

THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835

Marsh Co.,¹⁰³ *Cherokee Nation v. Georgia*,¹⁰⁴ and *Barron v. Mayor of Baltimore*.¹⁰⁵

Although the Marshall Court disposed of cases more quickly than the modern Court, one must recognize that several internal practices of the Marshall Court which are not followed today led to these extraordinary results. One such practice was that opinions delivered by one Justice in court had not been subscribed to, in all their language, by the other Justices, not even the ones joining in the opinion. A Marshall Court opinion was typically rendered in the form of an "opinion of the Court," delivered by one Justice, with no disclosure of the positions of other Justices. In many instances where the decision represented the views of only a majority of the Justices, there was no indication to that effect in the United States Reports and there were no published concurrences or dissents. This made it unnecessary in many cases for all the Justices to react to the content of an opinion delivered in court. Given the relative absence of pressure on a Justice purportedly writing for the Court to clear his language with each of his peers, one of the principal factors that serve to delay current Supreme Court opinions was eliminated.

The unlimited time given to oral arguments during Marshall's tenure also may have contributed to the speedy production of opinions. Eyewitnesses suggest that oral arguments before the Marshall Court more resembled orations than colloquies; the Justices sat largely silent.¹⁰⁶ Marshall has been reported, perhaps apocryphally, to have said that the "acme of judicial distinction means the ability to look a lawyer straight in the eyes for two hours and not hear a damned word he says."¹⁰⁷ Perhaps, in fact, Marshall and the other Justices were using time during oral argument to prepare the skeleton of opinions.

Because arguments in major cases invariably lasted longer than a day, the Justices could also find time to discuss a pending case at the boardinghouse. Nothing prevented them from having an informal conference on the case while it was still being argued; conceivably nothing

¹⁰³ 2 Pet. 245 (1829)

¹⁰⁴ 5 Pet 1 (1831)

¹⁰⁵ 7 Pet. 243 (1833).

¹⁰⁶ A contemporary newspaper correspondent reported:

The Courts sits from eleven o'clock in the morning until four in the afternoon. It is not only one of the most dignified and enlightened tribunals in the world, but one of the most patient. Counsel are heard in silence for hours, without being stopped or interrupted. . . . The Judges of the

Court say nothing, but when they are fatigued and worried by a long and pointless argument . . . their feelings and wishes are sufficiently manifested by their countenances.

New York *Statesman*, Feb. 7, 1824, quoted in Warren, *Supreme Court*, I, 467.

¹⁰⁷ Beveridge, *John Marshall*, IV, 83. The anecdote is too good not to repeat, but it has the aura of embellishment.