Note

After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801

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Most law students encounter the midnight judges, if at all, in a footnote to “perhaps the most famous case in American history.”¹ In the words of the judges’ foremost historiographer, “the appointment of the ‘midnight judges’ has lingered because it affords the appropriate essential for a springboard introduction to an analysis of John Marshall’s decision in *Marbury v. Madison*.”² To summarize: Thomas Jefferson and the Democratic-Republicans defeated the reigning Federalist Party, led by President John Adams, in the election of 1800. In response, the lame-duck

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1. Susan Bloch & Maeva Marcus, *John Marshall’s Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301, 301.

2. Kathryn Turner, *The Judiciary Act of 1801*, at 300 (1959) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with author).

Federalists tried to shore up their position in the short time before Adams left office. Just a few weeks before Jefferson's inauguration, the outgoing Federalist Congress passed the Judiciary Act of 1801, creating sixteen new federal circuit judgeships.³ In a separate act, Congress created three additional circuit judgeships and over forty justices of the peace for the District of Columbia.⁴ Adams hastily filled as many of these positions as he could with his supporters. As a Federalist senator famously observed to a friend, his party was "about to experience a heavy gale of adverse wind; can they be blamed for casting many anchors to hold their ship thro the storm?"⁵

In short order, however, President Jefferson and the Republicans regained the initiative. Shrugging off the Federalists' protests, the new Congress repealed the Judiciary Act, abolished the new courts, and put the so-called "midnight judges" out of their jobs.⁶ Jefferson also ordered his Secretary of State to ignore some signed commissions that the Adams administration had forgotten to deliver to justices of the peace during the chaotic changeover, leading William Marbury and several other would-be JPs to sue to get hold of their commissions. Marbury lost, but in deciding his case Chief Justice John Marshall promulgated what has become the classic statement of judicial review, the proposition that courts have the power to review the constitutionality of acts of Congress.⁷

The midnight judges, by contrast, never even came before the Court. In the standard account, they managed only a meek protest before giving up the fight:

Certain of the deposed National judges had, indeed, taken steps to bring the . . . measure before the Supreme Court, but their energies flagged, their hearts failed, and their only action was a futile and foolish protest to the very Congress that had wrested their judicial seats from under them.⁸

Beyond these cursory facts, the judges largely faded from historical memory.

In 1961, Kathryn Turner first treated the midnight judges as an object of study in their own right, giving a superb exposition of the harried process that led to their appointments.⁹ However, despite an outpouring of work

3. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.

4. Act of Feb. 27, 1801, ch. 12, 2 Stat. 103.

5. Letter from Gouverneur Morris to Robert Livingston (Feb. 20, 1801), in 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 714 (Maeva Marcus ed., 1985).

6. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

8. 3 ALBERT BEVERIDGE, THE LIFE OF JOHN MARSHALL 123 (1919).

9. Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961).

on Jefferson, Marshall, and the federal judiciary in the fifty years since Turner's piece, not enough attention has been paid to the second—and in many ways more intriguing—half of the judges' story: their response to the abolition of their offices. Most scholarship mentions only in passing that the judges sent a written memorial to Congress (the protest referred to above).¹⁰ And while some have treated the subject in relatively more detail,¹¹ or remarked upon the actions of individual judges,¹² there is as yet no comprehensive treatment of what the midnight judges did following the repeal and why. Despite its casual notoriety, in other words, there is still a need for "some further information" about this major constitutional episode.¹³

This Note draws on a variety of primary sources, including an overlooked cache of the judges' letters held at the Maryland Historical Society, to sketch out the midnight judges' deliberations in full. Its primary goal is to show that the midnight judges were not just a "futile and foolish" stop on the road to *Marbury*. To the contrary, the judges thoughtfully and conscientiously sought to challenge the constitutionality of the repeal of the Judiciary Act, even if their efforts did not culminate in the restoration of their offices. The picture that emerges from these sources does more than just recast the role of the midnight judges, however. It also offers new insights into the ways in which Federalists in all branches of government both resisted and capitulated to the emerging political order ushered in by the election of 1800. Ultimately, this new account argues for a revised understanding that puts the midnight judges, if not on the marquee, at least in a supporting role in working out the meaning of the repeal.

This Note proceeds in six parts. Part I outlines the constitutional

10. See, e.g., RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 64 (1971); GEORGE LEE HASKINS & HERBERT A. JOHNSON, *FOUNDATIONS OF POWER, JOHN MARSHALL, 1801-1815*, at 177-80 (1981); DUMAS MALONE, *JEFFERSON AND HIS TIME* 134 n.64 (1970); R. KENT NEWMAYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 154 (2001); CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL AND THE BATTLE FOR THE SUPREME COURT* 127-28 (2009); GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 419-21 (2009); see also Erwin Surrency, *The Judiciary Act of 1801*, 2 AM. J. LEGAL HIST. 53, 64 (1958).

11. See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 128-42, 172-81 (2005); Wythe Holt, "[I]f the Courts have firmness enough to render the decision," in EGBERT BENSON, *FIRST CHIEF JUDGE OF THE SECOND CIRCUIT (1801-1802)*, at 10 (David Nourse & Wythe Holt eds., 1987) (giving the most detailed account to date).

12. See D. KURT GRAHAM, *TO BRING THE LAW HOME: THE FEDERAL JUDICIARY IN EARLY NATIONAL RHODE ISLAND* 74-86 (2010) (marking on the actions of Judge Benjamin Bourne); JOHN PHILLIP REID, *LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE* 71-89 (2009) (marking on the actions of Judge Jeremiah Smith); Linda Kerber, *Oliver Wolcott: Midnight Judge*, 32 CONN. HIST. SOC'Y BULL. 25 (1967) (marking on the actions of Judge Oliver Wolcott).

13. Cf. Turner, *supra* note 9, at 494 ("It is the purpose of this Article to provide some further information about the final event of the Federalist decade.").

controversy over the repeal of the Judiciary Act. Part II discusses the Supreme Court's response, culminating with *Marbury v. Madison* and the lesser-known *Stuart v. Laird*, important decisions that nonetheless left the central question of the repeal unanswered. Part III briefly corrects a persistent historical error that continues to confound attempts to figure out why this might be the case. Part IV describes the midnight judges' early efforts to bring their case to judicial resolution, efforts that intersected in notable ways with the parallel deliberations occurring at the Supreme Court. Part V describes how, with the judicial avenue blocked, the judges ultimately turned to Congress in a last-ditch attempt to salvage their claims. Finally, Part VI concludes by examining the aftermath of the midnight judges' efforts.

I.

The Federalists contemplated changes to the federal courts well before their defeat in the election of 1800.¹⁴ Although the Judiciary Act of 1801 was undoubtedly enacted for crassly political reasons, it also addressed several legitimate criticisms of the original Judiciary Act of 1789. For example, the 1789 Act did not create any independent circuit courts. Instead, the Supreme Court justices periodically left Washington, D.C. to "ride circuit" and presided over circuit courts themselves. The justices had detested circuit riding almost from the start, in part for its physical discomforts,¹⁵ and in part because they harbored doubts about its constitutionality.¹⁶ The 1801 Act created permanent circuit courts staffed with full-time judges, relieving the Supreme Court of the need to ride circuit. The Act also made important changes to the scope of federal authority. In response to worries about the partiality of state courts, for instance, it granted general federal question jurisdiction to the federal courts for the first time.¹⁷ The result was a federal judiciary that was larger and more pervasive than ever before.¹⁸

14. See Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3 (1965).

15. See Letter from Thomas Johnson to George Washington (Jan. 16, 1793), in 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 5, at 80 (describing resigning from the Court to avoid "spend[ing] six Months . . . on Roads at Taverns chiefly and often in Situations where the most moderate Desires are disappointed").

16. While riding circuit, the justices would sometimes sit as trial judges and preside over cases outside the narrow grant of Supreme Court original jurisdiction prescribed in the Constitution. See U.S. CONST. art. III, § 2 (giving the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party").

17. Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92 (conferring jurisdiction over "all cases in law or equity, arising under the constitution and laws of the United States").

18. See Alison LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT. REV. 345.

These changes were anathema to many Republicans, certainly, but they hated the partisan aspects of the Judiciary Act even more. Not only did the Federalists force through a controversial expansion of the federal judiciary after they were repudiated at the polls, but Adams chose to staff the new courts with his own supporters instead of leaving the positions for Jefferson to fill. Republicans found the judicial appointments particularly obnoxious because, unlike executive officials whom Jefferson could (and often did) remove at will,¹⁹ the Constitution appeared to grant federal judges life tenure. And there was a further wrinkle: the 1801 Act reduced the size of the Supreme Court from six to five, with the change taking place at the *next* vacancy.²⁰ In other words, Jefferson would not be able to make an appointment to the Court until two justices died or retired.

Still, Adams had to move quickly once the Act was passed, since Jefferson would take office in March 1801. Although his administration was largely successful in packing the new courts, they did make some embarrassing blunders. Some nominees unexpectedly turned down judgeships, setting off a scramble to find replacements; several appointees, including two senators who resigned from Congress, accidentally received worthless commissions to offices that were either occupied or did not exist.²¹ But when the dust settled, Adams had appointed thirteen new circuit judges: Benjamin Bourne, John Lowell, and Jeremiah Smith in the First Circuit; Egbert Benson, Samuel Hitchcock, and Oliver Wolcott, Jr. in the Second; Richard Bassett, William Griffith, and William Tilghman in the Third; Philip Key, George Taylor, and Charles Magill in the Fourth; and William McClung in the Sixth.²² Although some of the appointments were questionable, generally the men were neither overly partisan nor obviously unqualified.²³

It has often gone unnoticed that Adams failed to place any circuit judges at all in the newly created Fifth Circuit, comprising North Carolina, South Carolina, and Georgia. The Senate did confirm three

19. See Carl Prince, *The Passing of the Aristocracy: Jefferson's Removal of the Federalists, 1801-1805*, 57 J. AM. HIST. 563 (1970).

20. Act of Feb. 13, 1801, ch. 4, § 3, 2 Stat. 89, 89.

21. Turner, *supra* note 9, at 498 n.31, 509-10, 511, 514. Incredibly, but for these erroneous commissions, the Federalists would have retained a Senate majority in the Seventh Congress, and could have blocked the repeal of the Judiciary Act at least until the following election. See ACKERMAN, *supra* note 11, at 138.

22. In the Sixth Circuit, comprising the new states of Tennessee and Kentucky, Congress provided only a single circuit judge who held court in conjunction with district judges, not unlike the old circuit-riding model. Judiciary Act of 1801 § 7, 2 Stat. 89.

23. See *id.* at 521-22; see also 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 761 (1953) (giving a—perhaps excessively—spirited defense of the appointments); Note, *The United States Courts and the New Court Bill*, 10 AM. L. REV. 398, 402 (1875) (opining that the judges, “although too much from one political party, were personally excellent, and ought to have saved the court [sic] from its intense unpopularity”).

Adams nominees to the Fifth: Thomas Bee, John Sitgreaves, and Joseph Clay, Jr., all sitting district judges.²⁴ However, Bee, who received his circuit commission after Jefferson took office, declined the position, explaining that he preferred to remain a district judge and “assigning as a reason his inability to undergo the fatigue incident to that office.”²⁵ Sitgreaves similarly rejected Adams’ offer, and Joseph Clay completed the trifecta.²⁶ That all three turned down their positions suggests that something more than mere “fatigue,” as Bee put it, was at work. Probably the men recognized the coming political realignment, which would decimate the Federalist Party in the South, and decided it was best not to antagonize the new regime.²⁷

That turn of events gave Jefferson a chance to make his own nominations to the Fifth Circuit. A flurry of office-seekers descended on the President.²⁸ He ultimately nominated two Republicans, Henry Potter and Dominic Augustin Hall, to replace Sitgreaves and Bee respectively.²⁹ Jefferson had trouble filling Clay’s slot, however. He wrote to Representative James Jackson in Georgia “to give me information as to the characters you think best qualified for the appointment,” stressing that they must be “of republican principles.”³⁰ In reply, Jackson lamented that lawyers with “integrity and republican principles . . . are rarely found” and offered one William Stephens as “the least tinctured with modern

24. Turner, *supra* note 9, at 514-15.

25. Letter from Levi Lincoln to Thomas Jefferson (Apr. 9, 1801), in 33 THE PAPERS OF THOMAS JEFFERSON 558 (Barbara Oberg ed., 2006) [hereinafter PAPERS OF JEFFERSON].

26. See Letter from Levi Lincoln to Thomas Jefferson (Mar. 21, 1801), in 33 PAPERS OF JEFFERSON, *supra* note 25, at 389 (informing Jefferson of Sitgreaves’s refusal); Letter from Levi Lincoln to Thomas Jefferson (Apr. 16, 1801), in 33 PAPERS OF JEFFERSON, *supra* note 25, at 596 (informing Jefferson of Clay’s refusal); Letter from Matthew McAllister to Thomas Jefferson (Apr. 15, 1801), in 33 PAPERS OF JEFFERSON, *supra* note 25, at 593 (2006) (informing Jefferson of Clay’s refusal).

27. See generally JAMES H. BROUSSARD, THE SOUTHERN FEDERALISTS, 1800-1816 (1978) (discussing the decline of the Federalist Party in the South following the election of 1800).

28. See Letter from Abraham Baldwin to Thomas Jefferson (May 1, 1801), in 34 PAPERS OF JEFFERSON, *supra* note 25, at 3 (offering candidates to replace Clay); Letter from James Jackson to Thomas Jefferson (July 18, 1801), in 34 PAPERS OF JEFFERSON, *supra* note 25, at 591-94 (responding to a request from Jefferson for candidates to replace Clay); Letter from Nathaniel Macon to Thomas Jefferson (Apr. 20, 1801), in 33 PAPERS OF JEFFERSON, *supra* note 25, at 620 (proposing Henry Potter to replace Sitgreaves); Letter from Matthew McAllister to Thomas Jefferson (Apr. 15, 1801), in 33 PAPERS OF JEFFERSON, *supra* note 25, at 593 (offering himself to fill Clay’s vacancy); Letter from Charles Pinckney (May 26, 1801), in 34 PAPERS OF JEFFERSON, *supra* note 25, at 186 (recommending several candidates for Bee’s position); Letter from Ephraim Ramsay to Thomas Jefferson (May 2, 1801), in 34 PAPERS OF JEFFERSON, *supra* note 25, at 14 (proposing Colonel Alexander Moultrie to fill Bee’s circuit vacancy).

29. See 36 PAPERS OF JEFFERSON, *supra* note 25, at 318-19 (listing interim appointments including Potter and Hall). There is some confusion on this point. For example, Carl Prince erroneously states that Jefferson did not replace Bee “because he knew [the circuit court] would probably be abolished.” Prince, *supra* note 19, at 568.

30. Letter from Thomas Jefferson to James Jackson (May 28, 1801), in 34 PAPERS OF JEFFERSON, *supra* note 25, at 197.

federalism of any of the old Lawyers at the bar.”³¹ Uninspired by such faint praise, Jefferson chose to leave the final seat vacant.

It is somewhat ironic that Jefferson would even seek to nominate judges to a court he was preparing to abolish. At this stage, he knew that the jobs would be temporary. As he wrote to a congressional ally in North Carolina concerning Potter’s nomination, Jefferson merely hoped that “[Mr.] Potts [sic] may be willing to stop the gap till you meet & repeal the law.”³² The prospect of repeal appears to have dissuaded some potential candidates. Charles Pinckney frankly told Jefferson that the prevailing opinion in South Carolina was that the 1801 Act would be repealed or greatly altered, which “produces a [g]eneral indisposition on the part of qualified men to accept.”³³ Still, federal judgeships, even fleeting ones, were choice positions of patronage, and Jefferson may also have been hedging in case the repeal effort failed.

On January 6, 1802, Senator John Breckinridge proposed the repeal of the Judiciary Act.³⁴ The debates over repeal occupied hundreds of pages in the Congressional journals.³⁵ Federalists tried to make a pragmatic case for the expanded federal courts, but the real dispute turned on the constitutional question of whether Congress could abolish the office of a sitting judge. Both sides could point to relevant text in Article III. On the one hand, by vesting “[t]he Judicial Power of the United States . . . in such inferior courts as the Congress may from time to time ordain and establish,” the Constitution granted Congress broad authority to tinker with the structure of the lower federal courts.³⁶ On the other, Article III guaranteed federal judges tenure “during good behaviour” and an undiminished salary “during their continuance in office,” suggesting that Congress did not have plenary authority to dismiss sitting judges.³⁷

Although Republicans admitted that they could not interfere with a judge’s tenure and salary while his office existed, they argued that Congress could abolish the office itself, particularly because they perceived the new circuit courts as expensive, unnecessary, and inimical

31. Letter from James Jackson to Thomas Jefferson (July 18, 1801), in 34 PAPERS OF JEFFERSON, *supra* note 25, at 592.

32. Letter from Thomas Jefferson to Nathaniel Macon (May 14, 1801), in 34 PAPERS OF JEFFERSON, *supra* note 25, at 109-10.

33. Letter from Charles Pinckney to Thomas Jefferson (May 26, 1801), in 34 PAPERS OF JEFFERSON, *supra* note 25, at 186.

34. ELLIS, *supra* note 10, at 45.

35. For helpful summaries of the debate, see DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS (1801-1809), at 12-19 (2001); and LINDA KERBER, FEDERALISTS IN DISSENT 136-65 (2d ed. 1980).

36. U.S. CONST. art. III, § 1, cl. 1.

37. U.S. CONST. art. III, § 1, cl. 2.

to the popular will.³⁸ The Federalists replied that that distinction between office and officeholder was entirely specious.³⁹ Some called for the courts to exercise judicial review and strike down the repeal as unconstitutional.⁴⁰ They further denied that the latest election represented anything but the whim of a transient majority, and warned of dire consequences if Congress cast aside the Constitution's safeguards.

In theory, a few defectors in the Senate could swing the vote to the Federalists, but as the debates stretched into a second month, it became apparent that the Republicans would not budge. Senator James Hillhouse confided to his friend, the midnight judge Oliver Wolcott, that "[t]he most impressive eloquence will not change a single vote."⁴¹ The Repeal Act narrowly passed the Senate on February 13. On March 3, it passed the House of Representatives, where the Republicans enjoyed a greater majority, by a much more comfortable margin. President Jefferson signed the bill into law five days later.⁴² An editorial in the *Washington Federalist* typified that party's sentiments, lamenting, "The fatal Bill has passed: Our Constitution is no more."⁴³

II.

Some Federalists now contemplated independent efforts to challenge the repeal,⁴⁴ but for the most part they decided to see how the Supreme Court would react. The Court was scheduled to convene in June, a month before the repeal went into effect.⁴⁵ In April, however, Republicans canceled the June term.⁴⁶ This change meant that the Court would not formally meet until February 1803, almost a year away. In the meantime, the justices would be expected to ride circuit under the original Judiciary Act of 1789, which had been resurrected upon the repeal of the 1801 Act.

38. See, e.g., 11 ANNALS OF CONG. 25-30 (Jan. 8, 1802) (statement of Sen. Breckenridge).

39. For a colorful example, see Gouverneur Morris's sarcastic statement on the floor of Congress: "[Y]ou shall not take the man from the office, but you may take the office from the man; you shall not drown him, but you may sink his boat under him." 11 ANNALS OF CONG. 39 (Jan. 8, 1802).

40. See, e.g., 11 ANNALS OF CONG. 164 (statement of Sen. Ross) ("If [Congress] should rashly exceed the delegated power [of the Constitution], our Judiciary . . . must declare that the great irrepealable statute made by the people shall restrain and control the unauthorized acts of agents.").

41. Letter from James Hillhouse to Oliver Wolcott (Feb. 20, 1802) (on file with Conn. Historical Soc'y, Oliver Wolcott, Jr. Papers).

42. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

43. WASH. FEDERALIST, Mar. 3, 1802, at 2.

44. See Letter from Alexander Hamilton to Charles Cotesworth Pinckney (Mar. 15, 1802), in 25 PAPERS OF ALEXANDER HAMILTON 562-63 (Harold Syrett ed., 1961) (calling a meeting of Federalists to discuss strategy after the repeal).

45. See Act of Mar. 8, 1802 § 2, 2 Stat. at 132.

46. Act of Apr. 29, 1802, ch. 31, § 1, 2 Stat. 156, 156 ("[T]he Supreme Court . . . shall have one session in each and every year, to commence on the first Monday of February annually . . .").

Republicans claimed they canceled the June term because the Court did not have enough business to require two sessions a year, but this fooled few observers—least of all the justices.⁴⁷ Riding circuit would amount to a tacit acceptance of the repeal's validity, so the change forced the justices to decide on a course of action without consulting face-to-face.

Chief Justice Marshall watched these developments closely. Not only was he the head of the federal judiciary, but he had also helped to draft the Judiciary Act as a member of the House of Representatives in 1800.⁴⁸ Moreover, just as Congress prepared to pass the Judiciary Act in early 1801, Adams named Marshall to the Supreme Court, asking that he also remain as acting Secretary of State until the presidential transition.⁴⁹ In this dual role, Marshall likely exercised unique influence over the selection of the midnight judges, although precisely how much remains unclear.⁵⁰

After Congress canceled the June term in April, Marshall wrote to his colleagues:

It having now become apparent that there will be no session of the supreme court . . . holden in June next & that we shall be directed to ride the circuits, before we can consult on the course proper to be taken by us, it appears to me proper that the Judges should communicate their sentiments on this subject to each other that they may act understandingly & in the same manner.⁵¹

He went on to state that the “late discussions . . . [have] unavoidably produced an investigation of the subject” of circuit riding, and he admitted to doubts about the legality of the practice. However, he stressed the importance of unanimity and agreed to abide by the others’ opinions on the matter.⁵²

Scholars have debated whether Marshall was serious about resisting circuit riding at this initial stage.⁵³ This is an interesting issue, to be sure, but for the purposes of this Note, the correspondence is more notable for what was missing entirely: any reference to the midnight judges. The omission is surprising, to put it mildly. As the head of the federal judiciary, Marshall presumably owed something to his brethren, whose

47. See, e.g., Letter from Samuel Chase to William Paterson (Apr. 6, 1802) (on file with N.Y. Pub. Library, William Paterson Papers) (“The object of postponing the Meeting of the Judges of the Supreme Court until February is obvious.”).

48. See Turner, *supra* note 14, at 10, 14.

49. See Kathryn Turner, *The Appointment of Chief Justice Marshall*, 17 WM. & MARY Q. 143 (1960).

50. Turner, *supra* note 9, at 495-96.

51. Letter from John Marshall to William Paterson (Apr. 19, 1802), in 6 PAPERS OF JOHN MARSHALL 108 (Charles Hobson ed., 1974) [hereinafter PAPERS OF MARSHALL].

52. *Id.*

53. See, e.g., ACKERMAN, *supra* note 11, at 164-66, 342-43 n.8.

roles he would supplant by riding circuit. He had personally signed their commissions and counted former colleagues among their number, including two in-laws.⁵⁴ Yet neither professional responsibility nor personal interest moved the Chief Justice to broach the subject. One might think there was no point in raising it until the Court had agreed to resist riding circuit. Still, this only explains why Marshall did not push for strong action concerning the midnight judges immediately; it does not explain why he neglected to mention them at all. More likely, the Chief Justice simply did not want to stick out his neck for a handful of dubious appointments. If so, this would not be the last time the pragmatic Marshall compromised his Federalist principles in order to fight another day.

Nearly all of Marshall's colleagues followed his lead and focused entirely on the circuit riding question.⁵⁵ Only Justice Samuel Chase, an ardent Federalist whom the Republicans would nearly remove from office in 1804, spoke out on the matter. Rather than address the question Marshall asked, Chase began by declaring the Repeal Act constitutionally suspect:

It is a great doubt with me, whether the Circuit Courts, established by the Law, can be abolished; but I have no doubt, that the circuit Judges cannot, directly, or indirectly, be deprived of their Offices, or Commissions, or Salaries, during their lives; unless only on impeachment . . . as prescribed in the Constitution.⁵⁶

Nevertheless, he was skeptical that the Court would have the opportunity to rule on the issue: "If the Constitutionality of this Act could be brought before the Supreme Court, by action of assize of Office, or by action to recover the Salary, I should decide . . . that the Act is void. . . . But by neither of those modes, nor by any other (as *Mandamus*, & *Quo Warranto*) could remedy be obtained."⁵⁷ As a result, the justices had to treat the circuit riding question delicately: "This Defect of Remedy to obtain a Right . . . will induce every judge of the Supreme Court to act with the greatest caution; and he must, in my judgment, decline to execute the office of a Circuit Judge, if he apprehends that he shall, thereby, violate the Constitutional Rights of the Circuit Judges."⁵⁸

54. See Turner, *supra* note 9, at 513, 516. A copy of Tilghman's commission, signed by Marshall, can be found in Box 13, Folder 18 of the Tilghman Family Papers, MS 2821, Maryland Historical Society. See also Letter from John Marshall to Oliver Wolcott (Feb. 21, 1801) (on file with N.Y. Pub. Library, Gibbs-Wolcott Papers) (enclosing Wolcott's commission and requesting his acceptance).

55. I am not the first to make this observation. See, e.g., Holt, *supra* note 11, at 15-16; Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1236, 1281 n.181 (2003).

56. Letter from Samuel Chase to John Marshall (Apr. 24, 1802), in 6 PAPERS OF MARSHALL, *supra* note 51, at 110 (emphasis omitted).

57. *Id.* at 113.

58. *Id.* (emphasis omitted); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The

Even after he turned to circuit riding, Chase continued to press the issue. First, he argued that if the midnight judges still held their offices, there were no vacant circuit positions for the justices to occupy in the first place.⁵⁹ Second, he noted that riding circuit would effectively displace the circuit judges; if the repeal really were unconstitutional, agreeing to do so would make the justices complicit in a wrongful act.⁶⁰ Chase only got around to answering Marshall in his third point, stating that, because riding circuit allowed the Justices to exercise original jurisdiction beyond the narrow scope of Article III, the practice was indeed unconstitutional.⁶¹

Chase's full-throated argument met largely with silence, eliciting just a brief rejoinder from Justice William Cushing:

As to being instrumental (by taking the Circuits) in violating the rights of the Judges & the Constitution, I do not see that it carries that inference. It is not in our power to restore to them their Salaries or them to the exercise of their Offices. Declining the Circuits will have no tendency to do either. . . . Suppose we apply or represent or remonstrate to the President; what can he say? "Gent There is the Law I cannot control Congress." And you & I know *We* cannot control the Majority.⁶²

Cushing's fatalism suggests that the Court had little appetite for controversy, especially concerning the midnight judges. The fact that the other justices failed to respond at all—at least in the extant correspondence—bolsters this interpretation. By early summer, the clear consensus among the Justices was to ride circuit.⁶³

Marshall did not respond to Chase (or if he did, the letter does not survive), so his personal opinion on the repeal remains uncertain. There are some faint indications that the Chief Justice agreed with Chase in principle, even if he did not want to say so in writing. Around the time he wrote to the Court about circuit riding, Marshall met with Representative James Bayard, the son-in-law of midnight judge Richard Bassett and the leader of the opposition to the repeal in the House. Afterwards, Bayard wrote to Bassett, telling him the judges should prepare to suspend their

government of the United States . . . will certainly cease to deserve [to be called one of laws and not men], if the laws furnish no remedy for the violation of a vested legal right.”).

59. Letter from Samuel Chase to John Marshall (Apr. 24, 1802), in 6 PAPERS OF MARSHALL, *supra* note 51, at 113-14.

60. *Id.* at 114 (“If one person exercises an office, to which another has *legal title* he is a *wrong-doer*. Shall a Judge be a wrong-doer?”).

61. *Id.* at 114-15.

62. Letter from Hannah Cushing to Abigail Adams (June 25, 1802), in 6 PAPERS OF MARSHALL, *supra* note 51, at 116 n.5 (excerpting William Cushing's reply to Samuel Chase).

63. See Letter from John Marshall to William Paterson (May 3, 1802), in 6 PAPERS OF MARSHALL, *supra* note 51, at 117; Letter from William Paterson to John Marshall (June 18, 1802), in 6 PAPERS OF MARSHALL, *supra* note 51, at 121.

courts once the repeal became effective.⁶⁴ Bayard also wrote to Alexander Hamilton, revealing that Marshall “considers the late repealing act as operative in depriving the [circuit] Judges of all power. . . . [T]he most advisable course for the Circuit courts to pursue will be at the end of their ensuing Session to adjourn generally, & to leave what remains to be done to the Supreme Court.”⁶⁵ Note that Bayard only stated that Marshall thought the repeal deprived the circuit judges of all *powers*, leaving open the possibility that the repeal had not affected the judges’ commissions and salaries. Indeed, Marshall’s biographer maintained that, like Chase, Marshall “held firmly to the opinion that in so far as the Republican Judiciary Repeal Act of 1802 deprived National judges of their offices and salaries, that legislation was unconstitutional.”⁶⁶

Regardless, from Chase’s perspective the entire process must have been deeply unsatisfying. The question that had convulsed Congress in early 1802 was not the constitutionality of circuit riding, but the constitutionality of ousting the midnight judges. Yet the justices’ correspondence seemed to convey just the opposite. Unhappily, Chase fell into line, “sink[ing],” as he earlier put it, “under the burthen of deciding so momentous a question.”⁶⁷

As a result of these deliberations, the justices took to the circuits in 1802 and later convened in Washington in February 1803 for their rescheduled term. Two weeks later, Chief Justice Marshall handed down his celebrated opinion in *Marbury v. Madison*, acknowledging Marbury’s right to his commission before dismissing the case because the statute conferring jurisdiction was unconstitutional.⁶⁸ In one sense, *Marbury* gave notice that the Supreme Court would not completely defer to the Republicans, but such ringing proclamations of judicial authority must be measured against the Court’s jurisdictional holding, which defused the potential for any real confrontation between the branches.

Indeed, when viewed alongside a lesser-known case called *Stuart v.*

64. Letter from James Bayard (Apr. 24, 1802) (on file with Md. Historical Soc’y, Bayard Papers). Although the letter is unaddressed, the contents clearly show Bassett was the intended recipient.

65. Letter from James Bayard to Alexander Hamilton (Apr. 25, 1802), in 25 PAPERS OF HAMILTON, *supra* note 44, at 614; see also Letter from Alexander Hamilton to Charles Pinckney (Apr. 25, 1802), in 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 224-25 (1922) (“The office still remains, which [Marshall] holds to be a mere capacity . . . to receive and exercise any new judicial powers which the Legislature may confer.”).

66. 3 BEVERIDGE, *supra* note 8, at 122.

67. Letter from Samuel Chase to John Marshall (Apr. 24, 1802), in 6 PAPERS OF MARSHALL, *supra* note 51, at 116. Chase may have held out hope for a meeting of the judges even after the disappointing exchange of letters. See ACKERMAN, *supra* note 11, at 344 n.16 (quoting a letter from Benjamin Stoddert to Judge Oliver Wolcott stating that Chase still expected a meeting “before the New Law” goes into operation).

68. 5 U.S. (1 Cranch) 137 (1803); ACKERMAN, *supra* note 11, at 181-82.

Laird,⁶⁹ *Marbury* looks less like a show of strength and more like another in a string of concessions stretching back to the circuit riding question. *Stuart* was one of several challenges by Federalist attorneys in circuit courts ranging from Virginia to Massachusetts on the eve of the 1802 elections. Each arose out of cases that had been pending in the circuits at the time of the 1801 Act's repeal and were transferred to the restored courts when the 1801 Act was abolished.⁷⁰ All the challenges advanced two distinct claims: (1) the Repeal Act unconstitutionally divested federal judges of tenure, so the transfer was void and the case should be heard in the original court; (2) Supreme Court justices could not constitutionally exercise original jurisdiction under the 1789 circuit-riding model, so the current court could not hear the case.⁷¹ Republicans denounced these legal maneuvers as pure sophistry. A Boston newspaper remarked that the plan "could have originated only in the head of some crack'd brained Lawyer, or some broken down despairing political quack," and characterized it as "the last effort of expiring Federalism in support of their midnight Judiciary."⁷²

In each case, the Federalists ultimately withdrew their objections, save one: *Stuart v. Laird*, where Chief Justice Marshall, sitting as circuit judge in Virginia, overruled the plea and thus set up an appeal to the Supreme Court.⁷³ As Bruce Ackerman has shown, *Marbury* provided an easy roadmap if the Court wished to declare circuit riding unconstitutional. *Marbury*'s core holding was that Congress could not expand the Supreme Court's original jurisdiction from the enumerated cases in Article III.⁷⁴ Under that logic, if the Justices exercised such original jurisdiction while riding circuit, and if they did not hold separate commissions as lower federal judges (who could be granted more extensive original jurisdiction), then the practice was clearly unconstitutional.⁷⁵ But the Court declined to take this route. Uncharacteristically, Chief Justice Marshall recused himself and assigned William Paterson to write for the Court.⁷⁶ In a terse opinion, Justice Paterson resolved the case on narrow grounds. He first held that Congress had broad power to transfer suits

69. 5 U.S. (1 Cranch) 299 (1803); ACKERMAN, *supra* note 11, at 181-82.

70. Act of Apr. 29, 1802, ch. 31, § 9, 2 Stat. 156, 163 (transferring cases pending at the time of repeal to the reconstituted pre-1801 Act courts); Act of Mar. 8, 1802, ch. 8, § 4, 2 Stat. at 132 (same).

71. See Holt, *supra* note 11, at 17.

72. "Veritas," INDEP. CHRON., Oct. 7, 1802, at 2. The Federalist press gave the litigation only limited coverage. See, e.g., *A Noble Stand in Favor of the Constitution*, TRENTON FEDERALIST, Oct. 18, 1802, at 3.

73. Holt, *supra* note 11, at 17-18.

74. *Marbury*, 5 U.S. (1 Cranch) at 174.

75. ACKERMAN, *supra* note 11, at 183-84.

76. Ackerman hypothesizes that Marshall withdrew because he could not stomach writing an opinion so clearly at odds with *Marbury*. ACKERMAN, *supra* note 11, at 187-88.

from one court to another and had indisputably done so here; as such, there was no need to reach the question of the constitutionality of abolishing the midnight judges' offices.⁷⁷ Next, because the Justices "acquiesced" in riding circuit under the original Judiciary Act for ten years, Paterson concluded the Court was bound by precedent—"the question is at rest, and ought not now to be disturbed."⁷⁸

III.

Stuart was hardly the ideal vehicle to challenge the repeal of the Judiciary Act.⁷⁹ As Justice Patterson noted, whether Congress could transfer cases between courts and whether Congress could abolish the office of a sitting judge were two separate issues. Although a creative judge could undoubtedly reach the second issue if he really wanted to, *Stuart's* "implication was clear enough: If the circuit judges wished to protest about their treatment under the [Repeal Act], they would have to bring a different lawsuit."⁸⁰ All of this raises an obvious question—why didn't the midnight judges follow *Marbury* or *Stuart's* lead and sue to recover their jobs? According to some scholars, they actually did. For instance, Bruce Ackerman points to a "little-known case" in which "one of the deposed circuit judges, Joseph Reed, did indeed bring an action . . . to federal court" before dropping the lawsuit.⁸¹ This certainly sounds promising, but for one fact: Joseph Reed was not a federal judge.

All of the claims about Reed trace back to an erroneous statement from Charles Warren in which he interprets a newspaper article about a case in New Jersey called *Reed v. Prudden*.⁸² Edward Harnett has observed that since the case to which Warren referred "was brought . . . *after* the adoption of the Judiciary Act of 1801, but *before* its repeal," it is "dubious" to conclude that *Reed* was a suit by a midnight judge to have

77. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 308-09 (1803).

78. *Id.* at 309.

79. See Weinberg, *supra* note 55, at 1282-83 ("The midnight circuit judges were even less a feature of *Laird* than of *Marbury*.").

80. ACKERMAN, *supra* note 11, at 185.

81. *Id.* at 179-80; see also CURRIE, *supra* note 35, at 20 ("One of the judges went to court, but it was not clear he had a right to sue.") (citations omitted); LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 120 (2004) ("[S]ome of the removed Federalist judges challenged . . . the repeal in four lower court cases."); Holt, *supra* note 11, at 73 n.61 ("One of Adams's 'midnight' appointees . . . Jacob Read . . . instituted suit (under the style *Read v. Prudden*) in the federal circuit court in New Jersey.").

82. 1 WARREN, *supra* note 65, at 272 n.1. Warren cites three versions of the article—*Constitutional Question*, WASH. FEDERALIST (D.C.), May 23, 1803, at 3; *Constitutional Question*, CHARLESTON COURIER (S.C.), May 9, 1803, at 3; and *Constitutional Question*, NEW-ENGLAND PALLADIUM (Bos., Mass.), Apr. 19, 1803, at 2—that are identical except for minor typographical differences. Another instance that Warren does not cite appears at *Constitutional Question*, PROVIDENCE GAZETTE (R.I.), Apr. 23, 1803, at 2.

his office restored.⁸³ More to the point, a different version of the article cited by Warren, printed in the *Gazette of the United States*, conclusively proves that Warren simply misread his source, confusing an independent legal challenge with a case initiated by a midnight judge.⁸⁴

The expanded article shows Reed was a private citizen, the administrator for the estate of a Mr. Thomas Bartow. He first appeared before Judges Tilghman, Griffith, and Bassett on October 2, 1801, over a \$525 debt dispute with a Mr. Joseph Prudden.⁸⁵ Prudden, the defendant, was granted an extension until the following May, and then again until October.⁸⁶ When the parties returned in October 1802, they found a very different court than a year earlier. Instead of Judges Tilghman, Griffith, and Bassett, Justice William Paterson and District Judge Robert Morris now presided under the old circuit-riding system. It was actually Prudden, not Reed, who decided to contest the constitutionality of the repeal. His argument, though quite convoluted in print, was relatively straightforward. First, Tilghman, Bassett, and Griffith were duly appointed circuit judges. Second, because they had not been impeached, they retained a vested interest in their offices. Third, William Paterson and Robert Morris were not commissioned as circuit judges, but as judges of the Supreme and District Courts, respectively. Consequently, Prudden's attorney argued, Patterson and Morris "ought not to have cognizance of the plea aforesaid: but the same ought of right and according to the laws . . . to be had and prosecuted before the Honourable William Tilghman, Richard Bassett, and William Griffith."⁸⁷

If the form of this argument sounds familiar, it is, because *Reed* was part and parcel of the same Federalist litigation strategy as *Stuart v. Laird*.⁸⁸ After introducing the *Reed* case, Ackerman wonders: "Why *didn't* Reed and his fellow judges push their lawsuit all the way to the Supreme Court? How could they have failed to see that their case provided a better vehicle for the Court than either *Marbury* or *Stuart*?"⁸⁹ Of course, once *Reed* is seen for what it really is—*Stuart* by another name—this conundrum falls away. Nevertheless, Ackerman is right to ask why the midnight judges' response unfolded the way that it did. It is to

83. See Edward Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 298-99 n.55 (2003-04).

84. See *Constitutional Question*, GAZETTE U.S. (Phila.), Apr. 9, 1803, at 2. The piece was reprinted in *Constitutional Question*, SPECTATOR (N.Y.), Apr. 20, 1803, at 2; *Constitutional Question*, COMMERCIAL ADVERTISER (N.Y.), Apr. 19, 1803, at 2.

85. Minutes of the U.S. Circuit Court (Apr. 2, 1790-Apr. 15, 1879), Record Group 21, T-928, Roll 1, Records of the U.S. District Court for the District of New Jersey and Predecessor Courts, 1790-1950 (on file with the Nat'l Archives, N.Y.C.).

86. See *Constitutional Question*, GAZETTE U.S., Apr. 9, 1803, at 2.

87. *Id.* (emphasis omitted).

88. See *supra* notes 69-73 and accompanying text.

89. ACKERMAN, *supra* note 11, at 181.

that question that I now turn.

IV

Go back now to March 1802, just after the repeal of the Judiciary Act. The midnight judges, like most observers, had expected repeal for several months.⁹⁰ Once it became a reality, William Tilghman, the chief judge of the Third Circuit, seized the initiative and wrote to the other judges on behalf of himself and his colleagues:

The act of the last session of Congress repealing the law under which we hold our offices has filled our mind with the most serious reflections. Thinking as we do, that the repealing law is a violation of the constitution, we feel ourselves impelled by sacred obligations, to take the legal measures for disputing its validity. How to bring this important subject to a constitutional decision, with the least possible interruption of the public conscience and tranquility; and how, in the meantime to conduct ourselves with the greatest propriety, are questions which require sure and mature deliberation. It appears to us that they cannot well be answered without a personal communication of sentiments between the Judges of the different circuits. . . . Under these impressions, we have thought it advisable, to request a general meeting of the Circuit Judges in the city of Philadelphia, on Saturday the 17th of July next.⁹¹

Not all of the judges responded to Tilghman's inquiry. The venerable John Lowell had passed away earlier in the month, although Judge Benjamin Bourne assured Tilghman of Lowell's opposition to the repeal.⁹² William McClung of the Sixth Circuit probably lived too far from Philadelphia to make an invitation practical. Finally, Jefferson's Fifth Circuit nominations, Henry Potter and Dominic Hall, either refused to participate or, more likely, were not contacted; in any event, they could expect the current Administration to watch out for them.⁹³

90. See Letter from William Tilghman to Harriet Tilghman (Nov. 14, 1801) (on file with Md. Historical Soc'y, Tilghman Family Papers); Letter from Oliver Wolcott to James Watson (Feb. 16, 1802) (on file with Conn. Historical Soc'y, Oliver Wolcott, Jr. Papers).

91. Letter from William Tilghman to Oliver Wolcott (May 22, 1802) (on file with Conn. Historical Soc'y, Oliver Wolcott, Jr. Papers). An identical letter, addressed to Judge Jeremiah Smith, is printed in JOHN HOPKINS MORISON, *LIFE OF THE HON. JEREMIAH SMITH* 148-49 (Little & Brown 1845).

92. See Letter from Benjamin Bourne to William Tilghman (June 12, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers).

93. Potter was soon named to the United States District Court of North Carolina, replacing Judge Sitgreaves, whose own refusal to accept a circuit position allowed Potter to become a circuit judge in the first place. See *supra* notes 25-33 and accompanying text (describing Potter's appointment to the Fifth Circuit); Letter from Thomas Jefferson to the Senate (Apr. 6, 1802), in 37 PAPERS OF JEFFERSON, *supra* note 25, at 187 (naming Potter to replace Sitgreaves on the district court). And, if

The remaining midnight judges responded enthusiastically to Tilghman's letter. George Taylor hoped that together the judges might "prove the mistake of those who assert that written constitutions are feeble barriers when opposed to the rage of party or the passions of the people."⁹⁴ Egbert Benson agreed, informing Tilghman that he and his fellow judges for the Second Circuit "would readily conform themselves to whatever the Gentlemen who may assemble shall recommend."⁹⁵ Jeremiah Smith, Benjamin Bourne, Philip Key, and Charles Magill also could not attend, but they promised to support any plan that might emerge from Philadelphia.⁹⁶ At the same time, more sobering realities belied the judges' enthusiasm. Even if the judges had a legal right to their salaries, litigating the issue would be difficult and time-consuming. Several of the men had already begun looking for more stable employment. Jeremiah Smith moved quickly to accept a position as chief justice of the Supreme Court of New Hampshire in May.⁹⁷ Charles Magill revealed that he had returned to private practice.⁹⁸ Oliver Wolcott, already in economic difficulties prior to his appointment to the bench, entered into serious discussions to oversee a copper mine in New Jersey as early as February 1802, before the Repeal Act had even passed the House.⁹⁹

Curiously—and, to my knowledge, unremarked on to date—word managed to get out about the July meeting around this time. Daniel D'Oyley, a Republican bureaucrat from South Carolina, somehow found

that complicated dance were not enough, Jefferson then nominated Edward Harris to replace Potter on the Fifth Circuit, despite the fact that the court would be abolished in less than three months. See Letter of Thomas Jefferson to the Senate (Apr. 27, 1802), in 37 PAPERS OF JEFFERSON, *supra* note 25, at 348. Dominic Hall eventually received a judgeship of his own on the District Court of Orleans, the predecessor to the District Court of Louisiana. See S. EXEC. JOURNAL, 8th Cong., 2d Sess. 475-76 (1804).

94. Letter from George Taylor to William Tilghman (June 7, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers).

95. Letter from Egbert Benson to William Tilghman (June 10, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers).

96. Letter from Benjamin Bourne to William Tilghman (June 12, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers); Letter from Philip Key to William Tilghman, n.d. (on file with Md. Historical Soc'y, Tilghman Family Papers) (writing before the first meeting in light of its content); Letter from Charles Magill to William Tilghman (July 10, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers); Letter from Jeremiah Smith to William Tilghman (June 7, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers).

97. MORISON, *supra* note 91, at 150; Letter from Jeremiah Smith to John Lowell (Mar. 25, 1802) (on file with Houghton Library, Harvard Univ., Lowell Family Papers) (declining to travel to the circuit sessions in Providence and Boston). Despite taking the New Hampshire position, Smith refused to resign from the federal bench, preferring to remain "a circuit judge *de jure*" though "ceas[ing] to be a judge *de facto*." MORISON, *supra* note 91, at 152.

98. Letter from Charles Magill to William Tilghman (July 10, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers) ("Having resumed the practice of law my professional avocations occasioned my absence from this place for the three weeks preceding the above date.").

99. Letter from Oliver Wolcott to James Watson (Feb. 16, 1802) (on file with Conn. Historical Soc'y, Oliver Wolcott, Jr. Papers).

out about the judges' plans and dashed off a barely legible letter to Albert Gallatin, the Secretary of the Treasury. "I know it to be the intention of the circuit judges of the U.S. to meet at Philadelphia on the 17th July," D'Oyley wrote.¹⁰⁰ He suspected that the judges would ask the Supreme Court to rule on the constitutionality of the repeal: "The federalists doubtless will support them by any means and the present state of affairs cannot discourage their hopes to introduce confusion or what may be worse . . . a dissolution of the government."¹⁰¹ One wonders exactly how this information, accurate to the day, could have reached D'Oyley, especially since the circuit judge in South Carolina (Dominic Hall) was a Jefferson nominee. And although D'Oyley may have just been an overeager partisan, the fact that he took the meeting so seriously is striking.

Before D'Oyley's fears could materialize, however, the judges had to figure out how to bring their case in the first place. Jurisdictional and common law vagaries combined to make direct judicial review of the midnight judges' claims quite difficult. Unlike William Marbury, the judges could not file for a writ of mandamus, a tool to force government officials to perform a nondiscretionary, ministerial act. Marbury sought the delivery of his commission, which he claimed had vested upon Adams' signature.¹⁰² By contrast, the midnight judges already *had* their commissions; indeed they had performed their duties throughout 1801. The issue, then, was not whether the judges' commissions to their offices had vested. It was whether the Repeal Act rendered the commissions null and void by abolishing the offices entirely, and here mandamus was no use. It would also be difficult for the judges to sue for their salaries directly. The background norm in the early Republic was that only the legislature could appropriate funds from the Treasury.¹⁰³ During this period, money claims against the United States were generally referred to a special House Committee on Claims for consideration, with the courts playing no significant role.¹⁰⁴ Thus, unless the judges thought that the

100. Letter from Daniel D'Oyley to Albert Gallatin (June 22, 1802), *microformed on The Papers of Albert Gallatin*, Reel 7-253 (Rhistoric Pub'ns).

101. *Id.*

102. See Saikrishna Bangalore Prakash, *When an Appointment Vests* (U. Va. Pub. Law & Legal Theory Working Paper Grp., Paper No. 2012-16, 2012), available at <http://ssrn.com/abstract=2008396>.

103. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1872-74 (2010); Floyd D. Shimomura, *History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Mode of Payment*, 45 LA. L. REV. 625, 637-43 (1985).

104. Shimomura, *supra* note 103, at 643-47; see also 12 ANNALS OF CONG. 73 (1803) (statement of Sen. Nicholas) (arguing that, if the office of circuit judge exists, "instead of sending [the judges] to the courts, where they can get no relief, I would make an appropriation for the payment of their salaries").

Republican Congress would agree to pay them a regular salary after abolishing their courts, they would need another strategy.

Unfortunately, very few of the replies provided anything like specific proposals. Samuel Hitchcock remarked on the difficulty in “bring[ing] the subject before the proper tribunal.”¹⁰⁵ Benjamin Bourne wrote to Tilghman in June expressing surprise that the judges were preparing for “active measures.”¹⁰⁶ His circuit “supposed it would rest with the Judges of the Supreme Court to decide on the validity of the [R]epealing Act & that probably they would determine (informally) this question prior to the period fixed for the revived circuit courts.”¹⁰⁷ And, in the clearest sign of the judges’ difficulties, William Griffith plaintively told Tilghman, “You must turn it in your mind—what we are to do at this meeting. As we have proposed it, no doubt the Gentlemen if they accede to the invitation will suspect from us some project: I have none, not even an Idea.”¹⁰⁸

Ironically, Oliver Wolcott, who had little formal legal experience before being elevated to the bench in 1801, wrote the most extensive reply by far. His letter contained a detailed memorandum laying out the constitutional case against the repeal.¹⁰⁹ Back in March, Wolcott had assured Representative Roger Griswold of his intent to, “in some form, record my opinion respecting the act for abolishing the Circuit Courts.”¹¹⁰ However, Wolcott did not take immediate action because he recognized that the real initiative lay with the Supreme Court.¹¹¹ Now, the receipt of Tilghman’s letter spurred Wolcott to develop a full indictment of the repeal. Where the other judges’ replies had simply asserted the repeal’s unconstitutionality without much argument, Wolcott undertook a sophisticated reading of constitutional text and structure. Although the legal basis against the repeal had been fleshed out during the Congressional debates, this was the first time a circuit judge had articulated the case so directly.

The Constitution, Wolcott wrote, “definitively stated” how officials

105. Letter from Samuel Hitchcock to William Tilghman (July 6, 1802) (on file with Md. Historical Soc’y, Tilghman Family Papers); *see also* Letter from George Taylor to William Tilghman (June 7, 1802) (on file with Md. Historical Soc’y, Tilghman Family Papers) (noting the “considerable difficulties” in submitting the question to a constitutional decision).

106. Letter from Benjamin Bourne to William Tilghman (June 12, 1802) (on file with Md. Historical Soc’y, Tilghman Family Papers).

107. *Id.*

108. Letter from William Griffith to William Tilghman (June 16, 1802) (on file with Historical Soc’y of Pa., William Tilghman Papers) (emphasis omitted).

109. *See* Letter from Oliver Wolcott to William Tilghman (June 25, 1802) (on file with Conn. Historical Soc’y, Oliver Wolcott, Jr. Papers). This version is a very rough draft, so making out its folds, strikethroughs, and scribbles is difficult.

110. Letter from Oliver Wolcott to Roger Griswold (Mar. 23, 1802) (on file with Conn. Historical Soc’y, Oliver Wolcott, Jr. Papers) (emphasis omitted).

111. *Id.*

were to be appointed to each of the branches of government—representatives and senators were chosen by the people and state legislatures, respectively; the president by the electoral college; and judges by the president, with the Senate’s advice and consent—and what their terms of tenure would be. By implication, Wolcott reasoned that “the Electors of the constituent branches can in no case, revoke appointments which they have once made.”¹¹² Furthermore, the Constitution “authorized distinct provisions for securing a due compensation.”¹¹³ Wolcott declared it his “most decided conviction, that the Act . . . abolishing the Circuit courts, is repugnant to these principles” and would “reduce[] the Judiciary to a subordinate grade, dependent on the will of Congress and the President.”¹¹⁴

As he saw it, moreover, the Republicans’ unrestrained conception of majority rule did not just put the federal judiciary at risk. The executive could easily become “a passive instrument of the ambition & passions of the Legislature,” and the aristocratic Senate might similarly succumb to the more populist House.¹¹⁵ Furthermore, the States might follow the federal lead and undermine judicial independence in their own governments. Wolcott foresaw corruption of the rule of law and civic decline throughout the Union.¹¹⁶ Concurrent attacks on the Federalist-dominated judiciary in Maryland showed these fears of widespread partisanship were not totally unfounded.¹¹⁷

Wolcott reiterated what he had told Roger Griswold in March—that the initiative lay with the justices of the Supreme Court. But whatever the Court decided, he still felt the judges were obliged to speak out:

[T]he Circuit Judges, though oppressed by power & deprived of the means of exercising their functions, can declare and publish their opinions—of this recourse they cannot be divided, and in my judgment they are bound to exert it; that it may appear, that they are not responsible, for the consequence of a passive surrender of the public rights constitutionally committed to them.¹¹⁸

112. *Id.*

113. *Id.*; see U.S. CONST. art. I, § 6, cl. 1 (Congressional pay) (later modified by the Twenty-Seventh Amendment); U.S. CONST. art. II, § 1, cl. 7 (Executive pay); U.S. CONST. art. III, § 1, cl. 1 (Judicial pay).

114. Letter from Oliver Wolcott to William Tilghman (June 25, 1802) (on file with Conn. Historical Soc’y, Oliver Wolcott, Jr. Papers).

115. *Id.*

116. *Id.*; see also Letter from Oliver Wolcott to William DePaulson[?] (Mar. 25, 1802) (on file with Conn. Historical Soc’y, Oliver Wolcott, Jr. Papers) (“A precedent is established which endangers all our *State Judicial Establishments*.”).

117. See Jed Shugerman, *Marbury and Judicial Deference: The Shadow of Whittington v. Polk and the Maryland Judicial Battle*, 5 U. PA. J. CONST. L. 58, 65-73 (2002).

118. Letter from Oliver Wolcott to William Tilghman (June 25, 1802) (on file with Conn. Historical Soc’y, Oliver Wolcott, Jr. Papers).

For Wolcott, moreover, this tactic was essentially majoritarian: “The Judges claim no exemption from responsibility to the People; to the will of the Nation, they are willing to submit. They merely claim, to be independent of the power or influence of the Legislative & Executive Departments in the expressions of judicial opinions.”¹¹⁹

The meaning of Wolcott’s memorandum shifts, however, when one recalls that just a few weeks earlier, the Supreme Court decided it would indeed ride circuit again, effectively ousting the midnight judges.¹²⁰ This meant Wolcott’s call for an independent judiciary to rise to the occasion and vindicate basic constitutional principles was stillborn, although he did not know it at the time. Indeed, it is curious that the Justices did not think to communicate their intentions to the midnight judges, especially since they had at least two clear opportunities. First, Justice Bushrod Washington corresponded with Egbert Benson in March, shortly before Bushrod told John Marshall the circuit riding question “ought to be considered as settled.”¹²¹ However, in his June 10 letter to Tilghman, Benson showed no awareness that the Court had even broached the issue. Second, Marshall apparently received his copy of the Judiciary Act of 1802, from which he learned of the incipient cancellation of the Supreme Court’s June term, from none other than Oliver Wolcott.¹²² One day after Marshall thanked Wolcott for sending the copy, the Chief Justice wrote Paterson of his “strong constitutional scruples” about circuit riding, but Marshall’s letter to Wolcott said nothing about the repeal.¹²³ Instead, Marshall expressed gratitude for the material because he “was entirely uncertain what destiny would be decreed us”—as if the circuit judges were not waiting on the Supreme Court to see what destiny would be decreed for themselves!¹²⁴

The judges only learned of the Court’s stance through a remarkable encounter on the eve of the Philadelphia meeting. Judge Philip Key, one

119. *Id.* (emphasis omitted).

120. See *supra* note 63 and accompanying text.

121. See Letter from John Marshall to William Paterson (May 3, 1802), in 6 PAPERS OF MARSHALL, *supra* note 51, at 117-18 (paraphrasing Bushrod Washington’s letter from “a few days past” and telling Paterson that Washington denied an “application” by Judge Benson to examine some papers George Washington bequeathed to his nephew in 1799). Benson was evidently displeased that Washington refused him access. See Letter from Bushrod Washington to Oliver Wolcott (Mar. 21, 1804) (on file with N.Y. Historical Soc’y, Rufus King Papers).

122. In fairness, there is some uncertainty as to whether Wolcott was the recipient of this letter because the cover page has gone missing. Scholars attribute it on the basis of the original being held in the Oliver Wolcott, Jr. Papers. See 6 PAPERS OF MARSHALL, *supra* note 51, at 105 n.1.

123. Letter from John Marshall to William Paterson (Apr. 6, 1802), in 6 PAPERS OF MARSHALL, *supra* note 51, at 106; Letter from John Marshall to Oliver Wolcott (Apr. 5, 1802), in 6 PAPERS OF MARSHALL, *supra* note 51, at 104.

124. Letter from John Marshall to Oliver Wolcott (Apr. 5, 1802), in 6 PAPERS OF MARSHALL, *supra* note 51, at 104.

of the more controversial midnight nominees because he had fought for the Loyalists in the Revolutionary War, owed his successful confirmation in part to an influential backer: Samuel Chase.¹²⁵ On his way to Philadelphia in July, Key paid Chase a visit. Considering the circumstances, the conversation must have been fascinating. Unfortunately, the written account is quite sparse, but, having escaped notice up to now, still deeply illuminating:

Mr. Chase informs us that the Judges of the Supreme Court have determined to go forward to the discharge of the duties imposed on them by the late Congress—that Congress was Competent to enlarge, diminish or annul *our* Judicial duties—and I understand (tho no opinion is given on the subject) that our Commissions and the right to our Salaries remain as before—this opinion formed by all the Judges renders inefficacious any attempt to support any exercise of Judicial Power vested in us by the Act under which we derive our Appointments.¹²⁶

Key's "understanding" from Chase that the midnight judges' commissions and salaries were unaffected by the repeal is worth noting, as none of the other justices raised the issue in their correspondence. Recall that only Justice Cushing responded to Chase's argument about ousting the midnight judges, and he merely stated that he did not think the Court had the "power" to restore the judges' offices or salaries.¹²⁷ Note also that, if Key could be believed, the legal challenge that would be advanced in *Stuart v. Laird* was dead on arrival. If the Court truly thought Congress was "competent to enlarge, diminish or annul" the judges' duties, it is hard to see why Congress could not transfer all pending cases from the 1801 Act courts into the old system. And while the judges might nonetheless retain a right to their salaries, *Stuart* did not directly raise that issue.

The judges could not easily bring the salary question to court, at least not directly.¹²⁸ However, Key proposed a scheme to get around this problem:

Perhaps being duly appointed and commissioned duties of a Judicial matter attach to us *in principles of Co. Law*, & so, the exercise of those duties, may be drawn into examination before the Supreme Court, and in that mode the Judges may declare that our Commissions remain as to all such duties, *and of course our*

125. Turner, *supra* note 9, at 513.

126. Letter from Philip Key to William Tilghman (July 19, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers).

127. See *supra* note 62 and accompanying text.

128. See *supra* notes 103-104 and accompanying text.

*salaries.*¹²⁹

In other words, while Congress was competent to strip the circuit judges of all *statutory* duties, Key and the others might retain residual common law powers simply by virtue of their commissions. In testing this theory, the judges could permit the Court to pronounce on the repeal and, in the process, establish the judges' continuing right to their salaries.

It is admittedly difficult to understand exactly what Key had in mind here. The Judiciary Act of 1801 not only established the circuit courts, it defined their jurisdiction, empowered the judges to issue certain writs and empanel juries, appointed clerks and marshals, and specified where court records should be kept.¹³⁰ All of these detailed specifications had now been repealed. Moreover, the Constitution was notably silent on the powers of federal judges, especially lower federal judges, whose very existence it left entirely in the hands of Congress.¹³¹ Hence, a signed commission by itself was a thin reed on which to base the exercise of judicial powers. Just as a practical matter, it would be difficult to test Key's theory that common law norms conferred freestanding authority on the holders of judicial commissions. Most probably, any attempt to perform a judicial act would simply be ignored. As one Republican congressman put it, "[I]f these men think they still hold their offices, . . . [I]et them take their seat upon the bench and see if the Marshal will obey them. Let them attempt to send a man to the whipping-post, or to jail, and I believe they will find out whether they are judges or not."¹³²

It is true that the Federalists were capable of bringing test cases to defend constitutional principles. This is essentially what they did in *Stuart v. Laird*.¹³³ But even if Key could have found putative litigants or a marshal willing to take part in his scheme, his reliance on the common law posed further problems. In the early Republic, it was a live question whether there was a federal common law to begin with.¹³⁴ Republicans

129. Letter from Philip Key to William Tilghman (July 19, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers) (emphasis added). After much squinting, I am confident that the mark I have indicated as "Co." is an abbreviation of "common law," although here, as elsewhere, the judges' messy scrawls do not allow for complete certainty.

130. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.

131. U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 1.

132. 12 ANNALS OF CONG. 65 (1803) (statement of Sen. Jackson).

133. See *supra* note 69 and accompanying text; see also Susan Low Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 CONST. COMMENT. 607 (2001) (arguing that Marbury purposefully chose his forum to give Marshall a vehicle to establish judicial review); James M. O'Fallon, *The Case of Benjamin More: A Lost Episode in the Struggle over Repeal of the 1801 Judiciary Act*, 11 LAW & HIST. REV. 43, 52 (1993) (suggesting that another legal challenge arising out of the repeal may have been a test case).

134. See Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223 (1986); Gary D. Rowe, *The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919 (1992).

campaign on widespread distrust of federal common law in connection with the hated Sedition Act.¹³⁵ Some of the Republican hostility toward the Judiciary Act of 1801 involved suspicions about federal common law, as well.¹³⁶ Moreover, although many Federalists were sympathetic to the idea of federal criminal common law jurisdiction, the judges' foremost ally on the Court, Justice Chase, had openly rejected it.¹³⁷ If the common law could not confer jurisdiction on federal judges in duly authorized courts, it seems yet a further step to say it can confer powers on a judge with no statutory authority whatsoever.

Whatever the particulars of Key's plan, it would surely have been enormously controversial. Unfortunately, none of the circuit judges expressed any recorded opinion about the idea, so it remains a tantalizing counterfactual. However, Key's July letter also included a second proposal. "If no other mode is devised of having a Judicial decision of our rights," he suggested, "would not a temperate dignified remonstrance to Congress, with a tender of our Services, and a demand of our salaries, be correct?"¹³⁸ This warranted skepticism, as it called for the judges to petition the very same legislature that had abolished their courts and salaries only a few months before. However, unlike the courts, Congress clearly had the power, if not the political will, to assign the judges new duties and to pay their salaries.

Key's letter probably deflated the Philadelphia meeting, which was not well attended anyway (Egbert Benson was the only judge outside of the Third Circuit to actually make the trip). Since the Supreme Court's decision to ride circuit threw whatever plan existed into disarray, the judges decided to hold another gathering. In August, Tilghman sent out notices to the circuit judges that had not made the July meeting:

We were convinced, by satisfactory information, that the Judges of the Supreme Court had determined to hold their Circuits under the Act of the last session of Congress. To that decision we are bound to submit. But it was our opinion, that altho precluded from holding Courts, yet our Commissions as Judges, & our right to receive the compensations fixed by law, remained in full force and

135. Federalists in part defended the Sedition Act as merely altering powers already granted to the federal courts by the common law, thus prompting the Republicans to deny the existence of any such common law authority in the first place. See Rowe, *supra* note 134, at 936-41.

136. See, e.g., Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1093-1111 (1985).

137. *United States v. Worrall*, 2 U.S. 384 (C.C.D. Pa. 1798); see also Stephen D. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U. L. REV. 26, 58-62 (1978). The Supreme Court would eventually reject federal criminal common law jurisdiction in the case of *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

138. Letter from Philip Key to William Tilghman (July 19, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers).

in this sentiment we were confirmed, by the opinion of men of great Abilities, in various parts of the Union.¹³⁹

Tilghman did not mention Key's common law plan at all. Instead, he endorsed the more moderate route, writing that "the prevailing Idea, at the meeting, seemed to be, that the subject would be most properly brought forward, by a memorial to Congress, at the next Session."¹⁴⁰ Stressing the importance of unanimity once more, Tilghman requested that the judges attend a second gathering in November.¹⁴¹

Just one day after Tilghman called for a second meeting in Philadelphia, the city's major Federalist newspaper, the *Gazette of the United States*, suspended its normal slate of articles and gave over nearly the entirety of its issue to an article entitled *Judge Bassett's Protest*.¹⁴² The gist of the argument was familiar: the Constitution had vested distinct powers in three coequal departments of government and fixed the modes of selection and terms of office; judges plainly holding office under good behavior could not be removed unless convicted of misbehavior; the circuit judges were still in rightful possession of their commissions; the justices should refuse to obey the repealing laws; and Congress ought to make provisions by law for the continuance of the judges' courts and duties. Editors all over the country republished the story in their own papers, where it received a great deal of attention.¹⁴³

Scholarly opinion has divided over the document's true authorship, with some, including many contemporary Republican partisans, attributing the piece to James Bayard, Bassett's son-in-law.¹⁴⁴ However, it seems extremely unlikely that Bassett and the other judges who met in late July would not have weighed in on the impending publication. The *Protest's* concluding section, taken at face value, suggested as much. "If

139. See Letter from William Tilghman to Oliver Wolcott (Aug. 26, 1802) (on file with Conn. Historical Soc'y, Oliver Wolcott, Jr. Papers); Letter from William Tilghman to Benjamin Bourne (Aug. 20, 1802) (on file with Historical Soc'y of Pa., Society Collection).

140. Letter from William Tilghman to Oliver Wolcott (Aug. 26, 1802) (on file with Conn. Historical Soc'y, Oliver Wolcott, Jr. Papers).

141. The judges evidently felt some sense of urgency, because they scheduled the second meeting for the earliest possible date which Key stated he could attend. See Letter from Philip Key to William Tilghman (July 28, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers). As it happened, Key was unable to attend regardless. Letter from Philip Key to William Tilghman (Dec. 4, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers).

142. GAZETTE U.S., Aug. 21, 1802. A copy—omitting several introductory paragraphs—is helpfully provided in an appendix to ACKERMAN, *supra* note 11, at 276-79.

143. The essay was also republished in pamphlet form as THE PROTEST OF THE HON. RICHARD BASSETT. . . AGAINST TWO ACTS OF CONGRESS OF THE 8TH OF MARCH AND 29TH OF APRIL 1802 (Phila., Bronson & Chauncey 1802).

144. See, e.g., MORTON BORDEN, THE FEDERALISM OF JAMES BAYARD 226 (1954) (observing that Bassett's arguments closely track some of Bayard's in the House); COLUMBIAN ADVERTISER (Alexandria, Va.), Aug. 25, 1802, at 3; PROVIDENCE PHOENIX (R.I.), Sept. 7, 1802, at 2; SALEM GAZETTE (Mass.), Sept. 7, 1802, at 3; VERMONT GAZETTE, Oct. 18, 1802, at 2.

any difference of opinion, between me and my associates in office, exists," it read, "it relates merely to the point of time for expressing our sentiments. I can confidently assert, that on deliberation, they coincide with me in other respects."¹⁴⁵ Indeed, the obvious source for much of the *Protest* was the judges themselves. In January, before the Repeal Act had officially been introduced, Judge William Griffith, Bassett's colleague along with William Tilghman, had asked Tilghman to publish his opposition, "which tho' ineffectual at this time may years to come, carry to the bosoms of the unthinking . . . the conviction that a cheap government has made a cheap constitution."¹⁴⁶ Bassett might have seen Wolcott's letter at the July meeting, containing a memorandum on the repeal and an entreaty for the judges to publish their opinions should the Court duck the question. Bayard made a similar suggestion to Bassett in January, too.¹⁴⁷

Unfortunately, as a persuasive essay, Bassett's *Protest* fell flat. Jefferson and his allies remained confident that they would carry the upcoming midterm elections.¹⁴⁸ "Let [Basset and Bayard] not prove the strength of their party . . . by the points of their bayonets, but test them by the vote of the people!" declared one paper, "Let registers be opened . . . in every state, in which the citizens shall inscribe their votes on the important question."¹⁴⁹ Indeed, the Republicans won sweeping gains in the 1802 elections.

V.

The grim election results overshadowed the judges' upcoming November meeting, which produced the finalized draft of the memorial to Congress. Now a private lawyer in Virginia, Charles Magill informed Tilghman that he would not attend. Jeremiah Smith, clinging to "a faint glimmering ray of hope, that the circuit judges will be restored," similarly declined.¹⁵⁰ Benjamin Bourne agreed to endorse the planned memorial, although he entertained "no hope of its meeting a favourable reception or

145. ACKERMAN, *supra* note 11, at 296 (emphasis omitted).

146. Letter from William Griffith to William Tilghman (Jan. 8, 1802) (on file with Historical Soc'y of Pa., William Tilghman Papers).

147. Letter from James Bayard to Richard Bassett (Jan. 25, 1802), in 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1913, at 146-47 (1913) ("Why do not those who are opposed to the [repeal], express in the public papers or by petitions their disapprobation of the measure? . . . [I]t is likely that a public movement would have great effect.").

148. See ACKERMAN, *supra* note 11, at 177.

149. SALEM REG. (Mass.), Sept. 16, 1802, at 3. For another editorial excoriating Bassett, see *Citizen Bassett's Protest*, INDEP. CHRON. (Boston, Mass.), Sept. 6, 1802, at 2-3.

150. MORISON, *supra* note 91, at 153; Letter from Jeremiah Smith to William Tilghman (Nov. 11, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers).

decision.”¹⁵¹ Samuel Hitchcock was flirting with insolvency; in a cruel twist, he was later called before the new circuit court in Vermont over unpaid debts, defended by none other than his fellow midnight judge Egbert Benson.¹⁵² Wolcott, too, was worn out. “I shall probably attend [the November meeting],” he told a friend, “but I have no expectation of advantage to myself or success in respect to public objects. . . . At any rate, I am tired of Offices and wish as soon as possible to get into a situation in which I can earn bread for my family.”¹⁵³

Despite these personal troubles, Wolcott again rose to the occasion. He had been thinking about the memorial to congress for at least a month,¹⁵⁴ and was primarily responsible for the document that emerged from the November meeting.¹⁵⁵ The final version struck a conciliatory tone while concisely expressing the judges’ position. It adopted the same posture that the judges had imputed to the Supreme Court—namely, that although the law had stripped the judges of their powers, they remained vested in the office, which meant they could perform judicial duties and had a right to their salaries.¹⁵⁶ The judges thus requested that Congress assign them new duties “consistent with the Constitution and the convenient administration of justice.”¹⁵⁷ As a practical matter, of course, this was highly unlikely, since earlier that year Congress had abolished the circuit courts, which it felt were unnecessary to the administration of justice. As for the judges’ salaries, they offered to “cheerfully . . . submit[] to judicial examination and decision.”¹⁵⁸ This helpful suggestion must of course be viewed against two background facts: first, that the judges probably could not go to the courts with their salary claim directly, and second, that their chances were much better among the judiciary, the only government

151. Letter from Benjamin Bourne to William Tilghman (Nov. 14, 1802) (on file with Md. Historical Soc’y, Tilghman Family Papers).

152. “M.,” BEE (Hudson, N.Y.), Dec. 7, 1802, at 3 (“Hitchcock will never question the constitutionality of the courts under the act of 1802, nor Mr. Benson, who thus relinquishes all pretensions to the office of judge, and appears as counsel at the bar.”).

153. Letter from Benjamin Bourne to William Tilghman (Nov. 14, 1802) (on file with Md. Historical Soc’y, Tilghman Family Papers); Letter from Oliver Wolcott to James Watson (Oct. 18, 1802) (on file with Conn. Historical Soc’y, Oliver Wolcott, Jr. Papers).

154. See Letter from George Cabot to Oliver Wolcott (Oct. 21, 1802), in HENRY CABOT LODGE, LIFE AND LETTERS OF GEORGE CABOT 327-28 (Boston, Little, Brown 1877) (giving advice on the construction of the memorial).

155. Wolcott’s papers at the Connecticut Historical Society contain two slightly different versions of the memorial along with a note: “The preceding Papers, contain the sentiments which I would have expressed; This paper contains the results of the Conference of the Judges.” Draft of the Circuit Judges’ Memorial, n.d. (emphasis omitted) (on file with Conn. Historical Soc’y, Oliver Wolcott, Jr. Papers).

156. Judges Removed From Office By Legislation (Jan. 28, 1803), reprinted in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 340 (Wash., Gales & Seaton 1833).

157. *Id.*

158. *Id.*

branch not dominated by Republicans. The judges' effort, as they explained it, was the product of "a conviction that they ought not voluntarily to surrender rights and authorities intrusted [sic] to their protection, not for their personal advantage, but for the benefit of the community."¹⁵⁹

During this time, Philip Key continued to press for more direct action. In December, he excitedly wrote to Tilghman for information about the November meeting. Key suggested that, if the judges could not agree on a plan, "after consulting a few Friends . . . if they approve of it I shall hold myself ready to do some Judicial Act, that shall bring in to view and before the Supreme Court, the Question whether my commission is vacated or not."¹⁶⁰ However, there is no indication that Key performed any "judicial act" in the coming months. Tilghman or Key's friends may have convinced Key otherwise (although there is no documentary evidence of this), or Key may simply have concluded that he could not achieve anything acting alone. All that is certain is that the tactic was not attempted, and Key did not mention it again.

Following the November meeting, the judges hastily circulated copies of the final draft among themselves. "The earlier in the Session the Business is brought before Congress the better," Benson urged.¹⁶¹ He sent his own and Wolcott's copies to Tilghman and told Tilghman to direct the three signed memorials to their principal contacts in Congress—James Ross in the Senate and Roger Griswold in the House—with news that the more distant copies would follow.¹⁶² In mid-December, Tilghman forwarded the remaining signed copies to Roger Griswold. In a deeply pessimistic letter, Tilghman admitted that he "entertain[ed] no hope of present success" but that "it appeared to the Circuit Judges that it was incumbent on them to place on the record of both houses of Congress, their considerations & solemn Opinion, that the Act which annihilated the Exercise of their Judicial functions, without a suggestion of misbehaviour, was a violation of the Federal Constitution."¹⁶³

It took almost two months for the memorials to be presented because James Ross, the judges' point man in the Senate, did not even arrive in

159. *Id.*

160. Letter from Philip Key to William Tilghman (Dec. 4, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers).

161. Letter from Egbert Benson to William Tilghman (Nov. 27, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers).

162. *Id.*

163. Letter from William Tilghman to Roger Griswold (Dec. 5, 1802) (on file with Md. Historical Soc'y, Tilghman Family Papers). Per a notation, the letter was not posted until December 18, 1802. Note that the handwriting in the December letter is especially difficult to make out, perhaps because it is a draft.

Washington until January 25.¹⁶⁴ On January 27, Ross and Griswold introduced the memorials in their respective chambers.¹⁶⁵ The House of Representatives took up the matter first. James Bayard, who had led the Federalist opposition to repeal in the House in 1802, was noticeably passive. He had been narrowly defeated in his re-election bid,¹⁶⁶ and now not even his father-in-law's petition could rouse him. Writing to a friend, Republican Representative Ebenezer Elmer observed, "Mr. Bayard was entirely silent on the subject & refused to vote on every question that was taken. . . . As Bayard has determined to return to a private life, I suppose he does not wish to irritate any further the Republicans of Delaware."¹⁶⁷

With Bayard sidelined, Wolcott's friend Roger Griswold became the "principal agitator" for the Federalist cause in the House.¹⁶⁸ Immediately after Griswold introduced the memorial, the House debated whether to refer it to the Committee on Claims, which traditionally heard money claims against the United States, or to the Committee of the Whole, used when the entire body wished to debate a motion. They ultimately decided that, although it contained a demand for salary, it fundamentally turned on constitutional determinations about the Repeal Act that only the whole House was competent to resolve. To Griswold's great displeasure, the Republicans then moved to consider the memorials immediately rather than delaying a day or two to give the House time to consider the subject.¹⁶⁹

Put on the spot, Griswold made two resolutions patterned on the judges' own requests: the first endorsing legislative action to provide new duties for the circuit judges and the second asking that their compensation claims be submitted to judicial decision.¹⁷⁰ At this point, however, he seemed to rather inexplicably botch the job. Asked what duties he proposed to assign to the former judges, Griswold claimed that "he had not expected to have been called upon to define the plan that would be most agreeable to him," and lamely suggested that Congress might "restore the law which the Legislature had, at the last session, attempted to repeal."¹⁷¹ This was very strange. At some point in early 1803, Egbert

164. S. JOURNAL, 7th Cong., 2d Sess. 171 (1802).

165. H.R. JOURNAL, 7th Cong., 2d Sess. 308 (1802); S. JOURNAL, 7th Cong., 2d Sess. 257 (1802). The actual memorials, identically worded but in each judge's handwriting, can be found in SEN7A-G4, Records of the United States Senate, National Archives.

166. See *Delaware Election*, CENTINEL FREEDOM (Newark, N.J.), Oct. 19, 1802, at 3 (announcing Cesar Rodney's victory over James Bayard by fifteen votes).

167. Letter from Ebenezer Elmer to David Moore (Jan. 27, 1803) (on file with the Library of Cong., Miscellaneous Manuscripts Collection).

168. *Id.*

169. 12 ANNALS OF CONG. 428-30 (1803).

170. *Id.* at 431.

171. *Id.*

Benson and Griswold had discussed how Congress might go about assigning the new duties that the judges requested in the memorial. Benson went so far as to send Griswold a proposal that Griswold could use in the congressional debates. Benson wrote to Tilghman that he had done this

with the view that as [our] Opponents in Congress will doubtless make every objection, and not improbably go so far as to say there is no practicable, and at the same time fit, Mode of Reference, that Mr. G may then in answer to such Objection read the Draft as a part of his Speech in the Debate, and so it may likewise get into the public Papers.¹⁷²

No copy of the draft law survives, but it is clear that Griswold received the draft before he introduced the memorial to Congress, so why he did not use it is simply a mystery.¹⁷³ Unsurprisingly, the Republicans did not find the suggestion of restoring the Judiciary Act of 1801 convincing, and Griswold's first motion was predictably defeated.

Debate on the second motion—a law to provide for judicial resolution of the judges' salary claims—was more contentious. John Randolph thought it especially inappropriate to make an exception to the rule that the United States could not be sued in its own courts because the claim involved “the interests of judges, as a *caste*,” so a judicial tribunal would inevitably be biased.¹⁷⁴ But the crux of the problem was that, having just denied the judges' request for new duties, House Republicans could not understand why they should pay salaries to men with nothing to do. Both motions were thus rejected—according to one onlooker, “in a manner not very respectful”¹⁷⁵—after just a few hours of debate.¹⁷⁶

The odds of success looked slightly better in the Senate, where the Federalists were able to send the memorial to a special committee, something their counterparts in the House had failed to do. What was more, because the Republicans inadvertently split their votes, the Federalists managed to secure all three committee memberships—James Ross, Gouverneur Morris, and Jonathan Dayton.¹⁷⁷ Even so, the

172. Letter from Egbert Benson to William Tilghman (Jan. 27[?], 1803) (on file with Md. Historical Soc'y, Tilghman Family Papers).

173. Benson's letter states that he had forwarded the proposal to Griswold along with a copy of the memorial signed by Judge Samuel Hitchcock. Since the House Journal shows that Griswold submitted Hitchcock's petition on January 27, Griswold must have had the draft law in his possession on that date as well. See *id.*; H.R. JOURNAL, 7th Cong., 2d Sess. 308 (1802).

174. 12 ANNALS OF CONG. 432 (1803).

175. Letter from James Hillhouse to John Trumbull (Feb. 4, 1803) (on file with Conn. Historical Soc'y, Jonathan Trumbull, Jr. Papers).

176. 12 ANNALS OF CONG. 440 (1803).

177. For this chain of events, see *Memorial of the Late Judges Before the Senate*, UNIVERSAL GAZETTE (D.C.), Feb. 10, 1803, at 3.

Republicans held a 17-13 majority in the chamber, and prospects for defection were slim. While the committee deliberated, the Senate considered a memorial from William Marbury requesting an attested copy of the Senate proceedings relating to his appointment as justice of the peace.¹⁷⁸ The rejection of that petition by a party line vote did not bode well for the judges.¹⁷⁹

Since House Republicans had refused to legislate new duties for the judges, the Committee came up with another plan, introduced by Morris on February 3, 1803. Morris proposed that the Senate resolve “[t]hat the President of the United States be requested to cause an information, in the nature of *quo warranto*, to be filed by the Attorney General against Richard Basset [sic] for the purpose of deciding judicially on their claims.”¹⁸⁰ *Quo warranto* was a common law writ used to force an officeholder to show on what authority he held his position. Morris’ proposal was unusual enough that he had to clarify to his fellow congressmen what exactly he was suggesting in the first place. As Morris explained it, once the attorney general filed the writ, it would be “incumbent on [the judges], either to disclaim the office . . . or else . . . establish their right. And to do this, they must prove two things: first, that the office exists, and secondly, that of right it belongs to them.”¹⁸¹

Republicans advanced three main objections to Morris’ plan. First, it was not clear that a writ of *quo warranto* was really applicable, since it was not the judges’ authority to hold their positions that was in question, but whether they held any positions at all.¹⁸² Indeed, Justice Chase had already rejected the use of the writ in his letter to Marshall, and Key had conveyed as much to Tilghman in July.¹⁸³ Second, Jefferson almost certainly would have ignored a Senate resolution requesting he file a writ. Indeed, many Republicans doubted whether Congress could properly make such a request to the Executive in the first place.¹⁸⁴ Third, reliance on the common law made Republicans extremely suspicious. Senator William Cocke asked, “If we adopt one form of the common law may not

178. It is notable, considering their divergent historical fates, that one commentator felt that the debate over the judges’ memorial was “of possibly greater importance” than Marbury’s. *To the Editor*, JENKS’ PORTLAND GAZETTE (Me.), Feb. 21, 1803, supp. at 1.

179. 12 ANNALS OF CONG. 34-50 (1803).

180. *Id.* at 52.

181. *Id.* at 55.

182. For more on the procedural obstacles to a hypothetical suit involving the midnight judges, see CURRIE, *supra* note 35, at 20 n.83.

183. See *supra* note 58 and accompanying text; Letter from Philip Key to William Tilghman (July 19, 1802) (on file with Md. Historical Soc’y, Tilghman Family Papers) (“[T]he Opinion of the Judge of the supreme court [to ride circuit] defeats any remedy by Mandamus, Quo Warranto, Assize, and a plea to their jurisdiction . . . because their proceeding to discharge our duties, predetermines the Question as to *our* right of exercising any courts.”).

184. See, e.g., 12 ANNALS OF CONG. 59-60 (1803) (statement of Sen. Wright).

the courts assume more?"¹⁸⁵ On the basis of these objections, the Senate rejected the measure 15-13.¹⁸⁶

The press paid little attention to the petition's failure. The *Federalist* *New York Evening Post* muttered that "President Jefferson, and the majorities in the two Houses of Congress, dare not submit the claim of the Circuit Judges for their compensation to judicial examination and decision"; another paper carried an anonymous letter from Washington noting that "[t]he memorial of the Circuit Judges has been dismissed without much ceremony, by those who, in feeling power, appear to forget there are such principles as right and wrong."¹⁸⁷ Compared to the piercing tirades that had poured forth in 1802, however, this was rather tame.

Some Republican newspapers predictably savaged the memorial. The radical *Aurora* took a patronizing tone, declaring, "The judges, who met below the people a short time ago in Philadelphia, this day brought forth the mouse from the mountain—a petition . . . on the subject of their salaries."¹⁸⁸ Another paper mocked, somewhat unfairly, "Although we are out of office . . . yet we will sweat the people out of 2,000 dollars a year if we can.—What *disinterested* patriots these must be, who are willing to accept the public money without any pretension to public services!"¹⁸⁹ Generally, though, papers on both sides presented the memorials with very little editorial comment, perhaps preferring not to revisit battles that had been fought with more vigor a year earlier.

Some Republicans now fully expected the circuit judges to go to the Supreme Court. "The Judges have made their débüt and have a proper congé [dismissal]," Representative Caesar Rodney recorded. "The opposition will try [the issue] perhaps in every shape of which this political Proteus is capable."¹⁹⁰ Instead, having tried and failed to appeal to the Court, to Congress, and to the public, the judges let the matter rest.

VI.

It took several years following the repeal controversy for the danger to

185. *Id.* at 58.

186. *Id.* at 78.

187. *Logic*, N.Y. EVENING POST, Feb. 9, 1803, at 3 (emphasis omitted); PROVIDENCE GAZETTE, Feb. 19, 1803, at 3 (emphasis omitted).

188. *From Washington*, AURORA GEN. ADVERTISER (Phila.), Feb. 2, 1803, at 2 (emphasis omitted). This passage is the only public reference to either of the judges' meetings I located in my research.

189. *Federal Patriotism*, PROVIDENCE PHOENIX, Feb. 12, 1803, at 2. For other attacks on the judges' motives, see AM. CITIZEN (N.Y.C.), Feb. 9, 1803, at 2; *Circuit Judges*, NAT'L AEGIS (Worcester, Mass.), Feb. 16, 1803, at 3; and KLINE'S CARLISLE WEEKLY GAZETTE (Pa.), Feb. 9, 1803, at 2.

190. Letter from Caesar Rodney to Joseph Nicholson (Feb. 16, 1803), in 1 WARREN, *supra* note 65, at 228.

the judiciary to subside. Shortly after the judges' memorial was rejected, the House moved to impeach Judge John Pickering. Pickering was a Federalist, an alcoholic, and probably insane. Indeed, as a circuit judge, Jeremiah Smith had discretely assumed some of Pickering's duties to prevent a scandal.¹⁹¹ Though there was some question as to whether Pickering's mental deficiencies constituted "misbehavior" under the Constitution, the Senate removed him from office.¹⁹² His removal set the stage for an even more tempting target.

On March 26, 1804, the House impeached Justice Samuel Chase. They charged him with a variety of offenses, including an 1803 charge to a Baltimore grand jury in which he forcefully denounced the repeal of the Judiciary Act of 1801.¹⁹³ After the House formed a committee to investigate the charges against Chase, Senator William Plumer lamented that the Supreme Court and circuit judges had not resisted the repeal in 1802, for "then was the time . . . to have taken their stand against the encroachments of Congress & the Executive."¹⁹⁴ Visions of another judicial purge flashed before the Federalists' eyes. Oliver Wolcott dashed off a note to Roger Griswold, worrying that the Republicans might "subvert[] the Judicial Department, or what would be still worse, convert[] it, into an active Engine for gratifying the vengeance of our fluctuating factions."¹⁹⁵ Once more, the Federalists saw the country moving toward chaos.

The impeachment trial, which convened in February 1805, was a major piece of political theater. John Marshall was asked to testify on Chase's behalf but, ever wary of further provocation, lent his associate only lukewarm support.¹⁹⁶ Yet when the Senate gave its verdict, the consensus was that Chase's defense team—which included, in an ironic touch, Philip Key—had far outclassed the opposition.¹⁹⁷ The Republicans, previously so steadfast, now wavered. Significant numbers broke ranks on each count, while the Federalists voted unanimously to acquit.¹⁹⁸ Chase kept

191. See 37 PAPERS OF JEFFERSON, *supra* note 25, at 462-63 (Letter from John Langdon to Thomas Jefferson and editorial note).

192. The episode is described in PETER C. HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635-1805, at 206-18 (1948).

193. See Stephen B. Presser, *Samuel Chase: In Defense of the Rule of Law and Against the Jeffersonians*, 62 VAND. L. REV. 349, 363-65 (2009).

194. WILLIAM PLUMER, MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803-1807, at 101-03 (1923).

195. Letter from Roger Griswold to Oliver Wolcott (Jan. 8, 1804) (on file with Yale Univ., Lane Collection, Manuscripts & Archives); Letter from Oliver Wolcott to Roger Griswold (Jan. 14, 1804) (on file with Yale Univ., Lane Collection, Manuscripts & Archives).

196. See JAMES HAW, STORMY PATRIOT: THE LIFE OF SAMUEL CHASE 232 (1980).

197. *Id.* at 239-40. In another reversal, Chase reached out to William Tilghman for help in securing a new job in Baltimore in expectation of Chase's removal. *Id.* at 225.

198. *Id.* at 240-41.

his job, and the threat to the judiciary receded.

Following the rejection of the memorial, the circuit judges dispersed to many of the state and national institutions they had thought so threatened by the repeal. William Tilghman became chief justice of the Pennsylvania Supreme Court, where he served for over two decades. His eulogist later remarked that Tilghman never spoke of his time as a circuit judge, finding it too painful to recount.¹⁹⁹ Jeremiah Smith remained chief justice of New Hampshire until 1809, resigned to serve as governor, and later returned to the bench. His biographer called the loss of his office "the severest disappointment that Judge Smith experienced in his public life."²⁰⁰ Oliver Wolcott tempered his views, becoming, of all things, a moderate Republican (though never a Jeffersonian), and later serving as governor of Connecticut. Egbert Benson left politics, founded the New York Historical Society, and returned to the House for a term in 1813. His one-time colleague Philip Key served in three successive Congresses beginning in 1807. Others, like Richard Bassett and Benjamin Bourne, seem to have left public life more or less uneventfully. A few were less fortunate. Without his judicial salary, Samuel Hitchcock could not pay his creditors, and he spent the end of 1803 in a debtors' prison; poor investments led to William Griffith's bankruptcy in 1812, as well.²⁰¹

Bruce Ackerman, speculating about the misinterpreted *Reed* case, conjectures that the midnight judges chose not to go before the Supreme Court because "they were more interested in the future of the Federalist Supreme Court than in their private bank balances."²⁰² This is not entirely right. The judges cared a great deal about their private bank balances. From the very beginning, the pressure to earn income and replace their lost salaries hurt the judges' cause.²⁰³ And because Congress refused to give the judges anything to do, their claims for their salaries—although analytically distinct from their claims to judicial duties—stood little chance of changing public or congressional opinion. As the *Macon Telegraph* put it in a retrospective on the midnight appointments written in 1888, "No very permanent interest could be taken in a question which resolved itself into whether sixteen very excellent gentlemen should continue or not to draw salaries from the United States treasury at the rate of \$2,000 a year."²⁰⁴

199. HORACE BINNEY, EULOGIES UPON WILLIAM TILGHMAN AND JOHN MARSHALL 14 (Phila., C. Sherman & Son 1861).

200. MORISON, *supra* note 91, at 150.

201. Holt, *supra* note 11, at 23; Griffith, William, 7 DICTIONARY OF AMERICAN BIOGRAPHY 625, 626 (1931).

202. ACKERMAN, *supra* note 11, at 197-98.

203. See *supra* notes 97-99, 152-153 and accompanying text.

204. *Midnight Judges: An Interesting Leaf from Early American History*, MACON TELEGRAPH

At the same time, the judges were not naïve. They were well aware of the challenges they faced, and their efforts were as much about discharging a duty as actually reversing the repeal. “By presenting the Memorial we have acquitted ourselves to ourselves and to our Friends,” Egbert Benson wrote as the matter moved toward Congress, “and the next thing, as far as Truth and Justice will permit, is to put our enemies in the array and expose them, and here I suspect our wishes, hopes and efforts will terminate.”²⁰⁵ In bits and pieces, the midnight judges offered up a constitutional argument that attempted to vindicate judicial independence even as it recognized the primacy of popular sovereignty. Nevertheless, their eventual failure was probably over determined—hostile public opinion, jurisdictional obstacles, political realignment, and a cautious Court all played a role.

In later years, the Repeal Act’s precedential value was murky, giving rise to “a limping and stunted concept of branch independence” in the young Republic.²⁰⁶ So too at the state level. In 1807, the Ohio legislature tried to impeach the state supreme court; when that failed, they reduced the length of the judges’ terms of office. Initially, the judges refused to leave the bench, and an open crisis seemed likely before they backed down.²⁰⁷ Years later, in 1824, Kentucky lawmakers abolished the state’s highest court following a series of anti-debtor rulings and created a new one composed of their ideological allies. Unlike the midnight judges, the Kentucky judges chose to flout the legislature and continued to hear appeals. The resulting schism, with parallel courts taking cases, empanelling juries, and issuing indictments, was an endless source of confusion until 1826, when supporters of the old court were able to reinstate the original judges and end the crisis.²⁰⁸ Still later, in Pennsylvania, the state attorney general filed a writ of *quo warranto* seeking a declaration that a state judge, whose district had been abolished and absorbed into another, had no right to exercise his office.²⁰⁹ The court held that the legislature’s repeal was invalid insofar as it deprived the judge of his guaranteed tenure, basically adopting the constitutional position advanced by the midnight judges sixty years earlier.²¹⁰

(Ga.), Sept. 16, 1888, at 10.

205. Letter from Egbert Benson to William Tilghman (Jan. 27[?], 1803) (on file with Md. Historical Soc’y, Tilghman Family Papers).

206. Charles Geyh & Emily Van Tassel, *The Independence of the Judicial Branch in the Early Republic*, 74 CHI.-KENT L. REV. 31, 77 (1998).

207. See Theodore W. Ruger, “A Question Which Convulses a Nation”: The Early Republic’s Greatest Debate About the Judicial Review Power, 117 HARV. L. REV. 826, 839 (2004).

208. *Id.* at 845–55.

209. *Commonwealth v. Gamble*, 62 Pa. 343 (1869).

210. *Id.* at 349–50; see also *People ex rel. Ballou v. Dubois*, 23 Ill. 547 (1860) (holding similarly regarding the abolition of a judicial district in Illinois).

About six months after Congress rejected the judges' petition, John Marshall wrote to Oliver Wolcott, congratulating him on his move to New York City to begin a new career in business. Finally, the Chief Justice joked, Wolcott was "taking a station to be held really, not nominally, during good behavior."²¹¹ Considering that the Supreme Court had done almost nothing to defend the vitality of this principle, Wolcott could be forgiven if Marshall's wisecrack fell flat. But he could also be satisfied that the midnight judges had, on the whole, conducted themselves well. As Wolcott put it in his initial draft of the memorial, "Having thus expressed their convictions, the undersigned leave the result to the wisdom of Congress; & if their decision shall be adverse to the right hereby claimed, to the experience of future times."²¹²

211. Letter from John Marshall to Oliver Wolcott (Aug. 15, 1803), in 6 PAPERS OF MARSHALL, *supra* note 51, at 197.

212. Draft of the Circuit Judges' Memorial, n.d. (on file with Conn. Historical Soc'y, Oliver Wolcott, Jr. Papers).