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ADDRESS DELIVERED BY JUDGE FRANCIS M. FINCH, DEAN OF THE COLLEGE OF LAW AT CORNELL UNIVERSITY, FEBRUARY 4, 1901.

One hundred years ago this winter day a new Chief Justice took his seat upon the Bench of the Federal Court at Washington. The court-room of the time was little better than a cavern, situated in a basement dark and dreary at the best, without ornament or touch of grace or dignity. The new occupant of the Bench took his seat quietly, careless of formality or display, and at once addressed himself to the work before him. The few who looked on at this simple but grave assumption of duty saw nothing remarkable in the man himself, sitting there wrapped in the dusk of his gown. The head was not large; no massive dome of brow overhanging the eyes; small, rather, as crown of a tall and powerful form, and yet a form so emaciated and with muscles so relaxed as to make each movement somewhat awkward. Only in the brightness of the intensely black eyes, piercing and scintillant, shone a trace of the dominant and powerful soul, waiting in the dark background to make all men know and heed. Scarcely at all impressed were some of those who looked on, but others who knew the man and the life he had lived lifted a warning finger that said wait and you will see. For they remembered that he came to his new duties with an experience rich and full, with

a preparation thorough and arduous, and with a brain of strongest and finest fiber. He had fought through many battles of the Revolution, displaying his young courage under the eye of that great chief who led his rustic riflemen against the veterans of an empire, and learning from him an indomitable patience, which has no better type than the familiar one of the obstructed river grinding its slow way through the rock. A lieutenant at nineteen, a captain at twenty-one, and often serving as Judge Advocate where the Courts Martial sat with their swords on the table, he shared in the unsuccessful defense of the fords of the Brandywine, in the desperate attack at Germantown—beginning with victory but ending with a rout,—and then in the cold and famine of Valley Forge—camp of bloody feet on the snows, camp of starvation for those who did not freeze, camp where treason and grumbling and envious ambition strove hard to overthrow the sad but determined leader of them all. Surely the young captain learned many lessons from the war. One learns fast in a fight, and lessons are plentiful, if hard, where hope wrestles with suffering and courage baffles despair.

But before the war closed, and when it had for the moment drifted away from need of him, he began the study of law in the office of one soon to be chancellor, and already a little gray with the cobwebs of equity, but a study broken more or less by occasional military service, and so mixing law and war—books and drums—until peace was declared and law became the dominant pursuit. Not always dominant, for that happened to him which so often happens, that from the beach where law borders on politics and the sands touch the water, he was lifted by an incoming surge and swept into the troubled waves of party warfare:—scene where another fight was on between We the People and We the States—a fight to demand of him the matured strength and vigor of his life.

He was elected to a seat in the Virginia Legislature. They chose men in those days, the best there were and with wills of their own, and the young man beginning his political career faced adversaries whose thrust and blow were the keenest and heaviest within the Virginian borders. More lessons and of a different sort were here learned, and one gravest of all, pushing up from the tangle of conflicting aims and snarling rivalries, that the existing Confederation of the States was but a rotten girdle which the weakest whim could break, and that some way and somehow a bond must be forged, iron-linked and

steel-riveted, to concentrate and compact the restless and defiant sovereignties into one solid and controlling organism. Difficult lesson! but already the bond was being prepared. Difficult! for men like not to be governed and prefer to govern, and freedom is a word easy to misuse and a tempting lure for unreasoning crowds not able to measure its meaning. And so when a written Constitution was framed about every word of which some struggle had swirled and combatants had gathered; framed so as to tie the separate States into regular orbits about a sun of national control and stop their erratic and centrifugal flights into the boundless space of unchecked liberty, there was war at once, war of words and of argument, war of sarcasm and invective, war everywhere of such giants as there were.

Our young lawyer and legislator was drawn into this conflict by virtue of his place as a member of the Virginia convention to which the proposed Constitution was submitted for ratification. No doubt about his vote at least, but terrible doubt as to the final outcome. For a determined opposition to the new restraint and the untried system was led by Patrick Henry, that splendid orator whose brilliant eloquence blazed all through the war, and has become only a marvelous legend in these days when words are very sober things and common-place, and few dare to give them wings that they may sometimes fly and not eternally crawl. But the eloquence of Henry by no means stood alone. It was backed and buttressed by the cooler arguments of Monroe and Mason and other champions of State sovereignty who rang the changes on what they were pleased to regard as the utter destruction of human rights. It needed strong men to confront these formidable adversaries especially since the Constitution was not popular among the people. It needed as it had the learning and ability of Madison, the earnest appeals of Randolph, the legal adroitness of Wythe and more than all the lucid and resistless logic of Marshall whose name at last was on all men's tongues. It is not too much to assert that he bore a leading part against the assault in a debate lasting twenty-five days, and that the narrow majority by which Virginia accepted the Constitution was largely due to his powerful advocacy. He was no orator, he had no graces of rhetoric, the tones of his voice were neither mellow nor persuasive, no subtle magnetism flashed along the lines of his thought, but he was compelled to win, if win he did, by the sheer force of unanswerable argument, running crystal-clear, rising grandly over all obstructions, and floating truth to its harbor.

See again what lessons he was learning, all unconscious of their bearing on his future life and fame. Before such antagonists, certain to detect mistake or riddle fallacy, it was imperative that he should know the Constitution thoroughly in every word and line, that he should have precise views of its construction and of the scope and range of its operation, and this required prolonged study and patient and honest thought. How well he did the work all authorities agree. Even Henry praised his "candor" and awarded him "veneration and respect," and Wirt tells us the secret of his wonderful power. He saw always, at once and as if by intuition, the pivotal point of every controversy on which the conclusion was sure to swing, and, disdaining all artifice and discarding all incident or accident surroundings, moved straight upon it and enveloped it with a merciless logic. Every link in the chain of his reasoning was sound and clean, developed with a marvelous simplicity as clear as it was strong. There was no escape from the deadly sequence of his thought, and his masterful capacity lay in his power to compel conviction, to force surrender.

But not yet was his preparation complete. It seemed almost as if some Providence was training him like an athlete for a struggle vital to a free civilization. For he passed a term in Congress mingling with statesmen and partisans and studying the ways of each; then went to France on a diplomatic mission and returned disgusted with a race which vilified everything American, and not for the last time either, as we were taught during our war with Spain, and should not pardon quite so cheaply as we do; next was made Secretary of War and then Secretary of State where the methods of diplomacy and the doctrines of international law became familiar to his thought; and finally and at last, the preparation ended, Chief Justice of the Supreme Court, and the man whom we saw quietly taking his seat on the Bench.

Let him sit there silent for a moment while we consider, as perhaps he was doing, the trouble behind him and the danger in his front, for both threatened the success of his judicial career. The Court itself was in its infancy,—but twelve years old, just learning to walk alone. It had done little in that period, gained nothing in the popular estimation and not overmuch in its own. Its members had been constantly changing and refusal to serve was a common answer to judicial appointment. Even the great ability of John Jay and the respect which he inspired could not lift the dead weight of a position

so humiliated that the judges had been required to act as commissioners of pensions and to dole out the nation's charities. Jay, himself, on his resignation, spoke discouragingly of the tribunal and ventured to doubt whether defects in its organization would not inevitably impede its usefulness. Doubtless this was the prevailing impression though hardly a just one, for, in its brief life, it laid down some foundation principles of great value and which no successor was required to overrule or disregard. But after all these did not suffice to lift it to its true and destined place as one of the co-ordinate departments of the government, or to secure for it the reputation and authority which was its due. Nobody feared it. Many gave it disrespect. That was the trouble which Marshall saw behind him; a Court to be lifted from a low level into higher and serener air; a Court despised to be made a Court respected; a tribunal of little power to be transformed into an invincible guardian of national justice and peace.

The trouble in front of him was of a different sort. Great judge as he was let us not forget that he was human. Let us not try to make of him a bronze statue, swarthy and stern, for there were sensitive vibrations in his nerves and warm blood in his veins. He could love with an absorbing passion, and those who do that can at least dislike a little and on occasion. The man who for twenty years and in spite of his public toils could wrap about the invalid wife of his youth a most devoted affection and tender care was likely to be a man who would feel what he regarded as false or wrong down to the bone. And he surely foresaw that his patience and his temper as well as his intellect were to be subjected to a severe and continued strain. For he had not seen the rapid growth of party strife, so poisoned with venomous lies on both sides that the simple truth remains yet obscure, without recognizing that the head and front of the clamor for State rights and for a strict construction of the Constitution, so narrow as to throttle the infant in its cradle, was Thomas Jefferson, popular idol and leader, who had rendered service great and brave in behalf of independence, and now, about to take his seat in the presidential chair, would be likely to wield the whole executive force against a centralized national power; no man suspecting how much the sobering pressure of official responsibility would make his action better than his words and his doctrine disappear in his deeds.

These two men did not like each other. They could not. They were made on different patterns. If for a time they treated each other with some politeness it was as thin and cold as the baby ice of a first freeze, and a collision was sure to come. And so, in front of the new occupant of the Bench, loomed up a dangerous and difficult struggle against an adversary astute and crafty, entrenched in the very fortress of power, and at the head of a party strong in the victory it had won. The Chief Justice had not only that hostility to face, but also to stand on guard over his own fairness and impartiality, and to banish from his judgment every trace of such unconscious prejudice as might warp his thought with personal distrust or partisan desire; for the smoke of the battle hung yet about him and there were live coals in the ashes, but never again to be blown into a flame. In my study of the man I have been most strongly impressed with the swift and thorough way in which he put off the fighting partisan and put on the calm and thoughtful and rigidly impartial judge.

The inevitable collision came, and over as little a matter as the appointment of a justice of the peace in the District of Columbia. President Adams, in the waning moon of his term and just before it ended, lent himself to a seizure of vanishing spoils by filling all possible offices with his own partisans and so leaving to the victorious enemy only the shouting but no booty. In a changed form the charming game has been played in our own day. Among these death-bed appointees was one man whose commission as justice of the peace for the District had been made out and signed by the President, after the nomination had been confirmed by the Senate, but not delivered to the anxious officer because it fell into the hands of Madison, the new Secretary of State, who, by his chief's orders, refused to deliver it, and so blasted the hopes of the waiting appointee.

We may not blame Jefferson. What he could snatch from the last blaze of the Federal fire he had some reason to think was his. But the embryo official, after demanding delivery of his commission and getting a curt refusal, applied to the Supreme Court for a writ of mandamus to be directed to Madison commanding him to deliver the commission to the appointee. Jefferson was enraged. Naturally. What business had a court to question the orders of the President or summon his Secretary to answer at its Bar? And so the Secretary refused to answer, or even to appear in the proceeding, and the Attorney General answered only as a witness and upon com-

pulsion. It was long before the decision came, for, beyond this studied contempt of a constitutional tribunal, there was a deliberate and venomous attack upon the independence of the Judiciary which began with an Act of Congress abolishing the August term of the Court, so that it was more than a year before the case was finally determined. But the time came at last and Marshall delivered the first of those opinions upon constitutional questions which have made his name famous and lifted the Court to its true place in the Republican system.

And this is how he did it. I may tell it, I think, so that no legal study or training will be needed for its comprehension; and I *must* tell it for a very grave reason which will develop itself in the process.

He began by stating the questions which the application raised in their natural and logical order. First: has the applicant a right to the commission which he demands? Second: if he has and the right has been violated does the law afford him a remedy? Third: if it does is that remedy a writ of mandamus by the Supreme Court? He discusses these questions in the order of their statement. As to the first he holds that the appointment was complete when, after confirmation of the nomination by the Senate, the President had signed the commission, and the Secretary of State had affixed the Great Seal, but that the recording the document and delivering it to the appointee were purely ministerial acts following the appointment, and not essential parts or elements of it, and therefore the applicant *was* duly appointed and so entitled to have his commission. To the second question the Chief Justice answered that the right of the officer so duly appointed to his commission and his office was a valuable and vested right which had been violated by a withholding of the commission, and for such violation the law gave a remedy by an action for damages, and where that could afford no adequate redress, then by a writ of mandamus commanding performance of the duty refused. So far the applicant was successful, but when it came to the third question, now become vital and decisive and shown to be such, the Judge ruled that while an Act of Congress *had* authorized the Court, in a class of cases to which the one at bar belonged, to issue a writ of mandamus, yet that authority was ineffective because the Act in that respect was in violation of the Constitution and so was null and void; and since no such authority had been granted from any other source the Court had no right to issue the writ and the petition for it should therefore be denied.

I spare you a detail of the argument, but call your attention to two of the vastly important doctrines thus established, and to a criticism of the opinion which has more or less prevailed, but which I think to be without adequate foundation. The decision established that Congress was not like the English Parliament, unlimited in its action and omnipotent in legislation, but was restrained by the limitations of the Constitution, the written evidence of the people's will; and that there was a tribunal, created by the same masterful will, which could enforce the restraint by annulling and refusing to act upon the illegal legislation. There was a twofold value to this doctrine. It not only confined the National Legislature within the prescribed limits, but it provided also a peaceable solution of the inquiry, certain to continually arise, whether a specified enactment was or was not in accord with the Constitution: dispute likely to be rancorous and terminate in force if no other method of decision was provided. The opinion further established that no officer of the Government was shielded from legal accountability by his official character if he trampled upon the vested rights of the most humble citizen.

It was not strange that the new President and his followers looked askance at the looming up of this judicial supervision, and sought to break its force by the criticism that so much of the opinion as passed on the validity of the petitioner's appointment was extra-judicial, unnecessary to the decision, and so without authority, and introduced to vent some Federal spleen on the President, and drive him to surrender of the offices which he withheld; because, said the assailants, if the Court had no jurisdiction, as it declared it had none, to issue the writ of mandamus at all, what mattered it whether the applicant was duly appointed or not, and what possible concern had the Judge with that inquiry. The suggestion never in the least touched or weakened the magnificent force of the constitutional argument, but has cast a blur upon the legal excellence and accuracy of the opinion which has disturbed even devoted admirers of its author, and led sometimes almost to apology.

In the centennial history of the Court, published with its approval, the opinion is said to be "in some respects *obiter dictum*," and the same thing is apparently conceded by the Court itself as late as 1880 in the case of *United States* v. *Schurz* (102 U. S. 395), though it is added that the ruling, although said to be extra-judicial, has been steadily followed. I

do not admit the soundness of the criticism. I have no apologies to make, but insist that none are needed. I maintain the judicial correctness and propriety of the whole opinion and deny that there is a single word in it which is extra-judicial or unnecessary to the ultimate decision. Be patient with me, I pray you, while I venture to remove even the faintest film of suspicion from one of the ablest and fairest opinions ever traced by a judicial pen.

I admit that ordinarily where the jurisdiction of the Court to grant the relief sought is challenged that becomes the first question to be determined, and if the Court is of the opinion that such jurisdiction does not exist the case is ended and comment upon the possible rights of the parties is immaterial, impertinent, and binds nobody. But that rule on occasion comes in collision with another rule to which it is necessarily subordinate; a rule of great value and of extremest wisdom, never to be consciously violated. That rule is that an Act of the Legislature should never be declared unconstitutional and therefore void except where such declaration is absolutely and inevitably necessary to a determination of the case before the Court: that is to say that if the controversy *can* be determined on other grounds it *must* be determined on other grounds, and the constitutional question be left to some proper, because imperative, occasion.

The power to vindicate the Constitution against legislation which contravenes it is the highest and most delicate power of the Judiciary. By the early Court it was spoken of with reverence as an "awful" power. It is no common thing, no cheap resource to be drawn on at will. It challenges the action of the people's representatives, of a co-ordinate department of the Government; it throttles a law by them enacted; it measures the Act by the fundamental law. Indeed such a tremendous power should never be exerted without a necessity so imperative that from it there is no escape.

To that rule, which Marshall himself afterward formulated, he gave a just obedience as it was his duty to do. That duty demanded that before raising the constitutional question he should first determine whether to solve the case before him it was *necessary* to raise it; whether it might not be that the writ could be refused without touching the grave question of constitutional jurisdiction at all; in which event that question must be left, for the time at least, unsolved. To perform that duty the Judge was compelled first to ascertain whether on

the facts the applicant was entitled to the issue of a mandamus. Only if he was did the further question arise whether the Court had power to issue it. For the inquiry was not whether there was general jurisdiction over the subject-matter of the applicant's right to his commission, nobody disputing that, but whether there existed the special jurisdiction to award a particular form of remedy, and so if the applicant was not entitled to that remedy, whether the Court could give it or not, that would be the sufficient and proper answer. To add another, obviously needless, and yet involving a grave constitutional question, would be extra-judicial and rob the decision on that point of all authority. *"Obiter dictum!"* Jefferson would have shouted—a Federal harangue tacked to an ended opinion!

I may possibly, at the expense of some endurable repetition, put the justification of the opinion as a whole in another form. There were three methods of framing it and only three. First: the Judge might hold that the appointment was not complete until the commission was delivered and so the applicant had no right to a mandamus. That would end the case and the opinion, for since the writ was refused for *one* sufficient reason it was not permissible to give another involving the constitutionality of a statute. Second: he might pass over the question of the applicant's right in silence and go to the constitutional question. But in that event those who believed the applicant had no right could dispute the necessity of the constitutional argument and therefore deny its authority; saying that the Judge silently assumed what was false to justify his resort to the constitutional question, and did not dare either to assert or argue the proposition assumed. Or, third: he could do as he did, first establish the applicant's right and then, the necessity of deciding the constitutional question being shown, proceed finally to the argument of that.

And so I am confident that there is not and never has been any real foundation for the criticisms of enemies or the half-doubt of friends; that the opinion is not marred by the presence of a single needless or extra-judicial word; that from the beginning to the end it moves on its way with a logic as faultless as it is irresistible, and with a simplicity that is massive and grand; a carving cut from flawless marble by a master hand.

We may take this case as a type and example and spare ourselves any discussion of those others which slowly but

surely built up that solid edifice of constitutional law which has proved to be the fortress and the glory of our republican institutions. For thirty-four years he continued his judicial labors, handing down from the Bench about five hundred opinions. They were models of judicial style. I often wondered how it happened that his severe reasoning and close and inexorable logic was clothed in words not only simple, but always apt to convey the thought, and flowing along with a movement as smooth and grand as that of a deep river unvexed by rocks or rapids. Perhaps Judge Story has given us the explanation. He credits Marshall with much of literary taste, describing him as a persistent reader of the famous English authors and as specially fond of poetry, and even tempted into writing verses of his own.

The fact tends to lessen our wonder at the lucid smoothness of his style, the even balance of his sentences, and now and then the dainty choice of an adjective. In one instance, at least, a flash of irony lit up the sober flow of his argument with an interjected phrase delicate indeed but having a cutting edge. And yet no grace or elegance of style was ever chosen for itself alone, but always as the fit vestment of close and logical thought. In that direction his opinions were remarkable for many things and in many ways.

They exhibited on occasion a resolute and unflinching but calm and dignified courage. It was no light matter to face the hostile legislation of one of the older States, practically defying a decision of the Court, and the order of a governor calling out his troops to resist by force the execution of a Federal decree. Very grave but very firm were Marshall's words as he stated the momentous truth that if any State could at will so nullify a national judgment, there was an end of the Court and of the Constitution, and the nation was resolved into warring and colliding fragments; and somewhat stern his order that the judgment should be enforced.

It took some courage, too, on the trial of Burr for treason, to lay down a rule of evidence which made a conviction impossible in the face of a strong popular demand for such conviction. Burr was distrusted by Washington, and Marshall revered Washington. Burr shot Hamilton, and Marshall loved Hamilton. That Burr was at least guilty of some unlawful conspiracy was plain, and the whole force and energy of Jefferson's administration and of his party following was brought to bear against the man who, by a sort of political treachery, had al-

most beaten Jefferson out of the presidency. But there was the constitutional definition of treason requiring some overt act to be proved by at least two witnesses—a definition meant to protect the people against that horrible and dangerous doctrine of constructive treason which had stained the English records with blood and filled the English valleys with innocent graves. The steadfast Judge would not relax or weaken the rule and trials for treason are almost unknown in our legal records.

His opinions are also remarkable for their great reach into the future of the nation and almost prophetic understanding of its coming growth. When Jefferson bought of Napoleon the whole Orleans territory and so made American the mouths of the great river, he did a thing marvelously wise in its foresight and magnificent in its results. It was the victory of a fortunate moment. The President cornered the Emperor. Yet, so deep had the partisan spirit of the time sunk into Jefferson that we find him saying to his friends that he knew he had thereby violated the Constitution. Not so at all. He merely violated his own narrow and grudging construction of that instrument, and read it more correctly by his acts than by his words.

Marshall, with eyes looking far into the future, had settled all such questions. He said that the Constitution had made of the people of the States a nation, and it had a nation's right to acquire property by conquest or purchase. He said again: "the power of governing and legislating for a territory is the inevitable consequence of the right to acquire and hold territory. * * * Accordingly, we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans." These wise and weighty words shine down upon us in the emergencies through which our national life is passing as if they had been kindled and aflame for the new summer of a new century. He who spoke them has been silent for more than sixty years, and yet they come to us as if he was yet alive and saw and felt their fitness for the new duties which have led us into untried ways. There is in them the light that will guide our hesitant steps, the strength that will brace all weariness or fear, the germ of a vital truth expanding before our eyes. They should encourage the man who shivers before the far-flying of the nation's flag; they should shame the lips, few and scattered, spitting venom at the manliness of those who bear it; they should shame the mere demagogue, though nothing can shame him; and they

should serve as the warrant for that vigorous national growth which is both natural and necessary; for when a nation ceases to grow that nation begins to die.

Silent for more than sixty years! alas, yes! For death came to the great Chief Justice as it comes to all; found him with the harness on, struggling against weakness to drag his accustomed load; left him asleep under the Virginian sod, every blade of which he loved with a Virginian's love for his native soil; left him with a simple and modest stone carved with the simple and modest words dictated by himself to mark his resting place. We may say of it, as Goldwin Smith has beautifully said of the plain tomb of the first Edward: "Pass it not by for its simplicity: there is no nobler dust."