

**2012 Texas Appellate Hall of Fame Inductee  
Chief Justice John Hemphill**

*Remarks by Chief Justice Wallace B. Jefferson*

Two Chiefs preceded John Hemphill. The first, James Collingsworth, was elected in 1836, but died before the Court convened. The Texas Congress elected Thomas J. Rusk in 1838. In his case, the rule of law succumbed to the burden of war, as Rusk was busy commanding troops, first against a rebellion of Mexican soldiers in Nacogdoches and next against Indian uprisings in territorial lands. Rusk returned to Austin, announced a quorum, and resigned as Chief Justice. All in 1840.

Three Chiefs preceded John Marshall – Jay, Rutledge, and Ellsworth.

Each of the predecessor chiefs lived lives of great accomplishment. Yet when we assemble lists of the great ones, these two, Marshall for the United States, Hemphill for Texas, stand apart. Why is that? Intellect? Longevity? Both probably contribute. Hemphill served for 18 years; Marshall for 32. Taney was smart; served for many years, but then there was *Dred Scott*. A Chief's prominence is characterized by more than intellect and endurance.

Every first-year law student reads the gospel in their first week of class. It goes like this: “It is emphatically the province and duty of the Judicial Department to say what the law is.” Those words had never been said. The term “judicial review” appears nowhere in the

Constitution, yet Marshal wrote that “all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the Constitution is void.” Our country would be much the worse had a rule prevailed that the Court can never hold a President or Congress accountable to the rule of law.

Not mere intellect or endurance, but the courage and confidence to deliver principles in the face of strong opposition. John Marshall.

Or courage to declare, in eloquent and forceful language, that ancient ways must occasionally yield to a broader conception of humanity. During the Texas Constitutional Convention of 1845, John Hemphill wrote: “I anxiously hope that some provision may be adopted by the convention by which the rights of the wife will be shielded under the immunities of the constitution.” Later as Chief Justice, after community property rights had been enshrined in that document, his opinions on the subject said: “Husband and wife are not one under our laws. The existence of a wife is not merged in that of the husband. Most certainly is this true so far as the rights of property are concerned. They are distinct persons as to their estates. When property is in question, he is not a baron, nor is she covert, if by the former is meant a lord or master, and by the latter, a dependent creature, under protection or influence. They are coequals in life; and at death, the survivor, whether

husband or wife, remains the head of the family.” He wrote that the doctrine on which the supposed merger of the wife into the husband once prevailed is now “swept away; and it is a maxim as old as the law, that where the reason of a rule ceases, itself should cease.”

Not mere intellect or endurance, but courage to announce even moral principles against the winds of strong opposition. John Hemphill.

Great chiefs need not be universally admired. Thomas Jefferson rejected Marshall’s approach, both as to *Marbury v. Madison*, and as a general prerogative of the courts. He said that Marshall’s concept of judicial review made the Constitution “a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.”

Nor did everyone agree with all the views John Hemphill espoused. Answering a question his younger brother posed, Hemphill said “Your mind appears to be affected with this cant and sickly sentiment which you constantly hear on the subject of slavery. You say something ought to be done. What ought to be done? What can be done? Can their situation be bettered? Can anything be done without affecting the morale of the people, convulsing society – causing misery and indescribably horrors – stripping a large section of the country of the sources of its wealth and happiness and power and without producing one single benefit to either the whites or blacks?”

I would answer as Hemphill did in another context – the basis for slave labor has been “swept away; and it is a maxim as old as the law, that where the reason of a rule ceases, itself should cease.”

Neither Thomas Jefferson’s criticism of Marshall, nor *this* Jefferson’s criticism of Hemphill, detracts from the outstanding service these great Chiefs gave to their country, republic, and state. Marshall’s opinion, while extolling judicial review in *Marbury*, invalidated an Act of Congress, but in doing so rejected an expansion of the Court’s original jurisdiction. And Hemphill’s colleagues said that the Chief “never made a public declaration of his political sentiments while he was on the bench” as he believed “the perfection of his office required him to abjure all partisan enthusiasm lest it might persuade his interests or tempt the supreme loyalty that bound him to the throne of justice.” A quite modern articulation of judicial ethics, don’t you think?

A large bust of John Marshall sits regally in the Great Hall of the Supreme Court of the United States. John Hemphill is the John Marshall of Texas. He deserves a similar honor, and his induction into the appellate hall of fame accomplishes that quite well.