

JOHN MARSHALL AND THE RULE OF LAW

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The merited fame of John Adams rests in no inconsiderable part upon his authorship of the Declaration of Rights in the Massachusetts Constitution of 1780. Article XXX of that historic document expressly applied the doctrine of separation of powers to the government of the commonwealth “. . . to the end it may be a government of laws and not of men.”¹ In eschewing this high-sounding declaration, Woodrow Wilson said: “There never was such a government. Constitute them how you will, governments are always governments of men, and no part of any government is better than the men to whom that part is intrusted. . . . So far as the individual is concerned, a constitutional government is as good as its courts; no better, no worse. Its laws are only its professions. It keeps its promises, or does not keep them, in its courts. For the individual, therefore, who stands at the centre of every definition of liberty, the struggle for constitutional government is a struggle for goods laws, indeed, but also for intelligent, independent, and impartial courts.”²

In a very practical sense, Wilson was right. All branches of the business of government are thoroughly human. Men make the law, whether by formal legislation or in the process of adjudication, and men execute and enforce the law. And even if there be a transcendental natural law, it falls to frail mortals to identify and apply it in the conduct of the affairs of men. There are, however, at least two elements of great significance to the rule of law in Adams' rhetorical phrases. In the first place, separation of powers and checks and balances are calculated to promote objectivity both in the formulation of the law and in its administration. Under such a system, the law-giver must

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1. “In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.” MASS. CONST. pt. 1, art. xxx. Adams was the principal draftsman of the entire Constitution of 1780. See A MANUAL FOR THE CONSTITUTIONAL CONVENTION, 1917 at 20 *et seq.* (2d ed. 1917).

2. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 17 (1908).

provide a reasonably intelligible guide for those who are to interpret and effectuate the law, and the individual is likely to have more than one governmental recourse when faced with the necessity of reconciling governmental authority with his individual interests. In the second place, Adams, in effect, bespoke an independent judiciary.

To the individual, the rule of law means that he lives in a politically organized society, which has achieved a relatively high degree of objectivity and evenhandedness in its substantive law, which, in turn, is given vitality by the existence of an independent judiciary guided by the concept of procedural due process and true to the proposition that government and public officials are subject to the rule of law.³ With respect to all three of these vitalizing elements, the influence of John Marshall was, as we shall see, both substantial and salutary.

"The Reconciliation of Government with Liberty"⁴ is a never ending challenge in any well-developed society. Its focus, however, can and does shift. Early in this century the greater stress in America was upon economic freedom. Men were concerned with preserving maximum freedom in economic action and were very sensitive to governmental intervention. Perhaps there has been no stronger statement of this point of view than the criticism Professor John W. Burgess made of the sixteenth amendment. Said the alarmed professor:

"The vast importance of this subject is revealed when we reflect that a tax on incomes, which may be laid without any constitutional limitations, puts all property and all human effort at the mercy of the governmental body which may lay such a tax. It is not like any other tax. Other taxes cover only a part of the property or a part of the labor or activity of the individual. But the unlimited income tax takes the whole thing or may take the whole thing at the option of the Government. In fact, since the adoption of the Sixteenth Amendment we have no real constitutional Government upon that most important of all subjects, the relation of Government to the Individual's right to property."⁵

3. The term "rule of law" is difficult to define exactly. A. V. Dicey, an English law professor of the nineteenth century is credited with its classic formulation. He defined it as meaning "in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land . . . [and, in the second place] not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals." DICEY, *LAW OF THE CONSTITUTION* 183-89 (8th ed. 1915). Mr. Justice Brandeis' version is that "the supremacy of the law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (concurring opinion).

4. This is the title of a book published by Professor John W. Burgess of Columbia University in 1915. See note 5 *infra*.

5. BURGESS, *THE RECONCILIATION OF GOVERNMENT WITH LIBERTY* 369-70 (1915).

While there are those who, at this day, are attacking graduated or progressive income taxation with Burgess-like zeal⁶ and while, quite apart from that controversy, the economic branch of the larger problem is certainly still with us, international tensions, the war of ideas, and the resulting concern over national security have rendered relatively much more acute the problem of reconciling "security and civil liberty."

What role should the legal profession play in this vital process? In broad terms the answer seems clear through. In keeping with the great traditions of the profession in England and America, the bar's pre-eminent concern should be with liberty. This is far from taking the position that lawyers should be insensitive to security matters. It does mean that security programs and administration are not their special professional responsibility, while human liberty very definitely is. Those who share these views can derive encouragement from the ideas and example of John Marshall.

That a man of Marshall's outlook has meant much to civil liberty is especially noteworthy. He was not a small "d" democrat. He was not a champion of the rights of man. He was, in short, not a civil libertarian. One notes with interest his very casual treatment, in his *Life of Washington*, of the adoption of the first ten amendments.⁷ Again, we find him opposing the Alien and Sedition Laws,⁸ not on civil liberties grounds but because he considered them unwise—he viewed them as provocative and damaging to public morale and national unity.⁹

His contribution lay in his deep lawyer-like devotion to a rule of law, whose ultimate minister is the courts. He powerfully strengthened the American tradition of ready access to the courts for protection of the rights of the individual.

INDEPENDENCE OF THE JUDICIARY

In Marshall's day, our courts had not achieved their present degree of detachment from political controversy. Certainly this was true of the courts of the fledgling national government. It was common-

6. See the so-called Reed-Dirksen Amendment, a proposal to limit federal taxing power by constitutional amendment. S.J. RES. 23, 84th Cong., 1st Sess. (1955).

7. 5 MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 207-10 (1st ed. 1807); 2 *id.* at 165-67 (2d ed. 1839).

8. For Alien Acts of June 18, June 25, and July 6, 1798, see 1 STAT. 566, 570, 577 (1845). For Sedition Law of July 14, 1798, see *id.* at 596.

9. "I am not an advocate for the alien and sedition bills; had I been in Congress when they passed, I should, unless my judgment could have been changed, certainly have opposed them. Yet, I do not think them fraught with all those mischiefs which many gentlemen ascribe to them. I should have opposed them because I think them useless; and because they are calculated to create unnecessary discontents and jealousies at a time when our very existence, as a nation, may depend on our union. . . ." *Marshall's Answers to Freeholder's Questions* in 2 BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 575, 577 (1916).

place for violent political criticism to be aimed at the judges and the courts. The judges, for their part, were disposed to speak out with extraordinary freedom on controversial political questions. Notable instances may be found in addresses to grand juries made by Justices of the Supreme Court while riding the circuit.¹⁰ Even the hero-worshipping Beveridge acknowledged the fundamentally political quality of Marshall's opinion in *Marbury v. Madison*.¹¹

That the great Chief Justice had the strength of character, mind, and purpose to lead the federal courts through this difficult period into a position of vital importance in the entire governmental scheme of things is schoolboy learning. It would be tedious for the reader were the story of Marshall's role in making the Federal Constitution an effective organic instrument of national union retold here. What should be said is that from the standpoint of human liberty under a rule of law, history has confirmed that the Marshall Court did not go beyond the appropriate reach of judicial independence in firmly establishing judicial competence to pass on the constitutionality of legislation. This was significant not alone to the emergence of a strong national government within the federal framework, not alone to the accommodation of horizontal clashes in the central government, but also to the effectuation in the American system of any adequate conception of the rule of law. Without judicial review, there would not have been independent tribunals with adequate authority to deny effect to arbitrary executive and legislative action which flouted the rule of law.¹² Marshall and his brethren did not have occasion to exercise this authority in behalf of civil liberties protected by the Bill of Rights, but they validated the basic doctrine. The federal courts have ever since enjoyed the independence needed to afford the individual adequate recourse to maintain the constitutional rule of law.

Marshall was an eloquent champion of an independent judiciary at the state level. In 1829, he served as a member of the Virginia constitutional convention. There he strongly espoused judicial tenure of office during good behavior. We reproduce a notable passage:

"Advert, sir, to the duties of a judge,—he has to pass between the Government and the man whom that Government is

10. See, e.g., 2 McREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 551-70 (1858); Fordham, *Iredell's Dissent in Chisholm v. Georgia: Its Political Significance*, 8 N.C. HIST. REV. 155, 156 (1931); 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 275-76 (rev. ed. 1926).

11. 3 BEVERIDGE, *op. cit. supra* note 9, at 132-42.

12. We do not mean to say that the power of the courts to declare legislative acts unconstitutional is essential to the survival of the rule of law. In England where there is no such authority, there is nonetheless an enviable record of maintaining basic liberties. The present Lord Chancellor of England has discussed the British situation in Fyfe, *The Executive and the Rule of Law*, 9 N.Y. CITY BAR ASS'N REC. 358 (1954).

prosecuting; between the most powerful individual in the community, and the poorest and most unpopular. . . . The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or controul him but God and his conscience? You do not allow a man to perform the duties of a juryman or a Judge, if he has one dollar of interest in the matter to be decided: and will you allow a Judge to give a decision when his office may depend upon it? when his decision may offend a powerful and influential man? . . . If they may be removed at pleasure, will any lawyer of distinction come upon your bench? No, sir. I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary." ¹³

An essential concomitant of an independent judiciary is an independent bar. It is not too much to say that an independent bar is the vital guardian of individual liberty. The late Mr. Justice Jackson put the matter with characteristic felicity when he said that we shall preserve individual freedoms only so long as there is access to the offices of lawyers with genuine independence of action.¹⁴ In times of stress and strong public feeling against unpopular persons and causes, lawyers find it necessary to stand firmly as a group to support the principle of the right to counsel. It is then that the organized bar has a special responsibility to maintain the principle. Should it fail in this, the rule of law would break down.

There is no basis for supposing that Marshall was any less sensitive to the need of an independent bar than of the essentiality of an independent judiciary. This is borne out, one may suggest, by his conduct of the trial of Aaron Burr.

PROCEDURAL DUE PROCESS

Mr. Justice Frankfurter has said: "The history of liberty has largely been the history of the observance of procedural safeguards." ¹⁵

13. PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30, at 615-19 (1830). See also Marshall's defense of the "judiciary clause of the Federal Constitution, summarized in 1 BEVERIDGE, *op. cit. supra* note 9, at 450-61. He repeatedly hammered the theme that, in national as in state courts, justice would be secured by reason of the independence of the judiciary. He also asserted the authority and duty of the federal courts to pass upon the constitutionality of acts of Congress, thus anticipating the decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

14. This is reported from memory. One of the authors of this paper heard Mr. Justice Jackson make the point in an eloquent address before the Columbus, Ohio, Bar Association some seven years ago.

15. *McNabb v. United States*, 318 U.S. 332, 347 (1943).

John Marshall's conduct in the proceedings arising out of the Burr conspiracy indicates his concurrence with this proposition. The atmosphere of political tension in which those proceedings took place was calculated to put fair procedure and judicial impartiality to the test. That they stood the strain is a lesson for our time.

Historians have not been certain as to Burr's intent. They are satisfied that he hoped to bring about a war with Spain and drive the Spaniards from Mexico. Whether he seriously contemplated the dismemberment of the union is a matter of dispute. President Jefferson believed that he did, and the great mass of the public shared the belief.¹⁶

In the wake of the public hysteria over the Burr plot, martial law was decreed in New Orleans, and a number of people were summarily arrested. Among these were Erich Bollman and Samuel Swartwout, two alleged accomplices of Burr. In defiance of writs of habeas corpus issued from the Supreme Court of New Orleans Territory and the United States District Court in Charleston, where they stopped en route, Bollman and Swartwout were hurried to Washington under military arrest. Here their commitment on a charge of treason was ordered by the Circuit Court of the District of Columbia, but not without a noble dissent by Judge William Cranch, who said:

"In times like these when the public mind is agitated, . . . it is the duty of a Court to be particularly watchful lest the public feeling should reach the seat of justice. . . . It then becomes the duty of the Judiciary calmly to poise the scales of justice, unmoved by the armed power, undisturbed by the clamor of the multitude."¹⁷

Bollman and Swartwout at once applied to the Supreme Court for a writ of habeas corpus.¹⁸ The Court determined that there was not sufficient evidence of a levying of war to justify the commitment for treason and ordered that the prisoners be discharged. It was able to

16. See 3 BEVERIDGE, *op. cit. supra* note 9, at 324 *et seq.* General Wilkinson, the American commander at New Orleans and a confidante of Burr, had written Jefferson denouncing Burr as contemplating dismemberment of the union. Instead of quietly ordering his arrest, the President, on November 27, 1806, issued a proclamation declaring that a conspiracy had been uncovered and calling for the seizure of the conspirators. Later (January 22, 1807) in a special message to Congress, the President stated that Burr's "guilt is placed beyond question." The great mass of the people accepted Jefferson's charge as true.

17. Quoted from 1 WARREN, *op. cit. supra* note 10, at 303 (1926).

18. The Court could not help but sense the height of public feeling over the supposed treason of Burr and his accomplices. It even swayed members of Congress. A bill suspending the writ of habeas corpus for three months actually passed the Senate only to be defeated in the House. A resolution was also introduced to deprive the Supreme Court of power to issue habeas corpus, but it, too was defeated. See, 1 WARREN, *op. cit. supra* note 10, at 302-07.

overcome an objection to jurisdiction on the ground that, unlike *Marbury v. Madison*, this case involved a species of appellate review on a habeas corpus vehicle. The Chief Justice observed that "as there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made, a deliberate and temperate inquiry."¹⁹

Meanwhile, the central figure in the conspiracy, Aaron Burr, the former Vice-President of the United States, had been apprehended. The fact that he had been publicly labeled a traitor by the President of the United States was enough for the common man. As Beveridge put it, "the popular voice demanded the life of Aaron Burr. No mere trial in court, no adherence to rules of evidence, no such insignificant fact as the American Constitution, must be permitted to stand between the people's aroused loyalty and the miscreant whom the Chief Executive of the Nation had pronounced guilty of treason."²⁰

Burr was brought before Marshall sitting as a judge of the United States Circuit Court for the District of Virginia. At the preliminary hearing, Marshall ruled that there was insufficient evidence of treason, but that he would commit Burr for high misdemeanor. When the amount of the bail to be fixed was being argued, Burr's counsel observed that several respectable gentlemen who had no fear that Burr would keep his recognizance nonetheless were unwilling to post bail "lest it might be supposed they were enemies to their country."²¹ Guilt by association is not an injustice confined to the twentieth century! Over the protest of the prosecution, Marshall fixed bail at \$10,000.

The grand jury, however, found indictments against Burr both for treason, in that he had levied war against the United States, and for misdemeanor, in that he had set on foot an armed expedition against Spanish territory in violation of the neutrality laws.²² The alleged overt act of levying war against the United States was that Burr, with upwards of thirty others on December 10 and 11, 1806, had assembled on Blennerhasset's Island in the Ohio River and that this aggregation of men "armed and arrayed in a warlike manner" did "traitorously . . . join themselves together against the said United States."²³

The trial itself began before Marshall on August 3, 1807. So great was the public prejudice that it was impossible to select an un-

19. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807).

20. 3 BEVERIDGE, *op. cit. supra* note 9, at 342.

21. 1 REPORTS OF THE TRIALS OF COLONEL AARON BURR 19 (Robertson 1808).

22. *Id.* at 306.

23. The indictment is set forth in full in 1 ROBERTSON, TRIAL OF AARON BURR FOR TREASON 482-84 (1875).

biased jury. After almost two weeks of challenges and wrangles, twelve men were finally selected who, if not unprejudiced, were at least less prejudiced than most.²⁴ The government put on a number of witnesses who testified to an assemblage of from twenty to thirty men on Blennerhasset's Island, that some arms were in evidence, and that boats and supplies had been gathered. It was conceded that Burr himself had been two hundred miles away at the time. The government then indicated an intention to introduce evidence showing Burr's connection with the events on Blennerhasset's Island. The defense moved that, since no overt act on the part of Burr had been proved by two witnesses, collateral testimony as to Burr's designs should not be received.

After long and emotion-packed argument, the Chief Justice made his ruling, granting the defense motion.²⁵ In this opinion, the Chief Justice took cognizance of the hue and cry for conviction and of the threats of his impeachment if Burr were to go free:

"That this court dares not usurp power, is most true. That this court dares not shrink from its duty, is not less true. . . . No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him, without self-reproach, would drain it to the bottom. But if he have no choice in the case; if there is no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."²⁶

The jury retired and promptly returned a verdict of "Not Guilty." Though the proceedings were to drag on for another three weeks, the trial of Aaron Burr was, for practical purposes, at an end.²⁷ The Chief

24. See 3 BEVERIDGE, *op. cit. supra* note 9, at 483.

25. *United States v. Burr*, 8 U.S. (4 Cranch) 470 (1807). The government theory was that, because of the common-law doctrine that "in treason all are principals," Burr was legally, though not physically present. On this theory, once the overt act of a treasonous assemblage had been proved by the testimony of two witnesses, the constitutional test had been met, and Burr's connection with it could be proved by any sort of legal evidence. Marshall, however, ruled that since Burr was not present, the government must also prove, by the testimony of two witnesses to the same overt act, that Burr had procured the assemblage. Marshall's interpretation of this constitutional point has been criticized. See CORWIN, JOHN MARSHALL AND THE CONSTITUTION 103-10 (1921). But the validity of Marshall's reasoning is, for our purposes, irrelevant.

26. 8 U.S. (4 Cranch) at 506-07.

27. Following Burr's acquittal, the government nol prossed the treason indictments of Blennerhasset and the others. The conspirators were then tried and acquitted of the misdemeanor charges contained in the second set of indictments. The prosecution then moved to commit Burr and his associates on a charge of treason within the jurisdiction of the United States Court for the District of Ohio. After more arguments and more witnesses, Marshall refused to hold them on the treason charges, but held them on the misdemeanor charges. These were never pressed.

Justice, no less than Burr, had been on trial. Every ruling he made was the object of attack. He came off well because he preserved the integrity of the judicial process by conducting an essentially fair and orderly trial despite the general atmosphere of intense political and emotional tension. Thus did he give us a worthy example of procedural due process.

THE SUBORDINATION OF PUBLIC OFFICERS TO THE RULE OF LAW

It will be remembered that in *Marbury v. Madison*, Marshall's opinion disposed of the case on jurisdictional grounds—the Court could not grant a writ of mandamus since the pertinent provision of the Judiciary Act, which purported to add to the Court's constitutional, original jurisdiction was unconstitutional in this respect. Thus, it can be said that there was no occasion to consider the question whether a cabinet officer was amenable to such a writ. But Marshall did, and where he came out we all know. He formulated his conclusions as follows: “. . . where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”²⁸

To say that this pronouncement was gratuitous is now quite academic. The vitality of its influence is the important thing, and there can be scant doubt that, like the decision of the English judges in the famous case of *Ashby v. White*,²⁹ it has been a stout support for the rule of law. It has meant in round terms, that executive officers, subordinate only to the President himself, are answerable in the courts of law for denial of the legal rights of an individual.

It is a matter of great contemporary interest that the Secretary of State is again in the posture of Madison—this time in three cases involving denial of applications for passports.³⁰ The upshot of these cases is that, as a constitutional matter, the Secretary does not have a discretion as to substance or procedure in the issuance or denial of

28. 5 U.S. (1 Cranch) at 166.

29. 2 Ld. Raymond 938, 1 Eng. Rep. 417 (1703). See 10 HOLDSWORTH, HISTORY OF ENGLISH LAW 539 (1938).

30. *Shachtman v. Dulles*, No. 12727, D.C. Cir., June 23, 1955; *Dulles v. Nathan*, No. 12727, D.C. Cir., June 23, 1955; *Foreman v. Dulles*, Civil No. 4924-54, D.D.C., June 28, 1955.

passports which is beyond judicial scrutiny. Formerly a passport was simply a document identifying one as an American citizen and bespeaking for him free and safe passage.³¹ Under such a dispensation, the issuance of a passport was understandably treated as an exclusively political matter. The situation under present legislation and regulations is quite different; it is now unlawful for a citizen to travel to Europe, for example, without a passport.³²

The basic substantive idea is that the liberty safeguarded by the due process clause of the fifth amendment embraces freedom to travel abroad. This significant position was taken by the Court of Appeals for the District of Columbia without dissent. Once we arrive at that point, the rule of law does not suffer the freedom of a citizen to travel abroad to be left to the absolute discretion of an executive officer. "[T]he government may not arbitrarily restrain the liberty of a citizen to travel to Europe. Discretionary power does not carry with it the right to its arbitrary exercise."³³

The right to travel is conceded to be subject to reasonable regulation. Since travel of our citizens abroad may have a bearing upon national security and the conduct of foreign affairs, that factor may be taken into account in regulating the issuance of passports. In all of these cases the rub was State Department concern over the political ideas and associations of the passport applicants.

*Shachtman v. Dulles*³⁴ was a suit instituted in the District Court for the District of Columbia to enjoin the Secretary of State from denying the application of the plaintiff for a passport to visit Europe and for a declaratory judgment. The district court sustained a motion to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted and the further ground that since a denial was in the proper exercise of the Secretary's discretion, the court lacked jurisdiction. The court of appeals reversed; the court held that the passport had been denied on a stated ground that was legally insufficient. What the complaint showed, as apprehended by the court of appeals, was that the Secretary refused the passport application solely because an organization headed by the plaintiff had been listed by the Attorney General as subversive and that, apart from such listing, plaintiff's connection with the organization would not have been considered by the Secretary as ground for rejecting his application. The complaint alleged

31. See Note, 3 STAN. L. REV. 312 (1951). Quite apart from the question of legality of departure from this country is the practical problem of legality of entry into another; it is pretty generally required now that aliens seeking entry have passports. See Comment, 61 YALE L.J. 171 (1952).

32. 66 STAT. 190 (1952), 8 U.S.C. § 1182 (1952); 22 C.F.R. § 53.1 *et seq.* (1949).

33. *Shachtman v. Dulles*, No. 12727, D.C. Cir., June 23, 1955, at 5.

34. No. 12727, D.C. Cir., June 23, 1955.

further that the plaintiff's organization was not subversive and that it had sought unsuccessfully for six years to have an opportunity to demonstrate this fact to the Attorney General. On this state of the case the court of appeals concluded that the denial of the application, judged solely on the basis of the plaintiff's allegations, constituted a deprivation of liberty in denial of substantive due process.

The court in this case did not order that the passport be issued. It reversed and remanded with the effect of imposing the burden upon the Secretary to answer the complaint. Whether by answer he could assert a legally sufficient ground for his action remained to be seen.

In each of the other two cases, it was determined at the district court level that the applicant for a passport was entitled to an appropriate hearing on his application. In one of these cases, the Secretary took an appeal.³⁵ The court of appeals issued an order reciting "that the appellee applied for a passport some two and a half years ago and was never accorded an evidentiary hearing or confronted with the evidence, if any, which led to the denial of a passport." It stayed an order of the court below requiring the issuance of a passport after failure of the Secretary to afford a hearing, on the condition that the Department provide an appropriate hearing within a limited time. The form of this order is of such interest as to bear reproduction below.³⁶ Before the time expired, the Department proceeded voluntarily to issue a passport. On a showing to that effect before the court of appeals, the case was dismissed as moot.

35. *Dules v. Nathan*, No. 12727, D.C. Cir., June 23, 1955.

36. "It is ORDERED by the Court that the said order of the District Court entered June 1, 1955, be, and it hereby is, stayed until further order of this court, PROVIDED, HOWEVER,

(1) That the Department of State accord a quasi judicial hearing on the appellee's application for a passport, with opportunity provided to the government and to the appellee to offer evidence, such hearing to be commenced on or before Tuesday, June 7, and to be concluded within three days unless this Court upon application extends the time;

(2) That the hearing officer or officers render a report and recommendation, based on the record of such hearing, within five days after the conclusion of the hearing;

(3) That the appellee be immediately furnished with a copy of such report and recommendation, and be allowed three days within which to file objections thereto with the Department of State;

(4) That within ten days after the rendition of such report and recommendation, action be taken by the Department of State, either granting or denying a passport, and a statement of such action be immediately furnished to appellee and to this Court;

(5) That if a passport is denied, the State Department immediately either (a) inform this Court and the appellee with particularity of the reasons for such denial or (b) show cause to this Court with particularity for any failure to supply such reasons.

After final action by the Department of State this Court will consider what further action on its part, if any, is necessary." *Id.* at 2-3.

In the other case, the district court found that the applicant had been granted an "informal hearing" which consisted exclusively of an interrogation of the applicant without production of any evidence or witness against him, no stenographic record being made although requested by the applicant, and without disclosure to him of the record or report on the basis of which his application was disapproved. The court concluded that the "denial to the plaintiff of a passport without an appropriate hearing was a denial of due process of law. . . ." The court accordingly ordered the Secretary to accord plaintiff a quasi-judicial hearing.³⁷

If these rulings stand, the individual citizen henceforth effectively can insist that if a passport is to be denied him, it can be done only after a fair hearing and only for a legally sufficient ground consistent with substantive due process. It does not seem at all far-fetched to say that these cases are within the great Marshall tradition of subordinating governmental officials to the rule of law and of assuring the individual recourse to the courts in matters affecting his liberty.

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The expression "equal justice under law" may be regarded by some as a badly overworked cliché, but it is a good summary statement of what Marshall stands for under the American rule of law. It articulates a very important principle in the value system of a people. We have been able to give that principle what has been, for the most part, faithful application because we have had the judicial institutions and processes and the independent bar essential to that end. Marshall made an enduring contribution to the protection of the rights of man by his service in rooting those institutions and processes deeply in our political and legal system.

37. *Foreman v. Dulles*, Civil No. 4924-54, D.D.C., June 28, 1955. The order was patterned on that of the court of appeals in the *Nathan* case.