

TAKING CARE OF JOHN MARSHALL'S POLITICAL GHOST

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“The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”¹

INTRODUCTION

These words of then-Congressman John Marshall may be his most famous from a time when he was not sitting as the Chief Justice of the United States. Marshall delivered them in an 1800 speech in Congress in defense of President John Adams. The occasion for the defense was an opposition attack on Adams for “a dangerous interference of the Executive with Judicial decisions” in the extradition of an alleged murderer.²

One might assume that a speech by a single Congressman in the midst of a partisan political dispute would be a strange place to search for constitutional granite. But this has not deterred modern advocates of expansive presidential power. Indeed, enthusiasts have leveraged segments of Marshall’s “sole organ” speech to support all manner of executive branch causes, from warrantless domestic surveillance of potential enemies, to detaining even United States citizens as “enemy combatants,” and even to deferential views on prior restraint of publications and on nationalizing domestic industries in support of an undeclared war.

My goal in this work is to set John Marshall’s 1800 speech in a fuller, richer context. Scholars have addressed at length elsewhere a number of broader claims of executive power in foreign affairs based, among others, on

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1. 10 ANNALS OF CONG. 613 (1800) [hereinafter ANNALS] (statement of Rep. Marshall on Mar. 7, 1800).

2. *Id.* at 619.

the Vesting Clause of Article II.³ But my focus here is on the curiously enduring nature of Marshall's "sole organ" speech in these and other examinations of presidential power. For even at a distance of two centuries, Marshall's defense of President Adams seems to reemerge whenever supporters of a strong Executive look for friends in the founding generation. As I will explain below, however, a detached examination of the limited nature of Adams's actions as well as of the political environment for and structure of Marshall's speech should give significant pause about extrapolation beyond the narrow dispute that occasioned it.

Part I begins by setting a simple background for the modern uses—or as I will suggest, misuses—of Marshall's "sole organ" rhetoric. It will suffice at that point to provide only a short summary of the legal dispute that later mushroomed into a national political controversy. The principal purpose of Part I is to review the quite remarkable array of substantive executive powers Marshall's speech has been used to justify. In the course of doing so, we will also see that these modern applications have come with generous infusions of motivation and intention into a two-hundred-year-old mind.

Part II then turns to the legal and political context. John Marshall rose in Congress to defend President Adams's involvement in a case of extradition pursuant to the terms of a specific treaty. We will see there, first, that Adams's cautious and deferential actions left little need for an expansive exposition on presidential power. The same is true of the political context. Part II will explain that, with a Republican opposition casting Adams as an unreformed monarchist in impending national elections, the political incentives militated in favor of painting executive power with a narrow brush. As a result, as readers confront ambiguity and seek to divine purpose in Marshall's speech, context would seem to caution modesty and restraint in application to modern controversies.

With this foundation, Part III examines Marshall's full speech in detail. Careful analysis reveals that Marshall focused his defense of President Adams on the specific treaty provision at issue. In doing so, he also explicitly excluded from executive power those treaties that provide for individual rights or defenses or for which the Legislative Branch has prescribed a specific mode or agency of execution. As the political context might predict, in short, Marshall's speech did not endorse a broad theory of executive power even on the execution of all treaties. What is left is expansive-sounding rhetoric about presidential authority to resolve issues of "political law" without judicial intervention.⁴ But as Part III also will explain, behind this rhetoric is merely

3. See, e.g., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

4. See *infra* notes 217–21 and accompanying text.

the concept of a circumscribed, self-executing government power founded in law, but one that is also subject to ultimate judicial review. Such a concept is neither unusual nor constitutionally problematic.

Compelling stories, especially those that culminate in compelling speeches, deserve an enduring moral. In March 1800, revolutionary war veteran, statesman, and short-term Congressman John Marshall—and of course also the future Chief Justice of the United States—rose in Congress to defend presidential involvement in a case that resulted in the extradition and subsequent prompt execution of an unfortunate soul. Marshall's florid and sometimes elliptical language in this defense has led executive branch enthusiasts as well as at least one otherwise quite careful scholar to conclude that Marshall's speech endorses an "extraordinary theory of Executive power."⁵

My point here is that, when properly understood in its legal and political context, the speech is not so extraordinary at all. In other words, closer examination reveals that this episode in the history of the United States is better understood as political, not constitutional, in nature.

I. CHANNELING THE GHOST OF CONGRESSMAN JOHN MARSHALL

A review of modern controversies over executive power in foreign affairs reveals that Congressman John Marshall's 1800 speech has something of the quality of an eternal polymorph. Even at substantial distances of time and circumstance, we find it shaped and applied for all manner of executive branch causes. And indeed, when excised from context, an advocate of even modest talents would have little difficulty summoning important messages from carefully selected passages.

This Part will examine the recurrent modern attempts to channel the ghost of John Marshall in the form of the 1800 defender of President John Adams. Although the events that gave rise to Marshall's speech have been exhaustively chronicled,⁶ context has typically played little if any role in such efforts. It will suffice for our purposes at this point, therefore, to provide only a brief background.⁷

5. Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 234 (1990).

6. See *id.* at 229–333; Larry D. Cress, *The Jonathan Robbins Incident: Extradition and the Separation of Powers in the Adams Administration*, 111 ESSEX INST. HIST. COLLECTIONS 99 (1975). For a detailed analysis of the proceedings in Congress and in particular of Marshall's speech, see Gale Lee Richards, *A Criticism of the Public Speaking of John Marshall Prior to 1801*, at 292–351 (Aug. 1950) (unpublished Ph.D. dissertation, University of Iowa) (on file with the State University of Iowa Library).

7. Part II below provides a more complete examination of the context for John Marshall's speech.

A. *The Superficial Story of John Marshall's "Sole Organ" Speech*

Our story begins in February 1799 with the seemingly prosaic event of the arrest of a British sailor in Charleston, South Carolina. The unusual aspect of the case, however, was that the arrest came at the instigation of British authorities,⁸ who asserted that the sailor was complicit in a mutiny and murder on a British warship eight years earlier.⁹ Those authorities also asserted that, although the prisoner claimed the name Jonathan (or Nathan) Robbins, his real identity was that of an Irishman named Thomas Nash.¹⁰ The specific ground for the arrest also was significant. For under the 27th Article of a controversial—thus far for other reasons¹¹—1794 Treaty, the United States had engaged with Great Britain to extradite all persons “charged with murder or forgery committed within the jurisdiction” of the offended state.¹²

The judge presiding over the case, Federal District Judge Thomas Bee, initially refused a request by the British consul to deliver Nash pursuant to the Treaty.¹³ Following informal correspondence—about which more later¹⁴—British authorities then made a formal request to Secretary of State Timothy Pickering that President John Adams order the release of Nash to their custody.¹⁵ With Adams's cautious approval, Pickering communicated the President's “advice and request” to Judge Bee that the prisoner “may be delivered up” to British authorities under the terms of the Treaty.¹⁶ In response, Judge Bee informed Pickering that he would order the delivery of Nash “[i]n compliance with the request of the President.”¹⁷

8. See Cress, *supra* note 6, at 100.

9. See *United States v. Robins* [sic], 27 F. Cas. 825, 826 (D.S.C. 1799) (No. 16,175).

10. *Id.* at 826, 837 n.1.

11. See *infra* notes 106–12 and accompanying text.

12. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., art. XXVII, Nov. 19, 1794, 8 Stat. 116 [hereinafter Treaty of Amity].

13. Cress, *supra* note 6, at 100–01; see also Letter from Timothy Pickering to John Adams (May 15, 1799), *microformed on Adams Papers, Letters Received and Other Loose Papers*, roll 394, at 219–219a (Mass. Historical Soc'y microfilm edition) [hereinafter Adams Letters Received] (stating that notwithstanding a request by British authorities “the district judge had not deemed it proper to deliver him up”).

14. See *infra* notes 72–77 and accompanying text.

15. See Note from Robert Liston to Timothy Pickering (May 23, 1799), in 4 STATE PAPERS AND PUBLIC DOCUMENTS OF THE UNITED STATES 303–04 (2d ed., Boston, T.B. Wait & Sons 1817) [hereinafter STATE PAPERS] (stating a request that Pickering “lay this matter before the President, and procure his orders that the said Thomas Nash be delivered up to justice”); see also ANNALS, *supra* note 1, at 516 (reproducing the note).

16. Letter from Timothy Pickering to Judge Bee (June 3, 1799), in STATE PAPERS, *supra* note 15, at 304. The full text of this letter is set forth *infra* note 78.

17. Letter from Thomas Bee to Timothy Pickering (July 1, 1799), in STATE PAPERS, *supra* note 15, at 305; see also ANNALS, *supra* note 1, at 516–17 (reproducing the letter).

At this point, however, this seemingly ordinary legal matter came to the attention of political partisans at the national level. Republican lawyers opposed to the Federalist Adams first took up Nash's defense in the habeas corpus proceedings and advanced a broadside of challenges against Adams's action and the Treaty itself.¹⁸ They also raised a surprise claim that Nash actually was a United States citizen who had been forcibly impressed into British service.¹⁹ Ultimately, following a full hearing, Judge Bee, highly skeptical of Nash's new factual claim,²⁰ concluded in July 1799 that the request for extradition of Thomas Nash (aka Jonathan Robbins) satisfied all of the factual and legal predicates of the 27th Article of the 1794 Treaty.²¹ Nash was then delivered to British authorities,²² subsequently tried by court martial, and executed.²³

In the charged political environment of the times, the legal case of "Jonathan Robbins" then moved fully to the national political stage.²⁴ Republicans in the House of Representatives first demanded that President Adams provide all documents relevant to the arrest and delivery of Nash/Robbins to the British.²⁵ Adams complied only three days later.²⁶ House Republicans nonetheless put before the body a formal resolution to

18. See *United States v. Robins* [sic], 27 F. Cas. 825, 827–29 (D.S.C. 1799) (No. 16,175).

19. *Id.* at 827.

20. *Id.* at 832 ("It is somewhat remarkable, that a man of the name of Jonathan Robbins, with the paper produced in his possession, should continue on board a British frigate for a length of time, under another name, and acting as a warrant officer, which impressed men are not likely to be entrusted with, and that he should afterwards take the name of Nathan Robbins, and lay in jail here five or six months, without the circumstance being made known until now."); see Wedgwood, *supra* note 5, at 295 (concluding that Nash's counsel "failed to develop factually why one should credit [his] late-in-the-day claim of citizenship"); see also *id.* at 295–99 (examining the arguments of Robbins's new counsel in detail as support for this conclusion). Documents supplied by the Department of State to Congress at the time also cast serious doubt on Nash's surprise claim of American citizenship. See Report of the Department of State, Items 4–6 (Feb. 6, 1800), in *STATE PAPERS*, *supra* note 15, at 302, 305–07.

21. *Robins*, 27 F. Cas. at 831–33.

22. *Id.* at 833.

23. See Letter from Hyde Parker to Robert Liston (Sept. 9, 1799), in *STATE PAPERS*, *supra* note 15, at 306 (stating that Nash had been "tried at a court martial, and sentenced to suffer death, . . . which sentence has been put into execution"); see also *ANNALS*, *supra* note 1, at 517 (reproducing the letter); *id.* at 618 (confirming in a formal resolution that Nash had been "tried by a court martial and executed").

24. See *infra* Part II.B.

25. *ANNALS*, *supra* note 1, at 511–12 (requesting that the President provide to the House all documents "relative to . . . the apprehension and delivering of Jonathan Robbins, under the twenty-seventh article" of the 1794 Treaty).

26. See Message from the President to the House of Representatives (Feb. 7, 1800), in *STATE PAPERS*, *supra* note 15, at 302 (transmitting the requested report from the Department of State to the House of Representatives); see also *ANNALS*, *supra* note 1, at 515 (reproducing the President's Message).

condemn the President for “a dangerous interference of the Executive with Judicial decisions” through his “advice and request” to Judge Bee.²⁷

It was in this context that first-term Congressman John Marshall rose in the House of Representatives to defend Adams’s actions. In an extended speech, Marshall carefully explained why the extradition of Thomas Nash on a charge of murder on a British warship “was completely within the letter and the spirit of the twenty-seventh article of the treaty between the two nations.”²⁸ It has been Marshall’s rhetoric on the execution of the Treaty by the President, however, that has attracted the special attention of later generations of executive power advocates. In keeping with the practice of such advocates, at this point I will present Marshall’s words with only limited commentary.

Let us begin with what is easily the most quoted passage: “The President,” Marshall opined, “is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”²⁹ But the following sentences seem to go even further: “He possesses the whole Executive power,” Marshall declared.³⁰ “He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.”³¹

The immediately succeeding passages then connect this executive power with the execution of treaties. Marshall reasoned that because a treaty is law, the nation’s chief executive officer is obligated to enforce it: The President, he stated, “is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.”³²

This seemingly holds true even if Congress has not yet implemented the treaty at issue:

The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till

27. ANNALS, *supra* note 1, at 532–33 (resolution by Rep. Livingston on Feb. 20, 1800).

28. *Id.* at 605 (statement of Rep. Marshall on Mar. 7, 1800).

29. *Id.* at 613.

30. *Id.*

31. *Id.*

32. ANNALS, *supra* note 1, at 613 (statement of Rep. Marshall on Mar. 7, 1800).

this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.³³

Recounted in this simple way, it would appear that through these words Congressman Marshall was staking out a broad constitutional field for executive power. It should thus not surprise that supporters of a strong Executive Branch have seized on select passages to support a whole variety of claimed presidential powers.

B. The Recurrent Revivals of Congressman John Marshall's Speech

From a legal perspective, Congressman John Marshall's speech of 1800 rested in near total peace for well over a century.³⁴ Then, in 1936 Justice Sutherland plucked the single "sole organ" sentence from Marshall's speech as part of a broader discourse on national, and in particular presidential, power in *United States v. Curtiss-Wright Export Corp.*³⁵ In specific, Sutherland cited the passage in dicta for the following proposition:

In th[e] vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.³⁶

Curtiss-Wright itself did not involve an exercise of independent executive power, but rather whether more latitude was appropriate for congressional delegations to the President in the field of foreign affairs.³⁷ With expansive rhetoric, Sutherland argued that this was indeed the case. For in this domain,

33. *Id.* at 613–14.

34. There are two noteworthy exceptions. Late in the nineteenth century, some Supreme Court justices opined—in a losing effort—that executive intercession in extradition is constitutionally required and that, therefore, a federal statute permitting initial arrest under a treaty on the authority of a court and at the request of a foreign state was unconstitutional. *See In re Kaine*, 55 U.S. (14 How.) 103, 137–38 (1852) (Nelson, J., dissenting) (citing Marshall's defense of President Adams); *id.* at 148 (Taney, C.J., dissenting); *id.* at 148 (Daniel, J., dissenting). In the 1893 case of *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), Justice Gray cited Marshall's "masterly and conclusive argument" for the proposition that a federal statute or treaty may "submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit." *Id.* at 714.

35. 299 U.S. 304, 319 (1936) (citing ANNALS, *supra* note 1, at 613 (statement of Rep. Marshall on Mar. 7, 1800)).

36. *Id.*

37. *Id.* at 315. This issue was then timely, because in the previous year the Supreme Court had struck down two federal statutes for violation of the non-delegation doctrine. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

the delegation works in tandem with “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.”³⁸

The foundations of Sutherland’s opinion in history, political theory, and constitutional interpretation have been subject to substantial scholarly analysis, much of it critical.³⁹ Though intensely interesting, this broader issue is beyond the scope of our task here. What is significant for present purposes is that Justice Sutherland’s quotation of John Marshall served to rejuvenate interest in both the speech itself and in the version he refiltered in *Curtiss-Wright*. Or to be more precise, Justice Sutherland’s selective use of John Marshall the Congressman propelled a newfound practice of wringing constitutional significance from individual passages in Marshall’s now two-centuries-old speech.

We will have space here only to highlight some of the more expansive of these efforts. Not surprisingly, executive branch officials—including of course from the Bush Administration—have been among the most opportunistic of this group. In 2001, for example, the Office of Legal Counsel relied on segments of Marshall’s speech as support for a presidential power to conduct unilateral military operations.⁴⁰ Citing the statements that the “President is the sole organ of the nation in its external relations” and that he “is entrusted with the whole foreign intercourse of the nation,” the Office reasoned that “depriving the President of the power to decide when to use military force would disrupt the basic constitutional framework of foreign relations.”⁴¹

Executive administrations have likewise cited the “sole organ” proposition as reinvigorated by *Curtiss-Wright* for a variety of other propositions. Included among these are that the President has the authority to conduct warrantless surveillance of potential enemies within the United States;⁴² to

38. *Curtiss-Wright*, 299 U.S. at 320.

39. See, e.g., David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory*, 55 YALE L.J. 467 (1946); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000); see also HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94 (1990) (reviewing the “withering criticism” of Justice Sutherland’s opinion in *Curtiss-Wright*).

40. John C. Yoo, Memorandum Opinion for the Deputy Counsel to the President re: The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 3 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

41. *Id.* at 9.

42. See Office of Legal Counsel, U.S. Dep’t of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, at 1 (Jan. 19, 2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> (“The NSA activities

transform a decision of the International Court of Justice into domestic law;⁴³ to preempt state laws that could interfere with a sole executive agreement;⁴⁴ to detain United States citizens captured in the United States as “enemy combatants”;⁴⁵ to require dismissal of private claims under the Alien Tort Statute;⁴⁶ and to disregard as unconstitutional a statute that would limit the ability to issue more than one official passport to government personnel.⁴⁷

are supported by the President’s well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States.”). To the same effect, see *Wartime Executive Power and the National Security Agency’s Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 264–319 (Feb. 6, 2006), available at http://www.fas.org/irp/congress/2006_hr/nsasurv.pdf (setting forth the prepared statement of Alberto Gonzales, U.S. Att’y Gen.). For an examination of the issues that surround this surveillance program, see David Cole & Martin S. Lederman, *The National Security Agency’s Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355 (2006).

43. See Brief for the United States as Amicus Curiae Supporting Respondent at 40–41, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) (citing the President’s status as “the sole organ of the federal government in the field of international relations” together with the United Nations Charter for an executive authority to “determine[] that the foreign policy interests of the United States justify compliance with the ICJ’s decision” (quoting *Curtiss-Wright*, 299 U.S. at 320)).

44. Brief for the United States as Amicus Curiae Supporting Petitioners at 14, *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003) (No. 02-722) (“California has thereby thrust itself into the field of foreign relations and foreign commerce that is reserved exclusively to Congress and the President, who ‘is the sole organ of the nation in its external relations, and its sole representative with foreign nations.’” (quoting *Curtiss-Wright*, 299 U.S. at 319 (quoting statement of John Marshall))).

45. Petition for a Writ of Certiorari app. at 156, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027) (“The order [under review] arises in the context of foreign relations and national security, where a court’s deference to the political branches of our national government is considerable. It is the President who wields ‘delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.’” (alteration in original) (quoting *Hamdi v. Rumsfeld*, 296 F.3d 278, 282 (4th Cir. 2002) (quoting *Curtiss-Wright*, 299 U.S. at 320))).

46. Brief for the United States of America as Amicus Curiae at 20–21, *Doe v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003) (Nos. 00-56603, 00-56628) (“The Supreme Court has long recognized that the Constitution commits ‘the entire control of international relations’ to the political Branches. It is the ‘plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations’ to decide the ‘important complicated, delicate and manifold problems’ of foreign relations. Because the Constitution has so committed the power over foreign affairs, the Supreme Court has strongly cautioned the courts against intruding upon the President’s exercise of that authority.” (citations omitted) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) and *Curtiss-Wright*, 299 U.S. at 319–20)).

47. Timothy E. Flanigan, Memorandum Opinion for the Counsel to the President re: Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports (Jan. 17, 1992), available at <http://www.usdoj.gov/olc/gray.11.htm>.

But spirited uses of select passages from Marshall's speech have also come from Justices of the Supreme Court. To begin with the most recent, consider Justice Clarence Thomas's selective quotation of Marshall in *Hamdi v. Rumsfeld* as support for an independent executive power to detain citizens as "enemy combatants."⁴⁸ There, Thomas argued that "[t]he Founders" intended to delegate to the President primary responsibility over national security and foreign affairs "principally because the structural advantages of a unitary Executive are essential in these domains."⁴⁹ In a remarkable feat of historical clairvoyance, Thomas then asserted that it was "[a]lso for these reasons" that Marshall described the President as "the sole organ of the nation in its external relations."⁵⁰

A line of cases on "sole executive agreements" also traces its foundation to Marshall's "sole organ" concept as rejuvenated in *Curtiss-Wright*. Perhaps not surprisingly, Justice Sutherland himself began this line in 1937 in *United States v. Belmont*.⁵¹ There, he reasoned that incident to the President's "authority to speak as the sole organ" of the country in recognizing foreign governments was also a power to settle related private claims.⁵² Carrying forward a controversy still very much alive, the Supreme Court has since reaffirmed this holding on three principal occasions,⁵³ although it signaled a more limited course this past term.⁵⁴

Then-Justice William Rehnquist likewise sought in the 1970s to invoke the ghost of Congressman John Marshall to argue that ex-Presidents had a constitutional right to control their public papers on separation of powers

48. *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Thomas, J., dissenting).

49. *Id.* at 580.

50. *Id.* at 581 ("Also for these reasons, John Marshall explained that '[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'" (quoting ANNALS, *supra* note 1, at 613 (statement of Rep. Marshall on Mar. 7, 1800))).

51. 301 U.S. 324 (1937).

52. *Id.* at 330 ("[I]n respect of what was done here, the Executive had authority to speak as the sole organ of th[e national] government.").

53. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding that an implied element of a sole executive agreement on the settlement of World War II-era claims preempted a California statute requiring disclosure of information on certain insurance policies related to the Holocaust); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (citing the "sole organ" concept and concluding that the President had the authority to establish a binding claims settlement procedure incident to a resolution of an international crisis); *United States v. Pink*, 315 U.S. 203, 229 (1942) (holding that the "[p]ower to remove such obstacles to full recognition [of a foreign government] as settlement of claims of our nationals certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations'" (citation omitted) (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936))).

54. See *Medellin v. Texas*, 552 U.S. ___, 128 S. Ct. 1346, 1371–72 (2008).

grounds.⁵⁵ Justice Harlan's opinion in *New York Times Co. v. United States*⁵⁶ relied on a similar extrapolation. In an opinion joined by Chief Justice Burger and Justice Blackmun, Harlan cited Marshall's "sole organ" statement as support for a deferential view on the power of the President to restrain the New York Times from publishing certain documents alleged to contain national security information.⁵⁷

But Justice Vinson's dissenting opinion in *Youngstown* reflects perhaps the broadest reading of Marshall's defense of President Adams in the Nash/Robbins affair.⁵⁸ In an opinion joined by Justices Reed and Minton, Vinson cited President Adams's actions as an example of "the leadership contemplated by the Framers" in which Presidents have "dealt with national emergencies . . . to save [legislative] programs until Congress could act."⁵⁹ As support for this proposition, Vinson quoted at length Marshall's 1800 observation—which I have reproduced in full above⁶⁰—that, although Congress "unquestionably may prescribe the mode" for the execution of a treaty, "till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses."⁶¹ Noting that a later Supreme Court described Marshall's argument as "masterly and conclusive,"⁶² Vinson reasoned that this and similar historical events justified President Truman's seizure of steel mills to support the undeclared Korean War.⁶³

My purpose in describing the above uses of Marshall's 1800 speech is not to engage with the ultimate legal conclusions in those specific disputes. It is, rather, to show how much and how often later advocates have been willing to

55. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 545 (1977) (Rehnquist, J., dissenting). Citing *Curtiss-Wright's* revival of Marshall's "sole organ" concept, Rehnquist argued that the need for executive branch confidentiality "is particularly true in the area of foreign affairs and international relations." *Id.* at 551 n.6 (citing *Curtiss-Wright*, 299 U.S. at 319).

56. 403 U.S. 713 (1971).

57. *Id.* at 756 (Harlan, J., dissenting). "It is plain to me," Harlan argued, "that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted." *Id.* After quoting Marshall's "sole organ" phrase, *id.*, Harlan concluded that "[f]rom that time, shortly after the founding of the Nation, to this, there has been no substantial challenge to this description of the scope of executive power," *id.* (citing *Curtiss-Wright*, 299 U.S. at 319–21).

58. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 667 (1952) (Vinson, C.J., dissenting).

59. *Id.* at 683.

60. See *supra* note 33 and accompanying text.

61. *Youngstown*, 343 U.S. at 684 (quoting ANNALS, *supra* note 1, at 596, 613–14 (statement of Rep. Marshall on Mar. 7, 1800)).

62. *Id.* at 685 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893)).

63. *Id.* at 700 (concluding after a "cursory summary of executive leadership" that it "amply demonstrates that Presidents have taken prompt action to enforce the laws and protect the country whether or not Congress happened to provide in advance for the particular method of execution").

infuse meaning to Marshall's words and attribute purpose to his actions almost without reference to their context. But context matters. And as we shall see below, Marshall's specific defense of a cautious presidential action under a specific extradition treaty in its specific political context should give substantial pause about extrapolation to any broader constitutional themes.⁶⁴

II. SETTING THE BACKGROUND AND CONTEXT

A. *The Legal Context: The Limited Need to Defend President Adams's Limited Action*

In this Part, I will attempt—in the limited space here allowed—to set Marshall's "sole organ" speech in a richer context.⁶⁵ Let us first return to the limited role of President John Adams in the sad story of Thomas Nash. Recall that the presiding judge in the case, Thomas Bee, refused the initial request of British authorities to deliver up Nash under the 1794 Treaty.⁶⁶ By its express text, the extradition provision of the Treaty—the 27th Article—failed to prescribe the precise modalities of delivery. It provided only that "the United States" had agreed with the King of Great Britain to extradite the covered fugitives.⁶⁷ In absence of express guidance, Judge Bee originally believed that a federal statute governing internal, state-to-state extraditions made this "a matter for the executive interference."⁶⁸

Beyond this omission, the 27th Article set forth both legal and factual predicates for extradition. First, the parties engaged to extradite, upon a formal

64. Martin Flaherty has provided the definitive explanation of the need for caution in the application of history to law. See Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

65. I am indebted to Sanaz S. Mirzaei, doctoral candidate in the Department of Government and Politics at the University of Maryland at College Park, for the foundation provided here by her excellent historical and political research.

66. See *supra* notes 8–23 and accompanying text.

67. Treaty of Amity, *supra* note 12, art. XXVII (providing that "[i]t is further agreed, that his Majesty and the United States, on mutual requisitions, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice" the covered persons).

68. See *United States v. Robins* [sic], 27 F. Cas. 824, 833 (D.S.C. 1799) (No. 16,175) (stating Judge Bee's opinion that "[w]hen application was first made, I thought this a matter for the executive interference" on the ground of the federal state-to-state extradition statute); see also Note from Robert Liston to Timothy Pickering (May 23, 1799), in *STATE PAPERS*, *supra* note 15, at 303 ("[O]n the application of the consul for the restoration of Nash, in conformity to the treaty of 1794, judge Bee, and the federal attorney, were of opinion that he could not with propriety be delivered up without a previous requisition on my part made to the executive government of the United States.").

request, those fugitives “charged with murder or forgery.”⁶⁹ Second, the crimes must also have occurred “within the jurisdiction” of the offended state.⁷⁰ Finally, in language clearly protective of the accused, the 27th Article provided that extradition was permitted “only . . . on such evidence of criminality, as, according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed.”⁷¹

Judge Bee’s initial apprehensions about applying this treaty provision without further guidance led to a chain of communication from the British consul in Charleston to the British minister in Philadelphia and then to Secretary of State Timothy Pickering.⁷² On the basis of the British inquiry, Pickering wrote to Adams on May 15, 1799 to offer his advice.⁷³ Drawing a distinction from an earlier case involving the same mutiny but a U.S. citizen prisoner,⁷⁴ Pickering urged that Judge Bee “should be directed to deliver up” Nash under the Treaty “on the demand of the British Government, by its minister.”⁷⁵

President Adams, however, was substantially more cautious about interfering in a judicial proceeding. In specific, he replied to Pickering on May 21, 1799 that he was uncertain about the Executive’s authority to give an order to a federal judge. “How far the president of the U.S. would be justifiable in directing the judge, to deliver up the offender,” he wrote to Pickering, “is not clear.”⁷⁶ Adams instead opted for a mere “advice and request” to Judge Bee on the extradition of Nash under the Treaty.⁷⁷

69. See Treaty of Amity, *supra* note 12, art. XXVII.

70. *Id.* The latter jurisdictional language assumed great significance in the debate in Congress over President Adams’s actions. See *infra* notes 172–75 and accompanying text. Marshall likewise addressed the issue at length. See ANNALS, *supra* note 1, at 597–605 (statement of Rep. Marshall on Mar. 7, 1800). Other than as proof that Robbins’s extradition fell within the scope of the Treaty, however, the specifics of this jurisdictional dispute are not of direct interest for our examination of Marshall’s statements about executive power.

71. Treaty of Amity, *supra* note 12, art. XXVII.

72. See Cress, *supra* note 6, at 100–01; see also Note from Robert Liston to Timothy Pickering (May 23, 1799), in STATE PAPERS, *supra* note 15, at 303–04.

73. Letter from Timothy Pickering to John Adams (May 15, 1799), *microformed on Adams Letters Received*, *supra* note 13, at 219–219a.

74. See Wedgwood, *supra* note 5, at 235–38, 268–86.

75. Letter from Timothy Pickering to John Adams (May 15, 1799), *microformed on Adams Letters Received*, *supra* note 13, at 219–219a.

76. Letter from John Adams to Timothy Pickering (May 21, 1799), *microformed on Adams Papers*, Letterbook, roll 119 (Mass. Historical Soc’y microfilm edition).

77. *Id.* (instructing Pickering that “I have no objection to advize and request” the judge regarding the extradition of Nash).

Pickering dutifully communicated President Adams's cautious approach on executive authority in the determinative letter to Judge Bee twelve days later.⁷⁸ Much in the nature of a legal brief to a court, the letter relayed Adams's views on the satisfaction of the requirements for extradition set forth in the 27th Article of the 1794 Treaty. It first informed Judge Bee that British authorities had made the required formal request for extradition.⁷⁹ On the understanding that Nash had been charged with a covered crime (murder) on a British warship on the high seas, the letter then conveyed Adams's opinion that the legal predicate for extradition—a crime committed “within the jurisdiction” of Great Britain—had been satisfied.⁸⁰ With reference to this legal element, therefore, the letter offered the view that Nash “ought to be delivered up.”⁸¹

Beyond this, the decision on the application of the Treaty to the case of Thomas Nash was left to Judge Bee.⁸² This is true with particular emphasis for the factual predicate protective of the accused. On this issue, Pickering merely repeated—verbatim, and without editorial—the Treaty's requirement that sufficient “evidence of . . . criminality be produced” as would justify arrest and trial under domestic law.⁸³ (Interestingly, in the copy of this letter that

78. Letter from Timothy Pickering to Thomas Bee (June 3, 1799), in *STATE PAPERS*, *supra* note 15, at 304. Given its importance, the full text of this letter is set forth below:

Sir,—Mr. Liston, the minister of his Britannick majesty, has requested, that Thomas Nash, who was a seaman on board the British frigate *Hermione*, and who he is informed is now a prisoner in the jail of Charleston, should be delivered up. I have stated the matter to the President of the United States. He considers an offence committed on board a publick ship of war, on the high seas, to have been committed within the jurisdiction of the nation to whom the ship belongs. Nash, is charged, it is understood, with *piracy and murder*, committed by him, on board the above mentioned British frigate, on the high seas, and consequently ‘within the jurisdiction’ of his Britannick majesty; and therefore, by the 27th article of the treaty of amity with Great Britain, Nash ought to be delivered up, as requested by the British Minister, *provided such evidence of his criminality be produced, as by the laws of the United States, or of South Carolina, would justify his apprehension and commitment for trial, if the offence had been committed within the jurisdiction of the United States*. The President has in consequence hereof authorized me to communicate to you ‘his advice and request,’ that Thomas Nash may be delivered up to the consul or other agent of Great Britain, who shall appear to receive him.

Id.

79. *Id.* The British minister in Philadelphia had made a formal request for extradition in late May. See Note from Robert Liston to Timothy Pickering (May 23, 1799), in *STATE PAPERS*, *supra* note 15, at 303–04.

80. Letter from Timothy Pickering to Thomas Bee (June 3, 1799), in *STATE PAPERS*, *supra* note 15, at 304 (stating that President Adams “considers” a murder in such circumstances to be one covered by the extradition provision).

81. *Id.*

82. See *Cress*, *supra* note 6, at 103 (stating after a review of Pickering's letter that “[t]he final decision in the case, then, was left fully in the hands of the judiciary”).

83. Letter from Timothy Pickering to Thomas Bee (June 3, 1799), in *STATE PAPERS*, *supra* note 15, at 304.

Adams transmitted to Congress in advance of Marshall's 1800 speech, this evidentiary condition is reproduced with emphasis.⁸⁴ Emphasis likewise was added to similar language in a later letter from Judge Bee to Pickering upon production of a copy to Congress.⁸⁵)

Pickering's letter to Judge Bee then closes with a direct quote of Adams's cautious "advice and request." "[I]n consequence" of the opinions set forth in the letter, Pickering concludes, "[t]he President has . . . authorized me to communicate to you 'his advice and request' that Thomas Nash may be delivered up to" British authorities.⁸⁶

Even Ruth Wedgwood—who has attempted to wring enduring significance from Marshall's later speech⁸⁷—concludes that in this affair President Adams "was surprisingly delicate concerning the Executive's relation to a judge."⁸⁸ His approach, rather, reflected "caution" on whether he had the constitutional authority "to direct the judge" on the application of the Treaty.⁸⁹ In other words, with a mere "request," Adams couched his communication to Judge Bee in the "language of deference."⁹⁰

The written record of the subsequent judicial proceedings likewise gives no indication that Pickering's letter on behalf of President Adams had any greater effect than deferential "advice" coupled with a conditional "request." Judge Bee in his formal opinion makes no mention of the letter at all;⁹¹ the

84. Compare Report of the Department of State, Item No. 2 (Feb. 6, 1800) (reproducing Letter from Timothy Pickering to Thomas Bee (June 3, 1799)), in STATE PAPERS, *supra* note 15, at 302, 304, with ANNALS, *supra* note 1, at 516 (reproducing the letter without this emphasis).

85. Compare Report of the Department of State, Item No. 3 (Feb. 6, 1800) (reproducing Letter from Thomas Bee to Timothy Pickering (July 1, 1799)), in STATE PAPERS, *supra* note 15, at 302, 305 (stating that the judge had ordered delivery of Nash "on such strong evidence of his criminality as justified his apprehension and commitment for trial" (emphasis in version forwarded to Congress)), with ANNALS, *supra* note 1, at 516–17 (reproducing the letter without this emphasis).

86. Letter from Timothy Pickering to Thomas Bee (June 3, 1799), in STATE PAPERS, *supra* note 15, at 304.

87. See *infra* note 168 and accompanying text.

88. Wedgwood, *supra* note 5, at 290. Wedgwood elsewhere likewise acknowledges that for Adams the Nash/Robbins affair "was a small matter, dispatched almost routinely in the press of other business." *Id.* at 309.

89. *Id.* at 290.

90. See *id.* at 292 n.246 (concluding that, with a mere "request," Pickering's letter to Judge Bee on behalf of President Adams and his later letter to British Minister Robert Liston "used the same language of deference" (citing Letter from Timothy Pickering to Robert Liston (June 4, 1799), *microformed on Domestic Letters of the Dep't of State, 1784–1906* (National Archives Microfilm Publication))).

91. Shortly before his death in 1812, friends of Judge Bee published a volume of his opinions that also included a new version of his memorandum order in the Robbins case. This later version includes a reference to the "request" of President Adams. See REPORTS OF CASES ADJUDGED IN THE DISTRICT COURT OF SOUTH CAROLINA BY THE HON. THOMAS BEE 266

only reference comes in introductory comments, presumably by a clerk.⁹² Rather, Judge Bee's opinion sets forth an independent examination and decision on each of the predicates for extradition set forth in the 27th Article. He first reversed his initial view that a federal statute on domestic, state-to-state extraditions required executive involvement in this case as well.⁹³ He instead concluded—in a view only rejected by the Supreme Court four decades later⁹⁴—that the reference in Article III of the Constitution to cases “arising under . . . treaties”⁹⁵ provides a self-executing foundation for jurisdiction by the lower federal courts.⁹⁶

But perhaps the most telling information comes from the personal pronoun Judge Bee uses at the end of his substantive analysis of the Treaty. After addressing a variety of challenges to both the Treaty and its application, Judge Bee concludes solely in the first person singular. This is particularly important on the protective factual predicate that Pickering's letter had left entirely for Bee to decide:

*I have carefully reviewed the arguments advanced by the counsel for the prisoner. I have looked into the constitution, the treaty, the laws, and the cases quoted: and upon a full investigation of them all, I am of opinion, that from the affidavits filed with the clerk of the court, there is sufficient evidence of criminality to justify the apprehension and commitment of the prisoner for trial, for murder committed on board a ship of war belonging to his Britannic majesty, on the high seas . . .*⁹⁷

With these conclusions, and a formal extradition request by British authorities under the 27th Article of the Treaty, Judge Bee declared that his obligation as a judge was clear: “I am bound by the express words of that

(Phila., William P. Farrand & Co. 1810) (stating that Robbins was delivered to the British “in consideration of the circumstances, and at the particular request of the president of the *United States* [Mr. John Adams]” (alteration in original)).

92. *United States v. Robins* [sic], 27 F. Cas. 825, 826–27 (D.S.C. 1799) (No. 16,175) (stating that “[t]he judge had received a letter . . . from the secretary of state . . . containing these words—The president ‘advises and requests’ you to deliver him up”).

93. *Id.* at 833. The Judiciary Act of 1789 did not address the subject of extradition.

94. *See Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (“Courts created by statute can have no jurisdiction but such as the statute confers.”).

95. U.S. CONST. art. III, § 2, cl. 1.

96. *Robins*, 27 F. Cas. at 833 (“[A]s the law and the treaty are silent upon the subject, recurrence must be had to the general powers vested in the judiciary by law and the constitution, the 3d article of which declares the judicial power shall extend to treaties, by express words.”). In 1848, Congress passed a law specifically authorizing judges to act on the foundation of extradition requests without first securing authorization from the President. *See* Act of Aug. 12, 1848, ch. 167, 9 Stat. 302; *see also In re Kaine*, 55 U.S. (14 How.) 103 (1852) (upholding the act against a claim that it unconstitutionally encroached on executive power).

97. *Robins*, 27 F. Cas. at 833 (emphasis added).

clause of the treaty, to deliver [Nash] up to justice.”⁹⁸ His formal order in the *District Court Minute Book* likewise simply “command[s]” that the marshal deliver Nash to the British because “the 27th Article of the Treaty of Amity etc. was binding in the Present instance.”⁹⁹

There was, in short, from a legal perspective little for John Marshall to defend when Adams’s actions became the subject of later Republican attacks. Through Pickering, Adams merely expressed an opinion on the interpretation of the Treaty. Separately, he conveyed an executive “request” and approval that, upon satisfactory proof as required by the Treaty, Judge Bee may deliver the prisoner directly to British authorities.¹⁰⁰ We shall see that this direct, formal connection with a foreign state will assume significance for Marshall’s speech—indeed, in my reading, that is one essential foundation for his reasoning.¹⁰¹ But as we turn to Marshall’s formal defense of Adams’s involvement in the Nash affair, we should keep firmly in mind that Adams did not claim an authority to control the domestic interpretation and application of the Treaty, and from the written record at least, the judge in the case did not recognize any such authority.

The (in)significance of Adams’s actions becomes even clearer if, as executive advocates would have it, we view them through a modern lens. There is nothing even noteworthy today about the Executive Branch offering its interpretive views on treaties; indeed, conventional Supreme Court precedent sanctions the practice.¹⁰² It is equally well established that the Executive Branch has the “ultimate” authority over formal extradition to a

98. *Id.*

99. See Order, *United States v. Nathan Robbins Alias Thomas Nash*, U.S. District Court for South Carolina (July 26, 1799), *microformed on* Minutes, Circuit and District Courts, District of South Carolina, 1789–1849, roll 1, M1181 (National Archives Microfilm Publication).

100. See Letter from Timothy Pickering to Thomas Bee (June 3, 1799), in *STATE PAPERS*, *supra* note 15, at 304 (communicating President Adams’s “request” that Thomas Nash “may” be delivered to British authorities).

101. See *infra* Part III.D.1.

102. See, e.g., *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) (stating that “[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty”); *O’Connor v. United States*, 479 U.S. 27, 33 (1986) (observing that executive branch interpretations of treaties are “entitled to great weight”); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982) (same). For a more limited view of the appropriate deference to executive views, see Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1944 (2005) (arguing that “courts should afford only calibrated deference to the views of the executive branch” depending on “the degree to which an issue affects foreign affairs and whether the continuing administration of the treaty at issue is expressly entrusted to a specific executive branch agency” (footnote omitted)).

foreign state, even where a court has found the treaty predicates satisfied.¹⁰³ In short, if a modern president were to take the actions taken by John Adams in 1799, it would barely occasion comment.

To be sure, legal issues that seem clear today may have been quite unsettled then. With only grainy understandings of the new constitutional institutions created a decade before, one can well imagine that even the simple act of an Executive communicating his views to a judge could occasion political controversy. In fact, as we shall see immediately below, the Republican opposition soon seized on the Thomas Nash affair to attack President Adams in the run-up to the presidential elections of 1800. But as the next section also will explain, that political context provided no incentive for John Marshall to extend his defense beyond Adams's cautious approach to executive power—and indeed the incentives ran directly to the contrary.

B. Marshall's Speech in Political Context

1. The General Background

The speech of Congressman John Marshall in March 1800 arose in the wash of substantial political uncertainty and consequent political opportunism. The basic facts of the Nash/Robbins affair in the backdrop of the speech have been extensively studied by historians¹⁰⁴ and the limited space permitted for this work precludes full elaboration here. We cannot in any event transport ourselves to fully understand the contemporary environment or to apprehend the tone and inflection of the sensibilities of the time. My goal here, rather, is to sketch the basic contours of the political background, with the hope of thereby better appreciating the likely motivations for and limitations on Marshall's speech.

We shall start with some broad reminders. The events of early 1800 unfolded as the national political system increasingly coalesced around two distinct political movements. In the early 1790s, the personal prestige of President George Washington and his general policy of international neutrality had provided a basic stability to the constitutional office of the President. But as he receded from national affairs at the end of a second term, political

103. See *In re Extradition of Howard*, 996 F.2d 1320, 1325 (1st Cir. 1993). For a comprehensive review of this and related principles of modern extradition law, see John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 150–51 (2002) (concluding that “[t]oday, the ability of the executive branch to reject the results of the [judicial] extradition hearing is taken for granted”).

104. See, e.g., 2 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL: POLITICIAN, DIPLOMATIST, STATESMAN 1789–1801*, at 458–75 (1916); FRANCES HOWELL RUDKO, *JOHN MARSHALL AND INTERNATIONAL LAW: STATESMAN AND CHIEF JUSTICE* 86–92 (1991); JAMES F. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES* (2002).

interests increasingly diverged into pro-central government Federalists associated with John Adams and Alexander Hamilton and anti-central government Republicans associated with Thomas Jefferson.¹⁰⁵

A principal event that gave momentum to this trend and (for reasons described below¹⁰⁶) is worthy of special mention here is the controversy that arose around the so-called Jay Treaty—for its chief negotiator John Jay—of 1794.¹⁰⁷ Later “Federalists” saw this Treaty of “Amity, Commerce and Navigation” with Great Britain as a means of solidifying commercial relationships and of avoiding war with that leading maritime power of the day.¹⁰⁸ Later “Republicans” in contrast, ideologically sympathetic to revolutionary France, viewed the Treaty as a betrayal of an established friend in favor of the aristocratic, moneyed interests of an established enemy.¹⁰⁹ Republican opposition in Congress and elsewhere led to excited debates over executive power, the role of the Senate in treaty making, and the responsibilities of the House in implementation.¹¹⁰ Notwithstanding the considerable controversy, the Jay Treaty ultimately was ratified and implemented under the influence of President Washington’s prestige.¹¹¹ But as one historian has observed, “[t]he idea of a unified, national government

105. See generally DAVID HACKETT FISCHER, *THE REVOLUTION OF AMERICAN CONSERVATISM: THE FEDERALIST PARTY IN THE ERA OF JEFFERSONIAN DEMOCRACY* (1965); LINDA K. KERBER, *FEDERALISTS IN DISSENT: IMAGERY AND IDEOLOGY IN JEFFERSONIAN AMERICA* (1970).

106. See *infra* notes 122–34 and accompanying text.

107. Treaty of Amity, *supra* note 12. For broader historical reviews of the controversy surrounding the Jay Treaty, see JERALD A. COMBS, *THE JAY TREATY: POLITICAL BATTLEGROUNDS OF THE FOUNDING FATHERS* (1970); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 415–49 (1993); Todd Estes, *Shaping the Politics of Public Opinion: Federalists and the Jay Treaty Debate*, 20 J. EARLY REPUBLIC 393 (2000).

108. See REGINALD HORSMAN, *THE NEW REPUBLIC: THE UNITED STATES OF AMERICA 1789–1815*, at 48–51 (2000); BERNARD A. WEISBERGER, *AMERICA AFIRE: JEFFERSON, ADAMS, AND THE REVOLUTIONARY ELECTION OF 1800*, at 150–54 (2000).

109. See HORSMAN, *supra* note 108, at 48 (observing that to Republicans Jefferson and Madison, adoption of the Jay Treaty “meant deserting the old ally France, . . . enhancing the moneyed interests, and presenting a threat to the independent republicanism they desired”); Keith Arbour, *Benjamin Franklin as Weird Sister: William Cobbett and Federalist Philadelphia’s Fears of Democracy*, in *FEDERALISTS RECONSIDERED* 179, 186 (Doron Ben-Atar & Barbara B. Oberg eds., 1998) (observing that to the Republican opposition “in 1795 the Jay Treaty . . . seemed a frighteningly plain step toward the ultimate aristocratic goal”).

110. See ELKINS & MCKITRICK, *supra* note 107, at 415–26, 441–49; Wedgwood, *supra* note 5, at 261–68.

111. See LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 532 n.48 (1995) (observing that the Federalist position prevailed on the Jay Treaty debate because of “Washington’s timing of critical actions and by the president’s great skill in using his unparalleled prestige to influence public opinion”); Estes, *supra* note 107, at 417.

that had been weakening since at least 1791 collapsed in the aftermath of Jay's agreement with Great Britain."¹¹²

The domestic conflict over international allegiances only intensified in the first years of the Presidency of John Adams. Notably displeased with the growing American affinity with Great Britain, revolutionary France seized close to three hundred American ships in a "quasi-war" in the late 1790s.¹¹³ In an effort to end the hostilities, President Adams sent a diplomatic delegation—which included John Marshall—to meet with French foreign minister Charles Talleyrand, but the delegation was met with affronts and requests for bribes.¹¹⁴ Marshall's principled refusal to negotiate in such circumstances had a substantial effect on his public standing and on that of the Federalists in general.¹¹⁵

Upon his return from France, therefore, Marshall was elected to Congress in 1799 as a representative of Virginia.¹¹⁶ Influenced by experiences in the Revolutionary Army and the state legislature,¹¹⁷ Marshall had by that time already expressed—as a delegate to the Virginia ratifying convention for the new Constitution, for instance¹¹⁸—clear sentiments in favor of a strong centralized government. Marshall thus quickly became aligned with Federalist

112. HORSMAN, *supra* note 108, at 51; *see also* ELKINS & MCKITRICK, *supra* note 107, at 415 (observing that it has "long been understood" that "[t]he outpouring of popular feeling over the Jay Treaty . . . was more directly responsible than anything else for the full emergence of political parties in America, and of clearly recognized Federalist and Republican points of view on all political questions"); ESTES, *supra* note 107, at 393 (observing that in addition to its role in diplomatic history "[s]cholars usually have portrayed the [Jay Treaty] debate . . . as an event that hastened the formation of the first political parties by deepening and clarifying allegiances on both sides").

113. *See* RUDKO, *supra* note 104, at 47–48; *see also* ELKINS & MCKITRICK, *supra* note 107, at 537–38; HORSMAN, *supra* note 108, at 51; ESTES, *supra* note 107, at 402–05.

114. For a broad review of this "XYZ Affair," *see* ELKINS & MCKITRICK, *supra* note 107, at 537–79; RUDKO, *supra* note 104, at 48–49.

115. *See* RUDKO, *supra* note 104, at 48–50; SIMON, *supra* note 104, at 44–45.

116. *See* ELKINS & MCKITRICK, *supra* note 107, at 558–59; RUDKO, *supra* note 104, at 83. Marshall did so with the urging of George Washington. *See* Letter from George Washington to John Marshall (Dec. 30, 1798), in 37 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 75, 76 (John C. Fitzpatrick ed., 1940).

117. *See* HORSMAN, *supra* note 108, at 133; *see also* RUDKO, *supra* note 104, at 2 (observing that experience in the Virginia state legislature "critically shaped Marshall's views" in favor of a strong central government); Martin S. Flaherty, *Byron White, Federalism, and the "Greatest Generation(s),"* 74 U. COLO. L. REV. 1573, 1594 (2003) (examining a similar point about Marshall's war experiences (citing LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 34–56 (1974))).

118. *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 222–36 (Jonathan Elliot ed., 2d ed., J.B. Lippincott Co. 1907) (1836) (statement of John Marshall on June 10, 1788); RUDKO, *supra* note 104, at 2 (observing that "Marshall, already impressed by the need for a strong national government, energetically advocated the adoption of the Constitution").

interests in Congress. Indeed, as a former diplomat on behalf of the Administration, Marshall “[r]epresent[ed] an important link between President Adams and House Federalists.”¹¹⁹

2. The Nash/Robbins Affair is Transformed into an Issue of National Electoral Politics

With this general context of increasingly divided and partisan national politics, let us return now to the role of the Nash/Robbins affair. Two ingredients in this affair combined to create a particularly combustible brew amid the conflict between the pro-national, pro-British Federalists and the pro-local, anti-British (though now less pro-French¹²⁰) Republicans. First, and foremost, Nash’s extradition and execution in the summer of 1799 unfolded in the shadow of the first presidential election seriously contested along party lines.¹²¹ Adding fuel was the legal ground for the delivery of Nash to the British: The authority for extradition on which President Adams and Judge Bee relied was found in Article 27 of the very same Jay Treaty that had provoked so much controversy four years earlier.¹²²

The result was a recipe for political profiteering. News of the extradition of Nash in July 1799 spread rapidly among newspapers and pamphleteers, the principal mode of political discourse at the time.¹²³ As one historian has observed, “Republican editors rekindled public dislike for the Jay Treaty with solemn editorials citing Article 27 as typical of Federalist treachery and cooperation with Great Britain at the expense of the American citizenry.”¹²⁴ To cite just one example, a leading Republican newspaper of the time, the Philadelphia *Aurora*, declared with reference to the Nash/Robbins affair that “BRITISH INFLUENCE threatens destruction to these States!”¹²⁵ By October

119. See Cress, *supra* note 6, at 113; see also EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT 50 (1919).

120. In November 1799, Napoleon Bonaparte overthrew the revolutionary government of France and established the French empire. Reliable news of the coup d’état reached the United States in February 1800. Interestingly, although the impact is hard to triangulate, this is just as the controversy was beginning in Congress that led to John Marshall’s speech. See EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA’S FIRST PRESIDENTIAL CAMPAIGN 67 (2007).

121. See *id.* at 67–86; JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC 226–49 (1993).

122. See *supra* notes 106–12 and accompanying text.

123. See Cress, *supra* note 6, at 106–07.

124. See *id.* at 106 & n.22 (citing articles on the Nash/Robbins affair in July and August 1799, in the *Charleston City Gazette and Daily Advertiser*, the *Richmond Examiner*, the *Baltimore American*, and the *Newark, New Jersey Centinel of Freedom*). For a more focused review of these attacks in Republican newspapers on the foundation of the Nash/Robbins affair, see DONALD H. STEWART, THE OPPOSITION PRESS OF THE FEDERALIST PERIOD 242–47 (1969).

125. John Smith, *AURORA GEN. ADVERTISER*, Aug. 12, 1799, at 2.

1799, Thomas Jefferson—with perhaps more than a bit of exaggeration—even opined in a private letter from Philadelphia that “no one circumstance since the establishment of our government has affected the popular mind more.”¹²⁶

Throughout the fall of 1799, Republican newspapers continued to fan the political flames into a principal theme in the early campaign against Adams for the election of 1800.¹²⁷ A widely reproduced Republican pamphlet thus declared that “Robbins” was “ignominiously put to death” on the authority of President Adams.¹²⁸ For its pithy summary, historian Albert Beveridge’s description of this Republican effort—in a work on the life of John Marshall for which he won the Pulitzer Prize—is worthy of extended quotation here:

Here was, indeed, a campaign issue. The land rang with Republican denunciation of the President. What servile truckling to Great Britain! Nay, more, what a crime against the Constitution! Think of it! An innocent American citizen delivered over to British cruelty. Where now were our free institutions? When President Adams thus surrendered the Connecticut “Yankee,” Robins, he not only prostituted patriotism, showed himself a tool of British tyranny, but also usurped the functions of the courts and struck a fatal blow at the Constitution. So shouted Republican orators and with immense popular effect.¹²⁹

Adams’s actions on the foundation of the Jay Treaty also conveniently played into broader Republican themes for the election of 1800. Building on long-standing antipathies,¹³⁰ the Republicans throughout the campaign sought to paint Adams as an unreformed monarchist. Thus, for example, one Republican pamphleteer, citing Adams’s early writings that had expressed favorable views on life tenure for presidents,¹³¹ declared that he was “a

126. Letter from Thomas Jefferson to Charles Pinckney (Oct. 29, 1799), in 31 THE PAPERS OF THOMAS JEFFERSON 226, 227 (Barbara B. Oberg ed., 2004).

127. See Cress, *supra* note 6, at 106–10 (describing the newspaper articles in more detail).

128. PHILIP FRENEAU, LETTERS ON VARIOUS INTERESTING AND IMPORTANT SUBJECTS 116–23 (Scholars’ Facsimiles & Reprints 1943) (1799); see Cress, *supra* note 6, at 108 n.29 (listing the newspapers that reprinted Freneau’s letter at the time).

129. BEVERIDGE, *supra* note 104, at 459. For a similar observation, see SIMON, *supra* note 104, at 95 (observing that in the fall of 1799 “[t]he Republicans charged that Robbins’s death had been the direct result of the precipitous action of President Adams, whose sympathies for Great Britain as well as his own monarchical tendencies had led to his unbridled, and unconstitutional, use of executive power”).

130. Proto-Republicans had tarred Adams as a monarchist in the election of 1796 as well. For example, partisans distributed pamphlets declaring that “John Adams is an avowed MONARCHIST.” JOHN FERLING, ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800, at 90 (2004); see also MANNING J. DAUER, THE ADAMS FEDERALISTS 101 (1953) (observing regarding the election of 1796 that it was “certain” that “there was considerable danger from the charges of monarchism” leveled against Adams).

131. See ELKINS & MCKITRICK, *supra* note 107, at 532–36 (referring to Adams’s *Defence of the Constitutions of Government of the United States of America* and *Discourses on Davila*); see

monarchist . . . [who] speaks with rapture, almost with rhapsody, of the hereditary senate and executive.”¹³² More broadly, the Philadelphia *Aurora* pronounced that Federalism as a whole was “a mask for monarchy.”¹³³ Ultimately, Republican efforts to mark out Adams as a monarchist became “central to their campaign against Adams.”¹³⁴

Newly elected Federalist Congressman John Marshall was no detached neutral in these events.¹³⁵ From his own writings, he was well aware at the time of the transformation of the Nash/Robbins affair from a legal case into a national political issue. Already in September 1799 (six months before his speech in Congress), Marshall joined the public debate in defense of President Adams. In an open letter in the *Virginia Federalist* attributed to him¹³⁶ and directed to the public at large, Marshall declared that he “wish[ed] to prevent the effects . . . upon the minds of those who do not possess the kind of information necessary to enable them to judge impartially on the subject.”¹³⁷ We will have more to say about this open letter below.¹³⁸ But the important message at this point is that Marshall recognized well in advance of the Congressional debates that the attacks on Adams were “calculated to exasperate the public mind.”¹³⁹

also DAVID MCCULLOUGH, JOHN ADAMS 374–79, 421 (2001) (same); *id.* at 409–10 (noting that in his first term as Vice President, “[t]he suspicion that Adams was a monarchist at heart grew stronger, and understandably, as in his *Defence of the Constitutions of Government*, he did seem to lean in that direction”).

132. See LARSON, *supra* note 120, at 178.

133. AURORA GEN. ADVERTISER, Oct. 14, 1800, at 2.

134. LARSON, *supra* note 120, at 177–78; see also MCCULLOUGH, *supra* note 131, at 544 (noting that as the campaigning fully developed later in the summer of 1800, “Adams was inevitably excoriated as a monarchist, more British than American”).

135. John Marshall, in these pre-Supreme Court days at least, was much more of a political player than is generally discussed. Bruce Ackerman, for one, has observed with reference to the later controversies over the election of 1800 that “[c]ontemporary biographers cast Marshall as an Olympian demigod, splendidly detached from the fierce struggles going on all round him. To put it mildly, this is an exaggeration.” BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 54 (2005); see also ELKINS & MCKITRICK, *supra* note 107, at 728 (observing that John Marshall “would take a highly active hand in the proceedings that opened in December 1799” toward the election of 1800).

136. The editor of Marshall’s papers included this letter among Marshall’s formal documents on the foundation of later attributions in the early 1800s. See 4 THE PAPERS OF JOHN MARSHALL 23 n.4 (Charles T. Cullen ed., 1984) [hereinafter MARSHALL PAPERS] (citing attributions by John E. Hall in 1821 and Francis Wharton in 1849).

137. *Id.* at 23.

138. See *infra* notes 227–30 and accompanying text.

139. MARSHALL PAPERS, *supra* note 136, at 23.

3. The Electioneering Moves to the Congressional Theater

By the early months of 1800, the electioneering for the impending presidential election was already in full swing.¹⁴⁰ Perhaps most importantly, the state elections for the legislature of New York were scheduled to occur in April.¹⁴¹ At that time, the choice of electors for President remained, as provided in Article II, Section 1 of the Constitution,¹⁴² very much within the discretion of the state legislatures.¹⁴³ This was all the more important because in the election of 1796, the New York state legislature itself had awarded the state's twelve electors to Adams in his three-vote victory over Thomas Jefferson.¹⁴⁴ As a result, the impending April state legislative elections in New York—as we shall see, only one month after Marshall's famous speech—could have a direct impact on the election of the President at the end of the year.¹⁴⁵

Not surprisingly, the presidential election became a subject of intense partisan interest in Congress as well. In January 1800, Federalist Senator James Ross introduced a bill (which was ultimately unsuccessful) that would have effectively transferred control over the coming election to the Federalist-dominated Senate.¹⁴⁶ By early March (only two days before John Marshall's speech), Massachusetts Federalist Congressman Fisher Ames even wrote to a

140. See MCCULLOUGH, *supra* note 131, at 534–35. The election of President became all the more significant as the nation lost the stabilizing influence of the person of George Washington, who died suddenly on December 14, 1799.

141. See FERLING, *supra* note 130, at 126–31; LARSON, *supra* note 120, at 94–109; see also WEISBERGER, *supra* note 108, at 238–39 (observing that for Republicans, a victory in the April elections in New York “was absolutely indispensable to the further progress of their cause”).

142. U.S. CONST. art. II, § 1 (“Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .”).

143. Indeed, in ten of the sixteen states involved in the election of 1800 the state legislature directly chose the electors for President without a separate vote of the electorate. See SHARP, *supra* note 121, at 243.

144. See LARSON, *supra* note 120, at 30–31; SHARP, *supra* note 121, at 245.

145. That was indeed the case. See MCCULLOUGH, *supra* note 131, at 556 (observing that with a change of only 250 votes in New York City, Adams would have won the electoral votes of New York and thus the election of 1800); see also SHARP, *supra* note 121, at 244 (stating that the ultimate Republican victory in the New York state elections early in 1800 “contributed substantially to the demoralization and disintegration of the Federalists and led to considerable optimism among the Republicans”).

146. The Bill would have created a “Grand Committee” with the authority to decide on the qualifications of the individual presidential electors chosen by the states. See ANNALS, *supra* note 1, at 28–29. With questions of constitutionality and propriety swirling, Congressman John Marshall led the efforts of more moderate Federalists in the House to reform the Bill, but it ultimately went nowhere. See ELKINS & MCKITRICK, *supra* note 107, at 730; LARSON, *supra* note 120, at 78–83; WEISBERGER, *supra* note 108, at 235–36.

confederate that “[o]ur parties in Congress seem to regard th[e] approaching election as the only object of attention.”¹⁴⁷

But the “most controversial” issue in Congress was the attempt of Republicans in the House to reawaken partisan passions over the Nash/Robbins affair.¹⁴⁸ Recall that, even though President Adams promptly complied with the initial request to turn over all relevant documents,¹⁴⁹ in late February 1800 House Republicans introduced a formal resolution to condemn him for “a dangerous interference of the Executive with Judicial decisions.”¹⁵⁰ (Perhaps not coincidentally, the proponent of this resolution was Representative Edward Livingston from New York, where the first significant state voting was about to occur.¹⁵¹) Some Republicans even raised the idea of impeachment.¹⁵²

House Republicans pursued extended debate on the subject for the next two weeks¹⁵³ with “little purpose beyond partisanship.”¹⁵⁴ Indeed, historian Albert Beveridge has concluded that “[f]or the purposes of the coming presidential campaign . . . the Robins affair was made the principal subject of Republican congressional attack on the Administration.”¹⁵⁵ This was all the more significant because recent moderate moves by Adams (such as on peace negotiations with France) minimized the impact of other campaign issues.¹⁵⁶

147. Letter from Fisher Ames to Christopher Gore (Mar. 5, 1800), in 2 WORKS OF FISHER AMES 1354, 1355 (W.B. Allen ed., 1983); *see also* Editorial Note, in MARSHALL PAPERS, *supra* note 136, at 35 (observing that in Congress in the early months of 1800 “[a]ttention, as always, was given to public opinion and the upcoming presidential election”).

148. *See* Editorial Note, in MARSHALL PAPERS, *supra* note 136, at 35 (noting that in February 1800 “the Republicans [in Congress] attempted to revive the matter as a campaign issue”).

149. *See supra* notes 25–26 and accompanying text.

150. ANNALS, *supra* note 1, at 532–33 (resolution by Rep. Livingston on Feb. 20, 1800).

151. *Id.*; *see also* RUDKO, *supra* note 104, at 87 (“The House began debate on resolutions introduced by Edward Livingston, Republican from New York, on February 20, 1800, condemning President Adams’s handling of the affair.”).

152. ANNALS, *supra* note 1, at 552 (statement of Rep. Harper on Feb. 26, 1800).

153. *See id.* at 541–78 (detailing the debates from Feb. 25 to Feb. 27, 1800); *id.* at 583–96 (detailing the debates from Mar. 3 to Mar. 6, 1800).

154. Editorial Note, in MARSHALL PAPERS, *supra* note 136, at 35.

155. BEVERIDGE, *supra* note 104, at 460; *see also* Richards, *supra* note 6, at 293 (observing that “[t]he Jonathan Robbins case was a deliberate and calculated Republican attempt to discredit the [Adams] administration”); *id.* at 304 (concluding with regard to the Republican attack in Congress that “[a] cloud of doubt concerning the integrity and ability of the [Adams] administration might aid materially in turning the election tide to Jefferson and his party” and that “[e]very member of the House was keenly aware of this fact, and was therefore sensible of the political implication which accompanied the outcome of this debate”).

156. Cress, *supra* note 6, at 112 (observing that “[t]he search for an issue with which to weaken the appeal of the president’s new policies led Republican leaders to launch a congressional investigation of the Robbins affair”).

Echoing the claims of allied newspapers throughout the past fall, Republican orators in Congress focused their attention on whether “Robbins” in fact was an American citizen wrongfully impressed by the British.¹⁵⁷ This laid the foundation for a return to the theme that, through his “orders” to the judge to cede jurisdiction to a foreign state,¹⁵⁸ Adams had again demonstrated his monarchical preferences.¹⁵⁹

The partisan foundation for these efforts became even clearer when Republicans sought to postpone further formal debate until more documents could be obtained from the court in South Carolina.¹⁶⁰ The obvious purpose of this maneuver, as John Marshall himself observed, was to keep the controversy alive and thus cast suspicion on “the character of the President of the United States . . . until the next session of Congress.”¹⁶¹ Not surprisingly, that session was to begin in November, on the eve of the formal election of the President.¹⁶² Referring again to the political background, Marshall declared that “a postponement amounted to a declaration to the people of America that there was much cause for suspicion, and that additional evidences were wanted to substantiate it.”¹⁶³

In short, as he rose to defend President Adams in early March 1800, John Marshall must have been fully attentive to the political foundation for the Republican attacks. We need not speculate too greatly on this score, however. For Marshall began his speech with a direct statement that his purpose was to “rescu[e] public opinion from those numerous prejudices” raised by “so many causes” against the Administration.¹⁶⁴ And he concluded with a declaration

157. See ANNALS, *supra* note 1, at 541–60 (relating substantial debate about the authenticity of the related documents); see also RUDKO, *supra* note 104, at 87 (referring to Nash’s claim that he was an impressed American sailor and stating that “Republicans tended to credit his story”).

158. See, e.g., ANNALS, *supra* note 1, at 543 (statement of Rep. Sedgwick on Feb. 25, 1800) (stating that the only issue was whether the President had interfered and “whether the Judge had been guilty of a breach of his duty in obeying the orders given him by the Executive”).

159. See RUDKO, *supra* note 104, at 87 (stating that in the congressional debates “[t]he Republicans were incensed by what they considered an unwarranted exercise of authority by the ‘monarchical’ Adams”).

160. See ANNALS, *supra* note 1, at 548–77.

161. *Id.* at 577 (statement of Rep. Marshall on Feb. 27, 1800); see also BEVERIDGE, *supra* note 104, at 462–63, 462 n.2 (observing that Marshall “thought this procrastinating maneuver a Republican trick to keep the whole matter open until after the coming presidential campaign” and that “[t]his, in fact, was the case”); Letter from John Marshall to James Markham Marshall (Feb. 28, 1800), in MARSHALL PAPERS, *supra* note 136, at 80, 81 (stating with regard to the Republican attacks in Congress that “[e]very stratagem seems to be us[e]d to give to this business an undue impression”).

162. See ANNALS, *supra* note 1, at 781 (reporting the beginning of a new session of Congress on Nov. 17, 1800).

163. *Id.* at 577 (statement of Rep. Marshall on Feb. 26, 1800).

164. *Id.* at 596 (statement of Rep. Marshall on Mar. 7, 1800).

that his long defense of Adams was necessary because the Republican resolutions were “so calculated to interest the public feelings.”¹⁶⁵ Indeed, Marshall concluded in a private letter shortly after his speech that the entire debate over the Nash/Robbins affair “was for the purpose principally of affecting the next election of President.”¹⁶⁶

With the manifest political motivations behind the attack itself, strong incentives would have pushed John Marshall to draw his defense of Adams’s involvement in the Nash/Robbins affair as narrowly as possible. To be sure, in a fit of naivety or bravado Marshall could have spurned party and politics to stake out some broader theory of executive authority. But as we turn to Marshall’s speech, we must keep in mind that any assertion of such authority that went beyond Adams’s cautious approach would have played into the Republicans’ political hand, and any unnecessary claim of substantive executive power risked substantiating Republican campaign themes of monarchism and presidential overreaching. In other words, any broader claim of executive power risked invigorating the very political controversy Marshall rose to quell.

III. EXAMINING JOHN MARSHALL’S “SOLE ORGAN” SPEECH IN CONTEXT

We turn now to the speech itself. As we do so, we must avoid the lawyer’s inclination to construct arguments on carefully selected text. If we instead consider the full text in full context, we find an interpretation of John Marshall’s speech that is fully consistent with the political incentives that pushed against staking out a broad theory of inherent executive power¹⁶⁷ by way of broad obiter dicta.¹⁶⁸

Indeed, as we shall see below, Marshall does not even found his defense of President Adams on a coherent, comprehensive method of constitutional

165. *Id.* at 616.

166. Letter from John Marshall to Reuben George (Mar. 16, 1800), in MARSHALL PAPERS, *supra* note 136, at 114.

167. Others have noted, although without extensive analysis, that in his famous political speech Marshall was not making a broad claim about executive power. See Bradley & Flaherty, *supra* note 3, at 549 n.19 (observing that Marshall’s speech was in defense of a specific action of President Adams under a specific treaty and that Marshall “was not making any claim about unspecified substantive powers”).

168. Although she fails to explain why Marshall would be inclined to disregard the political context, this is what Ruth Wedgwood claims. See Wedgwood, *supra* note 5, at 293 n.247 (asserting that “Marshall claimed far stronger power for the Presidency than Adams exercised in this correspondence”); see also *id.* at 351 (stating that “[i]t is striking that Marshall did not defend Adams on the narrower facts of his involvement”). Perhaps tellingly, Professor Wedgwood relegates *Marshall’s* own recognition of the political foundations for the Republican attacks on Adams to an afterthought on *subsequent* events. See *id.* at 357; see also *supra* notes 135–39 and 164–66 and accompanying text (examining evidence that Marshall was well aware of the political context for his speech).

interpretation. At times, he adopts a text-bound approach by adverting to the Take Care Clause¹⁶⁹ and, more obliquely, the presidential station derived from the Receive Ambassadors Clause.¹⁷⁰ In other places, he appeals to pragmatic and functional considerations arising from the need for faithful and consistent representation of national interests in foreign affairs.¹⁷¹ Ultimately, however, careful examination reveals that, with a certain appreciation of the fundamentally political nature of the entire affair, Marshall's speech was a lawyerly defense of a specific presidential action in a specific dispute under a specific treaty.

A. *The Treaty as the Source of Executive Authority in Domestic Law*

From premise and structure Marshall made clear in his 1800 speech that the source of executive authority to act in the extradition of Thomas Nash was the law created by treaty. He thus carefully explained how the extradition satisfied each and every legal and factual predicate set forth in the Treaty. He founded his argument, first, on the fact that Nash was arrested not for a violation of any domestic criminal law of the United States, but rather solely "for the purpose of being delivered up to justice in conformity with the treaty" between the United States and Great Britain.¹⁷²

Marshall then explained at length why, because Nash was a British sailor on a British warship in international waters, "jurisdiction" as provided in the Treaty was solely British.¹⁷³ Separately, he asserted that United States courts did not have concurrent jurisdiction in such circumstances, both because this was not a matter covered by the "Judicial Power" in Article III and because background understandings about international law placed limits on the prescriptive and adjudicative jurisdiction of the United States.¹⁷⁴ Moreover, he emphasized that the arrest of Nash was predicated on a charge of murder as

169. See ANNALS, *supra* note 1, at 614 (statement of Rep. Marshall on Mar. 7, 1800) (adverting to the President's duty "to take care that the laws be faithfully executed"); see also U.S. CONST. art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed").

170. See ANNALS, *supra* note 1, at 614 (statement of Rep. Marshall on Mar. 7, 1800) (observing that the Executive Branch is "[t]he department which is entrusted with the whole foreign intercourse of the nation"); see also U.S. CONST. art. II, § 3 (granting to the President the power to "receive Ambassadors and other public Ministers").

171. See ANNALS, *supra* note 1, at 614 (statement of Rep. Marshall on Mar. 7, 1800) (asserting that because the President is "the person . . . who conducts the foreign intercourse" and because in foreign affairs "the force of the nation [is] in the hands" of the President, "[o]ught not this person to perform the object" of a treaty in absence of congressional direction?); *id.* (arguing that "[t]he Executive is not only the Constitutional department, but seems to be the proper department to which the power in question may most wisely and most safely be confided").

172. *Id.* at 615.

173. See *id.* at 597–605.

174. *Id.* at 605–12.

expressly contemplated in the Treaty, and not on a broader theory of piracy (which would have resulted in tangled claims of universal jurisdiction).¹⁷⁵

As Ruth Wedgwood has noted, for modern tastes there is substantial room to question Marshall's jurisdictional arguments.¹⁷⁶ These possible flaws of logic and principle would seem to undermine the force of Congressman Marshall's speech in general. In any event, they are peripheral to our purposes here. For the ultimate foundation of Marshall's defense of executive power in the Nash/Robbins affair was the law created by treaty. In the beginning,¹⁷⁷ middle,¹⁷⁸ and end of his speech,¹⁷⁹ Marshall emphasized that the extradition was "completely within the letter and spirit" of the 27th Article of the Treaty.¹⁸⁰ Moreover, because Nash was not charged with a crime triable in United States courts, Marshall concluded that this "is the precise case in which his surrender was stipulated by treaty."¹⁸¹

With this foundation Marshall recurs to a simple constitutional syllogism to establish the authority of President Adams to act in the matter: Under the force of the Take Care Clause the President "is charged to execute the laws"; "[a] treaty is declared to be a law"; the President "must then execute [the] treaty, where he, and he alone, possesses the means of executing it."¹⁸² Notice, significantly, that the foundation of this syllogism is not some free-standing executive power to generate law, but rather the default authority—about which more below¹⁸³—of the President to execute the law first established by the Treaty.

175. *See id.* at 602 ("For the murder, not the piracy, Nash was delivered up. Murder, and not piracy, is comprehended in the 27th article of the treaty between the two nations.").

176. *See* Wedgwood, *supra* note 5, at 346 (raising doubts about Marshall's "inarticulate argument" on the finality of judgments by Article III courts and calling into question Marshall's "confabulated argument" about the extraterritorial jurisdiction of Article III courts); *id.* at 346–47 (asserting that Marshall's use of international law as a limit on jurisdiction of courts is "sleight of hand").

177. ANNALS, *supra* note 1, at 597 (statement of Rep. Marshall on Mar. 7, 1800) (stating Marshall's "first proposition . . . that the case of Thomas Nash . . . was completely within the 27th article of the Treaty of Amity, Commerce, and Navigation" between Great Britain and the United States).

178. *Id.* at 605 (asserting that it had been "demonstrated . . . that the case [of Thomas Nash] was completely within the letter and the spirit of the twenty-seventh article of the treaty").

179. *Id.* at 616 (concluding that "the case of Thomas Nash, as stated to the President, was completely within the twenty-seventh article of the treaty").

180. *Id.* at 605.

181. *Id.* at 612.

182. ANNALS, *supra* note 1, at 613 (statement of Rep. Marshall on Mar. 7, 1800).

183. *See infra* notes 243–50 and accompanying text.

Marshall also expressly denied that any substantive gap existed in the Treaty.¹⁸⁴ Instead, he analogized the case to a statute and reasoned that “[t]he treaty . . . is as obligatory as an act of Congress making the same declaration.”¹⁸⁵ Thus, just like the background understanding for a statute, the President has the authority to carry out the “law” created by the Treaty.¹⁸⁶ As a matter of emphasis, Marshall also acknowledged that, if a substantive gap had existed in the law, the President would not have the authority to fill it.¹⁸⁷

The limited nature of the executive power Marshall described is finally revealed by Congress’s power of curtailment. Marshall declared that, although the President may have a default authority to execute treaty law, such authority must yield to the legislative powers of Congress. “Congress, unquestionably, may prescribe the mode,” Marshall affirmed.¹⁸⁸ Indeed, although the law at issue emanated from an international treaty, he asserted that “Congress may devolve on others the *whole execution* of the contract.”¹⁸⁹ This congressional power of curtailment should alone give executive branch enthusiasts pause in expounding on Marshall’s description of executive authority to execute the specific treaty at issue there.¹⁹⁰

184. See ANNALS, *supra* note 1, at 614 (statement of Rep. Marshall on Mar. 7, 1800) (stating that “it is not admitted or believed that there is such a total omission in this case”).

185. *Id.* (asking if there were such a statute “could the President, who is bound to execute the laws, have justified the refusal to deliver up the criminal, by saying, that the Legislature had totally omitted to provide for the case?”).

186. In fact, when a bill was later introduced in Congress to implement the 27th Article of the Jay Treaty in express terms, Marshall proposed an amendment that would have empowered the President to extradite on his decision alone. See *id.* at 654 (statement of Rep. Marshall on Apr. 2, 1800).

187. See *id.* at 614 (declaring that “the Executive cannot supply a total Legislative omission”).

188. *Id.*

189. ANNALS, *supra* note 1, at 614 (statement of Rep. Marshall on Mar. 7, 1800) (emphasis added). Marshall himself put a point on this principle as Chief Justice of the Supreme Court only four years later. In *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), Marshall authored an opinion on the power of the President to contravene an act of Congress that addressed the seizure of American vessels on the high seas. Citing both the Take Care Clause and the President’s status as Commander in Chief, Marshall first observed that “[i]t is by no means clear that the president of the *United States*” might not have empowered the seizure “without any special authority for that purpose.” *Id.* at 177. He also admitted that “the first bias of my mind was very strong in favour of” recognizing presidential authority to do so. *Id.* at 179. “But,” he conceded, “I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.” *Id.* For an analysis of the Court’s limitation of executive power in this case, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 967–70 (2008). See also *id.* at 969–70, 970 n.88 (noting that Marshall’s analysis in *Little v. Barreme* is “perfectly consistent” with his “sole organ” speech in Congress).

190. For a broader examination of the power of Congress to curtail executive power, even in foreign affairs, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the*

B. A Treaty “of a Very Different Nature”¹⁹¹

John Marshall did not even make a claim about executive power in the enforcement of all treaties. He explained generally that the case of Thomas Nash was “completely within” the extradition provision of the Jay Treaty.¹⁹² But he likewise structured his defense of President Adams with reference to the specific circumstances of that specific treaty provision.

Most important, Marshall made clear that the executive power he was describing did not extend to treaties that address the rights of individuals; such treaties, he declared, properly fall within the province of the judiciary: “A case in law or equity proper for judicial decision may arise under a treaty, where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court.”¹⁹³ For illustration, he referred to treaties already then in effect that secured the individual rights of foreign citizens in the United States as well as a hypothetical treaty provision that would prescribe domestic “punishment” instead of external extradition.¹⁹⁴

In the same vein, Marshall expressly affirmed that a treaty itself may provide for execution by the courts. (We might compare here his statement that Congress as a whole likewise may “prescribe the mode” for the execution of a treaty.¹⁹⁵) Marshall did so by distinguishing an existing consular treaty that stipulated performance “through the medium of the courts.”¹⁹⁶ The treaty provision at issue in the extradition of Thomas Nash, in contrast, was “of a very different nature.”¹⁹⁷ For, as Marshall frequently emphasized,¹⁹⁸ the 27th Article of the Jay Treaty contemplated a formal international law act of delivery of an accused to a foreign state but did not prescribe the “mode” for doing so.¹⁹⁹

Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding, 121 HARV. L. REV. 689, 743–48 (2008); Barron & Lederman, *supra* note 189, *passim*.

191. ANNALS, *supra* note 1, at 608 (statement of Rep. Marshall on Mar. 7, 1800).

192. See *supra* notes 177–81 and accompanying text.

193. ANNALS, *supra* note 1, at 606 (statement of Rep. Marshall on Mar. 7, 1800).

194. *Id.* at 606–07.

195. *Id.* at 614.

196. *Id.* at 608.

197. *Id.*; see also *id.* at 614 (emphasizing that the Executive properly should be “entrusted” with execution of a treaty “like that under consideration”).

198. See ANNALS, *supra* note 1, at 609 (statement of Rep. Marshall on Mar. 7, 1800) (contrasting the case of a prize dispute between two individuals and concluding that “[t]he demand of a man made by a nation stands on different principles”); *id.* at 611 (distinguishing a domestic criminal prosecution from “a provision for the performance of a national compact for the surrender to a foreign Government of an offender against that Government”); *id.* at 613 (asserting that the case of Thomas Nash “was in its nature a national demand made upon the nation” and concluding that “the demand is not a case for judicial cognizance”).

199. Marshall made the same point in his public *Virginia Federalist* letter. See Letter to the Virginia Federalist (Sept. 7, 1799), in MARSHALL PAPERS, *supra* note 136, at 23, 25 (reasoning

C. “*The Sufficiency of the Evidence was Submitted Entirely to the Judge*”²⁰⁰

This distinction between individual treaty rights and government treaty powers is further illustrated by Marshall’s treatment of the evidentiary condition for extradition in the Jay Treaty. Recall that Secretary of State Pickering’s letter to Judge Bee on behalf of President Adams expressly reserved this issue for judicial determination (a point emphasized in the version of the letter later produced to Congress).²⁰¹

Marshall repeatedly stressed this point in his defense of Adams. As an abstract matter, Marshall confirmed that the Treaty permitted extradition only “if supported by proof.”²⁰² Therefore, Nash “ought to have been delivered” under the Treaty only if “the necessary evidence [of the murder] was produced.”²⁰³

As he turned to his defense of Adams’s action in this case, Marshall then emphasized that the President left such evidentiary issues for judicial determination. He first observed that Adams, in giving his “advice and request,” was not even aware of Nash’s surprise claim of American citizenship.²⁰⁴ But Marshall also “defended the conduct of the President on [an]other and still stronger ground” that delivery was directed only “if satisfactory evidence of the murder should be adduced.”²⁰⁵ Indeed, Marshall declared, “[t]he sufficiency of the evidence was submitted entirely to the Judge.”²⁰⁶

Marshall emphasized the same point on the essentially legal question of whether Nash had committed the covered crime of “murder.”²⁰⁷ Recall that a principal thrust of the Republican attack was that Nash in fact was an American sailor who had been impressed by the British.²⁰⁸ Marshall stressed, however, that Adams had left this issue as well to judicial determination.²⁰⁹ A homicide committed in resisting impressment is justified and therefore is not

that because “[t]he treaty has not pointed out any mode” of execution, the proper department for carrying it out was the President). We will have more to say about this below. *See infra* notes 243–50 and accompanying text.

200. ANNALS, *supra* note 1, at 617 (statement of Rep. Marshall on Mar. 7, 1800).

201. *See supra* notes 82–85 and accompanying text.

202. ANNALS, *supra* note 1, at 597 (statement of Rep. Marshall on Mar. 7, 1800).

203. *Id.* at 605.

204. *Id.* at 617.

205. *Id.*; *see also id.* at 616 (observing that President Adams properly informed the judge that Nash ought to be delivered “provided evidence of the fact was adduced”).

206. *Id.* at 617.

207. *See* Treaty of Amity, *supra* note 12, art. XXVII; *see also supra* notes 69–71 and accompanying text.

208. *See supra* notes 18–19 and accompanying text.

209. ANNALS, *supra* note 1, at 617 (statement of Rep. Marshall on Mar. 7, 1800).

murder, Marshall reasoned.²¹⁰ But Adams had advised Judge Bee to deliver Nash only “on such evidence as . . . would have been sufficient to have induced his commitment and trial for murder.”²¹¹ “Of consequence,” Marshall declared, “the decision of the President was so expressed as to exclude the case of an impressed American liberating himself by homicide.”²¹²

Marshall did not expressly connect these points with his affirmation that individual treaty rights fall within the province of the judiciary, not the Executive. But in perhaps the most telling passage of the speech, Marshall acknowledged the executive power to act under the Treaty ultimately is subject to judicial review: “[I]f the President should cause to be arrested under the treaty an individual who was so circumstanced as not to be properly the object of such an arrest,” Marshall concluded, “he may perhaps bring the question of the legality of his arrest before a judge, by a writ of habeas corpus.”²¹³

D. Understanding the Nature of a Self-Executing Government Treaty Power

The remainder of our examination of John Marshall's speech will benefit from a summary of the analysis to this point. First, as the political context might predict, Marshall focused his defense of President Adams on the specific treaty at issue. His description of executive power thus had as its reference the specific circumstances of the treaty provision—or if one is generous, the type of treaty provision—at issue. He also expressly excluded from executive authority those treaty rights that “are to be asserted or defended in court.”²¹⁴ And where the President initially acts in a way that may affect such rights, that executive action is subject to ultimate judicial review. Finally, Marshall made clear that the executive power to execute a treaty by default only applies where the Legislature has not otherwise prescribed the mode or agency of doing so. Marshall, in short, did not assert a broad executive power even on the execution of all treaties.

Why, then, has Marshall's speech attracted so much attention from executive branch enthusiasts? The reason most likely lies in the expansive rhetoric he employs to explain his narrower points. As we turn to this rhetoric, we must again return to context. A principal—perhaps the principal—legal charge against Adams was that he had improperly decided issues of law in the

210. *Id.* (“Had Thomas Nash been an impressed American, the homicide . . . would, most certainly, not have been a murder.”).

211. *Id.*

212. *Id.*

213. *Id.* at 615.

214. ANNALS, *supra* note 1, at 606 (statement of Rep. Marshall on Mar. 7, 1800).

extradition of Thomas Nash.²¹⁵ In response, Marshall stated that “[a] variety of legal questions must present themselves in the performance of every part of Executive duty, but these questions are not therefore to be decided in court.”²¹⁶ Such was the case of Thomas Nash.

Whether the case was within the Treaty (a “*casus foederis*”), Marshall stated, is indeed “a question of law, but of political law.”²¹⁷ He then reasoned that such a question “depend[s] on principles never submitted to courts.”²¹⁸ This applies as well with reference to the judicial power of Article III, for “the Judicial power cannot extend to political compacts.”²¹⁹ But, because the President is the “sole organ” in external relations and “possesses the whole Executive power,” and because “[t]he treaty . . . is a law,”²²⁰ he nonetheless has the power to “execute the contract by any means [he] possesses.”²²¹

These are strong words. Plucked out of context, such a claim by a person who was to become perhaps the country’s most famous early Chief Justice would indeed lead one to think that something profound is at work.

A more detached assessment reveals that the executive power Marshall is describing is not at all extraordinary. By March of 1800, the Supreme Court and the Executive Branch had indeed confronted the effect of treaties on numerous occasions. But as of this time, barely a decade after the Constitution came into effect, the Supreme Court had not yet analyzed in detail the broad implications of Article VI’s command that “all” treaties are the “Law of the Land.”²²² Nonetheless, Marshall himself would reason three decades later, then as Chief Justice, that some treaties—those that are merely “executory”

215. *See id.* at 612 (noting that congressional opponents had “contended that this was a case proper for the decision of the courts, because points of law occurred, and points of law must have been decided in its determination”).

216. *Id.*

217. *Id.* at 613 (stating that whether the case was within the Treaty “was a question of law, but no man could have hazarded the opinion that such a question must be carried into court, and can only be there decided”).

218. *Id.*; *see also id.* at 615 (concluding that “[i]t is . . . demonstrated, that, according to the principles of the American Government, the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question the power to decide which rests alone with the Executive department”).

219. ANNALS, *supra* note 1, at 607 (statement of Rep. Marshall on Mar. 7, 1800).

220. *Id.* at 613.

221. *Id.* at 614.

222. U.S. CONST. art. VI.

rather than “executed”²²³—do not of their own force create immediately enforceable rights or obligations in domestic law.²²⁴

To understand Marshall’s rhetoric of 1800 against this backdrop we must first recognize that he is describing two separate (although related) executive powers. One is an external power of contact, the other a domestic power of action. A proper understanding of this distinction requires that we pull apart the two issues and analyze them separately.

1. The President as “Sole Representative”

When carefully considered, John Marshall’s descriptions of the President as “sole organ” and “sole representative” in foreign affairs should be among the passages of least enduring constitutional significance. What is commonly omitted in modern quotations is that the referent for these statements is formal communication by a foreign state directed at the United States. The immediately succeeding sentence thus states, “Of consequence, the [extradition] demand of a foreign nation can only be made on him.”²²⁵ The same is true of the vehicle for delivery of the response. Thus, Marshall stated in the next paragraph, because the President “possesses the whole Executive power[,] . . . any act to be performed by the force of the nation is to be performed through him.”²²⁶

In this aspect of his speech, Marshall thus merely sketched out the concept that the President is the vehicle of formal communication with foreign states. This point comes out most clearly in his earlier public letter in the *Virginia Federalist*.²²⁷ Marshall again emphasized there that the Treaty “has not pointed out any mode” of execution; thus, “we must recur to principles and the nature of things . . . to discover it.”²²⁸ “Because the governments [are] the only channel of communication between the nations,” he reasoned, “the natural, and obvious and the proper mode is an application . . . to the executive of the nation to which [the person] has fled.”²²⁹ And as “a mere question of

223. For an explanation of this terminological distinction, see David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANSNAT’L L. 20, 85–91 (2006).

224. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (“[W]hen the terms of [a treaty] stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”).

225. ANNALS, *supra* note 1, at 613 (statement of Rep. Marshall on Mar. 7, 1800).

226. *Id.* Marshall thus repeatedly refers to the formal relationship with the foreign power, both respecting “demand” and the “act of delivering up an individual.” *Id.* at 608.

227. See Letter to the Virginia Federalist (Sept. 7, 1799), in MARSHALL PAPERS, *supra* note 136, at 23.

228. *Id.* at 25.

229. *Id.*

state,” the application by Britain to deliver up a fugitive under the Treaty “would be to the executive and not to the judiciary, or any other inferior department of the government.”²³⁰

At the time, this reasoning may have been of special value in laying out the implications from the President’s constitutional authority over ambassadorial relations.²³¹ For modern sensibilities, however, the principle has long since entered the mainstream. The formal status of the President as “the constitutional representative of the United States in its dealings with foreign nations”²³² developed separately and without express reliance on Marshall’s speech. It is now familiar ground.²³³

In this respect, in short, Marshall’s “sole organ” observation merely stands for the unproblematic proposition that the President is the conduit for formal interaction with foreign states.²³⁴ For Marshall, this principle had immediate application in specific reference to the extradition Treaty with Great Britain.

230. *Id.* at 25–26.

231. *See* U.S. CONST. art. II, § 2 (providing that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls”); *id.* art. II, § 3 (granting to the President the power to “receive Ambassadors and other public Ministers”). Indeed, others had already advanced this proposition by that time. On November 22, 1793, Jefferson wrote to the French Minister, Edmond Charles Genet, that the President was “the only channel of communication between this country and foreign nations, [and] it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation.” Letter from Thomas Jefferson to Edmond Charles Genet (Nov. 22, 1793), *in* 6 THE WRITINGS OF THOMAS JEFFERSON 451 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1895); *see also* *Pacificus* No. 7 (July 27, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 130, 135 (Harold C. Syrett ed., 1969) (observing that the President is “[t]he constitutional organ of intercourse between the U[nited] States & foreign Nations”). A Senate Committee also agreed with the proposition in 1816. *See* 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 1789–1901, S. Doc. No. 56-231, pt. 8, at 24 (1901) (“The President is the constitutional representative of the United States with regard to foreign nations.”).

232. *United States v. Louisiana*, 363 U.S. 1, 35 (1960).

233. *See, e.g.,* *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (“[T]he historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring))); *see also* *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion) (declaring that the President has “the lead role . . . in foreign policy”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (stating that “[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation”).

234. Thus, for example, the “sole organ” reference has had very little if anything to do with the substantive or jurisprudential reasons for any particular presidential power. *See* *Hamdi v. Rumsfeld*, 542 U.S. 507, 580–81 (2004) (Thomas, J., dissenting) (asserting that Marshall advanced his “sole organ” proposition “for the[] reasons” of the “structural advantages of a unitary Executive” in national security and foreign affairs).

Because the President is the formal representative of the United States in executing the Treaty in the external relations with Great Britain, Marshall reasoned that “any act to be performed by the force of the nation is to be performed through him.”²³⁵

2. The President and the Exercise of a Self-Executing Government Power

It is a common view that in his address of 1800 John Marshall was speaking *solely* of the President's status as a medium of external communication.²³⁶ Careful consideration nonetheless reveals that Marshall had more to say than that. For the speech also has a second, domestic law premise—thus far largely overlooked by scholars—that is substantially more subtle and relates to the creation of a government power by treaty.

At its core, the dispute between the Republicans and Marshall—to the extent it was anything other than pure political posturing for the impending national elections²³⁷—was, to use modern terminology, over the issue of self-execution. The language of the 27th Article was not at all clear on this point: It provided merely that the parties “agreed” to extradite covered fugitives.²³⁸ The Republicans argued that, without an express “mode of performance,” the Treaty did not operate of itself—i.e., without legislative implementation—to create a domestic law power of extradition.²³⁹ The logical consequence for these opponents was that, given the absence of such legislation, President Adams lacked the authority to bring about the delivery of Nash/Robbins to the British.²⁴⁰

Marshall's speech, in contrast, simply proceeded on the premise that the extradition provision was—again in modern terms—self-executing. In other

235. ANNALS, *supra* note 1, at 613 (statement of Rep. Marshall on Mar. 7, 1800).

236. See EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1984, at 208 (Randall W. Bland et al. eds., 5th rev. ed. 1984) (“Clearly, what Marshall had foremost in mind was simply the President's role as *instrument of communication* with other governments.”); KOH, *supra* note 39, at 81 (stating that Marshall's speech was “uncontroversial . . . because [Congress] had largely acquiesced in the president's narrower dominance over diplomatic communications”); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 52 (1988) (asserting that Marshall's sole organ statement “meant nothing more than that only the President communicates with foreign nations; he is the organ of communication”).

237. See *supra* Part II.B.

238. Treaty of Amity, *supra* note 12, art. XXVII (stating that “[i]t is further agreed, that His Majesty and the United States, on mutual requisitions, by them respectively, . . . will deliver up” the covered individuals).

239. ANNALS, *supra* note 1, at 614 (statement of Rep. Marshall on Mar. 7, 1800); see also Wedgwood, *supra* note 5, at 335–38 (examining the arguments of Republican Albert Gallatin).

240. See ANNALS, *supra* note 1, at 614 (statement of Rep. Marshall on Mar. 7, 1800) (describing the opposition argument that “although [extradition] should be properly an Executive duty, yet it cannot be performed until Congress shall direct the mode of performance”).

words, Marshall assumed, but did not analyze. The only real information we have on Marshall's thinking on this score comes from his open letter in the *Virginia Federalist*: The drafters of the Treaty *must have* intended direct enforcement, Marshall reasoned, for "it would be absurd to suppose the parties meant to stipulate for a thing which could not be performed."²⁴¹ On this assumption, Marshall's examination of the President's role in execution moves forward squarely on the foundation that the Treaty at issue "is a law."²⁴²

The next move is significant. The Treaty, as we have seen, identified neither the mode nor the agency for execution, that is, for the formal decision to deliver an accused to Great Britain upon its request.²⁴³ The question that remained, therefore, was an interpretive one: *Whom*, as a matter of domestic authority, did the Treaty empower to carry out the "law" it established? It is on this interpretive issue that Marshall's discussion of the President's role as external representative becomes relevant beyond the issue of mere communication with foreign states.

Marshall first indicated that, because both the formal demand by and formal delivery to Great Britain is a matter of external relations, the national Executive—the "sole representative with foreign nations"²⁴⁴—might have to be involved in any event.²⁴⁵ He then paired this external role with the duty under the Take Care Clause²⁴⁶ to conclude that the President must have been the empowered domestic agency²⁴⁷ to enforce the treaty obligation as a domestic law matter as well.²⁴⁸ Indeed, lacking any other prescribed agency,

241. Letter to the *Virginia Federalist* (Sept. 7, 1799), in MARSHALL PAPERS, *supra* note 136, at 23, 24 ("There must . . . have been some mode of carrying the provision of the treaty in this respect into execution, or else the articles would be nugatory; and it would be absurd to suppose the parties meant to stipulate for a thing which could not be performed.").

242. ANNALS, *supra* note 1, at 613 (statement of Rep. Marshall on Mar. 7, 1800).

243. *Id.* at 614.

244. *Id.* at 613.

245. *Id.* Moreover, to do otherwise could be dangerous to individuals and the state as a whole. As Marshall stated in the *Virginia Federalist* letter, "a removal of any person . . . without an application to the chief magistrate would not only be dangerous to the personal safety of individuals, but would be an indignity and affront." Letter to the *Virginia Federalist* (Sept. 7, 1799), in MARSHALL PAPERS, *supra* note 136, at 23, 25.

246. See U.S. CONST. art. II, § 3.

247. The use of the passive is intentional here. In his congressional speech, Marshall identifies neither the empowering authority nor the empowering mechanism. In his *Virginia Federalist* letter, Marshall nonetheless "recur[red] to principles and the nature of things" and reasoned that, in absence of a prescribed mode, the President is the proper authority to execute the Treaty. Letter to the *Virginia Federalist* (Sept. 7, 1799), in MARSHALL PAPERS, *supra* note 136, at 23, 25.

248. See ANNALS, *supra* note 1, at 614 (statement of Rep. Marshall on Mar. 7, 1800) ("Ought not this person to perform the object, although the particular mode of using the means has not been prescribed?").

the President “alone” possessed the “means of executing” the specific treaty provision at issue there.²⁴⁹ This is, in short, inference by default.²⁵⁰

The rub comes in Marshall’s description of the discretion that attends this default power of execution. As we have seen, Marshall seems to say that the very question of whether the Treaty applies is one of “political law” of a sort that “depend[s] on principles never submitted to courts.”²⁵¹

The first important point on these seemingly provocative words is that Marshall himself is at turns unclear and contradictory. To justify his claim of “political law” Marshall repeatedly referred to the “duty” to comply with Great Britain’s extradition request under the Treaty,²⁵² a point made most clearly in his *Virginia Federalist* letter.²⁵³ Elsewhere in his Congressional speech, however, he suggested that the President may have the discretion to decide *not* to extradite even when the Treaty unmistakably applies.²⁵⁴

But we must not be unduly harsh to Marshall on this score. The 27th Article of the Treaty with Great Britain was the first true extradition agreement in our nation’s history.²⁵⁵ Indeed, formal extradition treaties of any kind were exceedingly rare throughout the world prior to the nineteenth century.²⁵⁶

249. *Id.* at 613.

250. With this power and duty, Marshall then reasons that President Adams was required to communicate his views on the extradition to Judge Bee. As he explained in the *Virginia Federalist*, “it follows necessarily” that the President’s conveyance of the requisition by Great Britain under the Treaty “ought to have been accompanied with some expression of the will of Government upon the subject.” Letter to the *Virginia Federalist*, in MARSHALL PAPERS, *supra* note 136, at 23, 26.

251. ANNALS, *supra* note 1, at 613 (statement of Rep. Marshall on Mar. 7, 1800).

252. *See id.* at 614 (asserting that although Congress “may prescribe the mode,” until it does so “it seems the duty of the Executive department to execute the contract by any means it possesses”).

253. *See* Letter to the *Virginia Federalist* (Sept. 7, 1799), in MARSHALL PAPERS, *supra* note 136, at 23, 24 (stating that the extraction provision “contain[s] an absolute engagement”); *id.* (“Nor can either nation refuse, for the words are positive.”); *id.* at 28 (concluding with the reasoning that “[u]pon the whole, the President appears to have done no more than his duty”).

254. *See* ANNALS, *supra* note 1, at 614–15 (statement of Rep. Marshall on Mar. 7, 1800) (“If, at any time, policy may temper the strict execution of the contract, where may that political discretion be placed so safely as in the department whose duty it is to understand precisely the state of political intercourse and connexion between the United States and foreign nations . . . ?”); *see also* Letter to the *Virginia Federalist* (Sept. 7, 1799), in MARSHALL PAPERS, *supra* note 136, at 23, 26.

255. *See* Parry, *supra* note 103, at 108. An earlier consular convention with France in 1788 was limited to deserting sailors and expressly provided that extradition hearings would occur before “the courts, judges and officers competent” of each country. *See* Convention Between His Most Christian Majesty and the United States of America, for the Purpose of Defining and Establishing the Functions and Privileges of their Respective Consuls and Vice-Consuls, U.S.-Fr., art. IX, Nov. 14, 1788, 8 Stat. 106.

256. *See* 1 OPPENHEIM’S INTERNATIONAL LAW 950–51 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

Moreover, at the time of Marshall's speech the background understanding of international law favored the absence of any general duty of extradition.²⁵⁷ In large measure, therefore, Marshall was writing on a blank slate on the respective roles of the Legislative, Executive, and Judicial Branches in extradition matters, as well as on the interaction of international law obligation and domestic law action.

In any event, Marshall's assertions of "political law" do not reflect some grand theory of unbridled executive power. What is at work here, rather, is a discretionary governmental power founded in law. Marshall nowhere intimated that it is within the President's constitutional warrant to extradite an individual to a foreign power on his own initiative; to the contrary, he repeatedly emphasized, as we have seen, that President Adams's authority derived from the terms of a properly authorized and ratified treaty.²⁵⁸ The specific treaty provision Marshall addressed was "self-executing" in the sense that it created a domestic governmental *power to act* on an extradition request. Even this power, however, was subject to express limitations in the treaty (and of course other hierarchically superior legal principles²⁵⁹). Marshall then reasoned by default that the possessor of that power to act—to formally execute the Treaty by delivering a fugitive to a foreign state—was the national Executive.

Marshall of course did not use modern terminology to describe the power. But he did use two illustrations that should translate for the modern mind. He first raised, as a parallel hypothetical, a demand for extradition made *by the United States* to Great Britain under the same Treaty.²⁶⁰ He unsurprisingly reasoned that, although such a demand would require that the Executive resolve issues of law under the Treaty, "no man would say it was a question which ought to be decided in the courts."²⁶¹ The decision to make an extradition request of Great Britain on the international law foundations of a treaty, in other words, was for the Executive, not the courts.

Marshall separately drew an analogy to prosecutorial discretion. "A private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual," he noted.²⁶² "But a public prosecution carried on in the name of the United States can, without impropriety, be dismissed at the will of the Government."²⁶³ Such a decision of its nature

257. *Id.* at 948–50.

258. *See supra* Part III.A.

259. Of course, even if properly approved by the Senate and ratified by the President, a treaty may not contravene the Constitution itself. *See Reid v. Covert*, 354 U.S. 1, 16–17 (1957).

260. *See ANNALS, supra* note 1, at 613 (statement of Rep. Marshall on Mar. 7, 1800).

261. *Id.*

262. *Id.* at 609.

263. *Id.*; *see also id.* at 615 (making the same point).

involves legal determinations by executive branch officials. But even to this day, such exercises of prosecutorial discretion—except in the most extreme circumstances—do not require judicial intercession.

It is not at all unusual or suspect for the Executive Branch to exercise discretionary powers that do not depend on advance judicial approval. In addition to Marshall's own citation of prosecutorial discretion, a prominent example of this is a matter committed by law to agency discretion. As the Supreme Court declared in *Heckler v. Chaney*, "[t]his court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."²⁶⁴

It likewise is not at all uncommon—although the scholars have not focused substantial attention on this point—for treaties to delegate such a discretionary government power to act. Mutual Legal Assistance Treaties (of which nearly fifty exist) provide a good example.²⁶⁵ The purpose of these "MLATs" is to create a self-executing, though discretionary, power for executive branch agencies to assist foreign states through domestic investigatory powers.²⁶⁶ Another example in the same vein is prisoner exchange treaties (which are in force in relation to nearly seventy countries).²⁶⁷

Taken alone, we may fault Marshall's free-flowing "political law" rhetoric for failing to appreciate the important distinction between a basic power to act and the legality of any particular exercise of that power with reference to other rights secured by law. But again, we must resist the lawyer's impulse to craft arguments on text detached from context. Viewed in full perspective, Marshall's reference to "political law" within the authority of the Executive merely reflects the point that the President's default authority to execute the extradition Treaty did not—unlike modern practice—require *advance* judicial approval.²⁶⁸

264. 470 U.S. 821, 831 (1985) (concluding that a refusal to investigate the use of drugs for lethal injections was within the FDA's discretionary authority and not subject to judicial review).

265. See Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 925–26 (2004) (canvassing these and similar self-executing treaties).

266. See, e.g., *In re Comm'r's Subpoenas*, 325 F.3d 1287, 1290–91 (11th Cir. 2003) (describing the operation of such treaties).

267. Van Alstine, *supra* note 265, at 925.

268. This is consistent with the power of the political branches to act on deportation proceedings generally without advance judicial sanction. See, e.g., *Carlson v. Landon*, 342 U.S. 524, 537 (1952) ("The power to expel aliens, being essentially a power of the political branches of government, . . . may be exercised entirely through executive officers, 'with such opportunity for judicial review of their action as congress may see fit to authorize or permit.'" (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 713–15, 728 (1893))); see also *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

Nonetheless, the procedure actually followed by President Adams and defended by John Marshall—feeling their way, as it were, through the early constitutional dark—does not differ in substance from present legal practice for extradition treaties (of which nearly 110 are in force for the United States²⁶⁹). First, federal courts have consistently found that extradition treaties create a self-executing power to deliver fugitives to a foreign state.²⁷⁰ Recall also that President Adams merely offered his “advice and request” in a judicial proceeding already underway in federal court.²⁷¹ Under modern practice, federal prosecutors likewise commonly initiate extradition proceedings in federal court at the behest of the requesting country.²⁷² The assigned district judge then issues an arrest warrant and holds a hearing—to which the Federal Rules of Criminal Procedure and Federal Rules of Evidence do not apply—on the sufficiency of the evidence as required by the underlying extradition treaty.²⁷³

It is also “taken for granted” today that the President has the “ultimate” authority on whether to extradite the charged fugitive.²⁷⁴ Indeed, as the leading treatise on the subject has concluded, “United States jurisprudence reflects the view that an extradition treaty does not *per se* create an obligation to extradite.”²⁷⁵ Even under this approach that formally involves advance judicial engagement, the President retains the discretion *not* to extradite a requested fugitive.²⁷⁶

To be sure, Marshall’s analysis in early 1800 contemplated that the Executive Branch would make its own legal determinations concerning whether a particular case satisfied the requirements set forth in the treaty. But he also made clear that such legal determinations are not within the final authority of the President. Indeed, Marshall emphasized toward the end of his famous speech that the execution of this “political law” is subject to judicial oversight. Although the President may decide to act on the authority delegated by the extradition Treaty, Marshall declared, an affected individual may “bring

269. See Van Alstine, *supra* note 265, at 925.

270. See *id.* (citing cases).

271. See *supra* Part II.A.

272. See Parry, *supra* note 103, at 95.

273. See *id.*

274. *Id.* at 150.

275. M. Cherif Bassiouni, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 150 (4th ed. 2002).

276. Strong reasons exist to question this jurisprudence, in that it represents a violation of the very international law obligations the treaty was designed to create. See *id.* at 151 (concluding that “the United States’ view of the permissible scope of executive discretion conflicts with the obligations of the nation to perform its agreement in good faith”); see also David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 46–55 (2002) (arguing that an international law obligation under a treaty is also a domestic law obligation under the Supremacy Clause of Article VI).

the question of the legality of [the President's action] before a judge" as an ultimate check on an executive power grounded in law.²⁷⁷

CONCLUSION

A lawyer's recounting of legal history carries an inherent risk, to put the matter politely, of unintentional distortion. The legal mind is schooled in argumentation, in seeking out support for a particular, often preassigned or predetermined position. This risk of distorting an historical event through description only compounds with successive repetition.

The analysis in this work reveals that, as a result of two centuries of telling and retelling (most notably by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*²⁷⁸), the story of John Marshall's 1800 speech has strayed far from the original. When properly situated in its political context, strong incentives pushed John Marshall to draw his description of executive power as narrowly as possible. And a detached review of his speech in its entirety reveals that this in fact is what he did. With a clear appreciation of the political backdrop to the attack on President (and candidate) John Adams, Marshall's speech ultimately reflected only a defense of a specific presidential action in a specific dispute under a specific treaty.

There is, in short, little extraordinary in John Marshall's description of executive power in 1800. The power he described was, first, derived from his own assumption that the specific treaty at issue created immediately enforceable domestic law. In absence of an expressly prescribed mode or agency, Marshall simply reasoned that, by default, the President must have the power to execute the "law" the Treaty created. For modern understandings, that this power involved an initial exercise of discretion by the Executive is not at all unusual. Like a matter committed to agency discretion by Congress, a great number of modern treaties in fact create precisely the kind of domestic law power to act that Marshall addressed in 1800. Ultimately, Marshall emphasized that any exercise of the delegated power by the Executive is subject to the final authority of the Judicial Branch, as he would famously declare only three years later, "to say what the law is."²⁷⁹

277. ANNALS, *supra* note 1, at 615 (statement of Rep. Marshall on Mar. 7, 1800).

278. See *supra* notes 35–39 and accompanying text.

279. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

