

## Book Reviews

### THE GREAT DECISION<sup>1</sup>

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*It is emphatically the province and duty of the Judicial Department to say what the law is.*<sup>3</sup>

A political party, following the retirement of an iconic, unifying leader, is losing its grip on power at the national level. Its recent exercise of the country's Executive and Legislative power has been marked by overreaching, political prosecutions, and questionable National Security policy. The Presidency, firmly held for the past twelve years, is slipping; the party's majority in Congress is threatened as well. Political combatants vilify one another in the press with little regard for truth or objectivity during a vicious national election season. Party strategists use all means available to win the campaign, to include exploiting the incumbent party's majority status to rewrite election rules for the benefit of its members. In the wake of defeat, the lame-duck party plays its trump card, using its final weeks in power to seat a wave of political appointments, hoping to secure the party's influence before handing over the reins of government to its democratically-elected successors. The year is 1800, and Thomas Jefferson has just defeated John Adams for the presidency.

*The Great Decision* is a story of how the seminal Supreme Court case *Marbury v. Madison* defined the American judicial system by assigning the Judicial branch the power of judicial review, elevating the courts to the level of the Executive and Legislative branches, and defining what we now understand as the American rule of law, the concept that the law is above any man or institution. Cliff Sloan and David McKean's historical drama does more than just retell the story of the 200-year-old Supreme Court opinion that established the foundation of American Constitutional Law; they make a strong argument for the Great Chief Justice's status as a key founding father, as important to the new Republic's survival as Adams, Jefferson, and Washington were to its founding.

In the opening four chapters of *The Great Decision*, Sloan and McKean describe the political climate surrounding the 1800 election, which pitted incumbent Federalist President John Adams against Thomas Jefferson, leader of the newly emerging Democratic Republican Party. Jefferson, taking office as the third President of the United States, benefitted from the first peaceful and lawful transfer of power between competing political factions. However, the election process described by Sloan and McKean was anything but peaceful: like modern-day political warfare, the attacks were personal, the stakes were real, and the combatants were fully committed to winning, often irrespective of the cost.

In setting the stage for the *Marbury* decision, the authors narrate a series of overlapping vignettes that support the book's three major story lines: the transfer of power between Federalists and Republicans following the 1800 election, the key political players and their relationships with one another, and the state of the federal judiciary between the passage of the Judiciary Act of 1789 and the issuance of the *Marbury* opinion. The authors deftly place *Marbury* into a vivid historical and political context, which allows the reader to truly understand both the significance and improbability of the ultimate outcome.

Key to understanding the story behind *Marbury* is knowing the identities of and relationships between the various players, and the authors spend a great deal of time developing the characters. The book portrays the founding fathers as, on the whole, able and courageous men during uncertain times, though their less admirable character traits are emphasized for their effect on the tense political state of affairs. John Adams, the second President, is revealed as the dejected loser of the most hotly contested election in the nation's short history. The authors portray the supremely opinionated and ambitious Adams as the Captain of the Titanic, bitterly trying to save what he can of the Federalist party's twelve-year monopoly on federal power while doling out patronage appointments to political loyalists.<sup>4</sup> Thomas Jefferson, Adams's Vice President and successor as chief executive, is shown to be a flawed character as well. The authors depict Jefferson as a savvy politician who won the Presidency through back-room bargaining<sup>5</sup> and, after promising reconciliation at his inaugural address, worked to nullify nearly every Federalist action from Adams's term of office.

<sup>1</sup> CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION* (2009).

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<sup>3</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), reprinted in SLOAN & MCKEAN, *supra* note 1, at 216.

<sup>4</sup> President Adams made 217 judicial, legal, and military appointments from 1 February to 3 March 1801, even though Adams had been defeated by the Republicans the preceding December. SLOAN & MCKEAN, *supra* note 1, ch. 4.

<sup>5</sup> *Id.* at 51.

The introduction of John Marshall adds a layer of complexity to the story. John Marshall and Thomas Jefferson were cousins, though they had neither personal affection nor professional respect for each other.<sup>6</sup> Jefferson had been engaged to Marshall's mother-in-law and had broken the engagement, had been critical of George Washington immediately following Washington's presidency, and had been criticized for cowardly inaction during the British campaign through Virginia. Furthermore, the two were political rivals: Marshall, a Federalist, had been George Washington's aide during the Revolutionary War, Secretary of State and personal confidant to President Adams, and Adams's appointee as Chief Justice during his final weeks in office. On the day of Jefferson's inauguration, Marshall commented in a personal letter that Jefferson's party was composed of "speculative theorists and absolute terrorists," and if Jefferson turned out to be a terrorist then it would not be "difficult to see that much calamity is in store for our country."<sup>7</sup> When he penned the letter, John Marshall held both the offices of Chief Justice and Secretary of State.

William Marbury also provides an interesting angle to the story. Marbury had never held significant political office, but he was a political operative for the Federalist party in his home state of Maryland.<sup>8</sup> When it became clear that the party's chances for electoral victory in 1800 were in trouble, the Federalists attempted to change the rules for awarding Maryland's electoral votes: By convincing Maryland's legislature to award electoral votes on a "winner take all" basis, they hoped to leverage their thin Federalist majority into a significant victory in the Electoral College. The Federalists enlisted William Marbury to lobby the Maryland legislature, and even though Marbury failed, President Adams rewarded Marbury with an appointment as Justice of the Peace for the District of Columbia.<sup>9</sup> When James Madison assumed duties as Secretary of State in March 1801, Marbury's commission lay undelivered on what had previously been John Marshall's desk.<sup>10</sup>

While America's leadership seemed engrossed in petty disputes, the United States of America faced real and immediate threats to its continued existence. Issues such as debt from the Revolution, the national bank, and slavery divided states and individual Americans. Inextricably intertwined in these divisive issues was the fundamental question of whether the States or the central Government should have primacy. Our relationships with France and Britain were dominant and divisive foreign policy issues. Federalists wanted a standing Army and Navy; Republicans were adamant in opposition. John Adams, a former ambassador to Britain, favored relations with the British; Thomas Jefferson, a former ambassador to France, favored relations with the French, who had seized numerous American merchant ships during Adams's tenure as Vice President.<sup>11</sup>

The authors do a good, though not a great, job of describing how all of these issues came to a head in the election of 1800. The various splinter issues are addressed, in turn, throughout the book, but the reader must be well-versed in the history of the period to truly understand the stakes. The Presidential election of 1800 was a referendum on how the United States would be governed and, as a battle between political polar opposites, how the new nation would resolve these key issues. This political reality underscores not only why the election campaign was so bitter, but also why, when the Federalists lost both the Presidency and control of Congress, they sought refuge in the courts.

The stage was now set for the battle over the Judicial Branch, which is the focal point of Sloan and McKean's historical account. During the twelve years following ratification of the Constitution, the Supreme Court was anything but a co-equal branch. The country's most talented lawyers would not accept appointments to the Supreme Court; in its first twelve years, the Court had eleven different members and three Chief Justices.<sup>12</sup> John Jay, the first Chief Justice, deemed the Court "defective" and declined a second appointment.<sup>13</sup> Justices were in the habit of leaving the Court for extended periods of time to attend to other government business. In designing the new national capital in Washington, D.C., no one had bothered to create a chamber for the Supreme Court—the Justices had to meet in an unallocated room in the Capitol building<sup>14</sup> and, at times, met in the parlor of a local hotel.<sup>15</sup>

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<sup>6</sup> *Id.* at 42.

<sup>7</sup> *Id.* at 66.

<sup>8</sup> *Id.* at 19–20.

<sup>9</sup> *Id.* at 62.

<sup>10</sup> *Id.* at 63.

<sup>11</sup> *Id.* at 23.

<sup>12</sup> Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Sept. 29, 2009).

<sup>13</sup> SLOAN & MCKEAN, *supra* note 1, at xvi.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 143–44.

The Federalists set out to correct what they perceived to be the weakness of the third branch. Through the Judiciary Act of 1801, they reorganized the judiciary into six appellate courts, one in each circuit, and eliminated the practice of circuit riding, which required Supreme Court Justices to travel to various circuits to hear cases.<sup>16</sup> Though it was designed to strengthen the judiciary and make it more independent,<sup>17</sup> the Act also had the added perk of creating dozens of new jobs for federal judges, all of whom could be appointed by the departing Federalist-controlled Government.

Regardless of whether the Act was intended to entrench Federalist power in the judiciary, Republicans saw it as just that and unanimously opposed it.<sup>18</sup> A timeline of the passage and implementation of the Judiciary Act of 1801 helps illustrate the Republican point of view. John Adams officially lost his bid for reelection in early December of 1800.<sup>19</sup> The Judiciary Act was introduced into Congress in January 1801 and was signed into law by President Adams on February 13, 1801.<sup>20</sup> Four days later, on February 17th, Thomas Jefferson defeated Aaron Burr in a runoff election to become the third President.<sup>21</sup> John Adams appointed, and the Senate confirmed, each of the newly authorized judges between February 18th and March 3rd, Adams's final day in office.<sup>22</sup> In addition, Adams appointed various officials related to the new act organizing the District of Columbia, most of them loyal Federalists.

The rapid implementation of the Judiciary Act during the lame-duck administration elucidates Republican opposition to the entire scheme. Further, as Republicans were ideologically opposed to any expansion of federal government, they saw Adams's actions as a direct affront to the popular will as expressed in the recent election. It follows *a fortiori* that upon taking office in March, Jefferson would set out to undo the damage. Jefferson's subsequent actions set up the ensuing litigation. Jefferson directed Secretary of State James Madison to withhold commissions, including Marbury's appointment as Justice of the Peace, which had not yet been delivered.<sup>23</sup>

Sloan and McKean tell the remainder of the story, which is familiar to any lawyer, but the battle leading up to the lawsuit provides the story's true climax. Marbury sued Madison for delivery of his commission, and the authors reveal entertaining facts which add interest to an otherwise dry and academic judicial proceeding. Jefferson directed his Attorney General to take no part in the case; as a result, Marbury's attorney appeared unopposed before the Supreme Court bar.<sup>24</sup> Furthermore, key fact witnesses from James Madison's office claimed executive privilege on the stand and demanded the right to review and edit the questions during an overnight break.<sup>25</sup> Finally, John Marshall was intimately involved in the facts of the case:<sup>26</sup> Secretary of State John Marshall had prepared the commissions, presented them to the President for signature, and affixed the Seal of the United States certifying their completeness. He had also been the Secretary of State who had failed to deliver the commissions. Chief Justice John Marshall, writing the opinion of the Court, seized on these facts as conclusive proof that the appointment had been made. Delivery (or lack thereof), according to the opinion, was a "ministerial act" that had no bearing on the fact of appointment.<sup>27</sup>

In the first two-thirds of the book, the authors lay out the challenges facing the Chief Justice when deciding *Marbury*—the meat of the story. The climax turns out to be rather anticlimactic, possibly because the Court's ruling is familiar to every first-year law student in the country. But, in understanding the historical context of the case, the lawyer-reader can gain a new appreciation for the genius of Marshall's opinion. Had Marshall chosen to order mandamus—in effect telling President Jefferson that he had to honor Adams's lame-duck appointments—the President could very well have refused, sparking a separation of powers Constitutional crisis that could have forever weakened the Judicial Branch. Marshall, however, ordered no action, thereby ensuring that his order could not be disobeyed. Marshall also, in a deft move of logical irony, expanded

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<sup>16</sup> *Id.* at 54–55.

<sup>17</sup> *Id.* at xvi.

<sup>18</sup> *Id.* at 55.

<sup>19</sup> *Id.* at 31.

<sup>20</sup> *Id.* at 55.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 56, 76.

<sup>23</sup> *Id.* at 76.

<sup>24</sup> *Id.* at 132–33.

<sup>25</sup> *Id.* at 132–38.

<sup>26</sup> *Id.* at 170.

<sup>27</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 158 (1803), reprinted in SLOAN & MCKEAN, *supra* note 1, at 196.

the Court's Constitutional power by declaring that it lacked the Constitutional power to act. He secured for the Court the power of judicial review in a way that could be neither challenged by defiance nor scorned as a partisan power-grab by the mouthpiece for the deposed Federalists.

It is this aspect of Marbury, seen best in the full historical context, which secures John Marshall's place in the pantheon of American founding fathers and makes *The Great Decision* a very worthwhile read for any lawyer or history buff. By empowering the Judicial Branch with the duty of ensuring we are a government of laws and not men, John Marshall defined what we now refer to as rule of law. By putting the interests of the country ahead of politics, passions, and prejudices, he embodied what we would now refer to as political courage.

But perhaps the most interesting aspect of the book is its relevance to contemporary issues and politics. The political battle lines described by Sloan and McKean could have been drawn for the Presidential elections of 2004 or 2008, where intense partisanship resulted in bitter campaigns and personal attacks through every conceivable medium. Judge advocates in combat today find themselves trying to inspire adherence to the rule of law within their areas of responsibility, possibly without truly understanding how and when American rule of law was born. For these reasons, *The Great Decision* has relevance to any judge advocate and is a recommended read.