stantial as to be hardly perceivable by a mind so merely practical as mine. He finally was convinced that it was so and abandoned it.

"In the mean time, however, he had dwelt so much, in conversation, on these subjects that he had dissipated our majority, and it never could again be compacted. The consequence was that the bill was lost." [1]

Marshall's most notable performance while in Congress was his effort in the celebrated Jonathan Robins case — "a speech," declares that capable and cautious critic, Henry Adams, "that still stands without a parallel in our Congressional debates." [2] In 1797 the crew of the British ship Hermione mutinied, murdered their officers, took the ship to a Spanish port, and sold it. One of the murderers was Thomas Nash, a British subject. Two years later, Nash turned up at Charleston, South Carolina, as the member of a crew of an American schooner.

On the request of the British Consul, Nash was seized and held in jail under the twenty-seventh article of the Jay Treaty. Nash swore that he was not a British subject, but an American citizen, Jonathan Robins, born in Danbury, Connecticut, and impressed by a British man-of-war. On overwhelming evidence, uncontradicted except by Nash, that the accused man was a British subject and a murderer, President Adams requested Judge Bee, of the United States District Court of South Carolina, to

[1] Sedgwick to King, May 11, 1800; King, iii, 237–38.
[2] Adams: *Gallatin*, 232.

deliver Nash to the British Consul pursuant to the article of the treaty requiring the delivery.[1]

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.

The fires kindled by the Alien and Sedition Laws did not heat to greater fervency the public imagination. Here was a case personal and concrete, flaming with color, full of human appeal. Jefferson took quick party advantage of the incident. "I think," wrote he, "no circumstance since the establishment of our government has affected the popular mind more. I learn that in Pennsylvania it had a great effect. I have no doubt the piece you inclosed will run through all the republican papers, & carry the question home to every man's mind." [2]

"It is enough to call a man an *Irishman*, to make it *no murder* to pervert the law of nations and to degrade national honor and character. . . . Look at what has been done in the case of *Jonathan*

[1] United States *vs.* Nash *alias* Robins, Bee's *Reports*, 266.

[2] Jefferson to Charles Pinckney, Oct. 29, 1799; *Works:* Ford, ix, 87.

Robbins," [*sic*] exclaimed the "Aurora." "A British lieutenant who never saw him until he was prisoner at Charleston swears his name is Thomas Nash." So "The man is hanged!" [1]

For the purposes of the coming presidential campaign, therefore, the Robins affair was made the principal subject of Republican congressional attack on the Administration. On February 4, the House requested the President to transmit all the papers in the case. He complied immediately.[2] The official documents proved beyond a doubt that the executed sailor had not been an American citizen, but a subject of the British King and that he had committed murder while on board a British vessel on the high seas.

The selectmen of Danbury, Connecticut, certified that no such person as Jonathan Robins nor any family of the name of Robins ever had lived in that town. So did the town clerk. On the contrary, a British naval officer, who knew Nash well, identified him.[3]

Bayard, for the Federalists, took the aggressive and offered a resolution to the effect that the President's conduct in the Robins case "was conformable to the duty of the Government and to . . . the 27th article of the Treaty . . . with Great Britain." [4]

Forced to abandon their public charge that the Administration had surrendered an innocent Ameri-

[1] *Aurora*, Feb. 12, 1800. [2] *Annals*, 6th Cong., 1st Sess., 511.
[3] *Ib.*, 515–18. Nash himself confessed before his execution that he was a British subject as claimed by the British authorities and as shown by the books of the ship Hermione.
[4] *Ib.*, 526.

can citizen to British cruelty,[1] the Republicans based their formal assault in Congress upon the ground that the President had disobeyed the laws, disregarded the Constitution, and taken upon himself the discharge of duties and functions which belonged exclusively to the courts. They contended that, even if Nash were guilty, even if he were not an American citizen, he should, nevertheless, have been tried by a jury and sentenced by a court.

On February 20, Livingston of New York offered the Republican resolutions to this effect. Not only was the President's conduct in this serious business a "dangerous interference of the Executive with judicial decisions," declared the resolution, but the action of the court in granting the President's request was "a sacrifice of the Constitutional independence of the judicial power and exposes the administration thereof to suspicion and reproach." [2]

The House decided to consider the Livingston resolutions rather than those offered by Bayard, the Federalists to a man supporting this method of meeting the Republicans on the ground which the latter, themselves, had chosen. Thus the question of constitutional power in the execution of treaties came squarely before the House, and the great debate was on.[3] For two weeks this notable discussion continued. The first day was frittered away on questions of order.

The next day the Republicans sought for delay[4]

[1] The Republicans, however, still continued to urge this falsehood before the people and it was generally believed to be true.

[2] *Annals*, 6th Congress, 1st Sess., 532–33.

[3] *Ib.*, 541–47. [4] *Ib.*, 548.

— there were not sufficient facts before the House, they said, to justify that body in passing upon so grave a question. The third day the Republicans proposed that the House should request the President to secure and transmit the proceedings before the South Carolina Federal Court on the ground that the House could not determine the matter until it had the court proceedings.[1]

Marshall's patience was exhausted. He thought this procrastinating maneuver a Republican trick to keep the whole matter open until after the coming presidential campaign,[2] and he spoke his mind sharply to the House.

"Let gentlemen recollect the nature of the case," exclaimed Marshall; "the President of the United States is charged by this House with having violated the Constitution and laws of his country, by having committed an act of dangerous interference with a judicial decision — he is so charged by a member of this House. Gentlemen were well aware how much the public safety and happiness depended on a well or a misplaced confidence in the Executive.

"Was it reasonable or right," he asked, "to receive this charge — to receive in part the evidence in support of it — to receive so much evidence as almost every gentleman declared himself satisfied with, and to leave the charge unexamined, hanging over the head of the President of the United States . . . how long it was impossible to say, but certainly long enough to work a very bad effect? To him it

[1] *Annals*, 6th Cong., 1st Sess., 558.
[2] This, in fact, was the case.

seemed of all things the most unreasonable and unjust; and the mischief resulting therefrom must be very great indeed."

The House ought to consider the evidence it already had; if, on such examination, it appeared that more was needed, the matter could then be postponed. And, in any event, why ask the President to send for the court proceedings? The House had as much power to procure the papers as the President had. "Was he [the President] to be a *menial* to the House in a business wherein himself was seriously charged?"[1]

Marshall was aroused. To his brother he thus denounces the tactics of the Republicans: "Every stratagem seems to be used to give to this business an undue impression. On the motion to send for the evidence from the records of South Carolina altho' it was stated & prov'd that this would amount to an abandonment of the enquiry during the present session & to an abandonment under circumstances which would impress the public mind with the opinion that we really believed Mr. Livingston's resolutions maintainable; & that the record could furnish no satisfaction since it could not contain the parol testimony offered to the Judge & further that it could not be material to the President but only to the reputation of the Judge what the amount of the testimony was, yet the debate took a turn as if we were precipitating a decision without enquiry & without evidence."[2]

[1] *Annals*, 6th Cong., 1st Sess., 565.
[2] Marshall to James M. Marshall, Feb. 28, 1800; MS.

This Republican resolution was defeated. So was another by Gallatin asking for the papers in the case of William Brigstock, which the Republicans claimed was similar to that of Jonathan Robins. Finally the main question came on. For two hours Gallatin made an ingenious argument in support of the Livingston resolutions.[1]

The next day, March 7, Marshall took the floor and made the decisive speech which put a period to this partisan controversy. He had carefully revised his argument,[2] and it is to this prevision, so unlike Marshall's usual methods, that we owe the perfection of the reporter's excellent transcript of his performance. This great address not only ended the Republican attack upon the Administration, but settled American law as to Executive power in carrying out extradition treaties. Marshall's argument was a mingling of impressive oratory and judicial finality. It had in it the fire of the debater and the calmness of the judge.

It is the highest of Marshall's efforts as a public speaker. For many decades it continued to be published in books containing the masterpieces of American oratory as one of the best examples of the art.[3] It is a landmark in Marshall's career and a monument in the development of the law of the land. They go far who assert that Marshall's address is

[1] *Annals*, 6th Cong., 1st Sess., 595–96.

[2] Pickering to James Winchester, March 17, 1800; Pickering MSS., Mass. Hist. Soc. Also Binney, in Dillon, iii, 312.

[3] See Moore: *American Eloquence*, ii, 20–23. The speech also appears in full in *Annals*, 6th Cong., 1st Sess., 596–619; in Benton: *Abridgment of the Debates of Congress;* in Bee's *Reports*, 266; and in the Appendix to Wharton: *State Trials*, 443.

a greater performance than any of the speeches of Webster, Clay, Sumner, or other American orators of the first class; and yet so perfect is this speech that the commendation is not extreme.

The success of a democratic government, said Marshall, depended not only on its right administration, but also on the public's right understanding of its measures; public opinion must be "rescued from those numerous prejudices which . . . surround it." Bayard and others had so ably defended the Administration's course that he would only "reëstablish" and "confirm" what they had so well said.

Marshall read the section of the Jay Treaty under which the President acted: This provided, said he, that a murderer of either nation, fleeing for "asylum" to the other, when charged with the crime, and his delivery demanded on such proof as would justify his seizure under local laws if the murder had been committed in that jurisdiction, must be surrendered to the aggrieved nation. Thus Great Britain had required Thomas Nash at the hands of the American Government. He had committed murder on a British ship and escaped to America.

Was this criminal deed done in British jurisdiction? Yes; for "the jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world. . . . The nature of civil union" involves the "principle" that "the laws of a nation are rightfully obligatory on its own citizens in every situation where those laws are really extended to them."

This "is particularly recognized with respect to the fleets of a nation on the high seas." By "the opinion of the world . . . a fleet at sea is within the jurisdiction of the nation to which it belongs," and crimes there committed are punishable by that nation's laws. This is not contradicted by the right of search for contraband, as Gallatin had contended, for "in the sea itself no nation has any jurisdiction," and a belligerent has a right to prevent aid being carried to its enemy. But, as to its crew, every ship carried the law of its flag.

Marshall denied that the United States had jurisdiction, concurrent or otherwise, over the place of the murder; "on the contrary, no nation has any jurisdiction at sea but over its own citizens or vessels or offenses against itself." Such "jurisdiction . . . is personal, reaching its own citizens only"; therefore American authority "cannot extend to a murder committed by a British sailor on board a British frigate navigating the high seas." There is no such thing as "common [international] jurisdiction" at sea, said Marshall; and he exhaustively illustrated this principle by hypothetical cases of contract, dueling, theft, etc., upon the ocean. "A common jurisdiction . . . at sea . . . would involve the power of punishing the offenses . . . stated." Piracy was the one exception, because "against all and every nation . . . and therefore punishable by all alike." For "a pirate . . . is an enemy of the human race."

Any nation, however, may by statute declare an act to be piratical which is not so by the law of nations; and such an act is punishable only by that

particular state and not by other governments. But an act universally recognized as criminal, such as robbery, murder, and the like, "is an offense against the community of nations."

The Republican contention was that murder and robbery (seizure of ships) constituted piracy "by the law of nations," and that, therefore, Nash should have been indicted and tried by American authority as a pirate; whereas he had been delivered to Great Britain as a criminal against that nation.

But, said Marshall, a single act does not necessarily indicate piratical intent unless it "manifests general hostility against the world"; if it shows an "intention to rob generally, then it is piracy." If, however, "it be merely mutiny and murder in a vessel with the intention of delivering it up to the enemy, it" is "an offense against a single nation and not piracy." It was only for such murder and "not piracy" that "Nash was delivered." And, indisputably, this was covered by the treaty. Even if Nash had been tried and acquitted for piracy, there still would have remained the crime of murder over which American courts had no jurisdiction, because it was not a crime punishable by international law, but only by the law of the nation in whose jurisdiction the crime was committed, and to which the criminal belonged.

American law and American courts could not deal with such a condition, insisted Marshall, but British law and courts could and the treaty bound America to deliver the criminal into British hands. "It was an act to which the American Nation was bound by

a most solemn compact." For an American court to have convicted Nash and American authorities to have executed him "would have been murder"; while for them to have "acquitted and discharged him would have been a breach of faith and a violation of national duty."

It was plain, then, said he, that Nash should have been delivered to the British officers. By whom? The Republicans insisted that this authority was in the courts. Marshall demonstrated that the President alone could exercise such power. It was, he said, "a case for Executive and not for judicial decision." The Republican resolutions declared that the judicial power extends to *all* questions arising under the Constitution, treaties, and laws of the United States; but the Constitution itself provided that the judicial power extends only to all cases "*in law and equity*" arising under the Constitution, laws, and treaties of the United States.

"The difference was material and apparent," said Marshall. "A case in law or equity was a term well understood and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every question under the Constitution, it would involve almost every subject proper for Legislative discussion and decision; if to every question under the laws and treaties of the United States, it would involve almost every subject on which the Executive could act. The division of power . . . could exist no longer, and the other departments would be swallowed up in the Judiciary."

The Constitution did not confer on the Judiciary "any political power whatever." The judicial power covered only cases where there are "parties to come into court, who can be reached by its process and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit." Such a case, said Marshall, "may arise under a treaty where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court"; and he gave examples. "But the judicial power cannot extend to political compacts; as the establishment of the boundary line between American and British Dominions . . . or the case of the delivery of a murderer under the twenty-seventh article of our present Treaty with Britain. . . .

"The clause of the Constitution which declares that 'the trial of all crimes . . . shall be by jury'" did not apply to the decision of a case like that of Robins. "Certainly this clause . . . cannot be thought obligatory on . . . the whole world. It is not designed to secure the rights of the people of Europe or Asia or to direct and control proceedings against criminals throughout the universe. It can, then, be designed only to guide the proceedings of our own courts" in cases "to which the jurisdiction of the nation may rightfully extend." And the courts could not "try the crime for which Thomas Nash was delivered up to justice." The sole question was "whether he should be delivered up to a foreign tribunal which was alone capable of trying and punishing him." A provision for the trial of crimes

in the courts of the United States is clearly "not a provision for the surrender to a foreign Government of an offender against that Government."

If the murder by Nash were a crime, it is one "not provided for by the Constitution"; if it were not a crime, "yet it is the precise case in which his surrender was stipulated by treaty" which the President, alone, must execute. That in the Executive decision "judicial questions" must also be determined, argued nothing; for this often must be the case, as, for instance, in so simple and ordinary matter as issuing patents for public lands, or in settling whether vessels have been captured within three miles of our coasts, or in declaring the legality of prizes taken by privateers or the restoration of such vessels — all such questions, of which these are familiar examples, are, said Marshall, "questions of political law proper to be decided by the Executive and not by the courts."

This was the Nash case. Suppose that a murder were "committed within the United States and the murderer should seek an asylum in Great Britain!" The treaty covered such a case; but no man would say "that the British courts should decide" it. It is, in its nature, a National demand made upon the Nation. The parties are two nations. They cannot come into court to litigate their claims, nor can a court decide on them. "Of consequence," declares Marshall, "the demand is not a case for judicial cognizance."

"The President is the sole organ of the nation in its external relations"; therefore "the demand of a

foreign nation can only be made on him. He possesses the whole Executive power. 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. He is charged to execute the laws. A treaty is . . . a law. He must, then, execute a treaty, where he, and he alone, possesses the means of executing it."

This, in rough outline, is Marshall's historic speech which helped to direct a new nation, groping blindly and with infinite clamoring, to a straight and safe pathway. Pickering immediately reported to Hamilton: "Mr. Marshall delivered a very luminous argument on the case, placing the 27th article of the treaty in a clear point of view and giving constructions on the questions arising out of it perfectly satisfactory, but, as it would seem, wholly unthought of when the meaning of the article was heretofore considered. His argument will, I hope, be fully and correctly published; it illustrates an important national question." [1]

The Republicans were discomfited; but they were not without the power to sting. Though Marshall had silenced them in Congress, the Republican press kept up the attack. "*Mr. Marshall* made an ingenious and *specious* defence of the administration, in relation to executive interference in the case of *Robbins*," [*sic*] says the "Aurora," "but he was compelled to admit, what certainly implicates both the President and Judge Bee. . . . He admitted that an American seaman was justifiable, in rescuing him-

[1] Pickering to Hamilton, March 10, 1800; Pickering MSS., Mass. Hist. Soc.

self from impressment, to put to death those who kept him in durance. . . . Robbins [*sic*] claimed to be an American citizen, and asserted upon his oath, that he had been impressed and yet his claim was not examined into by the Judge, neither did the President *advise* and *request* that this should be a subject of enquiry. The enquiry into his citizenship was made *after* his surrender and execution, and the evidence exhibited has a very suspicious aspect. . . . Town clerks may be found to certify to anything that Timothy Pickering shall desire." [1] Nevertheless, even the "Aurora" could not resist an indirect tribute to Marshall, though paying it by way of a sneer at Samuel W. Dana of Connecticut, who ineffectually followed him.

"In the debate on *Mr. Livingston's* resolutions, on Friday last," says the "Aurora," "Mr. Marshall made, in the minds of some people, a very satisfactory defense of the conduct of the *President* and *Judge Bee* in the case of *Jonathan Robbins* [*sic*]. Mr. Dana, however, thought the subject exhausted, and very *modestly* (who does not know his *modesty*) resolved with his inward man to shed a few more rays of light on the subject; a federal judge, much admired for his wit and humour, happened to be present, when Mr. Dana began his flourishes.

"The judge thought the seal of conviction had been put upon the case by Mr. Marshall, and discovered symptoms of uneasiness when our little Connecticut Cicero displayed himself to catch Mr. Speaker's vacant eye — 'Sir,' said the wit to a bye-

[1] *Aurora*, March 10, 1800.

stander, 'what can induce that man to rise, he is nothing but a shakebag, and can only shake out the ideas that have been put into the members' heads by Mr. Marshall.'"[1]

Marshall's argument was conclusive. It is one of the few speeches ever delivered in Congress that actually changed votes from one party to the other in a straight-out party fight. Justice Story says that Marshall's speech "is one of the most consummate juridical arguments which was ever pronounced in the halls of legislation; . . . equally remarkable for the lucid order of its topics, the profoundness of its logic, the extent of its research,[2] and the force of its illustrations. It may be said of that speech . . . that it was '*Réponse sans réplique*,' an answer so irresistible that it admitted of no reply. It silenced opposition and settled then and forever the points of international law on which the controversy hinged. . . . An unequivocal demonstration of public opinion followed. The denunciations of the Executive, which had hitherto been harsh and clamorous everywhere throughout the land, sunk away at once into cold and cautious whispers only of disapprobation.

"Whoever reads that speech, even at this distance of time, when the topics have lost much of their interest, will be struck with the prodigious

[1] *Aurora*, March 14, 1800.

[2] Marshall's speech on the Robins case shows some study, but not so much as the florid encomium of Story indicates. The speeches of Bayard, Gallatin, Nicholas, and others display evidence of much more research than that of Marshall, who briefly refers to only two authorities.

powers of analysis and reasoning which it displays, and which are enhanced by the consideration that the whole subject was then confessedly new in many of its aspects." [1]

The Republican leaders found their own members declaring themselves convinced by Marshall's demonstration and announcing their intentions of voting with the Administration. Gallatin, Livingston, and Randolph had hard work to hold their followers in line. Even the strongest efforts of these resourceful men would not rally all of their shattered forces. Many Republican members ignored the pleadings of their leaders and supported Marshall's position.

This is not to be wondered at, for Marshall had convinced even Gallatin himself. This gifted native of Switzerland was the Republican leader of the House. Unusually well-educated, perfectly upright, thorough in his industry, and careful in his thinking, Gallatin is the most admirable of all the characters attracted to the Republican ranks. He had made the most effective argument on the anti-Administration side in the debate over the Livingston resolutions, and had been chosen to answer Marshall's speech. He took a place near Marshall and began making notes for his reply; but soon he put his pencil and paper aside and became absorbed in Marshall's reasoning. After a while he arose, went to the space back of the seats, and paced up and down while Marshall proceeded.

When the Virginian closed, Gallatin did not come

[1] Story, in Dillon, iii, 357–58.

forward to answer him as his fellow partisans had expected. His Republican colleagues crowded around the brilliant little Pennsylvania Swiss and pleaded with him to answer Marshall's speech without delay. But Gallatin would not do it. "Answer it yourself," exclaimed the Republican leader in his quaint foreign accent; "for my part, I think it unan*swer*able," laying the accent on the *swer*.[1]

Nicholas of Virginia then tried to reply, but made no impression; Dana spoke to no better purpose, and the House ended the discussion by a vote which was admitted to be a distinctively personal triumph for Marshall. The Republican resolutions were defeated by 61 to 35, in a House where the parties were nearly equal in numbers.[2]

For once even Jefferson could not withhold his applause for Marshall's ability. "Livingston, Nicholas & Gallatin distinguished themselves on one side & J. Marshall greatly on the other," he writes in his curt account of the debate and its result.[3] And this grudging tribute of the Republican chieftain is higher praise of Marshall's efforts than the flood of eulogy which poured in upon him; Jefferson's virulence toward an enemy, and especially toward Marshall, was such that he could not see, except on rare occasions, and this was one, any merit whatever in an opponent, much less express it.

[1] Grigsby, i, 177; Adams: *Gallatin*, 232.

[2] *Annals*, 6th Cong., 1st Sess., 619.

[3] Jefferson to Madison, March 8, 1800; *Works:* Ford, ix, 121. In sending the speeches on both sides to his brother, Levin Powell, a Virginia Federalist Representative, says: "When you get to Marshall's it will be worth a perusal." (Levin Powell to Major Burr Powell, March 26, 1800; *Branch Historical Papers*, ii, 241.)