John Marshall
Speech in the House of Representatives
7 March 1800

Here is some background from John C. Miller, The Federalist Era, 1789-1801 *(New York: Harper & Row, 1960, pp. 223-24): "Thomas Nash was a deserter and mutineer from the British frigate* Hermione*, the officers of which had been killed by the crew. Nash claimed to be Jonathan Robbins of Connecticut and asserted that he had been impressed [drafted forcibly] by the captain of the* Hermione *before the mutiny, in which, incidentally, he denied having taken part. Even though Nash had an affidavit purporting to prove that he was really Jonathan Robbins, the British demanded that he be surrendered for trial as a mutineer under the extradition clause of Jay's Treaty [1794]. At the request of the British minister, President Adams gave his personal attention and decided, upon the basis of the evidence, that Nash was not an American citizen. The President thereupon directed Judge Bee of the Federal District Court of South Carolina to turn Nash over to the British authorities, by whom he was tried, found guilty, and executed. Despite the evidence to the contrary, the Republicans continued to portray Nash as an American citizen delivered up to 'bloodthirsty Britons' by a weak and cowardly President. But a Republican effort to censure the Chief Executive was defeated in the House of Representatives in March, 1800, partly as a result of John Marshall's powerful speech in support of President Adams."*

. . . It is then demonstrated that the murder with which Thomas Nash was charged, was not committed within the jurisdiction of the United States, and, consequently, that the case stated was completely within the letter, and the spirit, of the 27th article of the treaty between the two nations. If the necessary evidence was produced, he ought to have been delivered up to justice. It was an act to which the American Nation was bound by a most solemn compact. To have tried him for the murder would have been mere mockery. To have condemned and executed him, the court having no jurisdiction, would have been murder:—to have acquitted and discharged him, would have been a breach of faith and a violation of national duty.

But it has been contended that altho' Thomas Nash ought to have been delivered up to the British Minister, on the requisition made by him in the name of his government, yet the interference of the President was improper.

This Mr. Marshall said led to his second proposition, which was—That the case was a case for executive and not judicial decision. He admitted implicitly the division of powers stated by the gentleman from New York, and that it was the duty of each department to resist the encroachments of the others.

This being established, the enquiry was, to what department was the power in question allotted?

The gentleman from New-York had relied on the 2d section of the 3d article of the constitution, which enumerates the cases to which the judicial power of the United States extends,—as expressly including that now under consideration. Before he examined that section, it would not be improper to notice a very material mis-statement of it, made in the resolutions offered by the gentleman from New York. By the constitution, the judicial power of the United States is extended to all *cases in law and equity* arising under the constitution, laws and treaties of the United States; but the resolutions declare the judicial power to extend to *all questions* arising under the constitution, treaties and laws of the United States. The difference between the

constitution and the resolutions was material and apparent. 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 e executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed up by the judiciary. But it was apparent that the resolutions had essentially misrepresented the constitution. He did not charge the gentleman from New-York, with intentional misrepresentation; he would not attribute to him such an artifice in any case, much less in a case where detection was so easy and so certain. Yet this substantial departure from the constitution, in resolutions affecting substantially to unite it, was not the less worthy of remark for being unintentional. It manifested the course o f reasoning by which the gentleman had himself been misled, and his judgment betrayed into the opinions those resolutions expressed.

By extending the judicial power to all *cases in law and equity*, the constitution had never been understood, to confer on that department, any political power whatever. To come within this description, a question must assume a legal form, for forensic litigation, and judicial decision. There must be 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.

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. As under the 4th or 6th article of the treaty of peace with Great Britain, or under those articles of our late treaties with France, Prussia and other nations, which secure to the subjects of those nations, their property within the United States: or as would be an article which, instead of stipulating to deliver up an offender, should stipulate his punishment, provided the case was punishable by the laws, and in the courts of the United States. But the judicial power cannot extend to political compacts—as the establishment of the boundary line between the American and British dominions; the case of the late guarantee in our treaty with France; or the case of the delivery of a murderer under the 27th article of our present treaty with Britain.

The gentleman from New-York has asked, triumphantly asked, what power exists in our courts to deliver up an individual to a foreign government? Permit me, said Mr. Marshall, but not triumphantly, to retort the question. By what authority can any court render such a judgment? What power does a court possess to seize any individual, and determine that he shall be adjudged by a foreign tribunal? Surely our courts possess no such power, yet they must possess it, it this article of the treaty is to be executed by the courts.

Gentlemen have cited and relied on that clause in the constitution. which enables Congress to define and punish piracies, and felonies: committed on the high seas, and offences against the law of nations: together with the act of Congress declaring the punishment of those offences; as transferring the whole subject to the courts. But that clause can never be construed to make to the government a grant of power, which the people making it, did not themselves possess. It has already been shown that the people of the United States have no jurisdiction over offences, committed on board a foreign ship, against a foreign nation. Of consequence, in framing a government for themselves, they cannot have passed this jurisdiction to that government. The law therefore cannot act upon the case. But this clause of the constitution cannot be considered and need not be considered, as affecting acts which are piracy under the

law of nations. As the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and piracy under the law of nations is of admiralty and maritime jurisdiction, punishable by every nation, the judicial power of the United States of course extends to it. On this principle the courts of admiralty under the Confederation, took cognizance of piracy, altho' there was no express power in Congress to define and punish the offence.

But the extension of the judicial power of the United States to all cases of admiralty and maritime jurisdiction, must necessarily be understood with some limitation. All cases of admiralty and maritime jurisdiction which, from their nature, are triable in the United States, are submitted to the jurisdiction of the courts of the United States. There are, cases of piracy by the law of nations, and cases within the legislative jurisdiction of the nation. The people of America possessed no other power over the subject, and could consequently transfer no other to their courts, and it has already been proved that a murder committed on board a foreign ship of war, is not comprehended within this description.

The consular convention with France has also been relied on, as proving, the act of delivering up an individual to a foreign power, to be in its nature judicial and not executive.

The 9th article of that convention authorizes the consuls and vice consuls of either nation, to cause to be arrested all deserters from their vessels, "for which purpose the said consuls and vice consuls shall address themselves to the courts, judges and officers competent."

This article of the convention does not, like the 27th article of the treaty with Britain, stipulate a national act, to be performed on the demand of a nation; it only authorizes a foreign minister to cause an act to be done, and prescribes the course he is to pursue. The contract itself is, that the act shall be performed by the agency of the foreign consul, through the medium of the courts; but this affords no evidence that a contract of a very different nature, is to be performed in the same manner.

It is said that the then President of the United States declared the incompetency of the courts, judges and officers to execute this contract without an act of the legislature. But the then President made no such declaration. He has said that some legislative provision is requisite, to carry the stipulations of the convention into full effect. This however is by no means declaring the incompetency of a department to perform an act stipulated by treaty, until the legislative authority shall direct its performance.

It has been contended that the conduct of the executive on former occasions, similar to this in principle, has been such, as to evince an opinion even in that department, that the case in question is proper for the decision of the courts.

The fact adduced to support this argument is, the determination of 'the late President, on the case of prizes made within the jurisdiction of the United States, or by privateers fitted out in their ports.

The nation was bound to deliver up those prizes in like manner as the nation is now bound to deliver up an individual demanded under the 27th article of the treaty with Britain. The duty was the same, and devolved on the same department.

In quoting the decision of the executive on that case, the gentleman from New-York has taken occasion to bestow high encomium on the late President, and to consider his conduct as furnishing an example worthy the imitation of his successor.

It must be cause of much delight to the real friends of that great man,—to those who supported his administration while in office, from a conviction of its wisdom and its virtue, to hear the unqualified praise which is now bestowed on it, by those who had been supposed to possess different opinions. If the measure now under consideration, shall be found, on

examination, to be the same in principle, with that which has been cited, by its opponents, as a fit precedent for it, then may the friends of the gentleman now in office indulge the hope, that when he, like his predecessor, shall be no more, his conduct too may be quoted as an example for the government of his successors.

The evidence relied on to prove the opinion of the then executive on the case, consists of two letters from the Secretary of State, the one of the 29th of June 1793 to Mr. Genet, and the other of the 16th of August 1793 to Mr. Morris.

In the letter to Mr. Genet, the Secretary says, that the claimant having filed his libel against the ship William, in the court of Admiralty, there was no power which could take the vessel out of court, until it had decided against its own jurisdiction, that having so decided, the complaint is lodged with the executive, and he asks for evidence to enable that department to consider and decide finally on the subject.

It will be difficult to find in this letter an executive opinion, that the case was not a case for executive decision. The contrary is clearly avowed. It is true that when an individual claiming the property as his, had asserted that claim in a court, the executive acknowledges in itself a want of power, to dismiss or decide upon the claim thus pending in court. But this argues no opinion of a want of power in itself to decide upon the case, if instead of being carried before a court as an individual claim, it is brought before the executive as a national demand. A private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual. The executive can give no direction concerning it. But a public prosecution carried on in the name of the United States, can without impropriety be dismissed at the will of the government. The opinion therefore given in this letter is unquestionably correct, but it is certainly misunderstood when it is considered as being an opinion that the question was not, in its nature, a question for executive decision.

In the letter to Mr. Morris the secretary asserts the principle, that vessels taken within our jurisdiction ought to be restored ; but says it is yet unsettled whether the act of restoration is to be performed by the executive or judicial department.

The principle then according to this letter is not submitted to the courts, whether a vessel captured within a given distance of the American coast was or was not captured within the jurisdiction of the United States, was a question not to be determined by the courts, but by the executive. The doubt expressed is, not what tribunal shall settle the principle, but what tribunal shall settle the fact. In this respect a doubt might exist in the case of prizes, which could not exist in the case of a man. Individuals on each side claimed the property, and therefore their rights could be brought into court, and there contested as a case in law or equity. The demand of a man made by a nation stands on different principles.

Having noticed the particular letters cited by the gentleman from New-York, permit me now said Mr. Marshall to ask the attention of the house to the whole course of executive conduct on this interesting subject.

It is first mentioned in a letter from the secretary of state to Mr. Genet of the 25th of June 1793. In that letter, the secretary states a consultation between himself and the secretaries of the treasury and war, (the President being absent) in which (so well were they assured of the President's way of thinking in those cases) it was determined, that the vessels should be detained in the custody of the consuls in the ports, "until the government of the United States shall be able to *enquire into and decide on the fact."*

In his letter of the 12th of July 1793 the secretary writes that the President has determined to refer the questions concerning prizes "to *persons learned in the laws."* And he requests that

certain vessels enumerated in the letter should not depart "until *his* ultimate determination shall be made known."

In his letter of the 7th of August 1793, the Secretary informs Mr. Genet that the President considers the U. States as bound to *"to effectuate the restoration of,* or to make compensation for, prizes which shall have been made of any of the parties at war with France, subsequent to the 5th day of June last, by privateers fitted out of our ports." That it is consequently expected that Mr. Genet will cause restitution of such prizes, to be made. And that the United States "will cause restitution" to be made "of all such prizes as shall be hereafter brought within their ports by any of the said privateers."

In his letter of the 10th of November 1793 the Secretary informs Mr. Genet, that, for the purpose of obtaining testimony to ascertain the fact of capture within the jurisdiction of the United States, the Governors of the several states were requested on receiving any such claim, immediately to notify thereof the Attornies of their several districts; whose duty it would be to give notice "to the principal agent of both parties and also to the consuls of the nations interested, and to recommend to them, to appoint by mutual consent, arbiters to decide whether the capture was made within the jurisdiction of the United States as stated in my letter of the 8th. inst. according to whose award the Governor may proceed to deliver the vessel to the one or the other party." If either party refuses to name arbiters then the attorney is to take depositions on notice, which "he is to transmit for the *information and decision of the President."* "This prompt procedure is the more to be insisted on, as it will enable the President, *by an immediate delivery* of the vessel and cargo to the party having title, to prevent the injuries consequent on long delay."

In his letter of the twenty-second of Nov. 1793 the Secretary repeats, in substance, his letter of the 12th of July and 7th of August, and says that the determination to deliver up certain vessels, involved the brig Jane of Dublin, the brig Lovely Lass, and the brig Prince William Henry. He concludes with saying, "I have it in charge to enquire of you, sir, whether these three brigs have been given up, according to the *determination of the President,* and if they have not to repeat the requisition that they be given up to their former owners."

Ultimately it was settled that the fact should be investigated in the courts, but the decision was regulated by the principles established by the executive department.

The decision then on the case of vessels captured within the American jurisdiction, by privateers fitted out of the American ports, which the gentleman from New-York has cited with such merited approbation; and which he has declared to stand on the same principles, with those which ought to have governed, in the case of Thomas Nash; which deserves the more respect, because the government of the United States was then so circumstanced as to assure us, that no opinion was lightly taken up, and no resolution formed but on mature consideration. This decision quoted as a precedent and pronounced to be right, is found, on fair and full examination, to be precisely and unequivocally the same, with that which was made in the case under consideration. It is a full authority to show, that, in the opinion always held by the American government, a case like that of Thomas Nash, is a case for Executive and not judicial decision.

The clause in the constitution which declares that "the trial of all crimes, except in cases of impeachment, shall be by jury," has also been relied on as operating on the case, and transferring the decision on a demand for the delivery of an individual, from the executive to the judicial department.

But certainly this clause in the constitution of the United States cannot be thought obligatory on, and for the benefit of, the whole world. It is not designed to secure the rights of

the people of Europe and 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, and to prescribe the mode of punishing offences committed against the government of the United States, and to which the jurisdiction of the nation may rightfully extend.

It has already been shown that the courts of the United States were incapable of trying the crime for which Thomas Nash was delivered up to justice, the question to be determined was not how his crime should be tried and punished but 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 performance of a national compact, for the surrender to a foreign government of an offender against that government.

The clause of the constitution declaring that the trial of all crimes shall be by jury, has never even been construed to extend to the trial of crimes committed in the land and naval forces of the United States. Had such a construction prevailed, it would most probably have prostrated the constitution itself, with the liberties and the in-dependence of the nation, before the first disciplined invader who should approach our shores. Necessity would have imperiously demanded the review and amendment of so unwise a provision. If then this clause does not extend to offences committed in the fleets and armies of the United States, how can it be construed to extend to offences committed in the fleets and armies of Britain or of France, of the Ottoman or Russian empires?

The same argument applies to the observations on the 7th article of the amendments to the constitution. That article relates only to trials in the courts of the United States, and not to the performance of a contract for the delivery of a murderer not triable in those courts. In this part of the argument, the gentleman from New-York has presented a dilemma of a very wonderful structure indeed. He says that the offence of Thomas Nash was either a crime or not a crime. If it was a crime, the constitutional mode of punishment ought to have been observed—if it was not a crime, he ought not to have been delivered up to a foreign government, where his punishment was inevitable.'

It had escaped the observation of that gentleman, that if the murder committed by Thomas Nash was a crime, yet it was not a crime provided for by the constitution, or triable in the courts of the United States: And that if it was not a crime, yet it is the precise case in which his surrender was stipulated by treaty. Of this extraordinary dilemma then, the gentleman from New-York is, himself, perfectly at liberty, to retain either form.

He has chosen to consider it as a crime, and says it has been made a crime by treaty, and is punished by sending the offender out of the country.

The gentleman is incorrect in every part of his statement. Murder on board a British frigate, is not a crime created by treaty. It would have been a crime of precisely the same magnitude, had the treaty never been formed. It is not punished by sending the offender out of the United States. The experience of this unfortunate criminal, who was hung and gibbeted, evinced to him, that the punishment of his crime was of a much more serious nature, than mere banishment from the United States.

The gentleman from Pennsylvania and the gentleman from Virginia have both 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.

The points of law which must have been decided, are stated by the Gentleman from Pennsylvania to be, first, a question whether the offence was committed within the British jurisdiction ; and, secondly, whether the crime charged was comprehended within the treaty.

It is true, sir, these points of law must have occurred, and must have been decided: but it by no means follows that they could only have been decided in court. 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. Whether a patent for land shall issue or not, is always a question of law, but not a question which must necessarily be carried into court. The gentleman from Pennsylvania seems to have permitted himself to have been misled, by the misrepresentation of the constitution, made in the resolutions of the gentleman from New York: and, in consequence of being so misled, his observations have the appearance of endeavouring to fit the constitution to his arguments, instead of adapting his argument to the constitution.

When the gentleman has proved that these are questions of law, and that they must have been decided by the President, he has not advanced a single step towards proving, that they were improper for executive decision. The question whether vessels captured within three miles of the American coast, or by privateers fitted out in the American ports, were legally captured or not, and whether the American government was bound to restore them if in its power, were questions of law, but they were questions of political law, proper to be decided and they were decided by the executive and not by the courts.

The casus foederis of the guaranty was a question of law but no man would have hazarded the opinion ; that such a question must be carried into court, and can only be there decided. So the casus foederis under the 27th article of the treaty with Britain is a question of law, but of political law. The question to be decided is whether the particular case proposed be one, in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts.

If a murder should be committed within the United States, and the murderer should seek an asylum in Britain, the question whether the casus foederis of the 27th article had occurred, so that his delivery ought to be demanded, would be a question of law, but no man would say it was a question which ought to be decided in the courts.

When therefore the gentleman from Pennsylvania has established, that in delivering up Thomas Nash, points of law were decided by the President, he has established a position, which in no degree whatever, aids his argument.

The case was in its nature a national demand made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence the demand is not a case for judicial cognizance.

The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence 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 a nation, is to be performed through him.

He 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.

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 the person to perform the object, altho' 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 this be done, it seems the duty of the executive department to execute the contract, by any means it possesses.

The gentleman from Pennsylvania contends that, altho' this should be properly an executive duty, yet it cannot be performed until Congress shall direct the mode of performance. He says that altho' the jurisdiction of the courts is extended by the Constitution, to all cases of admiralty and maritime jurisdiction, yet if the courts had been created without any express assignment of jurisdiction, they could not have taken cognizance of causes expressly allotted to them by the constitution. The executive he says can no more than courts, supply a legislative omission.

It is not admitted that in the case, stated courts could not have taken jurisdiction. The contrary is believed to be the correct opinion. And, altho' the executive cannot supply a total legislative omission, yet it is not admitted or believed that there is such a total omission in this case.

The treaty stipulating that a murderer shall be delivered up to justice, is as obligatory as an act of Congress making the same declaration. If then there was an act of Congress in the words of the treaty, declaring that a person who had committed murder within the jurisdiction of Britain, and sought an asylum within the territory of the United States, should be delivered up by the United States, on the demand of his Britannic Majesty, and such evidence of his criminality, as would have justified his commitment for trial, had the offence been here committed; could the President who is bound to execute the laws have justified a refusal to deliver up the criminal, by saying that the legislature had totally omitted to provide for the case ?

The 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.

The department which is entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements, with foreign nations, and for the consequences resulting from such violation, seems the proper department, to be entrusted with the execution of a national contract, like that under consideration.

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 the political intercourse and connection between the United States and foreign nations; to understand the manner in which the particular stipulation is explained and performed by foreign nations; and to understand completely the state of the union?

This department too, independent of judicial aid which may, perhaps, in some instances be called in, is furnished with a great law officer, whose duty it is to understand and to advise, when the casus foederis occurs. And if 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, he may perhaps bring the question of the legality of his arrest, before a Judge by a writ of habeas corpus.

It is then demonstrated, that according to the practice, and 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.

It remains to enquire, whether in exercising this power, and in performing the duty it enjoins, the President has committed an un-authorized and dangerous interference with judicial decisions.

That Thomas Nash was committed originally, at the instance of the British consul at Charleston, not for trial in the American courts, but for the purpose of being delivered up to justice in conformity with the treaty, between the two nations, has been already so ably argued by the gentleman from Delaware, that nothing further can be added to that point. He would therefore, Mr. Marshall said, consider the case as if Nash, instead of having been committed for the purposes of the treaty, had been committed for trial. Admitting even this to have been the fact, the conclusions which have been drawn from it were by no means warranted.

Gentlemen had considered it as an offence against judicial authority, and a violation of judicial rights, to withdraw from their sentence a criminal against whom a prosecution had been commenced. They had treated the subject, as if it was the privilege of courts, to condemn to death, the guilty wretch arraigned at their bar, and that to intercept the judgment was to violate the privilege. Nothing can be more incorrect than this view of the case. It is not the privilege, it is the sad duty of courts to administer criminal justice. It is a duty to be performed at the demand of the nation, and with which the nation has a right to dispense. If judgment of death is to be pronounced, it must be at the prosecution of the nation, and the nation may at will stop that prosecution. In this respect the President expresses constitutionally the will of the nation, and may rightfully as was done in the case at Trenton, enter a nolle prosequi, or direct that the criminal be prosecuted no further. This is no interference with judicial decisions, nor any invasion of the province of a court. It is the exercise of an indubitable and a constitutional power. Had the President directed the judge at Charleston to decide for or against his own jurisdiction-to condemn or acquit the prisoner—this would have been a dangerous interference with judicial decisions and ought to have been resisted.

But no such direction has been given, nor any such decision been required. If the President determined that Thomas Nash ought to have been delivered up to the British government, for a murder committed on board a British frigate, provided evidence of the fact was adduced ; it was a question which duty obliged him to determine, and which he determined rightly. If in consequence of this determination he arrested the proceedings of a court on a national prosecution, he had a right to arrest and to stop them, and the exercise of this right was a necessary consequence of the determination of the principal question. In conforming to this decision, the court has left open the question of its jurisdiction. Should another prosecution of the same sort be commenced, which should not be suspended but continued by the executive, the case of Thomas Nash would not bind as a precedent against the jurisdiction of the court. If it should even prove that, in the opinion of the executive, a murder committed on board a foreign fleet was not within the jurisdiction of the court, it would prove nothing more: and though this opinion might rightfully induce the executive to exercise its power over the prosecution, yet if the prosecution was continued, it could have no influence with the court in deciding on its jurisdiction.

Taking the fact then even to be, as the gentlemen in support of the resolutions would state it, the fact cannot avail them.

It is to be remembered too, that in the case stated to the President, the judge himself appears to have considered it as proper for executive decision, and to have wished that decision. The President and judge seem to have entertained, on this subject, the same opinion: and in consequence of the opinion of the judge, the application was made to the President.

It has then been demonstrated,

1st. That the case of Thomas Nash, as stated to the President, was compleatly within the 27th article of the treaty between the United States of America and Great Britain.

2dly. That this question was proper for executive and not for judicial decision, and

3dly. That, in deciding it, the President is not chargeable with an interference with judicial decisions.

After trespassing so long Mr. Marshall said on the patience of the house, in arguing what had appeared to him to be the material points growing out of the resolutions, he regretted the necessity of detaining them still longer, for the purpose of noticing an observation, which appeared not to be considered, by the gentleman who made it, as belonging to the argument.

The subject introduced by this observation however was so calculated to interest the public feelings, that he must be excused for stating his opinion on it.

The gentleman from Pennsylvania had said, that an impressed American seaman, who should commit homicide for the purpose of liberating himself from the vessel in which he was confined, ought not to be given up as a murderer. In this, Mr. Marshall said, he concurred entirely with that gentleman. He believed the opinion to be unquestionably correct,-as were the reasons that gentleman had given in support of it. He had never heard any American avow a contrary sentiment, nor did he believe a contrary sentiment could find a place in the bosom of any American. He could not pretend, and did not pretend, to know the opinions of the executive on the subject, because he had never heard the opinions of that department, but he felt the most perfect conviction, founded on the general conduct of the government, that it could never surrender an impressed American to the nation, which, in making the impressment, had committed a national injury.

This belief was in no degree shaken, by the conduct of the executive in this particular case.

In his own mind it was a sufficient defence of the President, from an imputation of this kind, that the fact of Thomas Nash being an impressed American, was obviously not contemplated by him in the decision he made on the principles of the case. Consequently if a new circumstance occurred, which would essentially change the case decided by the President, the judge ought not to have acted under that decision, but the new circumstance ought to have been stated. Satisfactory as this defence might appear, he should not resort to it, because to some it might seem a subterfuge. He defended the conduct of the President on other, and still stronger ground. The President had decided that a *murder* committed on board a British frigate on the high seas, was within the jurisdiction of that nation, and consequently within the 27th article of its treaty with the United States. He therefore directed Thomas Nash to be delivered to the British minister, if satisfactory evidence of the *murder* should be adduced. The sufficiency of the evidence was submitted entirely to the judge. If Thomas Nash had committed a murder, the decision was that he should be surrendered to the British minister, if he had not committed a murder, he was not to be surrendered.

Had Thomas Nash been an impressed American, the homicide on board the Hermione, would, most certainly, not have been murder.

The act of impressing an American is an act of lawless violence. The confinement on board a vessel is a continuation of that violence, and an additional outrage. Death committed within the United States, in resisting such violence, would not have been murder, and the person giving the wound could not have been treated as a murderer. Thomas Nash was only to have been delivered up to justice on such evidence as, had the fact been committed within the United States, would have been sufficient to have induced his commitment and trial for murder. Of consequence the decision of the President was so expressed, as to exclude the case of an impressed American liberating himself by homicide. . . .