2-18-1807

Letter from Buckner Thurston to Harry Innes (Feb. 18, 1807)

sent," but argued "that the authority of it was annihilated by the very able decision in *Marbury v. Madison*," since the *Hamilton* Court had been exercising original jurisdiction. *Bollman*, 8 U.S. (4 Cranch), at 103–04 (Johnson, J., dissenting).

26. 7 U.S. (3 Cranch) 448 (1806).

27. *Id.* at 450–51, 453. Dissenting in *Bollman*, Justice Johnson reported that he had objected to the Court's disposition of *Burford*, but had "submitted in silent deference to the decision of my brethren." *Bollman*, 8 U.S. (4 Cranch), at 107 (Johnson, J., dissenting). He also reported that his *Bollman* dissent had the support of an absent Justice. *Id.* Scholars have long been hopelessly divided as to whether this was Chase or not. *See* David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789–1888, at 81 n.131 (1985).

28. *See Ex Parte Bollman*, 8 U.S. (4 Cranch), at 91–92.

29. *Id.* at 93–94. The elided portion of the passage contains two further responses to Harper's arguments on the role of the common law. First, Marshall asserted:

> for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.

Second, responding to Harper's discussion of the contempt power, Marshall wrote:

> This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions. It extends only to the power of taking cognisance of any question between individuals, or between the government and individuals.

It would seem to follow from this second point that the case of Comfort Sands, described *infra* Chapter 6, text accompanying notes 7–8, would have come out the same way even after *Bollman*.

30. *Bollman*, 8 U.S (4 Cranch) at 95.

31. *Id.* at 96.

32. *Id.* at 96–97.

33. *Id.* at 99.

34. *Id.*

35. *Id.* at 101.

36. *Id.* at 100.

37. *Id.* at 114.

38. *See* Supreme Court Minute Book (entries of Feb. 16–20, 1807); Letter from Buckner Thurston to Harry Innes (Feb. 18, 1807), Innes Papers, Manuscript Reading Room, Library of Congress.

39. *Ex Parte Bollman*, 8 U.S. (4 Cranch) at 125, 128–36.

40. Scholars have frequently noted Marshall's cavalier treatment of precedent, whether favorable or unfavorable. *See, e.g.*, Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in* Marbury v. Madison, 1986 Wis. L. Rev. 301 (showing how Marshall invented nonexistent supporting precedent and ignored

HABEAS CORPUS

Rethinking
the Great Writ
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ERIC M. FREEDMAN