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JOHN MARSHALL THROUGH THE EYES OF AN ADMIRER:  
JOHN QUINCY ADAMS

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The United States Supreme Court recently heard argument in a Fourth Amendment case the Founders could have never dreamed of: whether government use of a thermal imaging device, used to detect heat emissions from a building or dwelling, requires a search warrant before scanning the exterior of a home.<sup>1</sup> Before argument began, Chief Justice Rehnquist noted that this was the first session of the Court following the February 4th anniversary of the beginning of John Marshall's term as Chief Justice:

I am quite convinced that Marshall deserves to be recognized along with George Washington, Alexander Hamilton, and Thomas Jefferson as one of the Founding Fathers of this country. Marshall served as Chief Justice from 1801 until 1835. He authored more than 500 opinions, including most of the important cases the Court decided during his tenure. Using his remarkable ability to reason from general principles to conclusions based on these principles, he derived from the Constitution a road map of how its checks and balances could be enforced in practice. ... It may be risky to suggest that any institution which has endured for over 200 years, the way the Supreme Court of the United States has, could be [the result of] the length and [sic] shadow of one individual, but surely there is only one individual who could possibly qualify for this distinction, and that is John Marshall.<sup>2</sup>

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\* United States Circuit Judge, Court of Appeals for the Ninth Circuit. Prepared in preparation for remarks delivered at the seminar *The Legacy of Chief Justice John Marshall* held March 16-17, 2001, at the College of William & Mary School of Law, Williamsburg, Virginia.

1. As the author of the lower court opinion *United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999), I had some passing interest in the Supreme Court proceedings. The Supreme Court subsequently held that a warrant was indeed required. *Kyllo v. United States*, 533 U.S. 27 (2001).

2. Official Transcript Proceedings Before the Supreme Court of the United States, *Kyllo*

The Chief Justice was quite right to mark the occasion, as a predecessor had one hundred years earlier.<sup>3</sup> It happily coincides with another important milestone: the 250th anniversary of the birth of James Madison. Two individuals more central to the development and understanding of the United States Constitution would be very hard to find. Madison, for example, was a principal contributor to the Constitution and author of the Bill of Rights, whose contribution is so remarkably enduring that the latest amendment to the Constitution, added in 1992, came off his pen in 1789.<sup>4</sup> His role in the creation of the “extended national republic” is rightfully described by Professor Jack Rakove as having had many partners, but few equals.<sup>5</sup> Charles Evans Hughes, who would serve as Chief Justice more than a century later, describing Marshall’s impact, said simply, “Marshall’s preeminence was due to the fact that he was John Marshall.”<sup>6</sup>

This discussion focuses on Marshall. His appointment, coming at the end of the term of John Adams in 1801 following a bitterly contested election, had an impact on the development of constitutional law as we have come to know it that can only be described as profound. I choose a rather unique pair of eyes to look at Marshall: John Quincy Adams. Adams knew Marshall well; his father had appointed the Virginian to the Supreme Court—an act Quincy would describe as “one of the most important services rendered by [his father] to his country.”<sup>7</sup> Quincy admired Marshall’s view of the role of the courts in resolving disputes between the

v. United States, 533 U.S. 27 (2001), available at 2001 WL 168056, at \*3-4.

3. Appendix, Centennial of Chief Justice Marshall’s Appointment, 180 U.S. 643, 645-76 (1901).

4. Proposed by then Congressman James Madison to the First Congress, it did not secure ratification with the first twelve amendments. Because the proposal contained no outside time limit for ratification, when the Michigan Legislature ratified it in 1992, the Archivist of the United States accepted it as properly ratified. Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 498 (1992). The Twenty-Seventh Amendment requires that any Congressional pay raise may not take effect until an intervening election. U.S. CONST. amend. XXVII.

5. JACK N. RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC*, at xii (2d ed. 2001).

6. JEAN EDWARD SMITH, *JOHN MARSHALL, DEFINER OF A NATION* 1 (1966) (quoting Charles Evans Hughes).

7. *THE DIARY OF JOHN QUINCY ADAMS (1794-1845): AMERICAN POLITICAL, SOCIAL AND INTERNATIONAL LIFE FROM WASHINGTON TO POLK* 461 (Allan Nevins ed., 1929) [hereinafter *DIARY*].

federal and state governments, a view seriously at odds with the “judge-as-machine” philosophy of Marshall’s cousin Thomas Jefferson.<sup>8</sup>

It seems entirely appropriate to pay attention to the thoughts of the son of a former President who assumed the office in his own right following an extraordinarily close election.<sup>9</sup> We also enjoy an advantage in doing so, for John Quincy Adams left us an extensive record of his observations of the times in which John Marshall lived and worked: a detailed diary, begun at age eleven and carefully maintained for nearly seventy years. John Quincy Adams (JQA) enjoyed a view of the first half of the nineteenth century shared by few others:

He walked with Czar Alexander I on the boulevards of St. Petersburg; he had an audience with George III ...; he dined with Wellington; he saw Napoleon return to Paris from Elba; and he exchanged views with Mme. de Stael and Jeremy Bentham and Talleyrand. He saw George Washington receive the Creek Chiefs, he dined repeatedly at the new White House with Jefferson .... He sat [at] the [Impeachment] trial of [Supreme Court Justice] Samuel Chase, and heard Aaron Burr make his farewell address .... He commented on the transcendentalism of Emerson and the novels of Bulwer; he shook the hand of Dickens; and superintended the erection of the sculptures on the portico of the Capitol. ... To him more than any other American we owe the preservation of the Smithson[ian] .... He taught oratory in Harvard University. He published original poetry, and versified Horace and La Fontaine;

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8. Jefferson penned a letter to Edmund Pendleton on August 26, 1776, saying:

Let mercy be the character of the law-giver, but let the judge be a mere machine. The mercies of the law will be dispensed equally and impartially to every description of men; those of the judge, or of the executive power, will be the eccentric impulses of whimsical, capricious designing man.

Letter from Thomas Jefferson to Edmund Pendleton (August 26, 1776), in 1 *THE PAPERS OF THOMAS JEFFERSON* 505 (Julian P. Boyd et al. eds., 1950).

9. John Quincy Adams (JQA) lost both the popular and electoral vote to Andrew Jackson, but was chosen as President by the House of Representatives. Jackson supporters, noting that Henry Clay had urged his own supporters to vote for Adams, called the House vote the result of a “corrupt bargain” (JQA nominated Clay to be Secretary of State). Hon. Michael Daly Hawkins, *John Quincy Adams and the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics*, 25 *OKLA. CITY U. L. REV.* 1, 26-27 (2000).

he read Bancroft and Byron; he expounded Shakespeare . . . He was the chief author of the Monroe Doctrine.<sup>10</sup>

JQA was an unabashed admirer of the man he called "Judge Marshall."<sup>11</sup> He was in a position, however, to make first hand judgments about Marshall's view of the Constitution and its application to the growth of the nation. He was active in public life during Thomas Jefferson's most productive period of writing, including his pointed criticism of Marshall's views on whether and to what extent the Constitution granted the federal government implied powers.<sup>12</sup> Quincy was also there—sitting in the United States Senate as a recently elected Senator from Massachusetts—when Jefferson the critic became Jefferson the President, and proposed the Louisiana Purchase,<sup>13</sup> a breathtaking extension of the implied powers of the federal government.<sup>14</sup>

Though of essentially the same generation,<sup>15</sup> Marshall and Adams came from decidedly different backgrounds. Adams was New England bred, internationally traveled, and the Harvard-educated son of a President.<sup>16</sup> Marshall was a son of Virginia, related through his mother to the Jeffersons, the Randolphs, and the Lees, and a family friend of George Washington.<sup>17</sup> He saw active combat in the

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10. DIARY, *supra* note 7, at xiii.

11. JQA also thought well of Madison, especially in comparison to his fellow Virginian Thomas Jefferson. *Id.* at 468 (Entry of July 29, 1836) ("Madison moderated some of his [Jefferson's] excesses, and refrained from following others. He was in truth a greater and far more estimable man."). As President, Madison appointed JQA ambassador to Russia, a posting Adams found so comfortable that he refused a Supreme Court appointment rather than leave St. Peterburg. PAUL C. NAGEL, JOHN QUINCY ADAMS: A PUBLIC LIFE, A PRIVATE LIFE 198-99 (1997). Adams delivered a two and one-half hour eulogy in Boston following Madison's death in 1836. DIARY, *supra* note 7, at 470 (Entry of Sept. 27, 1836).

12. See generally LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 411-14 (1974) (explaining that Jefferson feared giving the judiciary power over the executive and legislative branches would make them a "despotic branch").

13. NORMAN K. RISJORD, THOMAS JEFFERSON 148 (1994).

14. To the deep chagrin of the Federalists and the Massachusetts legislators who sent him there, Senator John Quincy Adams supported the Purchase, an act which endeared him to Republicans, but which probably cost him his seat. NAGEL, *supra* note 11, at 143-45, 177-80.

15. John Quincy Adams, born July 11, 1767, was some twelve years junior to John Marshall (born Sept. 24, 1755). *Id.* at 3; SMITH, *supra* note 6, at 21.

16. See generally NAGEL, *supra* note 11.

17. See generally SMITH, *supra* note 6.

Revolutionary War, which interrupted what little formal education he had.<sup>18</sup>

Despite their differing routes in getting there, John Marshall and John Quincy Adams found themselves on the stage of American politics at about the same time. Marshall's public career began with a stint in Congress (1799-1800), followed by time as Secretary of State in the administration of JQA's father (1800-1801), and finally as Chief Justice of the United States (1801-1835).<sup>19</sup> JQA's public career began in the foreign service, first as envoy to the Netherlands (1794-1796), Portugal (1796-1797), and Prussia (1797-1801), followed by election to the Massachusetts Senate (1802-1803), to the United States Senate (1803-1808), then service as United States Ambassador to Russia (1809-1813) in the Madison Administration, Special Envoy to England and France (1813-1817), Secretary of State in the Monroe Administration (1817-1824), and then as President of the United States (1825-1829).<sup>20</sup>

Their paths often crossed, at times both pleasant and not. One of Marshall's last official acts as Secretary of State was to follow President John Adams's direction and recall JQA from his ambassadorial posting in Berlin.<sup>21</sup> In a happier moment, Marshall would administer the oath of office to John Quincy Adams as the nation's sixth President. In addition to being walking companions, Marshall and Adams were regular social companions, attending public ceremonies (the return of General Lafayette to Leesburg, Virginia)<sup>22</sup>

18. *Id.* at 4-5. Marshall did attend the College of William & Mary in 1780, and studied under George Wythe. *Id.* at 75.

19. *Id.* at 6-20 (providing a brief sketch of Marshall's career as a public figure).

20. See generally NAGEL, *supra* note 11. Quincy's friends in Massachusetts would not allow him to retire, electing him to Congress in 1830. *Id.* at 336. Although he had refused to campaign or even say whether he would serve, Adams was thrilled: "My election as President of the United States was not half so gratifying to my inmost soul. No election or appointment conferred upon me ever gave me so much pleasure." 8 MEMOIRS OF JOHN QUINCY ADAMS 247 (Charles Francis Adams ed., 1969) [hereinafter MEMOIRS] (Diary Entry of Nov. 7, 1830). The first and only former President to do so, Adams served seventeen years in Congress until his death in 1848. NAGEL, *supra* note 11, at 414.

21. NAGEL, *supra* note 11 at 125-26.

22. On August 9, 1825, President Adams and Chief Justice Marshall, along with former President James Monroe and a crowd of 10,000 in the public square of Leesburg, Virginia, welcomed the Revolutionary war hero on his return to America. Selma Rattner, *Old, Yet Contemporary South*, N.Y. TIMES, Nov. 6, 1988, §5, at 14.

and the theater (the Washington debut of British actress Fanny Kimble in "The Taming of the Shrew").<sup>23</sup>

They could have easily been colleagues. In 1810, Justice William Cushing, the last of the original members of the Supreme Court, passed away.<sup>24</sup> After two unsuccessful attempts to fill the vacancy, on February 11, 1812, President Madison nominated JQA, then serving as ambassador to Russia, to the high court.<sup>25</sup> The Senate, acting with a speed and civility that would be unimaginable today, unanimously confirmed the nomination the next day.<sup>26</sup> In an equally unimaginable gesture, Adams turned the post down. Although his formal letter of refusal cited financial concerns, a private letter to President Madison and later conversations with his brother and father suggest that Adams simply felt his nature was simply too partisan to sit as a neutral arbiter.<sup>27</sup>

JQA argued at least four cases before the Marshall Court, including *Fletcher v. Peck*,<sup>28</sup> the first case in which the Supreme Court declared a state law to be unconstitutional.<sup>29</sup> His first appearance to argue before the high court came in February of 1804, during his service in the Senate.<sup>30</sup> The Supreme Court sat in a room that was part of the Capitol in those days and Adams's diary for that period reflects regular visits to attend proceedings or to argue cases.<sup>31</sup> Clearly exhilarated by the intellectual stimulus of his

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23. Frances Ann ("Fanny") Kimble was the daughter of the famed English actor Charles Kimble, a friend of a Boston physician and JQA friend Dr. George Parkman. The former President was flattered when Dr. Parkman informed him that Fanny Kimble wanted to discuss Shakespeare with him. NAGEL, *supra* note 11, at 342-33.

24. *Id.* at 198.

25. *Id.*

26. *Id.*

27. Letter from John Quincy Adams to James Madison (June 3, 1811), in 4 WRITINGS OF JOHN QUINCY ADAMS 93, 95 (Worthington Chauncey Ford ed., 1914) ("[T]he great proportion of my time has been employed in occupations so different from those of the judicial tribunals, that I have long entertained a deep and serious distrust of my qualifications for a seat on the bench.")

28. 10 U.S. (6 Cranch) 87 (1810). Adams argued successfully for a purchaser of certain land grants—issued and later revoked by the Georgia Legislature—convincing the Court that the later act violated Article 1, Section 10 of the Constitution. NAGEL, *supra* note 11, at 182-83.

29. CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 392-96 (rev. ed. 1987).

30. NAGEL, *supra* note 11, at 147.

31. DIARY, *supra* note 7, at 32.

encounter with the Marshall Court, Adams tells his diary on February 17, 1804: "On the whole, I have never witnessed a collection of such powerful legal orators as at this session of the Supreme Court."<sup>32</sup>

During his various stints in Washington, including the period of his Presidency, JQA developed the ritual of early morning walks in which he sought a minimum daily distance of four miles.<sup>33</sup> A notoriously early riser, Adams was often joined by the Chief Justice, reputed to be the only other man in Washington who rose as early and maintained as brisk a pace.<sup>34</sup> These walks included the talk of good friends, each respectful of and discrete about the other's position, but also concerned history and their places in it. They reflected on the passing of Marshall's colleague Justice Bushrod Washington and what might become of his uncle's Presidential papers and whether a response should be mustered up to rumors that Jefferson's soon-to-be published papers might suggest that Quincy was involved in an effort at New England secession in 1801.<sup>35</sup> During his years in the White House, First Lady Louisa Adams and the President frequently hosted dinner parties for their Washington friends, which Marshall attended. Dinner parties often included the Chief Justice, Justices Johnson, Story, and Todd, Attorney General William Wirt, and notable members of the Supreme Court bar, such as Daniel Webster.<sup>36</sup>

Quincy would serve a single embattled term as President. The allies of Andrew Jackson blunted nearly all of his reform proposals and took control of both houses of Congress in the 1826 elections.<sup>37</sup> The election of 1828 was a landslide for Jackson.<sup>38</sup> When JQA

32. 1 MEMOIRS, *supra* note 20, at 295 (Diary Entry of Feb. 17, 1804). In the 1804 Term, Adams argued two cases before the Supreme Court, *Head & Armory v. Providence Ins. Co.*, 6 U.S. (2 Cranch) 127 (1804), and *Church v. Hubbard*, 6 U.S. (2 Cranch) 187 (1804). He would later become the first former President to argue a case before the high court in *United States v. The Schooner Amistad*, 40 U.S. 518 (1841).

33. NAGEL, *supra* note 11, at 309-10.

34. In the stifling heat of the Washington summer, Adams opted for au natural swims in the Potomac. *Id.* at 273. There is no historical evidence that John Marshall ever joined Adams in this exercise.

35. 8 MEMOIRS, *supra* note 20, at 187 (Diary Entry of Feb. 11, 1830).

36. 5 *id.* at 322-23 (Diary Entry of Mar. 8, 1817).

37. NAGEL, *supra* note 11, at 300-05.

38. Jackson won fifty-six percent (to JQA's forty-three percent) of the popular vote and sixty-eight percent of the electoral vote (to JQA's thirty-two percent). Hawkins, *supra* note 9,

returned to Washington in 1831, he learned from former Attorney General William Wirt of the fading health of Chief Justice Marshall.<sup>39</sup> Adams was at once confident of Marshall's place in history and concerned about his replacement:

He has been thirty years Chief Justice of the Supreme Court, and has done more to establish the Constitution of the United States on sound construction than any other man living. The terror is, that if he should be now withdrawn, some shallow-pated wild-cat like Phillip P. Barbour, fit for nothing but to tear the Union to rags and tatters, would be appointed in his place.<sup>40</sup>

JQA was at his home in Quincy, Massachusetts on July 10, 1835 when he learned of the death of John Marshall six days earlier in Philadelphia.<sup>41</sup> Few people alive in America at that time were in a better position to have witnessed the contribution of Marshall to the development of a steady body of interpretative law so important to allowing for the "play in joints" of the Constitution that Alexander Hamilton thought so important. Hardly an unbiased observer, JQA was certainly someone capable of discerning between holding high office and making a serious contribution to an institution's future. He had very little regard for most of the men who served with Marshall, Justice Story being a notable exception.<sup>42</sup> Adams saw them as "men of strong prejudices, warm passions, and contradicted

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at 59; see also National Archives & Record Administration, *Electoral College Box Scores*, available at <http://www.nara.gov/fedreg/elctcoll/ecfront.html> (last visited Mar. 13, 2002) [hereinafter *National Archives*].

39. 8 MEMOIRS, *supra* note 20, at 315-16 (Diary Entry of Feb. 13, 1831). Wirt, part of the prosecution in the 1807 treason trial of Aaron Burr (presided over by John Marshall as Circuit Justice), served as Attorney General in the Monroe and Quincy Adams Administrations and argued a number of cases before the Marshall Court. BAKER, *supra* note 12, at 71, 398, 470; DIARY, *supra* note 7, at 447.

40. 8 MEMOIRS, *supra* note 20, at 315-16. Phillip Pendleton Barbour was appointed to the Court by President Andrew Jackson. Frank Otto Gatell, *Philip Pendleton Barbour*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 359 (Leon Friedman & Fred L. Israel eds., 1997); Hawkins, *supra* note 9, at 59; *National Archives*, *supra* note 38. Fate saved John Quincy Adams when he argued the *Amistad* case before the Supreme Court in 1841—Justice Barbour passed away during an overnight recess in the arguments. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 99 (1993).

41. 9 MEMOIRS, *supra* note 20, at 243 (Diary Entry of July 10, 1835).

42. *Id.*

minds."<sup>43</sup> Adams thought Marshall to be entirely different, both in the position he held and his unique vision:

He was one of the most eminent men that this country has ever produced. He has held this appointment thirty-five years. It was the last act of my father's Administration, and one of the most important services rendered by him to his country. . . . Marshall, by the ascendancy of his genius, by the amenity of his deportment, and by the imperturbable command of his temper, has given a permanent and systematic character to the decisions of the Court, and settled many great constitutional questions favorably to the continuance of the Union. Marshall has cemented the Union which the crafty and quixotic democracy of Jefferson had a perpetual tendency to dissolve.<sup>44</sup>

Adams was undoubtedly correct in his earlier assessment that he could not resist the partisan spirit within him. That spirit obviously rendered him unable, even in the midst of praising a man he admired so much, to refrain from taking one last jab at a man of whom he thought so little.<sup>45</sup> Having said that, it is interesting just how well John Quincy Adams's assessment of John Marshall has stood the test of time.

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43. *Id.*

44. *Id.*

45. His diary for August 29-30, 1836, made while JQA was reading Jefferson's 1793-1803 correspondence, reflects this disdain: "His duplicity sinks deeper and deeper into my mind. His hatred of Hamilton was unbounded; of John Marshall, most intense . . . . His treatment of my father was double-dealing, treacherous, and false beyond all toleration." *Id.* at 306.