British and French attacks on American shipping, and the Jay Treaty,<sup>81</sup> its ratification, and implementation by

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78. James McHenry, former surgeon, was a Baltimore merchant who served in the Revolutionary war and eventually became a member of George Washington's and Lafayette's staffs. He was frequently elected to the State Senate, served two years as a delegate to the Continental Congress, and was part of the Maryland delegation, along with Luther Martin and Daniel of St. Thomas Jenifer, to the Constitution Convention in Philadelphia. He attended Maryland's ratifying convention and supported the approval of the Constitution. He became Washington's Secretary of War after a number of other candidates turned down Washington's request to serve. He was an ally of Alexander Hamilton, but Washington found his service inadequate. He served in Adams' Administration until he was fired in 1800. MARYLAND BIOGRAPHY, *supra* note 41, at 588-90.

79. Key had been a loyalist during the Revolution and actually joined Maryland's Loyalist Regiment. After the Treaty of Paris of 1783 forbade further prosecutions of loyalists, Key returned to the United States where he became an active politician on behalf of the High Federalists. Key was elected to the Maryland House of Delegates from 1794 to 1799, and to Congress from 1806 to 1813. HOBART KEY, JR., *BY MY STRONG HAND* 161-62 (1965).

80. See JAMES THOMAS FLEXNER, WASHINGTON, *THE INDISPENSABLE MAN* 338-46 (1969).

81. The Jay Treaty was negotiated between Chief Justice John Jay and Great Britain in 1794. Its object was to end the British practice of interfering with American merchant trading with French possessions in the Caribbean. Its provisions included evacuation of American forts in the Northwest Territories by the British, border commissions to settle territorial disputes, an arbitration of admiralty claims, an end to confiscations in the future

Congress.<sup>82</sup> Only the Whiskey Rebellion would involve Marbury directly when he led the Annapolis militia on a show of force to western Maryland to squelch a threat of revolt in Frederick.<sup>83</sup> Other than that, Marbury kept his focus on his own state's affairs and tended to his duties, gaining respect and connections, and working to extend his own personal wealth.<sup>84</sup>

When William Marbury assumed the post of Agent for the state of Maryland in 1796, he simultaneously pursued three objectives. He was determined to make his posting permanent by enriching the state through vigorous tax collections. He sought to make as much money as he could by engaging in as many commissioned transactions as he could handle.<sup>85</sup> And he unabashedly abetted the fortunes of his Annapolis and Potomac friends against Baltimore. Maryland had never seen an Agent pursue his duties with such vigor. As far away as Philadelphia, Marbury gained the

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and the collection of civil debts still owed to the British. Although trading privileges were reopened, impressment of American seamen was left unresolved and the British maintained the right to seize French goods on board U.S. merchantmen. Most significantly, the Jay Treaty formed the party system in the United States. It was opposed vehemently by Madison and Jefferson, barely achieved approval in 1795 by a vote of 20 to 10 in the Senate, and an overwhelming Republican Congress in 1796 would have blocked its implementation except for a brilliant campaign by Hamilton and Washington to turn the tide. Implementation passed in the House of Representatives by one vote. *See generally* SAMUEL F. BEMIS, *JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* (1923) (discussing the Jay Treaty); CHARLES R. RITCHESON, *AFTERMATH OF REVOLUTION: BRITISH POLICY TOWARD THE UNITED STATES: 1783-1795* (1969) (same).

82. *See* Letters from Clement Biddle to William Marbury (Mar. 7, 1794) (regarding decrease in prices because of a war scare with Britain) (June 24, 1795) (regarding the ratification of the Jay Treaty) and (Apr. 4, 1796) (regarding stock prices and pending legislation enforcing the Jay Treaty), *in* CLEMENT BIDDLE LETTER BOOKS, 1792-1795 (unpublished manuscript, Historical Society of Pennsylvania).

83. Marbury was Captain of the artillery company of Annapolis. 18 *MUSTER ROLLS AND OTHER RECORDS OF MARYLAND TROOPS ON THE AMERICAN REVOLUTION, 1775-1783*, at 575, 581 (1900); William Faris Diary, Baltimore Historical Society, Sept. 15, 26, 1794. At Frederick, Marbury's company was joined by brigades that General Uriah Forrest commanded. Letter from William Pinckney to Alexander Hamilton (Sept. 18, 1794), *in* 6 HAROLD C. SYRETT, *PAPERS OF ALEXANDER HAMILTON* 249-50 (1962) [hereinafter *HAMILTON PAPERS*].

84. His role in the community was that of a dutiful citizen. He served on the grand jury, reported a man for firing a gun within the city precincts, and was a subscription agent for St. John's College. Annapolis Records, 1790-1805, Mayor's Court Docket, Vol. VIII, Jan. 20, 1795; 32 Chancery Court Records, Sept. 27, 1796, Feb. 1795 term, at 95.

85. Marbury was appointed Agent on January 23, 1796. Governor and Council Proceedings (MdHR 1884, 2/26/1/25, at 178). Under the new scale, some of the Agent's commissions ran as high as six per cent. 1795 Md. Laws, Nov. Sess., ch. 87.

reputation as the state's most authoritative financial representative.<sup>86</sup> He soon gained adversaries as well.

One can infer from the manner in which Marbury took on his new responsibilities that he thought his predecessors had been lax in pursuing those who were indebted to the state. Besides, the more funds he gained for the state, the more commissions flowed to him. Accordingly, he announced immediately the end of any tolerance for those who were delinquent in paying their debts to the state. "As several of them," he announced, "have heretofore neglected to comply, I will certainly put the law in force against those who fail in making their returns and payments on the first day of November next."<sup>87</sup> In response, one harried debtor assured the Agent:

I shall immediately [have] the money directly forwarded to you. And this, let me assure you that if I do not pay off the whole before the 4th July, I will suffer the hand that writes this to come off. I wish your answer. It will remove my concern, but not lessen my exertions.<sup>88</sup>

Marbury pursued his other duties with the same unrelenting thoroughness. During the year, out of a total amount of £40,785.10.11 in cash and bonds turned into Maryland's treasury, Marbury accounted personally for £35,310.0.3.<sup>89</sup> Marbury's activities demonstrated that the Agent was, in fact, a tax farmer, and he acted like one, seeking commissions even for transactions his right to which was problematic.<sup>90</sup> In addition, one of his

86. The evidence is found in the records of Clement Biddle, Philadelphia broker and factor to George Washington. CLEMENT BIDDLE LETTER BOOKS, 1769-1792, and 1792-1795 (unpublished manuscript, Historical Society of Pennsylvania).

87. MARYLAND GAZETTE (Annapolis), Oct. 13, 1796.

88. Letter from John Jones to William Marbury (Mar. 29, 1796), in SCHARF PAPERS (MdHR S1005 19,999-101-154, 1/5/8/74).

89. Agent's report to the General Assembly of Maryland (Nov. 14, 1796), in SCHARF PAPERS (MdHR S1005-5666 19,999-101-189, 1/8/5/74). At the time Maryland's currency was mixed between dollars and pounds.

90. Marbury's own deputy, William Richardson, bristled when Marbury tried to collect commissions on subscriptions to St. John's College. The ill Richardson would have none of it. He explained:

I see the law as very strict with regard to your commission, the legislature wishing to avoid the commission on college funds. As to my part, I care not a damn about it and wish not to run the risk of imputation for the trifling sum I should gain. However, if it be necessary, and may be done without imputation, I can give you receipts for the sums received quarterly to be dated at the end of each quarter. I have been and am at this time very unwell. Scarcely able to sit up while I write you.

Letter from William Richardson to William Marbury (Oct. 1, 1796), in SCHARF PAPERS (MdHR S1005 19,999-100-021, 1/8/5/74).

The only serious charge (apparently untrue) of corruption against Marbury while he was Agent was that he had been involved in the Yazoo land grab scandal in Georgia. Letter

many other duties was to invest a \$56,000 cash surplus in six percent federal stock for the state. By a canny knowledge of the bond market, and reliance upon his discerning brokers (plus aided by a war scare against Great Britain in early 1796), Marbury obtained the stock at a good discount.<sup>91</sup> With the \$56,000 the Treasurer gave to him that year, he purchased stock bearing a face value of \$62,424.91.<sup>92</sup>

Besides the pursuit of commissions and the desire to make his posting permanent, Marbury used his considerable influence to champion the financial interests of the Annapolis and Potomac Federalists against the growing influence of Baltimore. He wound up doing battle against the highest of the High Federalists in the state, and tying his future to the men in Georgetown.

In 1796, the last full year of Washington's administration, the Federalists were in a national battle for electoral survival against the newly organized Republicans, who hoped their opposition to the Jay Treaty would carry them to victory. The Republicans dominated the House of Representatives in early 1796 and aspired to have Jefferson succeed Washington and change the Constitution to allow for more popular control of the government. The Republicans' two-to-one majority in the House evaporated, however, when Hamilton orchestrated a flood of petitions in favor of implementing the Jay Treaty.<sup>93</sup> While the heart of the Republican opposition to the treaty and the President was in Virginia, Maryland remained firmly in the hands of the Federalists. Virginians' attacks on President Washington particularly alarmed Marylanders. The financial elite of Baltimore led the Federalist coalition.<sup>94</sup> Nevertheless, the pecu-

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from William Marbury to Hugh Matthews (Aug. 5, 1798) (disclaiming any interest in speculation in Georgia lands) in MATTHEWS PAPERS (Maryland State Archives).

91. He relied primarily upon the Philadelphia brokerage houses of Clement Biddle and Thomas McEwen. See, e.g., Letters from Thomas McEwen & Co. to William Marbury (Feb. 5, 10, 12, 14, 15, 16, 19, 24, 26; Mar. 1, 2, 9, 16 (two letters), 19, 23; Apr. 1, 4, 6, 18, 22; Aug. 1, 2, 16, 19, 22; Oct. 8; Nov. 5, 1796) in SCHARF PAPERS (respectively, MdHR S1005 19,999-: 101-100, 101-099, 101-159, 101-113, 101-094, 101-109, 101-112, 101-160, 101-158, 101-101, 101-161, 101-148, 101-138, 101-107, 101-122, 101-156, 101-198, 101-147, 101-194, 101-157, 101-139, 101-091, 101-155, 101-018, 1/5/8/74; 053-196, 1/8/5/44; 101-093, 101-104, 1/5/8/74); Notes of Meeting between Clement Biddle and William Marbury (Mar. 17, 1796); Letters from Clement Biddle to William Marbury (Feb. 2, 12, 15; Mar. 7, 18, 19 (two letters); Apr. 4, 1796), in SCHARF PAPERS (respectively, MdHR S1005 19,999-: 101-128, 101-142, 1/5/8/74; 124-014, 124-020, 124-021, 1/9/1/3; 101-103, 101-128, 1/5/8/74; 122-065, 1/9/1/3).

92. Agent's report to the General Assembly of Maryland (Nov. 14, 1796), in SPECIAL COLLECTIONS, No. 108, folders 472 and 473.

93. See STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM* 441-49 (1993); STEPHEN G. KURTZ, *THE PRESIDENCY OF JOHN ADAMS: THE COLLAPSE OF FEDERALISM: 1795-1800*, at 19-77 (1957); McDONALD, *supra* note 54, at 320.

94. KURTZ, *supra* note 93, at 25-26, 56.

liarities of Maryland finance and Maryland politics led Marbury to battle the leading lights of Baltimore, their defense of Federalism and the President notwithstanding.

Marbury began by challenging members of Washington's cabinet, seeking to obtain satisfaction from the federal government for arms lent by Maryland to suppress the Whiskey Rebellion of 1794.<sup>95</sup> In early February, in the midst of the Republican attacks on Washington in Congress, Marbury went to Philadelphia and sought out Timothy Pickering, regarded as a staunch Hamilton loyalist, and who had recently resigned from his position as Secretary of War to become Washington's Secretary of State, after Washington could find no one else to take the job.<sup>96</sup> Pickering's replacement, the affable James McHenry of Baltimore, a man even closer to Hamilton, had not yet arrived in Philadelphia to take the oath of office.<sup>97</sup> Pickering, distracted by resolutions in the House of Representatives calling on the President to divulge secret correspondences dealing with the Jay Treaty, was probably miffed at having to receive the state's bill collector from Annapolis. He delayed meeting with Marbury for some time, and then was reluctant to agree to a settlement before the new Secretary of War began his term.<sup>98</sup>

Back in Annapolis, the frustrated Marbury waited to write to his fellow Marylander, McHenry, until he took office as the new Secretary of War. James McHenry was not only in the intellectual thrall of Hamilton, he was also one of Samuel Chase's closest friends and associates. In fact, before Washington settled on Pickering as Secretary of State, he considered Chase for the post following a conversation he had with McHenry, who urged that Chase be brought into the administration. Writing to Hamilton, Washington spoke of his problems with Chase: "[H]e is violently opposed in his own State by a party, and is besides, or to speak

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95. The correspondence of Alexander Hamilton reveals a great deal of complicated bargaining over who would supply what materiel for the Maryland troops. See 17 HAMILTON PAPERS, *supra* note 83, at 122, 150-52, 196-98, 215, 225-27, 242-43, 393, 451.

96. Soon after becoming Secretary of State, Pickering avidly sought Hamilton's advice on all manner of activities. McDONALD, *supra* note 54, at 318-19.

97. See BERNARD C. STEINER, *THE LIFE AND CORRESPONDENCE OF JAMES MCHENRY* 163-68 (1907) (noting the events leading up to McHenry's arrival in Philadelphia).

98. Pickering used a number of delaying arguments. First, he opined that the Secretary of War may not have authority to pay such a claim. Further, when Alexander Hamilton accepted the arms some years back, he had only promised to return those that remained after the campaign. Letter From William Marbury to Secretary of War James McHenry (Feb. 17, 1796), in SCHARF PAPERS (MdHR S1005-5991 19,999-101-117, 1/8/5/74).



more correctly, has been, accused of some impurity in his conduct."<sup>99</sup> After moving Pickering from War to State, Washington went through the same agony in finding his replacement. After a number of rejections, Washington settled on McHenry, and to sweeten the offer, asked McHenry, "sound, I pray you, and let me know without delay, if Mr. Sam[ue]l Chase would accept a seat on the Supreme Judicial bench of the U. States."<sup>100</sup> Both offers were accepted immediately, and on February 8, 1796, in Philadelphia, newly installed Justice Samuel Chase swore in James McHenry as Secretary of War.<sup>101</sup>

Barely ten days later, Marbury's dunning letter arrived, insisting on payment for those arms and other materiel that had been lost in the Whiskey campaign.<sup>102</sup> Swamped by his own tasks as Agent, Marbury offered the hope that "it will be unnecessary for me to come up again on this business until the account is adjusted."<sup>103</sup> McHenry was not forthcoming, however, and Marbury had to go back to Philadelphia in March to do the state's bidding.<sup>104</sup> When Marbury interviewed McHenry regarding the state's claim, the Secretary of War continued to demur. He suggested that Maryland let the claim lay over until he could petition the Maryland legislature at its next session to authorize an arbitration of the dispute. Marbury suggested instead "that we leave it to James Winchester and Philip B. Key, Esqs. to assay and ascertain the amount of damages; that you pay to me the amount so ascertained by them . . . ." <sup>105</sup> Marbury assured McHenry that the reason for nominating Key and Winchester was that "they are and will be members of the legislature, and will explain all circumstances relative to the business."<sup>106</sup> In fact, Marbury knew that Philip Barton Key, although a Baltimore High Federalist,

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99. See Martin Howard Matteson-Boze, James McHenry, Secretary of War, 1796-1800, at 6 (1965) (unpublished Ph.D. thesis, University of Minnesota) (quoting President Washington).

100. *Id.* at 10.

101. *Id.*; see also STEINER, *supra* note 97, at 168.

102. He did offer on behalf of the state to take back the arms that were still extant. Letter From William Marbury to Secretary of War James McHenry, *supra* note 98.

103. *Id.*

104. Notes of Meeting between Clement Biddle and William Marbury (March 17, 1796), in SCHARF PAPERS (MdHR S1005 19,999-101-128, 1/5/8/74); Letter from William Campbell to William Marbury (Apr. 5, 1796), in SCHARF PAPERS (MdHR S1005 19,999-101-162, 1/5/8/74).

105. Letter from William Campbell to William Marbury, (March 17, 1796), in SCHARF PAPERS (MdHR S1005 19,999-101-162, 1/5/8/74).

106. *Id.* Winchester was a respected lawyer. See Malcolm C. Clark, *Federalism at High Tide: The Election of 1796 in Maryland*, 61 MD. HIST. MAG. 210, 211 (1966). Winchester was later appointed a district judge in Maryland by Adams. See TIMES AND DISTRICT OF COLUMBIA DAILY ADVERTISER, Aug. 25, 1801.

was dependent on Marbury's assistance to gain title to some confiscated property and might be counted upon to press Marbury's claim.<sup>107</sup>

Marbury's conciliatory interposition was not a disinterested defense of the state's claim. If McHenry went straight to the legislature and obtained an arbitration, the settlement would be sent directly to the Treasurer. Under Marbury's proposal, the money would be routed through his own hands, with the consequent commission. McHenry agreed to Marbury's proposition, but Winchester declined to serve, and Key was apparently unsuccessful, if he indeed made the attempt, in securing satisfaction for Marbury.<sup>108</sup> Maryland's claim remained unsettled and Marbury never obtained his commission.<sup>109</sup> A few months later, either through pique or principle, Marbury refused to sell Key some state land at the price Key desired, his repeated entreaties notwithstanding.<sup>110</sup>

No sooner had Marbury challenged McHenry than he frontally attacked Attorney General Luther Martin, another Baltimore stalwart. It was not the act of a timorous man, for Luther Martin possessed the formidable reputation as one of the foremost lawyers in the country.<sup>111</sup> Martin had been an original member of the Chase combine that ten years previously had connived with the Intendent, Daniel of St. Thomas Jenifer, to gain confiscated British properties on the sly (embarrassing Marbury's future friend and champion, General Uriah Forrest, then Commissioner for Confiscated Properties). As noted above, Martin and Chase also led Maryland's paper money faction, and soon thereafter, the primary anti-Federalist opposition to the Constitution in the state.<sup>112</sup> In the early 1790s, Martin assisted the Chesapeake party against those along the Poto-

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107. Key previously served Marbury in the significant 1793 exchange of stock for the state of Maryland. See *supra* notes 67-68 and accompanying text.

Ironically, Philip Barton Key was another of Adams' literal "midnight appointments," whom the President appointed on March 3, 1801 as Chief Judge of the Fourth Circuit under the Judiciary Act of 1801. NATIONAL INTELLIGENCER, April 17, 1801. Key, along with the other circuit judges, lost their positions when the Republican Congress repealed the Judiciary Act of 1801 the following year.

108. Letter from James Winchester to James McHenry (May 1, 1796) *Maryland Politics in 1796—McHenry Letters*, 9 PUBLICATIONS OF THE SO. HIST. ASS'N 374, 376-77 (1906).

109. As late as 1803, the state and the federal government were still arguing over the issue. 3 CALENDAR OF MARYLAND STATE PAPERS—THE BROWN BOOKS 154 (1948).

110. Letter from Philip Barton Key to William Marbury (June 20, 1796), in SCHARF PAPERS (MdHR S1005 19,999-101-009, 1/5/8/74).

111. See ROBERT R. BELL, THE PHILADELPHIA LAWYER: A HISTORY: 1735-1945, at 87 (1992); HENRY P. GODDARD, LUTHER MARTIN: THE "FEDERAL BULLDOG" 29 (1887). See generally PAUL S. CLARKSON & R. SAMUEL JETT, LUTHER MARTIN OF MARYLAND (1970).

112. In 1805, Martin would be Chase's principal attorney defending the associate justice before the United States Senate on charges of impeachment. Philip Barton Key and Charles Lee would also serve as Chase's attorneys. GODDARD, *supra* note 111, at 18-20.

mac, and now, in mid-decade, though a Federalist, was still aiding his own and his Baltimore friends' interests against the downstaters.

Martin had for some time been trying to wedge his way into some valuable confiscated property that was the subject of much litigation and on which bonds to the state had been defaulted.<sup>113</sup> The statute required the Agent to intervene, through the attorney general, in any suit for such property in which the state had an interest.<sup>114</sup> The problem in this case was that the Attorney General had personal interests on the other side. Martin was already in trouble, having been indicted for taking bribes.<sup>115</sup> Marbury added to Martin's woes. Informing the Governor and Council of Martin's conflict of interest, and adding that the state could "suffer considerably," Marbury was authorized to hire an attorney to defend the state's interests against its own Attorney General.<sup>116</sup>

Finally, and most critically, Marbury sought to prevent the Baltimore elite from capturing the state's financial surplus. With the federal government's assumption of the state's debt and the new federal securities in the state's treasury, the mid-1790s was a boom time for Maryland. It was awash in revenues. Not only did Maryland have an extra \$56,000 to invest in 1796,<sup>117</sup> but there was predicted an additional \$35,000 surplus for 1797.<sup>118</sup> Marbury urged the state to invest the extra cash in more federal stock. The Baltimore financiers, however, wanted the money subscribed to the Bank of Baltimore, which had been chartered with an approved capitalization of \$1,200,000 of which \$180,000 could be subscribed to by the state.<sup>119</sup> Under the business ethics of the time, trustees of a bank

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113. *Griffith v. Moore* (Sept. 25, 1793) in *CHANCERY COURT PAPERS* (MdHR 17,898-2017-1/4, 1/36/2/68).

114. 1795 Md. Laws, Nov. Sess., ch. 87.

115. The Governor and Council authorized William Pinkney, a lawyer of even greater renown than Martin, to handle the appeal against the Attorney General. Governor and Council Proceedings (MdHR 1884, 2/26/1/25, at 178).

116. Governor and Council Proceedings, July 12, 1796 (MdHR 1884, 2/26/1/25, at 218). Further records of Martin's involvement in the case are not extant, and one can presume that as he took on more weighty issues, he let the issue pass. At the time, Martin's wife had just died, and he became involved in trying to exonerate her father's name from the charge that he engaged in notorious murders of Indians on the frontier. See CLARKSON, *supra* note 111, at 171-88.

117. Governor and Council Proceedings (MdHR 1884, 2/26/1/25, Jan. 20, 22, 23, 1796, at 176-78); Agent's report to the General Assembly of Maryland (Nov. 14, 1796), in *SPECIAL COLLECTIONS*, No. 108, folder 473.

118. Letter from Philip Barton Key to James McHenry (Nov. 28, 1796), in *SPECIAL COLLECTION* 2087, MCHENRY LETTERS, 00/11/08/20.

119. 1795 Md. Laws, Nov. Sess., ch. 27. In 1790, the Maryland legislature chartered the Bank of Maryland, also headquartered in Baltimore. However, its capitalization was only \$300,000, and the Baltimore financiers needed a source of much greater capital. 1790 Md. Laws, Nov. Sess., Ch. 5.

obtained personal loans easily from the bank on favorable terms. It was no wonder the Baltimore elite desired the full capitalization of the bank.

Private investment money was scarce in 1796 with the major syndicate of Robert Morris, John Nicholson, and James Greenleaf in Washington City crumpling in bankruptcy and scandal.<sup>120</sup> The Bank of Columbia in Georgetown was well established, capitalized at \$1,000,000,<sup>121</sup> but even it was encountering difficulty in raising its subscriptions.<sup>122</sup> If Baltimore received the benefit of the state surplus, Georgetown would be eclipsed forever. Baltimore had already won the commercial contest with Georgetown and Annapolis, and this would help propel it to become the state's financial center as well. But it needed the cash. The sectional lines were drawn.

Even though the Baltimore bankers, whom Hamilton urged, were placing their enormous influence behind Washington against the Republicans, Marbury's loyalties were sectional. The political opposition to Marbury, however, was formidable and included the Speaker of the House of Representatives, Philip Key (not to be confused with Marbury's sometime ally, Philip Barton Key). The Speaker reported to Secretary of War James McHenry about the contest. Marbury, he declared, had become the obstacle to the Bank of Baltimore's ambitions.

We shall have in our treasury after meeting the demands of the state nearly \$35,000. Some struggle will take place how this sum is to be disposed off. The Agent and his party are for investing it in 6 per cent stock with an eye to the commission & to prevent Baltimore from drawing any benefit from the use of it. Others are for taking shares in the new bank. This agent's business keeps open a kind of shop that is well calculated to promote the interest of a few in this town—and its high time the door was closed. Our bank stock is yet in the moon and the state in the clouds in pursuit of it.<sup>123</sup>

As the debate in the legislature carried on in November and December, Speaker Key despaired to McHenry, "[s]o powerfully does Potomack and the city [Annapolis] combine against Baltimore that I much suspect no money will be invested in the new bank."<sup>124</sup> The "Potomack," of course, rooted its interest in the Bank of Columbia, located in

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120. See BOB ARNEBECK, *THROUGH A FIERY TRIAL: BUILDING WASHINGTON 1790-1800*, at 339-412 (1991).

121. 1793 Md. Laws, Nov. Sess., ch. 30.

122. As of 1795, only \$400,000 had been paid in. 1795 Md. Laws, Nov. Sess., ch. 77.

123. Letter from Philip B. Key to James McHenry (Nov. 28, 1796), in *SPECIAL COLLECTION 2087, MCHENRY LETTERS*, 00/11/08/20.

124. Letter from Philip B. Key to James McHenry (Dec. 13, 1796), in *MCHENRY PAPERS* (Library of Congress).

Georgetown, and in which Marbury had invested at least \$3,200 of his own money.<sup>125</sup> Marbury won. In November, the Legislature authorized the purchase of an additional \$40,000 of federal stock and reappointed Marbury as Agent for the forthcoming year. The Bank of Columbia remained partially insulated from the competition threatened by the Baltimore financiers. The directors would soon show their gratitude to their Annapolis ally.

By the end of the year, Marbury had become one of the most powerful financial figures in Maryland—and was very wealthy to boot. It was time for a portrait, and so, he and his wife took the trip to the studio of her cousin, Rembrandt Peale, in Baltimore.<sup>126</sup> There, the portrait that would later hang in the United States Supreme Court was finished. To complete this most successful year of Marbury's life to date, he received news in December that his brother, Joseph, had been appointed justice of the peace for Charles County.<sup>127</sup>

### III. SUCCESS AND SCANDAL

Following Marbury's successful defeat of the Baltimore banking clique in 1796, there was a short and direct route into the inner circle of the Georgetown Federalists. He was elevated to the board of directors of the Bank of Columbia in early 1798,<sup>128</sup> and the following year, was appointed agent to the Washington Navy Yard,<sup>129</sup> whereupon he moved his family and his future from Annapolis to Georgetown. The man who appointed him as naval agent, brought him to Georgetown, undoubtedly sponsored him as director of the Bank of Columbia, and almost certainly championed his name as a justice of the peace, was Benjamin Stoddert.

Stoddert was eleven years senior to Marbury, and like so many of Marbury's allies, came from Charles County, Maryland. He was grandson to James Stoddert, wealthy planter, merchant, neighbor and fellow justice of the peace to Francis Marbury, William Marbury's grandfather. Benjamin Stoddert had trained to be a merchant, and was at the University of

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125. Receipt from Samuel Hanson of Samuel, Cashier (Sept. 10, 1794) in *SCHARF PAPERS* (MdHR S1005 19,999-101-191, 1/5/8/74); Dividend Receipt signed by Uriah Forrest (Apr. 25, 1796) (MdHR S1005 19,999-100-002, 1/8/5/74).

126. Rembrandt Peale, 1778-1860, *A LIFE IN THE ARTS* 36 (1985) (Exhibition Catalogue, Historical Society of Pennsylvania).

127. Governor and Council Proceedings (Dec. 2, 1796) (MdHR 1884, 2/26/1/25, at 243).

128. *THE WASHINGTON GAZETTE*, Mar. 17-24, 1798.

129. Letter from Benjamin Stoddert, Secretary of the Navy, to William Marbury (May 23, 1799), in *3 NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE* 242-43 (1938) [hereinafter *NAVAL DOCUMENTS*].

Pennsylvania when the Revolutionary War began in which he fought and was severely wounded at Brandywine.<sup>130</sup>

Resigning his commission as Major in 1779, he soon became Secretary to the Board of War under the Articles of Confederation, serving under John Adams.<sup>131</sup> He then returned to Maryland, and appropriate to his social standing, served on the Governor's Council for two years (while the young William Marbury was but a clerk to the Auditor General) before moving to Georgetown in 1783, where he became even more wealthy through his merchant and shipping partnership with General Uriah Forrest, another close friend of Adams.<sup>132</sup> During the next few years, with Forrest in London and Stoddert in Georgetown, the firm became extraordinarily prosperous.<sup>133</sup> In 1785, when he became an original proprietor of the Potomac Company, he became associated with George Washington and virtually every elite personage in Georgetown and Alexandria.<sup>134</sup> He was one of the prime purchasers of federal stock under Hamilton's assumption program and invested heavily in land in and around Georgetown.<sup>135</sup> Consequently, when George Washington chose the district just southeast of Georgetown to be the nation's capital in 1790, Stoddert, allied with Uriah Forrest, James Lingan, and others as long time proponents of the site, was in a prime position to make an even greater fortune.<sup>136</sup>

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130. See BRYAN, *supra* note 12, at 98; EBERLEIN & HUBBARD, *supra* note 59, at 24; Cordelia Jackson, *People and Places in Old Georgetown*, 34 REC. OF THE COLUM. HIST. SOC'Y 133, 145 (1932).

131. Stoddert had been Captain of Hartley's Additional Regiment, which transferred to the Pennsylvania Line in 1778. STEUART, *supra* note 37, at 41.

132. EBERLEIN & HUBBARD, *supra* note 59, at 24; THOMAS JEFFERSON AND THE NATIONAL CAPITAL: 1783-1810 at 516 (Saul K. Padover ed., 1946).

133. Hugh T. Taggart, *Old Georgetown*, 11 REC. OF THE COLUM. HIST. SOC'Y 192 (1908).

134. He was a manager of the Potomac Company's original meeting in 1785. VIRGINIA JOURNAL AND ALEXANDRIA ADVERTISER, Apr. 14, 1785. He also became a member of the Board of Commissioners for Georgetown. William Tindall, *The Executives and Voters of Georgetown, District of Columbia*, 24 REC. OF THE COLUM. HIST. SOC'Y 89 (1922).

135. See Ferguson, *supra* note 55, at 42 n.15.

136. John Ball Osborn, *The Removal of the Government to Washington*, 3 REC. OF THE COLUM. HIST. SOC'Y 136, 137 (1900). The Hamilton-Jefferson 1790 compromise on the site of the national capital brought the financial elite of Maryland even greater influence and notoriety. Maryland and Georgetown had long lobbied for the honor. As early as 1783, the Maryland legislature had authorized the cession of a ten square mile district to the national government should Maryland be chosen as site for federal capital. WASHINGTON GAZETTE, June 15-June 20, 1796. At the end of 1788, Maryland agreed to pay two-thirds the cost of establishing a capital district on her borders, Virginia to pay the other third. BRYAN, *supra* note 12, at 113-14. While Congress was considering making Philadelphia the capital in 1789, a memorial arrived from the citizens of Georgetown "offering to put themselves and their fortunes under the exclusive jurisdiction of Congress in case that town should be selected as the permanent seat of government." *Id.* at 37 n.1. At the end

Stoddert and the other Potomac landowners hosted President Washington for dinner at Uriah Forrest's home in Georgetown on March 28, 1791, where they worked out the terms of the land transfer to the federal government.<sup>137</sup> Subsequently, Stoddert purchased more lands within the boundaries of the federal district, awaiting an expected flood of immigrants.<sup>138</sup> By 1797, however, with the collapse of the market for house lots in Washington City, Stoddert, along with Forrest and other land speculators, faced the prospect of financial downfall.<sup>139</sup> Marbury's defense of the Bank of Columbia was not enough to stay the creditors. Stoddert was particularly hard-pressed, not only because he and Forrest had wound up their merchant association in 1793,<sup>140</sup> but also because his acceptance of the major responsibility of his life, Secretary of the Navy to John Adams, would soon divert him from his personal affairs.<sup>141</sup> At that critical point in Stoddert's career, Marbury came to Stoddert's financial rescue.

Marbury provided Stoddert the extraordinary sum of £9,000 as a three-year mortgage encumbering virtually all of Stoddert's enormous holdings in western Maryland.<sup>142</sup> But Marbury's intervention merely stayed the day. A few days after Jefferson took office, Stoddert mortgaged his substantial home in Georgetown.<sup>143</sup> He also had to transfer the bulk of his western holdings to Marbury to cure his existing mortgage and, in May,

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of 1789, Virginia passed a bill authorizing the cession of a tract south of the Potomac. CHRONOLOGY & DOCUMENTARY HANDBOOK OF THE STATE OF VIRGINIA 16 (1979).

137. The next day, the agreement with Washington was signed, promising lands to the new government at the price Washington wanted. ARNEBECK, *supra* note 120, at 44-45. Washington later made Stoddert his agent to locate the various other land owners and induce them to sell their tracts to the government. BRYAN, *supra* note 12, at 119-25.

138. See, e.g., Memorandum of Purchase of 800 acres between Benjamin Stoddert and William Deakins, Jr. from George Bell, 1792, in BENJAMIN STODDERT LETTERS (Library of Congress, Manuscript Division).

139. MICHAEL A. PALMER, STODDERT'S WAR: NAVAL OPERATIONS DURING THE QUASI-WAR WITH FRANCE 1798-1801, at 13 (1st ed. 1987).

140. GEORGETOWN WEEKLY LEDGER, Oct. 5, 1793.

141. SENATE EXECUTIVE JOURNAL, May 18 and 21, 1798, reprinted in 5 JOURNAL OF THE SENATE, *supra* note 12, at 275-76. Stoddert was appointed Secretary of the Navy after George Cabot of Massachusetts refused the appointment. PALMER, *supra* note 139, at 9.

142. 17,345 acres of land, 18 surveyed lots that Stoddert picked up from soldiers of the Maryland line, and a half interest in an additional 5,454 acres were placed under Marbury's mortgage. Indenture made on Mar. 30, 1797 between Benjamin Stoddert and William Marbury, Provincial and General Court Deeds, Book J. G., No. 4, at 430.

143. The mortgage was for \$33,890. Cordelia Jackson, *People and Places in Old Georgetown*, 34 REC. OF THE COLUM. HIST. SOC'Y 133, 146 (1932). Through the offices of William Campbell, Stoddert even tried enlisting the interest of his political and financial adversary, James McHenry, in purchasing some lots in the city of Washington. Letter from James McHenry to Benjamin Stoddert, Baltimore (Jan. 9, 1801), in JAMES MCHENRY PAPERS (William L. Clements Library, Univ. of Michigan).

1801, he took out an additional mortgage with Marbury on lands closer to Washington, D.C.<sup>144</sup>

Benjamin Stoddert, however, was never intimidated by anyone (save perhaps Washington), including the one who held Stoddert's financial future in his hands. In all of his dealings, Stoddert was a master of detail, uncompromising in his contests with others, and resolute in his objectives.<sup>145</sup> Absolutely loyal to those whom he served, he expected the same dedication from those who reported to him. While the Cabinet's Hamiltonian trio of Pickering at State, McHenry at War, and Wolcott at Treasury frustrated the designs of John Adams, Stoddert's arrival refreshed and invigorated the Adams Presidency. Secretary of the Treasury Oliver Wolcott wrote that Stoddert had "more of the confidence of the President than any officer of the government."<sup>146</sup> Adams never forgot the quality and fidelity of Stoddert's service. A week after Thomas Jefferson took office, Adams sent a letter from his home in Massachusetts to acting Secretary of War Samuel Dexter, closing, "[m]y respects to the President, and complements to Messrs. Madison, Lincoln, Dearborn, and love to Mr. Stoddert."<sup>147</sup> Additionally, Adams wrote to Stoddert, "I am and ever shall be, I believe, world without end, your friend."<sup>148</sup>

Although the naval war with France, fought from 1798 to 1800, was a military standoff, it was a political victory for the United States.<sup>149</sup> Stoddert assumed primary responsibility for the successful American defense of its shipping interests, which permitted John Adams to negotiate triumphantly for peace from a position of proven military capacity. When

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144. Mortgage indenture between Benjamin Stoddert and William Marbury, May 9, 1801, MONTGOMERY COUNTY LAND RECORDS, Vol. I, at 373. The following year, Stoddert sought desperately to sell all his lots in Washington to Vice-President Aaron Burr. Letter from Benjamin Stoddert to Aaron Burr (Apr. 17, 1802), in THE GRATZ COLLECTION, Case 8, Box 17 (Pennsylvania Historical Association, Philadelphia). In 1806, Marbury purchased the estate of Oakland in Montgomery County from Stoddert for \$8,535. Sale of land, Feb. 4, 1806, MONTGOMERY COUNTY LAND RECORDS, Liber M, at 486.

145. For example, in his letter to ship builders, Washington, Butler, and Nevison in Leeds, England, postmarked from Georgetown on Aug. 27, 1785, Stoddert writes, "I have your favor of the 12th inst. which serves to convince me that if you cannot avoid error, you can confidently and with ability defend it." He complained later in this letter that the ship he contracted for had not been built. In a letter sent December 16, 1785 to the same parties he threatened that company with a lawsuit. Benjamin Stoddert's Letters (Aug. 1785) (Library of Congress).

146. ELKINS & MCKITRICK, *supra* note 93, at 634 (quoting Oliver Wolcott).

147. Letter from John Adams to Samuel Dexter (Mar. 23, 1801), in 9 THE WORKS OF JOHN ADAMS 580-81 (Charles F. Adams ed., 1850-56) (1969) [hereinafter ADAMS' WORKS].

148. Letter from John Adams to Benjamin Stoddert (Mar. 30, 1801), in ADAMS' WORKS, *supra* note 147, at 583.

149. See ELKINS & MCKITRICK, *supra* note 93, at 643 (discussing the pivotal role the United States Navy played in bringing the troubles with France to an end).



Stoddert accepted Adams' appointment, the United States Navy had only three ships under its flag. By the end of 1798, it had twenty, and by 1800, thirty-nine.<sup>150</sup>

Stoddert's accomplishments, however, came at great political cost to him. The Jeffersonians objected vehemently when Stoddert interpreted his statutory authorization to build a number of 74-gun ships of the line as also permitting him to purchase land and establish naval yards along the coast. Once the Jeffersonians were in power, Secretary of the Treasury Gallatin inspired a congressional investigation of Stoddert's practices.<sup>151</sup> Central to Stoddert's plan was the establishment of a naval yard in Washington at Anacostia, and in 1799, he called upon William Marbury to become Naval Agent for the unbuilt facility.<sup>152</sup>

The expected letter from Philadelphia arrived in May, 1799. "Well knowing your ability and Integrity qualify you for a more important service," Stoddert complimented Marbury, "I have the honor to request that you will undertake the Agency for this Ship—as well as for all other matters belonging to the Navy Department in that quarter."<sup>153</sup> Stoddert, with little time to lose, was setting up naval yards and planned to build six 74-gun ships of the line under the appropriations that Congress gave to him in February, 1799.<sup>154</sup> A war was to be fought, and he planned on getting the ships built before Congress could change its mind and cut back on its appropriations.<sup>155</sup> Stoddert's long term objective was to establish a navy that could support the United States' interests among the great powers. One of the ships was to be completed in Washington. Stoddert directed Marbury to find and obtain materials for a wharf at the

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150. LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 159 (1948).

151. See Letter from Benjamin Stoddert to Congress (Apr. 27, 1802) (Houghton Library, Harvard University) (asserting that even without a specific authorization from Congress, he would have been permitted to effectuate the building of the ships by creating Navy Yards).

152. During the naval war with France a total of 33 Navy Agents were appointed. 7 NAVAL DOCUMENTS, *supra* note 129, at 374-75. Marbury was the sole Naval Agent during this time for the Navy Yard at Anacostia. Jefferson reduced the number of naval agents drastically once he was in power. The other authorized Navy Yards at the time were in Norfolk, Portsmouth, Philadelphia, New York, and Charlestown, Massachusetts. WHITE, *supra* note 150, at 160.

153. Letter from Benjamin Stoddert to William Marbury (May 23, 1799), in 3 NAVAL DOCUMENTS, *supra* note 129, at 242-43.

154. Henry B. Hibben, *History of the Washington Navy Yard*, 51st Cong., 1st Sess., SENATE EXECUTIVE DOCUMENT NO. 22, at 21 (1889). Stoddert later expanded his target to nine ships. Letter from Benjamin Stoddert to William Marbury (Dec. 13, 1800), in 7 NAVAL DOCUMENTS, *supra* note 129, at 32-33.

155. See Letter from Benjamin Stoddert to William Marbury (Dec. 13, 1800), in 7 NAVAL DOCUMENTS, *supra* note 129, at 32-33.

yard, the necessary outbuildings, and for the ship itself. "You will be allowed as your compensation 2 p' C' Commission upon all money expended by you," Stoddert added before listing the materials Marbury was to obtain, and enclosing an advance of \$5000.<sup>156</sup> Stoddert implored Marbury to get to Washington as soon as possible to begin the work.<sup>157</sup> Once again Marbury had to fulfill the role of deputy, only this time to one whose intricate management of navy affairs brooked no variation. It was a trying, and in some ways, a mortifying experience for him. Unfamiliar with maritime matters, Marbury had to be given detailed instructions about virtually every detail, including how to bargain for and purchase meat, flour, shot, rigging, iron, ballast, and timber.<sup>158</sup> In the end, Marbury would find that being naval agent to Stoddert would bring not honor, but public disfavor.

If Marbury had earlier found Annapolis filled with intrigue and rough dealing, Washington City was many times more hard-hearted. Longtime resident Stoddert cautioned him, "I too well know the mode of conducting business in the city of Washington to think it proper to trust anything to chance."<sup>159</sup> As former Senator Tristram Dalton observed, "[f]ew, very few, are to be found, whose tales and representations are to be relied upon. This is a country of speculators. Whoever treads this ground must do it with the utmost caution, if he expects to escape impositions and censure."<sup>160</sup> Marbury soon found Dalton's words to be prophetic. Although Marbury's services to Stoddert and Forrest were to gain him a justice of the peace appointment, his involvement with two other Federalists, John Templeman and Louis Deblois, involved him in separate but simultaneous public scandals and helped earn for him the disdain of Thomas Jefferson.

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156. Letter from Benjamin Stoddert to William Marbury (May 23, 1799), in 3 NAVAL DOCUMENTS, *supra* note 129, at 242-43.

157. Letter from Benjamin Stoddert to William Marbury (May 25, 1799), in 2 MISCELLANEOUS LETTERS SENT BY THE SECRETARY OF THE NAVY, 1798 to 1886 (National Archives Microform No. 209) [hereinafter NAVY LETTERS].

158. See Letters from Benjamin Stoddert to William Marbury (June 17; July 19, 25; Aug. 12; Oct. 31; and Nov. 12, 1799; Jan. 15, 17, 21; Feb. 23; and Aug. 2, 1800), in 2 & 3 NAVY LETTERS, *supra* note 157; 4 NAVAL DOCUMENTS, *supra* note 129, at 344, 385; (Jan. 1, 1800) in 5 NAVAL DOCUMENTS, *supra* note 129, at 84-85; (Feb. 23 and Aug. 2, 1800), in NAVY LETTERS, *supra* note 157; Marbury's account of Apr. 12, 1800, in 2 THOMAS BEALL ACCOUNT BOOK, at 213 (Library of Congress).

159. Letter from Benjamin Stoddert to William Marbury (Nov. 5, 1799), in NAVY LETTERS, *supra* note 157.

160. ARNEBECK, *supra* note 120, at 430.

Immediately after his appointment as naval agent, Marbury advertised for the necessary timber for the proposed 74-gun ship,<sup>161</sup> and soon found a ready supplier for the price that Stoddert authorized. John Templeman, a wealthy Georgetown merchant and fellow member of the Bank of Columbia's board of directors, was that supplier.<sup>162</sup> Because timber deliveries had fallen short in the past, Stoddert decided to double the order and have Templeman obtain timber for the other five ships as well.<sup>163</sup> Templeman's performance, however, never matched his confidence in fulfilling the contract.<sup>164</sup>

The construction of the wharf at the naval yard posed an additional problem. By late December, 1799, delays frustrated Stoddert, and he demanded that Marbury begin construction of the wharf as soon as possible.<sup>165</sup> Marbury completed the contract the following week,<sup>166</sup> and found a log provisioner in Lewis Deblois, who also owned a wharf on the Potomac.<sup>167</sup> Despite some labor problems, the wharf was finally laid by year's end, but the construction of the ship dock and the ship itself had still not begun. Events then went forward that would lead to the public embarrassment of naval agent Marbury.

Throughout 1800, Stoddert continued having his friend John Templeman supply the ship's timber, despite the expense and shortage Tem-

161. BRYAN, *supra* note 12, at 331 (quoting CENTENNIAL OF LIBERTY (Georgetown), June 18, 1799); MARYLAND GAZETTE (Annapolis), June 10, 1799.

162. MARYLAND GAZETTE (Annapolis), Mar. 17-24, 1798. Templeman was one of the original incorporators of the bank, along with Stoddert. BRYAN, *supra* note 12, at 336.

163. See Letters from Benjamin Stoddert to William Marbury (May 23, 1799), in 3 NAVAL DOCUMENTS, *supra* note 129, at 242-43.

164. See Letter from Benjamin Stoddert to William Marbury (Mar. 12, 1801), microformed on No. 179, Roll 18 NATIONAL ARCHIVES, MISCELLANEOUS LETTERS OF DEPARTMENT OF STATE (describing Templeman's problems in supplying timber at the price for which he had contracted).

165. Letter from James Stoddert to William Marbury (Dec. 27, 1799), in 4 NAVAL DOCUMENTS, *supra* note 129, at 572; Letter from Joshua Humphreys to William Marbury (Nov. 26, 1799), in LETTER BOOK OF JOSHUA HUMPHREYS 1797-1800, at 278 [hereinafter HUMPHREYS LETTER BOOK] (unpublished manuscript, Historical Society of Pennsylvania). Humphreys was officially titled "Naval Constructor," serving at Philadelphia, and has been credited as the master builder of the American Navy. See Richard Eddy, *Defended by an Adequate Power: Joshua Humphreys and the 74-gun Ships of 1799*, 51 AM. NEPTUNE 173-94 (1991).

166. 5 NAVAL DOCUMENTS, *supra* note 129, at 50-51. However, as late as July 1800, Marbury was still advertising for "proposals for filling the wharf." CENTINEL OF LIBERTY (Georgetown), Jul. 8, 1800.

167. ARNEBECK, *supra* note 120, at 556. Stoddert had been pressing Marbury in September, 1799 to find a log supplier. Letter from Benjamin Stoddert to William Marbury (Sept. 23, 1799), in NAVY LETTERS, *supra* note 157.

pleman was encountering.<sup>168</sup> Marbury was not happy with Templeman's performance and searched for another supplier. In late summer, 1800, he found a prospect in John Hughes of Alexandria and his partner, Thomas Rouse. In early December, the ship dock was ready, but on Friday, December 12, 1800, word arrived from South Carolina that Jefferson had unexpectedly taken that state's electoral votes and the presidential election.<sup>169</sup> Stoddert hurriedly wrote to Marbury the next day. Piqued that the 74-gun ship was to have begun "some months past," and needing to report to Congress, Stoddert urged Marbury to contract for materials as soon as possible, and told him to raise the offering price, although insisting on "good personal or real Security not only for the money advanced—but for the performance of the contract."<sup>170</sup> Stoddert needed to keep the construction of the ship on line before the change in administrations in March.<sup>171</sup>

That same Saturday, before Stoddert's letter arrived from the Navy Department with the new directions for Marbury, Hughes showed up from Alexandria at Marbury's Georgetown office ready to sign the contract. It was a day of confusion, as the prospect of the dreaded Jefferson becoming President afflicted Federalists all over the city. Marbury, likely distracted, agreed to Hughes' terms, but asked him to return on Monday to sign the contract, perhaps in order to have the document ready by then.<sup>172</sup>

When Hughes returned on Monday, Marbury informed him of Stoddert's new instructions containing a higher offering price for the timber, but with a strict requirement of security for the contract. Hughes was happy to find out that the price offered was now higher, but dismayed when Marbury "demanded such security of me, as he had never before

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168. Letters from Benjamin Stoddert to William Marbury (Feb. 23 and Apr. 1, 1800), in *NAVY LETTERS*, *supra* note 157. At one point, Marbury explored the Potomac on his own, looking for the right kind of trees. When he reported that he found properly sized locust trees, he received little credence. Joshua Humphreys, Naval Constructor, was puzzled that such timber was available along the Potomac, and Stoddert simply discounted Marbury's judgment. Letter from Joshua Humphreys to Benjamin Stoddert (Sept. 3, 1799), in *HUMPHREYS LETTER BOOK: 1797-1800*, *supra* note 165, at 254; Letter from Benjamin Stoddert to William Marbury (Nov. 18, 1799), in *3 NAVY LETTERS*, *supra* note 157; *4 NAVAL DOCUMENTS*, *supra* note 129, at 421.

169. *ALEXANDRIA TIMES AND ADVERTISER*, Dec. 12, 1800.

170. Letter from Benjamin Stoddert to William Marbury (Dec. 13, 1800), in *7 NAVAL DOCUMENTS*, *supra* note 129, at 32.

171. As late as the last day in Adams' administration, Stoddert was making final arrangements for the purchase of land for a Navy Yard in Gosport, Virginia. *6 CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS, 1792-1793*, at 202 (photo. reprint 1886) (1968).

172. *Deposition of John Hughes (Feb. 24, 1801)*, *ALEXANDRIA TIMES AND ADVERTISER*, Mar. 11, 1801.

hinted at."<sup>173</sup> Hughes protested the new demand and Marbury left the office to consult with Stoddert who was in Georgetown that day.

While Marbury was absent, John Templeman, still angling to obtain the new contract despite having failed to deliver under earlier agreements, showed up at Marbury's office and drew Hughes and Rouse aside. If Hughes and Rouse would take him in as a partner, Templeman wheedled, he would stand in as their security. Certainly, Stoddert would find that security enough.<sup>174</sup>

Meanwhile, at Stoddert's office, Marbury found the Secretary of the Navy unwilling to compromise. Despite Marbury's protests that he had given his word to Hughes, Stoddert insisted on the surety.<sup>175</sup> Chagrined, Marbury returned to his own office and informed Hughes and Rouse that the terms were firm. He suggested, however, that Robert T. Hooe of Alexandria would be an adequate surety. Marbury and Hooe were friends, so Marbury was reasonably certain that he could count on Hooe for help. Hooe, like so many of Marbury's intimates, hailed originally from Charles County, Maryland. During the Revolution, he moved his operations to Alexandria and became one of that city's wealthiest merchants.<sup>176</sup> Approximately one year after Marbury sent Hughes to gain Hooe's backing, Hooe became co-plaintiff with Marbury in his suit against Madison for their jointly withheld justice of the peace commissions.<sup>177</sup>

Hughes and Rouse then told Marbury of Templeman's offer to become partners with Hughes to gain the contract from Stoddert. Marbury was outraged. For over a year, Marbury contended with Templeman's shortfalls, and bore Stoddert's incessant scolding for not obtaining the timber. As Rouse recounted, Marbury declared that:

Templeman was quite out of the question, for he did not see any reason he had to expect any other contract until first having concluded the one he had already agreed in; and further Capt. Marbury assured us that no other person should have the contract but Mr. Hughes and myself, and that he would write Mr. Hughes the next post to Alexandria, respecting the same.<sup>178</sup>

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173. *Id.*

174. Deposition of Thomas Rouse (Feb. 28, 1801), *reprinted in* ALEXANDRIA TIMES AND ADVERTISER, Mar. 11, 1801.

175. Letter from Benjamin Stoddert to William Marbury (Mar. 4, 1801).

176. MARYLAND STATE PAPERS (Red Books), No. 4, part 1, at 10 (1950).

177. Deposition of John Hughes (Feb. 24, 1801), *reprinted in* ALEXANDRIA TIMES AND ADVERTISER, Mar. 11, 1801; MARYLAND STATE PAPERS, *supra* note 176, at 10.

178. Deposition of Thomas Rouse (Feb. 28, 1801), *supra* note 174; MARYLAND STATE PAPERS, *supra* note 176, at 10.

But Templeman was not through. Within a week, he secured a new partner and offered, once again, to supply the timber, but now at an even higher price than what Stoddert had authorized. Marbury dutifully informed Stoddert of Templeman's offer, and Stoddert told Marbury to raise the price to meet Templeman's request.<sup>179</sup> When Marbury informed Stoddert that Hughes had agreed to the stated price, Stoddert ordered him to sign the contract with the higher price for Templeman.<sup>180</sup> Even though Templeman had fallen short of supplying timber under earlier contracts, Stoddert opined that Hughes would never find sufficient security for the performance of the contract.<sup>181</sup>

Marbury, firmly overruled, never sent the promised letter to Hughes confirming the terms. The inevitable reckoning occurred in February, 1801. True to Marbury's prediction, Hughes obtained Robert Hooe's surety. When he returned to Marbury's office with Hooe's guaranty in hand, he discovered that the contract had been let to Templeman. He blamed Marbury for misleading him. The scandal became public in late February and was reported fully in the press on March 11, 1801, just at the time when President Jefferson was deciding which of John Adams' justices of the peace appointments should be kept and which should be dropped.<sup>182</sup>

The vicissitudes Marbury and Stoddert encountered in their haste to build the dock and the ship ultimately caused the expenditures for the Washington shipyard to exceed even the more developed yards in New York, Portsmouth, Boston, Philadelphia and Norfolk.<sup>183</sup> None of this was lost on Jefferson, who, with his Secretary of the Treasury Albert Gallatin, was committed to reducing the federal budget. Upon taking office, Jefferson was confronted with some large sums Stoddert had asked Marbury to disburse to Templeman, even over and above the amount due under the contract. On March 12, 1801, in a defensive letter to Marbury, Stoddert declared that he had underestimated the price for timber when the earlier contracts with Templeman and others had been signed in 1799 and that Templeman was bearing a loss as a result. He directed Marbury to

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179. Letter from Benjamin Stoddert to William Marbury (Dec. 22, 1800), in *NAVY LETTERS*, *supra* note 157.

180. The final price, however, was the same that Hughes and Rouse had agreed upon. *ALEXANDRIA TIMES AND ADVERTISER*, Mar. 11, 1801. Templeman informed Joshua Humphreys, the Navy's shipbuilder, that he had the contract on February 17, 1801. Letter from Joshua Humphreys to John Templeman (Feb. 25, 1801), in *HUMPHREYS LETTER BOOK: 1800-1835*, *supra* note 165, at 23.

181. Letters from Benjamin Stoddert to William Marbury (Feb. 23; Apr. 1, 15, 1800), in *3 NAVY LETTERS*, *supra* note 157.

182. *ALEXANDRIA TIMES AND ADVERTISER*, Mar. 11, 1801.

183. *BRYAN*, *supra* note 12, at 331; Hibben, *supra* note 154, at 21.

pay Templeman a supplement.<sup>184</sup> At the same time, he explained the situation fully to Jefferson and assumed personal responsibility for placing the contractor at risk.<sup>185</sup> Jefferson was unmoved. When he received Stoddert's letter, he countermanded the order to Marbury immediately.<sup>186</sup>

In the end, Jefferson canceled construction of all of the 74-gun ships of the line, and the timber, which was so expensively and laboriously acquired, rotted in the yards.<sup>187</sup> Undoubtedly in Jefferson's mind, Marbury forever became associated with the ambitious Stoddert and the costly overruns. A few months later, Jefferson's Secretary of War, Henry Dearborn, unceremoniously fired Marbury as naval agent.<sup>188</sup>

The Templeman affair had been scandal enough, and it followed on the heels of a bitter public dispute between Marbury and Lewis Deblois, a fellow Federalist and foreman of the navy yard. Marbury had contracted with Deblois to supply the logs for the wharf in 1799, and then hired him to supervise the daily laborers at the yard because Deblois owned and operated a wharf not far from the navy yard.<sup>189</sup>

Deblois was the son-in-law of Tristram Dalton, former Senator from Massachusetts, Treasurer of the Mint under Washington, and longtime friend and colleague of John Adams.<sup>190</sup> Washington City's economic collapse in the late 1790s plunged Dalton into bankruptcy.<sup>191</sup> Nonetheless, highly regarded by men of both parties, John Adams appointed Dalton as

184. Letter from Benjamin Stoddert to William Marbury (Mar. 12, 1800), in *NAVY LETTERS*, *supra* note 157.

185. Letter from Benjamin Stoddert to Thomas Jefferson (Mar. 12, 1801), *microformed on* No. 179, Roll 18 (National Archives, MISCELLANEOUS LETTERS OF DEPARTMENT OF STATE).

186. Letter from Benjamin Stoddert to Thomas Jefferson (Mar. 14, 1801), in *JEFFERSON LETTERS* (Library of Congress) (acknowledging the order that Stoddert not pay contractors through Marbury).

187. PALMER, *supra* note 139, at 127.

188. Letter from Henry Dearborn to William Marbury (July 9, 1801), in *7 NAVAL DOCUMENTS*, *supra* note 129, at 269. Although the expenses of the Washington navy yard were unusually high, the Jeffersonians never questioned the propriety of Marbury's handling of the funds entrusted to him.

189. HUMPHREYS LETTER BOOK: 1797-1800, *supra* note 165, at 251.

190. ARNEBECK, *supra* note 120, at 172, 247; SENATE EXECUTIVE JOURNAL, May 3, 4, 1792, *reprinted in* 5 JOURNAL OF THE SENATE, *supra* note 12, at 121-22.

191. In 1799, Maryland passed an act for Dalton's relief. MARYLAND GAZETTE (Annapolis), Jan. 9, 1800. During those hard months for Dalton and his son-in-law Deblois, in late 1801 each was appointed but excused from grand jury duty in Washington. Minutes of the U.S. Circuit Court of the District of Columbia 1801-1863, *microformed on* M1021, Roll 1, 1801-1813 (NATIONAL ARCHIVES MICROFILM).

justice of the peace for Washington County, probably as a sinecure for his friend.<sup>192</sup>

Dalton's son-in-law, Lewis Deblois, saw his own ventures fall with the syndicate of Nicholson, Greenleaf, and Morris, whose unsecured speculations in Washington retarded the city's development for years afterward.<sup>193</sup> With a large family of young daughters, and the commercial activity of Washington near a standstill, Deblois was also near bankruptcy. He took the job as foreman of the navy yard in early 1800 only to be dismissed publicly by Marbury that summer. Deblois' reputation was left in tatters. A public feud between the two men erupted.

Marbury had made the most serious accusations against Deblois. According to Marbury's version of the events, shortly after he had hired Deblois as foreman for the building of the wharf, Marbury discovered that Deblois was billing the navy department a dollar a day for each day laborer he hired, but was paying the men only 2/3 dollar and pocketing the balance.<sup>194</sup> He forced Deblois to refund the difference to the navy. Ready to fire Deblois, Marbury was compelled by Stoddert to receive naval Captain Thomas Tingey to supervise the building of the wharf. Tingey asked that Deblois be given a second chance. But Deblois' self-dealing did not abate. Marbury soon discovered that Deblois had engaged a blacksmith to fashion a crane for Deblois' house out of iron purchased for the navy yard, and that Deblois had even billed the navy yard for labor. Deblois also promised the blacksmith that he could have the lucrative contract for iron smithing at the navy yard in return for a kickback. Furthermore, Marbury uncovered evidence that Deblois overcharged the department for the logs he purchased for the wharf on his original contract.<sup>195</sup>

Marbury finally fired Deblois in the summer of 1800 and let those in Georgetown know why. Unemployable, Deblois took his case to the Re-

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192. In June 1800, on his first formal visit to Washington, William Thornton and Tristram Dalton escorted President Adams to the Capitol. There, Dalton offered the president a formal address of welcome. Adams later called on Dalton at his residence. *FEDERAL GAZETTE*, June 13, 1800.

Although Jefferson did not reappoint Dalton when he canceled Adams' appointments, Jefferson did name Dalton immediately to succeed William Cranch as Commissioner for the city of Washington. Adams raised Cranch to the Circuit Court of the District of Columbia, a position immune to the power of Jefferson. *THOMAS JEFFERSON AND THE NATIONAL CAPITAL*, *supra* note 132, at 59.

193. ARNEBECK, *supra* note 120, at 247, 268-69, 279, 294, 320-21, 328-29, 347, 354, 381, 427, 441.

194. *CENTINEL OF LIBERTY OF GEORGETOWN AND WASHINGTON ADVERTISER*, Sept. 23, 1800.

195. Depositions of John Cannon, Blacksmith, and Joseph N. Stockett, *reprinted in CENTINEL OF LIBERTY OF GEORGETOWN AND WASHINGTON ADVERTISER*, Sept. 23, 1800.



publican press, and accused Marbury of being "a base calumniator, unworthy any longer to hold the weighty and confidential office that you now fill under this general government."<sup>196</sup> When Marbury offered to have the three (unnamed) "esteemed gentlemen" who had originally recommended Deblois review the charges, Deblois demurred: "From my own experience, I was convinced that characters, however pure, would not have had fair play, if put in competition with your own."<sup>197</sup> Apparently bested in the war of letters in the press, Deblois broke off the contest, but both protagonists had been tainted in the fracas. In the final irony of the affair, John Adams appointed Lewis Deblois as a justice of

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196. CENTINEL OF LIBERTY OF GEORGETOWN AND WASHINGTON ADVERTISER, Sept. 16, 1800.

197. Deblois offered instead a formal arbitration of the matter. Marbury, with strong evidence on his side, wisely refused the bait that would have made the two antagonists equal in the contretemps. *Id.*, Sept. 23, 1800. Deblois also charged that Marbury took timber from the Navy Yard for his own use, but Marbury produced evidence that the timber was paid for and that the surplus was returned to the yard. *Affidavit by Leonard Harbaugh*, CENTINEL OF LIBERTY OF GEORGETOWN AND WASHINGTON ADVERTISER, Nov. 4, 1800.

A more serious accusation against Marbury did not become public until 1803. It involved Marbury's old friend, William Campbell. In October 1800, in the midst of his extraordinary amount of work as naval agent, state's agent and broker, Marbury accepted an appointment from Maryland's Chancellor as one of three trustees, including Philip Barton Key, to oversee the selling of Semples Manor, a large estate. *Lawson v. Attorney General*, 6 CHANCERY RECORDS 177, Oct. term, 1800. It is not clear whether Marbury and Key had composed their differences or whether they were appointed together through happenstance.

Over the next year, the trustees surveyed and divided the manor into lots, but Marbury wound up selling the entire parcel at an auction. Immediately thereafter, the tenants of the manor brought a formal charge of fraud before the Chancellor. The tenants charged that Key and Marbury had contrived to sell the entire property within two minutes of the start of the auction to none other than William Campbell, at the bargain price of one dollar per acre. Had the property been sold in lots as advertised, the tenants would have been able to purchase their homesteads at the expected price of \$4.00 per acre. With Campbell in control and ready to take in the profit, the tenants were given "the humiliating task of crouching at the feet of speculators to secure to their family a home against the inclemency of the approaching season." *Id.* Four weeks later, a second petition came to the Chancellor in which the bulk of the original petitioners asserted that they signed their names not knowing the substance of the petition, whereupon the Chancellor ratified the sale.

No other facts are known. Perhaps the tenants were illiterate or did not realize what they were signing. Or perhaps they were quickly informed that if they wanted any chance of purchasing their homesteads from Campbell, they had better withdraw their complaint. Later on, the sale was set aside, but as late as 1810, Marbury and Key were still petitioning the Chancellor for payment for their services. They received £200. 46 CHANCERY RECORDS, vol. 254, Oct. term 1800.

Earlier in 1798, Marbury had to scotch a rumor that he had been involved in the Yazoo land grab scandal. Letter from William Marbury to Hugh Matthews (Aug. 5, 1798), in MATTHEWS PAPERS (Maryland State Archives) (disclaiming any interest in speculation in Georgia lands).

the peace along with Marbury and Deblois' father-in-law, Tristram Dalton.<sup>198</sup> The explanation is not difficult. In the rushed few days that Secretary of State John Marshall had for putting together a list of nominees, names came from differing sources. Marbury was among those who were prominent Federalist partisans of Adams grouped around Stoddert. Dalton was a friend of Adams, and he and his son were in need of a financial safe haven.

#### IV. MARBURY AND THE FEDERALIST CAMPAIGN AGAINST JEFFERSON

For all his problems as naval agent, Marbury had nonetheless moved easily into the highest circles of the Federalist elite in Georgetown, a town that had become the center for the elite gentry of Charles County and other southern Maryland counties.<sup>199</sup> He became Uriah Forrest's broker, and he and his family made their abode in Forrest's home at the western end of Georgetown, the very place where President Washington and the landed proprietors had made the terms that secured the city of Washington as the nation's capital.<sup>200</sup> The Marbury family soon became active in Georgetown society. Marbury was elected a manager of the dancing assemblies for the social elite.<sup>201</sup> Dr. William Thornton, architect of the Capitol, welcomed Marbury at his home, even though Thornton was an avowed Republican.<sup>202</sup> Marbury also served as a member of the board of directors of the Bank of Columbia, had lucrative investments, and had begun making prudent purchases of land.<sup>203</sup> Marbury had not

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198. SENATE EXECUTIVE JOURNAL, *supra* note 12, at 388.

199. Harold W. Hurst, *The Maryland Gentry in Old Georgetown, 1783-1861*, 73 MD. HIST. MAG. 1, 2 (1978).

200. Marbury lived in the house until his death in 1835. It still stands, expanded by Marbury to three stories, at 3350 M Street. Apparently, the title of the home was in Stoddert's name, though only Forrest lived there. Shortly before Marbury moved to Georgetown, Stoddert may have sold the place to Marbury's old friend, William Campbell, who in turn leased it to Marbury. Marbury later took title to the property. Letter from Robert W. Lyle, Curator, to David Forte, Author (Sept. 7, 1990), in Peabody Room, *supra* note 20. This author has been unable to confirm the actual titles in the property records of Georgetown. In recent years, Marbury's home has been the subject of an expensive and unsuccessful redevelopment, and was purchased for an embassy by Ukraine in 1993. ST. LOUIS POST-DISPATCH, May 23, 1993, at 6B.

201. WASHINGTON FEDERALIST, Nov. 29, 1800.

202. Diary of Mrs. William Thornton, 1800-1863, 10 REC. OF THE COLUM. HIST. SOC'Y 95, 104, 109-111, 149, 172 (1907). Tristram Dalton warned John Adams in 1800 that Thornton was a "rabid Republican." ARNEBECK, *supra* note 120, at 569-70.

203. Perhaps because of his father's failure to find security in land, Marbury eschewed land speculation until late in his career, instead concentrating on commissions and equity holdings. It was not until 1794 that Marbury made his first purchase of land from the state—a mere 26 acres, purchased Dec. 20, 1794 and recorded Feb. 23, 1796. Provincial and General Court Deeds, Book JG, No. 4, at 26. He thereby spared himself the trauma virtually every wealthy Federalist experienced when land prices collapsed in the late 1790s.

only become part of the Forrest-Stoddert social elite, but was drawn into their politics just at the time when the fault line between the Hamilton and Adams Federalists became permanent and unbridgeable. In addition, membership in Uriah Forrest's Federalist clique not only brought Marbury into the inner circle of Adams' favorites, it also made him an object of the Republican party's enmity.<sup>204</sup>

Forrest was the head of the Federalist party in Georgetown and knew Maryland politics well, having served on the Governor's Council,<sup>205</sup> in the lower house, and in the Senate.<sup>206</sup> He had also been elected Mayor of Georgetown, representative to the Continental Congress, representative to the United States Congress, and in 1800 served as justice of the peace for Montgomery County.<sup>207</sup> Like Benjamin Stoddert and James Lingan, Forrest had a distinguished record in the Revolution, serving the entire war and suffering the loss of a leg.<sup>208</sup> He was long a friend of John Adams and wholeheartedly admired him. It was Forrest who apprised the recently inaugurated Adams in 1797 that despite Vice-President Jefferson's protestations of support and friendship, Jefferson was in fact seeking to undermine Adams' power.<sup>209</sup> It was also Forrest's blunt advice to the President in April 1799 that, though late in the day, salvaged the Ad-

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Only then did he begin to accumulate large holdings at good prices. While Stoddert and Forrest would die in debt, Marbury guaranteed himself and his children long-term prosperity.

204. See, for example, the advice of Jefferson's trusted advisor on local politics, John T. Mason, whom Jefferson appointed as attorney for the District of Columbia in the place of Thomas Swan, one of the most powerful Federalist politicians in Alexandria whom John Marshall utilized in formulating his list of appointees. See Letter from John Marshall to James Marshall (Mar. 18, 1801), in *MARSHALL TRANSCRIPTS AND PHOTOSTATS* (Library of Congress). Mason characterized all the significant personages in Washington according to their animosity, neutrality, or support of the new administration. Those he most deprecated he called "tools" of Forrest and Stoddert. Letter from John T. Mason to Thomas Jefferson (undated, but from context almost certainly written in the spring of 1801), in 10 *LETTERS OF APPLICATION AND RECOMMENDATION DURING THE ADMINISTRATION OF THOMAS JEFFERSON, 1801-1809* (1962), microformed on No. 418, Roll 10 (S) (National Archives Microfilm Publications) [hereinafter *LETTERS OF APPLICATION*].

205. Register of Civil Appointments since the Year 1793 and of the Permanent Officers Existing at that Period Transferred from the Register of Civil Appointments, Maryland State Archives, at 4 [hereinafter *Register of Civil Appointments*]. Forrest replaced Randolph Latimer, who resigned in 1792 to become Agent. *MARYLAND GAZETTE* (Annapolis), June 5, 1792.

206. *MARYLAND GAZETTE* (Annapolis), Sept. 22, 1796; Treasurer of the Western Shore Journal of Accounts, at 25.

207. 1 *MARYLAND BIOGRAPHY*, *supra* note 41, at 324-25; Register of Civil Appointments, *supra* note 205, at 72.

208. For his Revolutionary record, see *STEUART*, *supra* note 37, at 4, 5, 10, 15, 23.

209. See Adams' reply to Forrest (June 28, 1797), in 8 *ADAMS' WORKS*, *supra* note 147, at 546.

ams administration from the continuing machinations of the Hamiltonian faction.<sup>210</sup>

As President, John Adams faced two initial tasks; first, to neutralize the threat from France without all-out war and without alliance with Britain, and second, to free his administration from Hamilton's influence over the cabinet. Washington had neutralized the British threat to American shipping through diplomatic and trade concessions in the Jay Treaty in 1794, while warning about the dangers of entangling alliances in a European war in his farewell address. However, the cost of Washington's policy had been the solidification of Republican opposition and retaliation by France on the high seas. Those legacies he left Adams to deal with.

Adams necessarily was a lesser light to Washington, and believed earnestly that he had been the target of Hamilton's intrigue to keep him from both the Vice-Presidency and the Presidency. The most prominent members of Adams' cabinet—Timothy Pickering at State, James McHenry at War, and Oliver Wolcott at Treasury—were holdovers from Washington's administration and maintained close ties to Alexander Hamilton.<sup>211</sup> Adams needed every friend he could find to advance his brand of moderate Federalism. He found three stalwarts in Uriah Forrest, Benjamin Stoddert, and John Marshall. Neutralizing the Republican opposition, making peace with France, and taking control of his administration were each daunting tasks. Although Adams accomplished two of them, it was not enough.

Adams was hampered by his own emotional and vacillating personality, his distaste for political conflict, and his constitutional notion of a strict separation of powers. He believed that the "spirit of faction" that Hamilton and Jefferson exemplified would destroy the Union, and he therefore steadfastly stood apart from party affairs.<sup>212</sup> He added to his own political isolation with long absences from the capital during which time he retreated to his New England farm. It provided him with a place of respite and renewed focus. But the administration of his government suffered from his frequent departures from Philadelphia. It took Uriah Forrest's letter in April 1799 to shake Adams from the illusion that he

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210. Letter from Uriah Forrest to John Adams (Apr. 28, 1799), in 8 ADAMS' WORKS, *supra* note 147, at 637.

211. See ELKINS & MCKITRICK, *supra* note 93, at 623-32 (discussing Adams' cabinet members).

212. See *id.* (noting that the Federalists were politically dysfunctional); JOHN R. HOWE, JR., THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS 193-216 (1966) (discussing consequences of the existing political division).

could run the federal government from a distant farmstead.<sup>213</sup> Forrest was forthright: Adams could no longer allow a hostile cabinet to direct his administration.

The public sentiment is very much against your being so much away from the seat of government, from a conviction that, when you are there, the public vessel will be properly steered; and that these critical times require an experienced pilot. The people elected you to administer the government. They did not elect your officers. . . .<sup>214</sup>

Forrest warned Adams that his cabinet was not primarily loyal to him, and that the President should not be distant from the seat of government. The plea was well taken. Adams was in the midst of taking the controversial step of sending a new diplomatic mission to France in an attempt to settle hostilities. His administration hung in the balance.

Adams had a number of friends backing his more moderate Federalist course domestically and internationally, but he possessed little taste for structuring a political coalition to bring it about. He believed the nation needed a larger army, but not of the size that the Federalists in Congress were pushing. He wanted, instead, to defend the nation through the "wooden walls" of a navy.<sup>215</sup> Adams preferred using his executive powers to stymie policy he disapproved of, rather than the veto. He delayed appointments to the army and, although he did not oppose (as Hamilton did) the Alien and Sedition Acts,<sup>216</sup> he purposely left the acts against aliens unenforced.<sup>217</sup>

Meanwhile, Adams' friends were moving into positions of power. Attorney General Charles Lee, later Marbury's attorney in his suit against Madison, gave loyal and principled legal advice.<sup>218</sup> Secretary of the Navy Benjamin Stoddert (whose wife was a particularly close friend to Mrs. Adams)<sup>219</sup> met the French threat on the oceans. John Marshall, bowing to direct pressure from George Washington, entered Congress and

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213. At first, Adams resisted Forrest's position, but later saw the necessity of it. Letter from John Adams to Uriah Forrest (May 18, 1799), in *ADAMS' WORKS*, *supra* note 147, at 645.

214. Letter from Uriah Forrest to John Adams (Apr. 28, 1799), in 8 *ADAMS' WORKS*, *supra* note 147, at 637.

215. RALPH A. BROWN, *THE PRESIDENCY OF JOHN ADAMS* 72 (1975).

216. Ch. LIV, 1 Stat. 566 (1798); ch. LVIII, 1 Stat. 570 (1798); ch. LXVI, 1 Stat. 577 (1798); ch. LXXIV, 1 Stat. 596 (1798). Hamilton's opposition is chronicled in McDONALD, *supra* note 54, at 339.

217. MANNING J. DAUER, *THE ADAMS FEDERALISTS* 242 (1953). Although Adams stymied prosecution of the alien acts, he did approve of two prosecutions under the Sedition Act. BROWN, *supra* note 215, at 126-28.

218. See ELKINS & MCKITTRICK, *supra* note 93, at 632-34 (discussing Charles Lee).

219. BROWN, *supra* note 215, at 35.

wielded much influence.<sup>220</sup> He served with Leven Powell, who also became one of Adams' firmest backers.<sup>221</sup>

Adams began his independent course in December 1798 when he resisted the calls from his party for war with France. In February, 1799, he shocked his cabinet by nominating a new mission to re-open negotiations with France.<sup>222</sup> Attorney General Lee and Congressman John Marshall offered their unequivocal support immediately.<sup>223</sup> With the Fifth Congress' adjournment in March, 1799, Adams was impatient to leave Philadelphia for his farm. He had hardly settled into his New England home, however, when Uriah Forrest's alarming missive arrived. As early as 1796, Adams' friend, Elbridge Gerry, had warned Adams of Pickering's alliance with Hamilton, whom Adams believed had worked to prevent his election. But at that time, Adams dared not split the Federalist party in the face of the rising Republican strength by firing Pickering at the start of his new and untried administration. The new President also convinced himself that "Pickering and his colleagues are as much attached to me as I desire."<sup>224</sup> By 1799, however, he could no longer ignore what all others knew.

In September 1799, an even more blunt letter from Secretary of the Navy Stoddert followed Forrest's entreaty, pleading with the President to come to the capital and take charge of the difficult diplomacy regarding Britain and France without falling into war. The letter warned that Adams' absence could only increase the chances for a Republican victory in the next election.<sup>225</sup>

In October, Adams took Uriah Forrest's and Benjamin Stoddert's advice to heart and returned to the capital—temporarily moved to Trenton to escape Philadelphia's annual yellow fever epidemic.<sup>226</sup> Adams discov-

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220. DAUER, *supra* note 217, at 236. Marshall's support of his policies particularly gratified Adams. See BROWN, *supra* note 215, at 167.

221. DAUER, *supra* note 217, at 101.

222. The envoy was William Vans Murray, then United States Minister to The Hague. *Id.* at 231. Murray supported Adams. BROWN, *supra* note 215, at 41. The Federalists in Congress agreed reluctantly to the mission and added Patrick Henry and Oliver Ellsworth. Henry declined and was replaced by William R. Davie. *Id.* at 100; DAUER, *supra* note 217, at 232.

223. See ELKINS & MCKITRICK, *supra* note 93, at 633-34 (discussing Lee's and Marshall's support for President Washington and President Adams).

224. DAUER, *supra* note 217, at 114 (quoting Letter from Elbridge Gerry to John Adams (Feb. 3, 1797)).

225. Letters from Benjamin Stoddert to John Adams (Aug. 29 and Sept. 13, 1799), in 9 ADAMS' WORKS, *supra* note 147, at 19-20, 27-29.

226. During that summer, Adams did not press for the immediate departure of the mission to France, raising questions among historians about his sudden and strange attitude. See BROWN, *supra* note 215, at 100-03 (expressing the view that Adams was marking

ered that Hamilton, recently arrived on army business, was seeking to prevent the envoys from leaving on their peace mission to France. Receiving Hamilton, Adams listened to his argument why the mission should be aborted. Sure he had been the object of Hamilton's intrigues for over a decade, Adams dismissed his arguments. "[N]ever in my life did I hear a man talk more like a fool," Adams wrote of the meeting.<sup>227</sup> Adams ordered Pickering to provide the envoys their formal instructions, and he ordered Stoddert to prepare passage. Stoddert reserved one of the navy's best frigates, *The United States*, and the mission sailed for France in November, 1799.<sup>228</sup>

In May, 1800, President Adams finally made the move he should have done three years earlier: he removed Pickering and McHenry from the cabinet, discharging Pickering directly when the Secretary of State refused to resign.<sup>229</sup> Adams convinced John Marshall to be Secretary of State and Samuel Dexter to be Secretary of War. At Treasury, President Adams kept Wolcott, who continued to delude the President about his loyalty while still reporting to Hamilton.<sup>230</sup> The Pickering and McHenry removals openly split the Federalist party and Hamilton soon called for Adams' defeat.<sup>231</sup> By that time, however, President Adams had a cabinet, with the exception of Wolcott, who supported his moderate Federalism. In the last year of its term, the Adams presidency had become an administration. The next month, June 1800, President Adams went south to make a tour of the new capital, staying with his friend, Uriah Forrest,<sup>232</sup> while the executive departments in Philadelphia packed. A few weeks later, the entire government moved to cramped and unfinished quarters in the still wilderness capital of Washington.<sup>233</sup>

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time to continue assessing French designs and to strengthen the hand of his negotiators while Stoddert built up the Navy).

227. ELKINS & MCKITRICK, *supra* note 93, at 640. Forrest McDonald argues that Hamilton's advice was honest, uncontrived, and ultimately correct. McDONALD, *supra* note 54, at 347.

228. ELKINS & MCKITRICK, *supra* note 93, at 639.

229. BROWN, *supra* note 215, at 168-69. Ironically, Pickering negotiated with Uriah Forrest to rent a house when the State Department was moved to Washington. Letter from Timothy Pickering to Uriah Forrest (Feb. 13, 1800), in PICKERING PAPERS (unpublished manuscript, Massachusetts Historical Society). Pickering later claimed that Adams fired him as part of a bargain with the Jeffersonians to secure his re-election. Letter from Timothy Pickering to Justice Samuel Chase (Feb. 9, 1811), in PICKERING PAPERS (unpublished manuscript, Massachusetts Historical Society).

230. See BROWN, *supra* note 215, at 182-83.

231. McDONALD, *supra* note 54, at 350-52.

232. BRYAN, *supra* note 12, at 348-50.

233. After his tour, Adams once again returned to his farm and formally moved to the Presidential Residence in November.

With the government in Washington, Uriah Forrest called upon Marbury to help secure Adams' re-election. The issue that concerned Forrest was how Maryland's electoral vote for President would be decided in the 1800 election. Ever since an indefatigable Aaron Burr had organized a Republican victory in the New York state legislative elections over the efforts of Alexander Hamilton in early May, it seemed that Jefferson and the Republicans were closing in on victory. Because the New York state legislature chose the state's presidential electors, it was evident that New York's entire electoral vote would go to Jefferson.<sup>234</sup>

Leven Powell, a friend of John Marshall's and his fellow Federalist Congressman from Virginia, was taken aback by the New York vote, and he described the "friends of the government" as "exceedingly alarmed" at the trend.<sup>235</sup> As the summer passed, however, the Federalists seemed to be holding on. They hoped to salvage the Presidency, just as they had in 1796, when John Adams defeated Thomas Jefferson by only three electoral votes, exactly the margin that Adams had gained over his rival in Maryland.<sup>236</sup> Although New York's twelve electoral votes were lost to Jefferson and Burr,<sup>237</sup> the Federalists hoped to squeeze out some votes for Adams in other states.

Pennsylvania's legislature also chose its presidential electors, but Maryland had always permitted its voters to select its electors by individual district.<sup>238</sup> Inasmuch as Pennsylvania was expected to go Republican, and Maryland to remain Federalist, Powell suggested that the manner of choosing electors in each state be reversed: "Pennsylvania must therefore pass a law to choose the electors by districts or we'll have none . . . , and if Maryland would either choose her electors by the Assembly or a general

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234. Without Burr, Jefferson would not have won New York and therefore would not have been elected President in 1800. ELKINS & MCKITTRICK, *supra* note 93, at 692. Hamilton, smarting from his defeat, asked Governor John Jay of New York to call a special session of the outgoing Federalist legislature to change the method of choosing electors. Instead of the legislature voting as a block, Hamilton urged that the electors be picked by the voters in separate districts, a more democratic process, as was the practice in many other states. That way the Federalists would gain some of the New York electors. John Jay refused, however, finding the suggestion unethical. DAUER, *supra* note 217, at 250; McDONALD, *supra* note 54, at 349.

235. Letter from Leven Powell to Charles Simms (May 4, 1800), in CHARLES SIMMS PAPERS 1731-1822 (1918) (Library Of Congress) [hereinafter SIMMS PAPERS].

236. JOHN T. WILLIS, *PRESIDENTIAL ELECTIONS IN MARYLAND* 16 (1984).

237. Because it was believed that the Republicans won in New York on local issues, General Philip Schuyler also wrote to Jay, claiming he was doing so at the urging of several Federalists in Congress, including John Marshall. The letters asked Jay to call a special session of the legislature to change the voting for electors from at-large to districts so that the Federalist ticket could recoup votes. CUNNINGHAM, *supra* note 2, at 184-85.

238. 1790 Md. Laws, Nov. Sess., ch. 16; 1795 Md. Laws, Nov. Sess., ch. 73.



ticket his [i.e., Adams'] election might be secured."<sup>239</sup> Jefferson's home state of Virginia had changed its own method to a general ticket to ensure that no stray Federalist electoral votes could be cast for Adams.<sup>240</sup> Cunningly, the Virginia legislature held off making the change until the Federalist-controlled legislature in Maryland had adjourned. Otherwise, there would undoubtedly have been a similar retaliatory move in Annapolis. Consequently, the issue was put over in Maryland for the newly elected legislature to decide. The Federalist candidates for the Maryland state legislature ran on the platform of "a legislative choice." If they succeeded, the state legislature would vote Maryland's electoral votes, and all ten would be for Adams.

In Prince George's County, Marbury's cousin, William Marbury, Jr., was mounting a successful campaign as state representative on the Federalist platform. In Georgetown and in Montgomery County, Uriah Forrest and his Federalist partisans sought to do the same. Four representatives would be elected from Montgomery County, and Forrest sought to make sure that they each pledged to change Maryland's method of selecting presidential electors. The Federalists of Montgomery County settled upon four worthies as candidates,<sup>241</sup> but were surprised when Daniel Reintzell, a prominent politician and justice of the peace, also announced that he would stand for the post.<sup>242</sup> Reintzell, a Federalist, declared himself an Adams' supporter, but refused to pledge himself for "a legislative choice." His entry into the race would split the Federalist vote, and his election might weaken Adams' chances for a second term. There was also some suspicion about Reintzell's motives because his two brothers were both Republican.<sup>243</sup>

A small delegation of the most prominent Federalists, including Forrest and Marbury, met with Reintzell at the City Tavern in early September to ask him to withdraw. Reintzell later claimed that they offered him a

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239. SIMMS PAPERS, *supra* note 235.

240. J. R. Pole, *Constitutional Reform and Election Statistics in Maryland, 1790-1812*, 55 MD. HIST. MAG. 275, 280 (1960). In 1796, one Federalist elector, Leven Powell, had been chosen in Virginia. DAUER, *supra* note 217, at 101.

241. The candidates were R. P. Magruder, Thomas Davis, Hezekiah Veatch, and Thomas Beal of George. ALEXANDRIA TIMES AND ADVERTISER (Alexandria), Oct. 11, 1800 (later renamed THE TIMES AND DISTRICT OF COLUMBIA DAILY ADVERTISER).

242. Reintzell had been annually appointed justice of the peace for Montgomery County since 1792. 72 Archives of Maryland, *supra* note 43, at 248, 322; Register of Civil Appointments, *supra* note 205, at 72-73. In 1796, he was elected to the Maryland General Assembly. Treasurer of the Western Shore Journal of Accounts, 1794-1796, Maryland State Archives, at 19. He also served as one of three justices for the Montgomery County Orphan's Court in 1798. *Id.* at 303.

243. The summary that follows is taken from an exchange of letters in the CENTINEL OF LIBERTY OR GEORGETOWN AND WASHINGTON ADVERTISER, Sept. 9 and 12, 1800.

plum position in Adams' new administration as a payment for his standing down. He refused, but Forrest continued the pressure. Reintzell then broke with the Federalists publicly, taking his case to the press and naming those who importuned him, including William Marbury.<sup>244</sup>

Reintzell stayed in the race, running on the Republican platform. He and the three other Republicans from Montgomery County were defeated soundly in the October election, but state-wide, the Republicans took over the legislature. There would be no "legislative choice."<sup>245</sup> In the end, Maryland's voters, choosing their electors by district, divided the state's ten electoral votes evenly between Adams and Jefferson.<sup>246</sup> When the electoral votes were tallied nationwide, Jefferson had bested Adams 73 to 65.<sup>247</sup> Had the Federalists been able to hold on to the Maryland legislature, all of Maryland's votes would have flowed to Adams. John Adams would have been re-elected to a second Presidential term, and the name of William Marbury would never have appeared in the history books.

John Adams did not retaliate against Daniel Reintzell. Because Reintzell had been a justice of the peace for Montgomery County, the moderate Adams allowed him to continue in office by appointing him justice of the peace with the other "midnight appointments," notwithstanding party position.<sup>248</sup> Adams' friends in Maryland had, nonetheless, tried to gain those votes that would have garnered him victory. Along with others, William Marbury had intervened publicly on behalf of John Adams in a move that might have cost Thomas Jefferson the election. For good or ill, Marbury's political future was tied to the fortunes of the Adams' partisans.

On the very night that Jefferson was elected President, William Marbury publicly proclaimed his Federalist loyalty. With Thomas Jefferson and his titular running mate, Aaron Burr, having obtained an equal number of electoral votes,<sup>249</sup> the House of Representatives would decide

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244. THE CABINET, Sept. 3, 10, 12, 17, 1800.

245. The Republicans elected 48 members to the Federalists' 32. W. Wayne Smith, *Politics and Democracy in Maryland, 1800-1854*, in MARYLAND: A HISTORY, *supra* note 35, at 239, 242.

246. In Pennsylvania, the Jeffersonians wanted a legislative choice, but the Federalists succeeded in having the electors chosen by district. WASHINGTON FEDERALIST, Nov. 9, 1800. The vote went eight for Jefferson and seven for Adams, a stronger showing for the President than had been expected. *Id.*

247. WILLIS, *supra* note 236, at 18.

248. SENATE EXECUTIVE JOURNAL, *supra* note 12, at 387.

249. At that time, the Constitution provided that electors for President vote for two persons, and that the person receiving the most votes would be President and the runner-up Vice-President. In case of a tie, the House of Representatives would decide among those tied with each state having one vote. U.S. CONST. art. II, § 1, cl. 3 (*amended* 1804).

between the two. After thirty-six ballots in which the Federalists tried unsuccessfully to put Burr in the President's chair, they permitted the requisite nine state majority to elect Jefferson on February 17, 1801.<sup>250</sup>

That night, according to the Federalist newspaper, the *Washington Gazette*, "[a] band of republicans, consisting of the most worthless of the wretches assembled here, marched from one end of the city to the other, and attempted to compel the citizens to illuminate their houses."<sup>251</sup> Forty or fifty of them came to the house of William Cranch, who was nephew to Abigail Adams, Commissioner of the District of Columbia and soon-to-be-appointed Circuit Court justice of the District of Columbia. Bowing to their threats, Cranch put candles in all of his windows.<sup>252</sup> The mob moved on through the city, arriving finally at Marbury's residence. But Marbury would have none of it. "[H]e refused in the most resolute manner, to obey the mandate, and the mob left him imprecating vengeance."<sup>253</sup>

## V. THE APPOINTMENTS

In the last weeks of John Adams' administration, William Marbury had achieved, for his era and locale, what his grandfather had done nearly a century before. Alexander Hamilton's financial management of the new nation had given Marbury the opportunity for social and material success. It was the peculiarities of local Maryland politics, however, that brought Marbury into the small but powerful group of Adams' loyalists arrayed against Hamilton's faction and the Republicans. For that serendipitous loyalty, the last Federalist President awarded Marbury an office.

In the rush of appointments before leaving office, President Adams included Marbury among the twenty-three names he sent to the Senate as justices of the peace for Washington County.<sup>254</sup> Of that number, eleven were prominent Federalist partisans, including Marbury, Benjamin Stoddert, and Uriah Forrest.<sup>255</sup> Four other appointees were from old and

250. NOBLE E. CUNNINGHAM, JR., *IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON* 234-35 (1987).

251. *WASHINGTON GAZETTE*, Feb. 25, 1801 (quoting a letter dated Feb. 18, 1801).

252. ARNEBECK, *supra* note 120, at 619.

253. *WASHINGTON GAZETTE*, Feb. 25, 1801 (quoting a letter dated Feb. 18, 1801). The article spoke of "Mr. M's house." Because Marbury's home was, in fact, at the far end of Georgetown, and because no other "Mr. M" can be found who was one of the more partisan Federalists, "Mr. M" was very likely William Marbury.

254. Through a clerk's error, Marbury's name was spelled "Marberry" when it was sent over to the Senate. Similarly both Uriah and Peter Forrest's names were spelled with one "t." *SENATE EXECUTIVE JOURNAL*, *supra* note 12, at 388.

255. Other Federalist partisans included James Barry, Thomas Beal, Richard Forest, Marsham Waring, John Threlkheld, William H. Dorsey, Robert Peter and John Laird.

respected Federalist families in the area.<sup>256</sup> Adams also appointed five men, three or four of whom were Republican, because they were sitting justices of the peace under Maryland law.<sup>257</sup> William Thornton, cele-

Captain James Barry's work as a Federalist politician came to more prominence when he was elected to the city council in 1802. See Allen C. Clark, *The Mayoralty of Robert Brent*, 33-34 REC. OF THE COLUM. HIST. SOC'Y 268 (1931). Thomas Beal of George was elected as state representative on the platform of a "legislative choice." ALEXANDRIA TIMES AND ADVERTISER (Alexandria), Oct. 11, 1800. Richard Forrest was the nephew of Uriah Forrest. 1 MARYLAND BIOGRAPHY, *supra* note 41, at 325. Marsham Waring was a member of the board of directors on the Bank of Columbia with Forrest, Stoddert, and Marbury. MARYLAND GAZETTE (Annapolis), Mar. 17-24, 1798. John Threlkeld was the former mayor of Georgetown. BRYAN, *supra* note 12, at 275 n.2. William Hammond Dorsey was a Federalist elected to the Maryland Senate and House of Representatives, MARYLAND GAZETTE (Annapolis), Sept. 22, 1796, Treasurer of the Western Shore Journal of Accounts, Maryland State Archives, 1797-1801, at 25 (1798-1799), and chosen, along with Lingam and Forrest, to prepare an address of welcome when Adams visited the city, EBERLEIN & HUBBARD, *supra* note 59, at 145. Robert Peter was also a former mayor of Georgetown. JACKSON, *supra* note 130, at 139. John Laird was a member of the board of directors of the Bank of Columbia, MARYLAND GAZETTE (Annapolis), Mar. 17-24, 1798, and was known to Jefferson as a "bitter and violent" Federalist, 3 LETTERS OF APPLICATION, *supra* note 204.

256. They included Thomas Addison, Daniel Carroll, Thomas Sim Lee, and John Mason. Thomas Addison was an original resident of Washington, friend of President Washington, and the only person living south of the Anacostia River who could serve that area. Letter from Thomas Addison to James Madison (Aug. 7, 1802), in MADISON PAPERS (Library of Congress). Daniel Carroll of Duddington, a member of one of the most prominent families in Maryland, had served nearly a decade as justice of the peace for Montgomery County and on the Levy Court. Register of Civil Appointments, *supra* note 205, at 44-46. He was known to Jefferson as a "moderate Federalist." Undated Memorandum in Jefferson's files regarding possible appointments to be Director of the Bank of Columbia, LETTERS OF APPLICATION, *supra* note 204. Thomas Sim Lee had been elected Governor of Maryland six times. Register of Civil Appointments, *supra* note 205, at 1-4. With Washington, he had been a Director of the Potomac Company. VIRGINIA JOURNAL AND ALEXANDRIA ADVERTISER, June 16, 1785. John Mason was a relative of the Masons of Virginia whom Jefferson knew well. He was seen by Jefferson as "a man of very fair character." 3 LETTERS OF APPLICATION, *supra* note 204.

257. They were Joseph Sprigg Belt, Robert Brent, Daniel Reintzell, Abraham Boyd, and Cornelius Cunningham. Joseph Sprigg Belt, a Republican, was a sitting justice of the peace for Montgomery County. Register of Civil Appointments, *supra* note 205, at 44-46, 72-73. Robert Brent was a prominent Catholic and a future mayor of Washington. EBERLEIN & HUBBARD, *supra* note 59, at 461; WASHINGTON: A CHRONOLOGICAL & DOCUMENTARY HISTORY: 1790-1970, at 6 (Howard B. Furer ed., 1975); Clark, *supra* note 255, at 267. The Maryland Catholic elite were, on the whole, Federalists. However some like the Brents, became Republicans. DAUER, *supra* note 217, at 27. Daniel Reintzell had gained Jefferson's gratitude by running against the Federalists in the state legislative elections. He had served nearly ten years as a justice of the peace, and that apparently was enough for John Adams. 72 Archives of Maryland, *supra* note 43, at 248, 322; Register of Civil Appointments, *supra* note 205, at 72-73. Reintzell also had been mayor of Georgetown, a member of the Maryland General Assembly, and would eventually become one of the more partisan Republicans in the state. BRYAN, *supra* note 12, at 275 n.2; Treasurer of the Western Shore Journal of Accounts, Maryland State Archives, 1794-1796, at 19; FEDERAL REPUBLICAN (Baltimore), Aug. 10, 19, 1812. Abraham Boyd was a long time justice of the

brated architect of the Capitol, was also an appointee, though he too was a Republican.<sup>258</sup> Finally, Adams appointed Tristram Dalton and his son-in-law Lewis Deblois as personal favors. In sum, Adams had appointed an estimated seventeen Federalists and six Republicans.

After Thomas Jefferson was inaugurated, he discovered the undelivered commissions, ordered them withheld, and within two weeks, had substituted his own appointments.<sup>259</sup> Jefferson had to move quickly. Civil society simply could not, at that time, operate without justices of the peace. Furthermore, these very justices constituted the county legislatures of the federal district, and those bodies were to convene within a month.<sup>260</sup> President Jefferson's problem lay in justifying the replacement of the bulk of Adams' nominees without appearing to be rankly partisan within the first weeks of his administration. Jefferson had set his strategy on wooing the great mass of Federalists to his side, without seeming to be vindictive in replacing Federalist appointees with Republicans.<sup>261</sup> His moving inaugural address had the desired effect of soothing the worst fears of most of the Federalists, including John Marshall who administered the oath.<sup>262</sup> Nonetheless, Jefferson had a partisan agenda in substi-

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peace. 1 GAIVS M. BRUMBAUGH & MARGARET R. HODGES, *REVOLUTIONARY WAR RECORDS OF MARYLAND* 27-35 (1924). Cornelius Cunningham had actively opposed the Federalist design for "a legislative choice" in 1800, and ran for city council as a Republican in 1802. Clark, *supra* note 255, at 268; *THE CABINET*, Sept. 17, 1800.

One sitting Federalist, Justice Henry Whetcroft, had been overlooked by the rush to formulate a list and had been assured "by a gentleman of great respectability, who was present when the nominations were made" (Marshall?) that all sitting justices were to have been continued. Whetcroft lodged his protest with Jefferson, but received no appointment. Letter from Henry Whetcroft to Thomas Jefferson (Mar. 10, 1801), in 10 *LETTERS OF APPLICATION*, *supra* note 204. In fact, Adams had overlooked another sitting justice, Amariah Frost. Register of Civil Appointments, *supra* note 205, at 45-46.

258. CONSTANCE MC LAUGHLIN GREEN, *WASHINGTON: VILLAGE AND CAPITOL, 1800-1878*, at 18 (1962); *THOMAS JEFFERSON AND THE NATIONAL CAPITAL*, *supra* note 132, at 517. A physician, born in the West Indies and educated in Scotland, Thornton came to the United States in 1787. *Id.* He was Commissioner of Washington from 1794 until 1802, when he was placed in charge of the Patent Office until 1828. *Id.*

259. James Marshall, brother of John Marshall and newly appointed Circuit Court Judge in the District of Columbia, had delivered a number of commissions on the day of Jefferson's inauguration. Those deliveries, however, were made in Alexandria. Marbury's commission remained in the State Department. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 146 (1803).

260. The first meeting of the Alexandria County Levy Court was on April 3, 1801. *ALEXANDRIA COUNTY LEVY COURT MINUTE BOOK, 1801-1822*, *microformed on tape* 29, Virginia State Library, Richmond.

261. Jefferson explained, "[i]f we can but avoid shocking their feelings by unnecessary acts of severity against their late friends." Letter from Thomas Jefferson to William Giles (Mar. 1801), in *JEFFERSON PAPERS* (Library of Congress).

262. Letter from John Marshall to C.C. Pinckney (Mar. 4, 1801) (quoted in DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801-05*, at 22 (1970)).

tuting Republicans for Adams' Federalist appointees, but he had to tread carefully in light of the conciliatory pose he had struck. His first cover was to claim that Adams had appointed too many justices of the peace. His second was that Adams had rewarded Federalists with an unnecessary and expensive number of offices.<sup>263</sup> The excuses were flimsy. First of all, many of the justices of the peace were, in fact, Republican. Second, those offices were funded by the fees assessed for their services, and not the federal treasury, so Jefferson could not claim credibly that his action was a cost-cutting move.<sup>264</sup> Furthermore, throughout the rest of Jefferson's administration, citizens desperately wrote the President and the Secretary of State of their need for more justices in the outlying areas of the district.<sup>265</sup> But Jefferson, caught with his own excuse that Adams had appointed an excessive number, could not appoint any more.

Nonetheless, Jefferson had to follow through on his purported reasons for withholding the commissions. By March 16, he had made his recess appointments.<sup>266</sup> He reduced the number of justices of the peace to fifteen for each county from the twenty-three for Washington County and the nineteen for Alexandria County that Adams had appointed.<sup>267</sup> He then reappointed a number of justices while carefully culling those he regarded as enemies and substituting those that supported him.

Of the fifteen men that Jefferson appointed for Washington County, twelve, in fact, had been on Adams' list. He reappointed the five former justices of the peace, most of whom were Republican, as well as William Thornton, who was also Republican. But when Henry Whetcroft, one of the two sitting justices of the peace who Adams had overlooked inadvertently in the rush of the last days, importuned Jefferson to continue him in office, Jefferson asked his local patronage chief, John T. Mason (later to be appointed U.S. Attorney for the District), of Whetcroft's political

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263. MALONE, *supra* note 262, at 144.

264. Ch. XV, § 11, 2 Stat. 103, 107 (1801). On May 3, 1802, Congress rescinded the authority of justices of the peace to charge fees. 2 Stat. 193 (1802). Ultimately, one of President Jefferson's own appointees, Benjamin More, was arrested for taking fees and unsuccessfully contested the validity of the law. See James M. O'Fallon, *The Case of Benjamin More: A Lost Episode in the Struggle over Repeal of the 1801 Judiciary Act*, 11 L. & HIS. REV. 43 (1993).

265. Letter from Robert Brent to President Jefferson (Feb. 4, 1803), in 10 LETTERS OF APPLICATION, *supra* note 204; Letter from Daniel C. Brent to Thomas Jefferson (Aug. 18, 1804), in 5 LETTERS OF APPLICATION, *supra* note 204; Petition to Thomas Jefferson from some citizens of the City of Washington (1805), in 1 LETTERS OF APPLICATION, *supra* note 204; Letter from George Deneale to James Madison (Mar. 4, 1807), in 3 LETTERS OF APPLICATION, *supra* note 204.

266. THOMAS JEFFERSON AND THE NATIONAL CAPITAL, *supra* note 132, at 198-99.

267. SENATE EXECUTIVE JOURNAL, *supra* note 12, at 404.

leanings. When Mason informed Jefferson that Whetcroft was not a Republican, Jefferson rejected him.<sup>268</sup>

Jefferson did reappoint the four prominent but relatively apolitical Federalists that had been on Adams' list, but he cut every one of the Adams' partisans but two. Jefferson had intended to leave off Stoddert, but reinserted his name at the last moment because Stoddert remained temporarily in Jefferson's cabinet while the new President sought a successor to lead the Navy Department. Removing Stoddert in those circumstances would have seemed a direct insult. In any event, Stoddert refused the oath and never took office.<sup>269</sup> Eleven of Adams' appointments for Washington County had been cast aside (twelve if one includes Stoddert), including Adams' friend, Tristram Dalton, as well as Lewis Deblois, and, of course, William Marbury.<sup>270</sup> Despite the rush in finding suitable substitutes, Jefferson managed to field a Republican majority in

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268. Letter from Henry Whetcroft to Thomas Jefferson (Mar. 10, 1801), in 12 LETTERS OF APPLICATION, *supra* note 204; Letter from S. Hanson to Thomas Jefferson (Mar. 16, 1801), in 6 LETTERS OF APPLICATION, *supra* note 204. The Circuit Court of the District of Columbia, staffed by Federalists James Marshall and William Cranch and the Republican William Kilty, helped Whetcroft by appointing him Notary Public later in March. Advertisement in the WASHINGTON GAZETTE, Mar. 27, 1801. Later, in 1802, Jefferson appointed Whetcroft a captain of infantry for the first Legion of the Militia of the District of Columbia. ALEXANDRIA TIMES AND ADVERTISER, July 20, 1802. Mason was a strong supporter of Jefferson, and ran for the Maryland Assembly opposing Forrest's slate. *Id.* Jefferson soon gave him the U.S. Attorney position. ALEXANDRIA TIMES AND ADVERTISER, Mar. 25, 1801. Adams had appointed Thomas Swan, an equally partisan personality on the Federalist side, who assisted Marshall in gathering names for last minute appointments. See Letter from John Marshall to James Marshall (Mar. 18, 1801), in MARSHALL TRANSCRIPTS AND PHOTOSTATS (Library of Congress).

269. Letters from Jacob Wagner to Thomas Jefferson & Meriwether Lewis (Feb. 6, 1802), in 8 LETTERS OF APPLICATION, *supra* note 204. The other active Federalist, William Hammond Dorsey, is a more curious case. It is possible that Dorsey signaled Jefferson or his lieutenants of a change in political leanings. Some years later, Dorsey proclaimed to have been loyal to Jefferson while serving him. Letter from Robert Brent to unknown person reporting Dorsey's confession of loyalty (Jan. 28, 1806), in 3 LETTERS OF APPLICATION, *supra* note 204.

270. The three substitutes appointed by Jefferson were Thomas Corcoran, justice of the peace under Maryland law, Register of Civil Appointments, *supra* note 205, at 72-73, Benjamin More, Letter from a number of prominent Republicans to Thomas Jefferson (Mar. 5, 1801), in 8 LETTERS OF APPLICATION, *supra* note 204, and Thomas Peter, a younger member of a family of prominent Federalist merchants, but related by marriage to the family of George Washington, EBERLEIN & HUBBARD, *supra* note 59, at 342. It is not known why Jefferson nominated him. Madison, List of Recess Appointments Made in the First Year of Jefferson's Administration (Dec. 1801), in JEFFERSON PAPERS (Library of Congress).

Washington county. He appointed probably seven (or six, once Stoddert refused to serve) Federalists and eight or nine Republicans.<sup>271</sup>

Notwithstanding the man's experience and position, Marbury must have been one of the easiest cuts for Jefferson to make. Marbury had rejected Jefferson's preferred occupation of farming for the world of negotiable instruments. In addition, Marbury's life's work in securities trading was associated with the Hamiltonian "stock jobbers" whom Jefferson detested. Marbury had been the subject of much newspaper notoriety in the Republican press in the few months preceding Jefferson's inauguration. He had personally weighed in to try to swing all of Maryland's votes to Adams, which if successful, would have kept Jefferson from his desired "Revolution of 1800."<sup>272</sup> Marbury was also tied to the enormous cost overruns associated with a navy that Jefferson wanted cut to the bare minimum. He had no connection to a family or to figures to whom Jefferson owed any social or political favor, and was intimately tied to the Forrest-Stoddert clique whom the Republicans in Georgetown and Washington most despised.

Kept from the status and position of being justice of the peace, William Marbury later turned to Charles Lee, former Attorney General, to seek his exoneration before the Federalist Supreme Court and John Marshall.

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271. Jefferson did better in Alexandria County. This author estimates that Adams appointed 14 Federalists and five Republicans. When Jefferson was done, there were an estimated five Federalists and 10 Republicans.

272. Although his work for his principals, Uriah Forrest and Benjamin Stoddert, locked him solidly into the Adams circle, it is not known how politically committed Marbury was to Adams or his program. There is no record of Marbury making political statements associating him with either Hamilton or Adams. His underlying instincts, however, may have come to the fore in 1807 when he named his last son Alexander Hamilton Marbury. Peabody Room, *supra* note 20.