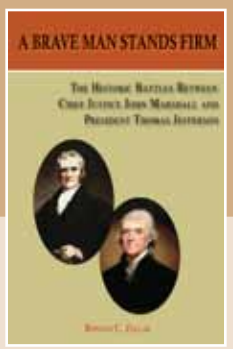
A Brave Man Stands Firm: The Historic Battles Between Chief Justice John Marshall and President Thomas Jefferson



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Reviewed by Frederick Baker Jr.

Former Michigan Assistant Attorney General Ronald Zellar has made the productive use of his early retirement years that the rest of us fantasize about by writing a really good book. It reminds me that there is no antidote to ignorance like study. I thought from my personal interest in the case that I understood the political dynamics surrounding *Marbury v Madison*,[1] but found that I had no idea how intense and bitter the rivalry and confrontations between Jefferson and Marshall were. Indeed, as Zellar observes and his book makes vivid, there was no relationship between the two men: "it was a war."

Zellar's book weaves together the stories of the four great conflicts between the two, collectively sometimes referred to as Jefferson's war on the judiciary: the new Democratic-Republican majority's repeal of the (Federalist) Judiciary Act of 1801, replacing it with the Judiciary Act of 1802; the *Marbury* decision; the judicial impeachment strategy Jefferson employed to combat the power of Federalists appointed to the judiciary in the waning days of the Adams administration; and the long cord of this four-strand story, Aaron Burr's treason prosecution, in which Jefferson, lionized today as a great democrat and civil libertarian, sought to manipulate the outcome of the trial and bend the court to his will. He did so without regard to the constitutional protections Marshall bravely upheld in the face of the threat of impeachment should the outcome be other than conviction, which was communicated explicitly on Jefferson's behalf by the prosecution in the course of Burr's trial. It is from the summation by Luther Martin, Burr's defense counsel, who sought to encourage Marshall in the face of such threats, that the book's title derives:

> When the sun mildly shines upon us, when the gentle zephyrs play around us, we can easily proceed forward in the straight path of our duty; but when black clouds enshroud the sky with darkness, when the tempest rages, the winds howl, and the waves break over us—when the thunders awfully roar over our heads, and the lightnings of heaven blaze around us—it is then that all the energies of the human soul are called into action. It is then that the truly brave man stands firm at his post. It is then that, by an unshaken performance of his duty, man approaches the nearest possible to the Divinity….

The relationship between Burr and Jefferson was an odd one. It is easy to forget that Burr and Jefferson were running mates who tied in the Electoral College, surely to Jefferson's chagrin, as he had invited Burr to join the ticket. The contest was thrown to the House of Representatives, and Jefferson became president only after 36 ballots; Burr served uneasily as vice president during Jefferson's first term. Ironically (because the failure of Jefferson's impeachment strategy for remolding the Federalist-dominated judiciary probably encouraged Marshall during Burr's treason trial), Burr dutifully presided in the Senate over the impeachment trial of Supreme Court Justice Samuel Chase. It was Chase's acquittal that doomed Jefferson's strategy of judicial intimidation and removal.

As a Jefferson rival, Burr was of course not asked to run with him in 1804. His political isolation on the national level proved fateful because, when he sought instead the New York governorship, he was the object of comments by Alexander Hamilton that led to their fatal duel. Ostracized in New York and wanted for murder in New Jersey, where the duel occurred, Burr resorted to his western adventures, which undoubtedly included planning an invasion of Mexico. Jefferson (under the influence of General James Wilkinson, commander in chief of American forces, himself undoubtedly a conspirator with Burr, and, we now know,

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all the while in the pay of Spain) came to believe that Burr's scheme included a plan to split the western lands from the country and unite them in an empire comprising Mexico, with Burr at its head. After two grand juries in the West refused to indict, Burr was arrested, brought to Richmond, Virginia, at Jefferson's behest, and charged with treason. Ironically, Marshall was the trial judge only because Jefferson's repeal of the Judiciary Act of 1801 had reinstated the role of Supreme Court judges as circuit-riding trial judges. So the trial of the century was in the hands of the same justice who established in *Marbury* the doctrine that lies at the core of our form of government—that it is "the province and duty of the judicial department to say what the law is."[2]

And that is what Marshall did. Rejecting the prosecution's "constructive treason" theory, which the founders so carefully foreclosed by limiting treason (the only crime defined in the Constitution) to levying war against the United States, Marshall declined the invitation to import that English doctrine into our law. Instead, giving the Constitution a strict construction (which, as one commentator observed, was most appropriate because the framers, "for the most part . . . had been traitors themselves"), Marshall ruled that "conformably to the Constitution . . . no man can be convicted of treason who was not present when the war was levied." Thus, as Burr was not present at Blennerhassett's Island when a force was assembled, even assuming that such conduct had a treasonable object and could constitute levying war, Burr could not be convicted in the absence of testimony (by two witnesses, as the Constitution requires) establishing the overt act required.

This book quotes lavishly from primary sources; the actors speak eloquently in elaborate figures that we, who no longer study rhetoric and the classics, cannot replicate today. It includes a table of contents, an index, and an impressive bibliography (who knew the transcripts of Aaron Burr's trial were available online?). I recommend it to the student of the period and the casual reader who would know more about the origins of the system of co-equal branches of government that we take for granted today, for which we are indebted to the courage of Justice Marshall, a brave man who stood firm. ■

Frederick Baker Jr., a Supreme Court commissioner, served 28 years on the State Bar Publications and Website Advisory Committee, the last 24 as its chair. He now contributes to the Bar Journal *"in retirement" the occasional review of a book by a Michigan author or on a Michigan law-related subject.*

FOOTNOTES

1. 5 US (1 Cranch) 137; 2 L Ed 60 (1803). Abigail Adams is a first cousin seven times removed, and her nephew, William Cranch, was one of President John Adams' "midnight appointees," whose fates Marshall decided in his masterly opinion in *Marbury*. Cranch avoided their outcome by collecting his commission from outgoing Secretary of State Marshall while Jefferson was being inaugurated. Ironically, as reporter of decisions, a post he held for some time while sitting on the D.C. circuit bench to which Adams appointed him, he reported Marshall's decision in *Marbury*.
2. *Id.* at 177.