ATTEMPTS TO CURB THE POWER OF THE SUPREME COURT

DURING THE MARSHALL ERA, 1801-1835

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CHAPTER I

EARLY ATTEMPTS TO CURB THE COURT'S POWER

Since the beginning of the nineteenth century the activities of the United States Supreme Court have been of great interest to students of American government and history and to the public in general because the Court's decisions affect the lives of all citizens. The Court, while praised at times, has suffered severe and determined criticism from both enlightened and unenlightened sources. This study intends to examine criticisms of the Court and efforts to curb its power during the formative period of American constitutional law. Although the attack upon the Court's power became quite violent during the 1820's, it had its beginnings during the first term of Thomas Jefferson's presidency.

The controversy over the Court's power actually began with John Adams' appointment of John Marshall as Chief Justice on January 20, 1801. Marshall replaced Oliver Ellsworth who resigned after having spent much of his last

year of office in France as minister-plenipotentiary.[1] Virginia Republicans, especially President-elect Jefferson, were quite upset at the appointment of Marshall, since Jefferson had planned to place Judge Spencer Roane, a staunch Virginia Republican, on the high bench as Ellsworth's successor.[2] There is little doubt that had Roane been appointed Chief Justice rather than Marshall, American constitutional law in the new republic would have developed along different lines. Jefferson and Marshall, third cousins and fellow Virginians, became fierce political enemies when Jefferson determined to destroy the power of the federal judiciary while Marshall was just as determined to enhance its power.

The first hint that a clash between Jefferson and Marshall was imminent came in an omitted paragraph from Jefferson's first annual message to Congress. It has never been ascertained why Jefferson struck this paragraph from

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[1]Ellsworth had never really enjoyed being Chief Justice because of the long periods of separation from his wife and children and the hardships of riding circuit. From 1798 to the end of Adams' administration, foreign affairs dominated the government, as war with France seemed imminent. Ellsworth, being one of Adams' most trusted associates, was sent to France to try and develop better relations between that country and the United States and helped negotiate the Convention of 1800. William G. Brown, The Life of Oliver Ellsworth (New York, 1905), p. 278; Henry Flanders, The Lives and Times of the Chief Justices of the Supreme Court (Philadelphia, 1881), II, 208.

[2]William E. Dodd, "Chief Justice Marshall and Virginia," American Historical Review, XII (July, 1907), 776.

his prepared address at the last minute, for it undoubtedly contained his beliefs as to which official or branch of government decided the constitutionality of acts passed by Congress. In this paragraph, Jefferson held that the infamous Sedition Act of 1798 was "in palpable and unqualified contradiction to the Constitution" and hence a "nullity."[3] Jefferson was, in effect, declaring that the President or the States, not the judiciary, had the power of judicial review over acts passed by Congress. He did say in the message that the judiciary should be examined by Congress, especially the Circuit Court judgeships which had been established by the Federalist-sponsored Judiciary Act of 1801.[4]

The relatively mild statement by Jefferson in his message precipitated a torrent of criticism upon the Supreme Court, ex-President Adams, and especially on the former Federalist-dominated Congress, which had passed the Judiciary Act of 1801. The Republicans, who in 1801 had gained

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[3]Albert J. Beveridge, The Life of John Marshall (Boston, 1919), III, 606, quoting from the paragraph omitted from the final draft of Jefferson's message to Congress, December 8, 1801.

[4]The Judiciary Act of 1801 reduced the number of justices on the Supreme Court from six to five and relieved the justices of circuit duty. The act also created many new judgeships including three circuit judges for each of the six U. S. Circuit Courts, U. S. Statutes at Large, II, 90, (1801). James D. Richardson, editor, Messages and Papers of the Presidents (Washington, 1904), I, 331.

the Presidency and a majority in both houses of Congress,[5] were now ready to attempt to repeal the act and hence abolish the judgeships established by it.[6] In the Senate a lively partisan debate over repeal ensued, lasting from January 6 to February 3, 1802. The debate encompassed not only the question of repeal but the nature of the Constitution itself. The Congressional debate presented practically every argument for and against a federal judiciary independent of the legislature and the executive, as well as arguments concerning the authority and legality of the Court's assumption of judicial review over Congressional acts.[7]

Republican Senator John Cabell Breckenridge of Kentucky opened the debate by moving repeal of the Judiciary Act of 1801.[8] He declared that the need for more courts and judges was on the decrease and that ". . . the time will never arrive when America will stand in need of thirty-eight federal judges."[9] Gouverneur Morris, Federalist

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[5]Noble E. Cunningham, The Jeffersonian Republicans in Power (Chapel Hill, 1963), p. 4.

[6]Many of these offices created by the Judiciary Act of 1801 had been filled by the famous "midnight judges" appointed by President Adams during his last few days in office.

[7]Annals of Congress, 7th Congress, 1st Session, pp. 25-134.

[8]Ibid., p. 23.

[9]Ibid., p. 26.

Senator from New York, challenged Breckenridge and argued for independence of the judiciary. He retaliated that the judiciary, once established, must be free from the clutches of the legislature and that the judges must have power to declare acts of Congress unconstitutional. In an unfortunate statement Morris concluded that the judiciary must remain independent from the popular branch of government so that the people might be saved "from their most dangerous enemy. . . themselves."[10] The Republicans used Morris' statement as ammunition. James Jackson of Georgia castigated Morris by declaring, "For myself, I am more afraid of an army of judges, under the patronage of the President, than an army of soldiers."[11]

Breckenridge then asked where in the Constitution the Federalists and the members of the Supreme Court found the right to annul acts of Congress.[12] Morris declared, "They derive it from the constitution of man, from the nature of things, from the necessary progress of human affairs. . . ."[13] His argument that the right of judicial review over Congressional legislation came from an authority higher than

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[10] Ibid., pp. 33-41.

[11] Ibid., p. 47.

[12] Ibid., pp. 178-179.

[13] Ibid., p. 189.

the Constitution was of no avail, as the Senate voted sixteen to fifteen for repeal.[14]

In the House the debate over the Repeal Bill became even more heated. The Republicans now revealed their plan to impeach those Federalist judges who opposed Republican ideology. Robert Williams, Republican from North Carolina, lamented that if judges had the power to declare acts of Congress unconstitutional with no appeal, they could neither err nor be impeached.[15] John Randolph added that the judiciary wanted in the name of judicial review "a new power, of a dangerous and uncontrollable nature."[16] William Branch Giles, Republican floor leader from Virginia, summed up the arguments for his party and maintained candidly that the Federalists were simply attempting to "entrench themselves" in the government and that they had chosen the judicial branch because judges "held their offices by indefinite tenure and of course were further removed from any responsibility to the people. . . ."[17]

The Federalists, through the eyes of their able floor leader, James A. Bayard of Delaware, believed that the

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[14] Ibid., p. 183. Senator John C. Calhoun from South Carolina voted against the act. He was the only Republican who did not follow party leadership on this issue.

[15] Ibid., p. 531.

[16] Ibid., p. 661.

[17] Ibid., p. 581.

Republicans were trying to destroy the judiciary and especially the Supreme Court.[18] Bayard and Roger Griswold of Connecticut warned that if the Repeal Bill were passed, not only would the Constitution be destroyed but civil war might result. These Federalists predicted that some states might secede if the Republicans were successful.[19] However, the Federalists were outnumbered again and the Judiciary Act of 1801 was repealed on March 3, 1802.[20]

Less than a month had passed when the Republicans added an amendment to the Repeal Act abolishing the June session of the Supreme Court. This amendment provided for only one session of the Court each year, beginning in February. Bayard sensed the motive behind the amendment when he asked if the Republicans were afraid the Court would declare the Repeal Act unconstitutional and, hence, void. He stated that the purpose of the amendment was to keep the Supreme Court from ruling on the validity of the Repeal Act until it had already gone into complete execution and the public had forgotten about it.[21] To no one's surprise the amendment passed

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[18] Ibid., p. 632.

[19] Ibid., pp. 648-650, 793.

[20] Ibid., p. 982. The vote was 59 for the Repeal Act and 32 against. At this time there were 69 Republicans and 36 Federalists in the House of Representatives.

[21] Ibid., p. 1235.

on April 23, 1802,[22] and the Supreme Court did not meet again until February, 1803.

During the February term of the Supreme Court in 1803, John Marshall, speaking for the majority of the Court, delivered an opinion destined to bring the wrath of Congress and the President upon the judiciary. The case was Marbury v. Madison,[23] which gave Marshall an opportunity to strengthen the power of the Court and to provide for a more independent judicial branch. Until this time the Supreme Court had never exerted much authority and was considered the weakest of the three branches of the national government. The case involved the legality of Secretary of State James Madison's refusal to deliver the commission for Justice of the Peace in the District of Columbia to William Marbury, one of the "midnight appointees" (under the Act of 1801) of President John Adams.[24] Marbury brought the case before the Supreme Court and asked for a writ of

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[22] Ibid., The vote was 46 to 30 for the amendment.

[23] Marbury v. Madison, 5 U. S., 368-391 (1803).

[24] An interesting facet of the case was that Marshall had been Secretary of State under Adams and had been lax in his duty to deliver some of the commissions to the forty-two judges whom Adams had appointed, during his last few days in office. Beveridge, Life of John Marshall, III, 124; John A. Garraty, "The Case of the Missing Commissions," American Heritage, XIV (June, 1963), 8.

mandamus requiring Madison to deliver the commission, thereby completing the legal transaction.[25]

Marshall began his famous opinion by lecturing President Jefferson and Secretary of State Madison on their official responsibilities. He declared that Marbury was legally entitled to the commission and refusal to deliver it was "not warranted by law."[26] He continued that although Marbury was entitled to a writ requiring the delivery of the commission, that a writ of mandamus could not be issued by the Supreme Court.[27] He explained that the case could not be brought up originally in the Supreme Court according to Article III of the United States Constitution, which enumerates the original jurisdiction of the high court. Marshall reasoned that the Supreme Court could not rule in the case unless the subject were a matter of legal appellate jurisdiction. Section 13 of the Judiciary Act of 1789 had given the Supreme Court the power to issue writs of mandamus to public officials,[28] but Marshall declared that this section of the act "appears not to be warranted by the

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[25]For a complete explanation of the case see Beveridge, The Life of John Marshall, III, 101-156.

[26]Marbury v. Madison, 5 U. S., 373, 380-382 (1803).

[27]Ibid., p. 388.

[28]U. S. Statutes at Large, I, 81.

constitution."[29] Marshall then sacrificed the relatively unimportant Marbury for the more significant power of judicial review over acts of Congress. This was one of the most important questions ever decided by a court of law. It gave a power to the United States courts that is lacking in the judiciaries of every other major country in the world. Marshall, by reversing the regular order of the case and reserving the jurisdictional question until last, succeeded in delivering a vicious propaganda attack on the Jefferson administration while giving the judiciary an independence which has been criticized and attacked ever since but has never been destroyed.

The Marbury v. Madison decision did not result in an immediate attack upon the Court. Other events of lasting significance were more prominent in the minds of Republicans and people in general at that time. Jefferson himself was more concerned with the coming Presidential election, foreign affairs, and negotiations concerning the purchase of the Louisiana territory from France than with the opinions of Marshall or in planning any immediate assault upon the Court.[30]

The first concerted Republican effort to shatter the power of the judiciary was a call for the impeachment and

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[29] Marbury v. Madison, 5 U. S., 388 (1803).

[30] Beveridge, The Life of John Marshall, III, 153-155.

conviction of key Federalist members of the federal courts and their replacement by Republicans. William Branch Giles put the matter in plain terms when he declared, "We want your offices, for the purpose of giving them to men who will fill them better."[31] On February 4, 1803, Jefferson wrote a letter to the House of Representatives which contained affidavits and complaints against Judge John Pickering of the United States District Court of New Hampshire.[32] Judging from the testimony of witnesses concerning Pickering's actions on the bench and statements from his friends, it is obvious that he was a drunkard and had been on the verge of insanity for at least three years prior to the impeachment proceedings.[33] The only real question in the case concerned whether Pickering's insanity could exempt him from being convicted of "high crimes and misdemeanors." Pickering's son, Jacob, along with Federalist Senators Samuel White of Delaware and Jonathan Dayton of New Jersey, declared that one who was insane could not be convicted of such crimes.[34]

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[31] Memoirs of John Quincy Adams, I, Charles F. Adams, editor (Philadelphia, 1874), 322.

[32] Annals, 7th Congress, 2nd Session, p. 460.

[33] Ibid., pp. 334-342. The depositions of Samuel Tenney, Ammi R. Cutter, William Plummer, Joshua Brackett and Edward St. Loe Livermore printed in the Annals of Congress illustrated Pickering's actions; Worthington C. Ford, editor, Writings of John Quincy Adams (New York, 1914), III, 108.

[34] Annals, 7th Congress, 2nd Session, pp. 328-329, 365.

The Senate, however, did not agree, and Pickering was found guilty of "high crimes and misdemeanors" on March 12, 1804, and was removed from office.[35]

The impeachment of Pickering was only the first step in the Republican plan to weaken the judiciary. The next and more significant step was to impeach Samuel Chase, Associate Justice of the Supreme Court. This was, as John Quincy Adams wrote in March, 1805, unquestionably intended to pave the way for another prosecution which would have "swept the judicial bench clean at a stroke."[36] If the attempted removal of Chase were successful, John Marshall, the distinguished nemesis of Jefferson and his party, would be next.

No sooner had the Senate convicted Pickering when the House voted seventy-three to thirty-two to impeach Chase.[37] Jefferson had foreseen this step in May, 1803, when in a letter to Joseph H. Nicholson, the President asked the Maryland Representative to take an active part in the impeachment of Chase for his "seditious and official attack on the principles of our Constitution."[38] Jefferson added that it would be better if he did not get involved in the proceedings. Chase's "seditious and official attack" had

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[35] Ibid., p. 367.

[36] Ford, editor, Writings of John Quincy Adams, III, 108.

[37] Annals, 8th Congress, 2nd Session, p. 675.

[38] Albert E. Bergh, editor, Writings of Thomas Jefferson, X, (Washington, 1804), 390.

occurred in his charge to a Baltimore circuit court jury, May 2, 1803. In his harangue, Chase, a Federalist aristocrat, denounced the democracy which Jefferson and the Republicans held so dear. He declared that Universal suffrage would lead to "mobocracy, the worst of all possible governments." He lambasted the Republicans by declaring that the doctrine "that all men in a state of society are entitled to enjoy equal liberty and equal rights, have brought . . . mighty mischief upon us; and I fear that it will rapidly progress, until peace and order, freedom and property, shall be destroyed."[39] Chase went on to denounce the natural rights philosophy on which Jefferson had based the Declaration of Independence and all his theories concerning government and society.[40]

Nicholson discussed Jefferson's proposal to impeach Chase with Representative John Randolph of Virginia and Speaker of the House Nathaniel Macon of North Carolina. Randolph, an intransigent states' rights advocate, endorsed the impeachment plan, but Macon was more hesitant. In a letter to Nicholson on August 6, 1803, Macon questioned the effects of a "judicio-political" charge to a jury on the people of the United States. He expressed doubt that such an error in judgment was just cause for impeachment of a

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[39] Annals, 8th Congress, 2nd Session, p. 675.

[40] Ibid., pp. 675-676.

judge. Macon also warned Nicholson to allow someone else to manage the prosecution of the trial, as it was common knowledge that Nicholson wanted a Supreme Court judgeship. It would be more discreet to have someone less personally involved take the lead in the proceedings.[41]

When Congress again met in January, 1804, Randolph suggested that a House committee be appointed to investigate the official conduct of Chase.[42] The committee extended its investigation to include Chase's conduct in the trials of John Fries who had been convicted of treason in 1798 and James Thompson Callender, editor of the Richmond Enquirer, who had been found guilty of libel under the Sedition Act against President John Adams. Both trials had taken place in the spring of 1800 with Chase presiding.[43]

On March 12, 1804, the House of Representatives voted to impeach Chase under eight articles. Articles I and II concerned Chase's conduct during the Fries trial; articles III, IV, V, and VI concerned the Callender trial, the

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[41] William E. Dodd, The Life of Nathaniel Macon (Raleigh, N. C., 1903), pp. 187-188.

[42] Annals, 8th Congress, 1st Session, p. 805.

[43] In 1798 the Federal government placed a direct tax on houses, land, and slaves. The people of eastern Pennsylvania were extremely angry about the tax and when two tax-dodgers were arrested, John Fries, a Pennsylvania auctioneer, led a group of armed men and released them from prison. Fries and two others were arrested and tried for treason. Beveridge, Life of John Marshall, III, 171-172.

fourth accusing the Justice of "injustice, partiality, and intemperance" in his official actions. Articles V and VI charged Chase with violating Virginia criminal procedures during Callender's trial.[44] John Quincy Adams, in a letter to his father, observed that if the commission of simple errors in the legal procedures of a state was grounds for impeachment, the articles then contained a "virtual impeachment of . . . all the judges of the Supreme Court from the first establishment of the national judiciary."[45]

Articles VII and VIII were based on Chase's conduct toward the Newcastle, Delaware, grand jury in 1800 and the Baltimore grand jury in 1803. Article VIII accused Chase of delivering an "intemperate and inflammatory political harangue . . . indecent and unbecoming . . . a judge of the Supreme Court of the United States."[46]

Even Chase's influential Federalist friends had little hope for his acquittal.[47] Because of Republican strength in Congress and the discreet backing of President Jefferson, it appeared that the question of Chase's guilt or innocence was merely academic. After disposing of Chase, the

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[44]Annals, 8th Congress, 2nd Session, pp. 86-87.

[45]Writings of John Quincy Adams, III, 116.

[46]Annals, 8th Congress, 2nd Session, pp. 87-88.

[47]William C. Bruce, John Randolph of Roanoke, I (New York, 1922), 205.

Republicans could possibly remove all Federalist judges who chose to stand in the way of the new power structure. John Marshall fully realized the Republicans' plans and feared that they would be successful in removing all Federalists from the judiciary. In a letter to Chase before the trial began, Marshall indicated his alarm by even suggesting that "the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature."[48]

Albert J. Beveridge indicates that this was "the most radical method for correcting judicial decisions ever advanced, before or since, by any man of the first class."[49] Marshall actually advocated that appeals from Supreme Court decisions should go to Congress for final rulings. This statement directly contradicted Marshall's reasoning in Marbury v. Madison and many of his later decisions, and indicated his great fear that the Republicans would succeed in their impeachment plans. When later called to the witness stand in the Chase trial, Marshall spoke with "temerity and caution" and obviously attempted to accommodate the prosecution and the Senate.[50]

The trial began on February 4, 1805, in the Senate Chamber which had been well decorated for the event. Extra

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[48]Beveridge, Life of John Marshall, III, 177, citing Marshall's letter to Samuel Chase, January 23, 1804.

[49]Ibid., p. 173.

[50]Ibid., p. 196.

benches and chairs were brought into the Chamber and a new gallery was constructed for the spectators. The Chamber became an elegant courtroom worthy of the auspicious occasion.[51] The nature of the check and balance system of the United States government was on trial.

The House managers who conducted the prosecution were led by John Randolph. The other managers were Christopher Clark of Virginia, Joseph Nicholson of Maryland, John Boyle of Kentucky, Peter Early of Georgia, Caesar A. Rodney of Delaware, and George W. Campbell of Tennessee. All were lawyers and all but Clark had been managers in the Pickering trial.

Despite the legal ability of the House managers, they were completely outclassed by the defense counsel. Chase gathered the greatest legal experts in the United States for his defense. He chose Robert Goodloe Harper, former Republican Representative from South Carolina who had split with Jefferson's party over support of the Jay Treaty; Joseph Hopkinson, brilliant thirty-four year old lawyer from Pennsylvania; Philip Barton Key of Maryland; Charles Lee, Attorney-General of the United States during the Adams Administration; and the eminent Luther Martin of Maryland. Martin was leader of the defense counsel and Chase could not have chosen a better one. Martin possessed generous

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[51] Annals, 8th Congress, 2nd Session, p. 100.

portions of legal knowledge, wit, sarcasm and a fighting nature. He was also a coarse, unkempt alcoholic. All these characteristics helped make Martin a colorful character as well as a brilliant lawyer.[52]

The trial began with Chase reading a plea in which he denied none of the charges against him. He maintained, however, that his errors concerning particular laws and judgments were pardonable and did not constitute high crimes and misdemeanors.[53] Chase's speech lasted most of the day.

On February 9, Randolph opened the case for the prosecution. The Virginia Representative admitted that he was not well prepared to conduct the prosecution,[54] and his arguments throughout the proceedings showed his weakness and inability to compete with Martin and Chase's other counselors. One of the prosecution's problems was that Randolph had recently split with the Jefferson Administration over the Yazoo land fraud issue. Simultaneously Randolph was fighting Jefferson and Chase.[55] The prosecutor even went so far as to praise Chief Justice Marshall's handling

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[52] Ibid., p. 101; Bruce, John Randolph of Roanoke, pp. 203-4.

[53] Annals, 8th Congress, 2nd Session, p. 140.

[54] Ibid., p. 153.

[55] Beveridge, Life of John Marshall, III, 174.

of the Logwood case.[56] He did this in an effort to contrast Marshall's methods with those of Chase concerning cases of a similar nature. Randolph reasoned that a look at the judicious manner in which Marshall judged cases would help incriminate Chase. At the same time Randolph was obviously trying to irritate Jefferson who was concerned more with the future impeachment of Marshall than with the Chase trial.

The chief arguments of the prosecution concerned the improper conduct of Chase during the Callender trial. Callender had been arrested and tried for writing a pamphlet of a libelous nature entitled "The Prospect Before Us," which contained defamatory remarks against President John Adams.[57] In the Chase trial, the key witness for the prosecution was John Taylor of Caroline who had been present at the Callender trial. He recalled that Chase had refused to allow Callender's defense attorney, George Hay, to admit certain evidence and that Chase had interrupted Hay several times during the course of the trial ". . . the effect of

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[56]This case was United States v. Thomas Logwood. Logwood was indicted in 1801 for counterfeiting. Although Marshall was very lenient with the counsel for Logwood, the defendant was found guilty and sentenced to ten years' imprisonment. Order Book No. 4, 464 Records, U. S. Circuit Court, Richmond, as cited in Beveridge, Life of John Marshall, III, 187.

[57]Annals, 8th Congress, 2nd Session, p. 120.

which was to produce laughter in the audience at the expense of the counsel."[58]

John Marshall, chief witness for the defense, was also present at the Callender trial, and he admitted that Chase had interrupted Hay several times throughout the proceedings. He explained, however, that Chase had done this only after Hay had resorted to questioning the merits of the Sedition Act under which Callender was being tried. Marshall testified that Hay had persisted in his arguments against the constitutionality of the act even though he had received several warnings from Chase to cease this type argument.[59]

After Peter Graves of Georgia and George Washington Campbell of Tennessee had given long, repetitious and boring concluding arguments for the Republican managers,[60] Joseph Hopkinson began a noteworthy appeal for Chase. He argued that for a period of fifty years in England there had been but two removals of judges, while in the United States there had been seven in about two years.[61] Hopkinson said he abhorred this trend and warned that if Congress could, without control or limit, remove judges for acts never before

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[58] Ibid., p. 207.

[59] Ibid., p. 263.

[60] Ibid., pp. 312-353.

[61] Ibid., p. 356.

considered criminal, "then indeed is every valuable liberty prostrated at the foot of this omnipotent House of Representatives. . . ."[62]

Hopkinson's speech was preliminary to the remarks of Luther Martin. Martin, with a delicate blending of wit, sarcasm, and logic, analyzed the articles of impeachment and dismissed them one by one. He argued that juries had the duty of deciding guilt or innocence according to the content of laws rather than the constitutionality of those laws.[63] He concluded that Chase's charge to the jury at the Callender trial was not out of order; that Callender was obviously guilty of violating the Sedition Act which was in effect at the time and that it was the duty of the judge to recommend to the jury to look into the guilt of libel of such magnitude.[64]

After Martin's eloquent conclusion all other aspects of the trial became anticlimactic. Randolph, in a final appeal for the House managers, failed miserably. John Quincy Adams noted that for two hours and a half Randolph spoke

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[62] Ibid., pp. 449-502.

[63] Ibid.

[64] Ibid., p. 488; Robert Harper dwelled on this point in his concluding argument, Annals, 8th Congress, 2nd Session, pp. 502-539, 542-599.

> with as little relation to the subject matter as possible--without order, connection, or argument; consisting altogether of the most hackneyed commonplace of popular declamation, mingled up with panegyrics and invectives upon persons, with . . . much distortion of face and contortion of body, tears, groans and sobs . . . and continual complaints of having lost his notes.[65]

March 1, 1805, was the date set for the Senate's verdict in the Chase trial. At noon spectators began to crowd their way into the Chamber. Vice President Aaron Burr, as President of the Senate,[66] instructed Senate attendants to arrest any spectator who made the slightest noise or disturbance.[67] At 12:30 the Senators, led by Burr, entered the courtroom. The last of the thirty-four Senators to appear was Urian Tracy of Connecticut who was very ill and carried a bottle of smelling salts with him. Tracy came to cast his vote against conviction.[68]

By a roll call vote each Senator cast his vote on each article of impeachment. The voting took about two hours. Partisan voting did not take place as the managers failed to receive the necessary two-thirds majority needed for conviction on any article. All the Senators voted not guilty

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[65] Memoirs of John Quincy Adams, I, 359.

[66] Burr had recently shot and killed Alexander Hamilton in a duel and the Chase trial marked the conclusion of his career as President of the Senate.

[67] Allan Nevins, editor, Diary of John Quincy Adams (New York, 1951), p. 32.

[68] Washington, National Intelligencer, March 4, 1805.

on Article V and only Article VIII came close to receiving the necessary twenty-three votes. Nineteen voted for conviction on this article.[69]

Randolph was visibly upset by the acquittal and he hurried to submit a resolution calling for a constitutional amendment which would allow the President, "on the joint address of both Houses of Congress," to remove judges from either the Supreme Court or any United States inferior court.[70] Nicholson followed with a resolution asking for a constitutional amendment to allow state legislatures to recall at will United States Senators from their respective states.[71] These were indications of the proposals which were to come during the later history of the Marshall Court.

Thus, the first real attempt to curb the power of the judiciary during the formative years of the United States government had been defeated. Justice Chase had been found innocent of the impeachment charges against him. By the same token, Chief Justice Marshall and the other members of the Supreme Court were more secure in their positions than ever before. The trial proved impeachment to be impotent as a political weapon. Not until another landmark decision in the case of McCulloch v. Maryland would there be a concerted attempt to lessen the power of the federal courts.

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[69] Ibid.

[70] Annals of Congress, 8th Congress, 2nd Session, p. 1213.

[71] Ibid., p. 1214.

CHAPTER II

LAND AND BANK CASES LEAD TO NEW ATTACKS ON THE COURT

One of the most complicated, controversial and important cases over which Marshall presided during his term as Chief Justice was the famous land fraud case of Fletcher v. Peck, 1810. In this case Marshall and the Court declared a state law unconstitutional. He also gave a new and more complete interpretation of the contract clause of the Constitution.

During the late eighteenth century the United States possessed an abundant amount of unsettled land which speculators longed to buy in hope of making huge profits. Although many states had already ceded their claims to western lands to the United States, Georgia had not. Georgia claimed a tract of land west of the Chattahoochee River of over thirty-five million acres which was commonly called the Yazoo lands after one of its principal rivers.[1]

Throughout the 1780's and 1790's, Georgia granted thousands of acres of land to those who would settle on it. Although by state law no individual was to receive more than a thousand acres, the governors of the state ignored this

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[1]C. Peter Magrath, Yazoo (New York, 1966), pp. 2-3.

restriction, and in 1794 Governor George Matthews generously donated 1,500,000 acres to a single person.[2]

Seeing this fertile area as a prize location for promotional activities, many professional land speculators as well as some land companies descended on Georgia in an effort to buy the whole remaining tract of Yazoo land. Four companies with very prominent ownership began a campaign to buy the Yazoo lands in the mid 1790's. These companies were the Georgia Company, the Georgia-Mississippi Company, the Upper Mississippi Company and the Tennessee Company.[3] They made offers to the Georgia legislature in 1794 to buy the land and also gave the legislators some personal incentives to pass a sale law. The legislators were bribed with shares of ownership in the companies or with cash. Practically every member of the legislature was guilty of accepting some sort of bribe from the land companies before passing the sale law.[4] On January 7, 1795, Georgia sold thirty-five million acres of the Yazoo lands for $500,000, an average of one and one half cents an acre.[5]

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[2]Ibid., p. 3.

[3]Some of the owners and backers of the companies were Senators James Gunn of Georgia and Robert Morris of Pennsylvania, Representatives Robert Goodloe Harper of South Carolina, and James Wilson, Justice of the United States Supreme Court; Ibid., p. 5.

[4]Magrath, Yazoo, pp. 6-7; Charles H. Haskins, "Yazoo Land Companies," Papers of the American Historical Association, V (New York, 1891), 84.

[5]Magrath, Yazoo, p. 7; Beveridge, Life of John Marshall, III, 550.

The people of Georgia soon realized that their legislature and a group of speculators had corruptly consummated a deal which gave away two-thirds of valuable Georgia Yazoo land for a pittance. The people found a hero for their campaign against the corrupt legislature in James Jackson, United States Senator from Georgia, a Republican.[6] Jackson soon resigned from the Senate and returned to Georgia to wage a campaign against the Yazoo transaction which he continued until his death in 1806.[7]

Jackson was elected to the Georgia legislature in 1796. Most of the members of the previous term did not run again and the new legislature was determined to undo the foul deed of their predecessors. On February 13, 1796, the legislature under Jackson's leadership passed an act which repealed the sale of the Yazoo lands. A copy of the Sale Act and all legal documents of the transaction were publicly burned.[8] The Repeal Act allowed the land companies monetary refunds but most did not seek them. They were willing to take the chance that the Repeal Act would not be binding. On February 13, 1796, the day of the Repeal Act, the Georgia

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[6] Magrath, Yazoo, pp. 9-10.

[7] Ibid., p. 10.

[8] Ibid., pp. 12-13.

Company sold most of its shares of land to the New England Mississippi Land Company.[9]

The New England Mississippi Land Company began immediately to sell shares of land to individuals in the New England area. Later the New England Land Company and individual purchasers denied that they knew of the fraud involved in the original sale. They claimed to be innocent victims of the Repeal Act, a situation which has never been determined.[10]

The controversy between the Georgia legislature and the New England speculators continued until 1802 when Georgia ceded its Yazoo claims to the United States. The fight now shifted to Congress. From 1803 until 1809 the Yazoo claimants, represented by Gideon Granger of Connecticut and Perez Morton of Massachusetts,[11] tried to get compensation from the United States Government for the lands they had purchased. The staunchest foe of compensating the claimants was John Randolph of Roanoke. Randolph disliked all speculators and was a natural obstructionist. He was also a doctrinaire states' rights advocate and felt that the state

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[9] Ibid., p. 15.

[10] Ibid., pp. 16-18.

[11] Ibid., p. 15. Both were organizers of the New England Mississippi Land Company.

should be left alone to solve its land problems.[12] Bills introduced in Congress to compensate the Yazoo claimants were consistently voted down because of Randolph's efforts. He kept "anti-Yazooism" alive in the House of Representatives.[13]

The claimants then decided to test the issue in the federal courts. They strongly suspected that the Supreme Court would uphold their claims to the Yazoo lands. They knew the federal judges to be generally sympathetic to business and commercial interests and anti-states' rights in nature.[14]

The case was a friendly suit. Robert Fletcher of New Hampshire sued John Peck of Massachusetts for breach of contract as Peck had sold him 15,000 acres of Yazoo land obtained from the Georgia sale of 1795. Fletcher claimed Peck did not possess this land and could not sell it because of the subsequent Repeal Act of the Georgia legislature.[15] The contract by which Peck had sold the land to Fletcher

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[12] Ibid., p. 41.

[13] Ibid., p. 48; Randolph especially attacked Secretary of State James Madison as Madison had endorsed a compromise with the land claimants. He opposed Madison's presidential aspirations by trying to push James Monroe to run for President in 1808; William C. Bruce, John Randolph of Roanoke, I, 325.

[14] Ibid., pp. 50-51.

[15] Ibid., pp. 53-54.

was drawn up in such a way as to test every aspect of interest to the New England speculators.[16]

The case was brought to the Supreme Court on a writ of error from a United States Circuit Court and was argued before the high court in 1810. After hearing the case argued Marshall delivered his momentous decision. The Chief Justice first stated the importance of the matter under consideration and declared that a state law should never be declared unconstitutional in a doubtful case. The court could not, on "slight implication and vague conjecture," declare that a state had "transcended its powers."[17] Marshall asserted, however, that an action of a state legislature done within the law could not be undone by a succeeding legislature.[18]

On examining the assertion that the Sale Act was passed because of bribery, Marshall deplored the fact that "corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation."[19] He added, however, that it was not the duty of the judiciary to look into the motives of legislation and that the Court could not rule on the matter of corruption.[20]

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[16] Ibid., p. 54.

[17] Fletcher v. Peck, 6 U. S., 331 (1810).

[18] Ibid., p. 336.

[19] Ibid., p. 332.

[20] Ibid., pp. 332-333.

Marshall also asserted that the individual purchasers of the lands in question were innocent of fraud and should not be punished for the actions of others.[21] The Chief Justice then discussed the nature of the original Georgia Sale Act and asserted that the act was in fact a contract. He concluded that when a law is by nature a contract and is legally passed by a state legislature, a future legislature cannot undo the contract by revoking the law. He upheld his judgment by relying on the contract clause of the federal Constitution.[22]

Justice William Johnson wrote a separate concurring opinion which stated that the Georgia Repeal Act was invalid on a "general principle" and not because of a violation of the contract clause. He hinted at the political nature of the case by suspecting it a "mere feigned case" drummed up for the benefit of both parties.[23] In this assertion he was certainly correct.

The investors had won their case, and the Court had maintained that they should be compensated for their claims, but Fletcher v. Peck possesses greater significance. In declaring the Georgia Repeal Act unconstitutional, the Court for the first time in a major decision overruled a

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[21] Ibid., pp. 334-335.

[22] Ibid., p. 336.

[23] Ibid., p. 345.

legislative act of a state. Judicial review over state actions has now become a fundamental part of our legal heritage, and in this decision Marshall strengthened the judiciary by broadening its authority to include the states.

Although the main surge of resentment over this new power of the Court did not manifest itself until the famous bank decision of 1819, some Congressmen did begin to assail the Court for its "improper" ruling. On April 17, 1810, John Randolph introduced a resolution in the House of Representatives stating that the claim of the New England Land Company was "unreasonable, unjust, and ought not to be granted." This resolution, if passed, would in effect declare that the House had no respect for the Court's decision in Fletcher v. Peck. The resolution was defeated fifty-four to forty-six.[24]

In 1812 Randolph was defeated in his bid for re-election by John W. Eppes, Thomas Jefferson's son-in-law.[25] George M. Troup, Representative from Georgia, now assumed the anti-Yazoo leadership with a personal assault on the Yazoo claimants and the Supreme Court. He declared the case to be a "feigned issue" invented by two speculators for their personal benefit. The decision could not affect "the right of

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[24] Annals of Congress, 11th Congress, 2nd Session, p. 1882.

[25] Magrath, Yazoo, p. 93.

the United States to the public property."[26] Troup said the decision was ". . . shocking to every free government, sapping the foundations of all your constitutions, and annihilating at a breath the best hope of man . . . ." He even asked why the judges who made the decision were allowed to sleep in tranquility after they had so shaken the foundations of the Republic.[27]

Although Troup persisted in his arguments against the Yazoo claimants, his strength in Congress began to diminish, and on March 31, 1814, while Randolph was still absent from the House, Congress appropriated five million dollars to the investors for their land claims.[28] One of Marshall's fundamental legal principles, the sanctity of contracts, had now been upheld by the Court and by Congress.

At this time another great financial problem was developing in the United States, and in 1819 John Marshall again performed what he considered to be a great service for the economic well-being of the country. That year Marshall delivered two important decisions relating to finance, Sturges v. Crowninshield and McCulloch v. Maryland. These decisions in effect strengthened the nation's finances, made the central government more powerful at the expense of

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[26] Annals, 13th Congress, 2nd Session, p. 1848.

[27] Annals, 12th Congress, 2nd Session, p. 1858.

[28] Annals, 13th Congress, 2nd Session, p. 1925.

the states and brought renewed attempts to curb the power of the Court.

In order to understand Marshall's opinions in the Sturges and McCulloch cases, it is necessary to review briefly the financial conditions prevalent in the United States at that time. The First Bank of the United States, chartered in 1791, had generally functioned well. Its directors had administered the funds of the national government with considerable skill, but the Bank had drawn criticism from Presidents Jefferson and Madison as well as from the one hundred state chartered banks.[29] While directors of the state banks simply wanted to eliminate the competition of the Bank of the United States, many people sincerely believed the Bank to be "an undemocratic, political institution." The Bank was also unpopular because people feared the large foreign holdings of stock which amounted to well over half the shares. Finally, many honestly thought the Bank to be unconstitutional.[30]

Henry Clay was one of the major opponents of rechartering the Bank in 1811. One of his biographers states that he "espoused the Anti-Bank cause with the whole fervor of his nature."[31] He, like other Congressmen, feared that

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[29]Beveridge, The Life of John Marshall, IV, 172-173.

[30]Davis R. Dewey, Financial History of the United States (New York, 1920), p. 127.

[31]Carl Schurz, Henry Clay, I (Boston, 1887), 64.

if the Bank remained unchecked this "great money power" would become dangerous to the free institutions of the society. He also questioned the constitutionality of the Bank.[32] Clay was the leader of a group in Congress which at this time opposed all banks, state and national. To defeat the recharter this group aligned itself with those state bank advocates who opposed the national Bank because of the competition it represented.

Another faction which opposed rechartering the Bank was a group of Senators led by Samuel Smith of Maryland which became known as the "Invisibles." These Senators were more hostile to Secretary of the Treasury Albert Gallatin than to the Bank. Smith had been an enemy of Gallatin throughout his career and he threw all of his support to defeat the Bank because Gallatin favored its recharter.[33]

Together, these opponents of the national Bank had enough strength to defeat the recharter bill by a single vote in each House.[34] Congress now decided to postpone the rechartering of the Bank indefinitely.[35] Now the field

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[32] Ibid.

[33] Raymond Walters, Jr., Albert Gallatin, Jeffersonian Financier and Diplomat (New York, 1947), pp. 239-240.

[34] Bray Hammond, Banks and Politics in America From the Revolution to the Civil War (Princeton, 1947), pp. 220,222.

[35] Annals, 11th Congress, 2nd Session, pp. 1826, 346.

was left open for the state banks and they began to multiply. From 1811 to 1816 one hundred fifty-eight new state banks were chartered, many with practically no restrictions as to lending policies.[36] Some historians declare that these wholesale charters were granted because the legislatures were controlled by the banks.[37]

The abundance of new banks brought on a craze of speculation in the United States. Beveridge declares that "thrift, prudence, honesty, and order had seemingly been driven from the hearts and minds of most of the people; while speculation, craft, and unscrupulous devices were prevalent. . . ."[38] Hezekiah Niles, in his Weekly Register carried on a one-man crusade against this "speculating mania."[39]

State banks began to print illegally unlimited amounts of paper money without any backing by gold or silver. By 1818 most of the banks could not pay their debts and would not honor notes of other banks.[40] Niles estimated that by August, 1818, "the notes of at least ONE HUNDRED banks in the United States [were] counterfeited. . . ."[41]

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[36]Dewey, Financial History of the United States, p. 144.

[37]Beveridge, Life of John Marshall, IV, 186.

[38]Ibid., pp. 169-170.

[39]Niles Register, February 28, 1818.

[40]Beveridge, Life of John Marshall, IV, 193-196.

[41]Ibid., p. 428.

The worthlessness of the banks' paper money and the general collapse of financial solvency brought disaster to both industry and agriculture. John Quincy Adams recorded in May, 1819, "The merchants are crumbling to ruin, the manufacturers perishing, agriculture stagnating, and distress [is] universal in every part of the country."[42]

Amid the wild speculation and corruption of the state banks, the Second Bank of the United States was born. The new Bank's charter, which was signed by President Madison on April 10, 1816,[43] came only after the failure of seven previous attempts to establish a national bank from January, 1814, to April, 1816.[44] The new Bank was similar to the First Bank of the United States except for its larger capitalization (thirty-five million dollars for the Second Bank as opposed to ten million dollars for the First Bank) and the fact that the administrators were Republicans rather than Federalists. The first president, William Jones, was financially incompetent as well as corrupt. He speculated in the Bank's stock and profited financially from the obviously corrupt operations of the Baltimore branch. Many of the lesser directors were also dishonest and incompetent,

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[42] Memoirs of John Quincy Adams, IV, 375.

[43] U. S. Statutes at Large, III, 226.

[44] Ralph C. Catterall, The Second Bank of the United States (Chicago, 1902), pp. 7-21.

and the early history of the Second Bank of the United States was filled with blunders, frauds, mismanagement and speculation similar to that found in the state banks.[45]

By 1818 the financial situation had deteriorated to such a degree that even the directors of the Bank realized the need for reform. On August 26, they issued a resolution instructing the branch banks to honor no bank notes except those issued by the Bank of the United States.[46] The branch banks began to call for the redemption of loans made to state banks and to individuals. People had been borrowing money with no intention of repaying on time. They had been receiving regular extensions on their time allotments from both state banks and the national Bank and they now lacked money to pay off the loans. The people, as well as the state banks, attacked the new policies of the Bank of the United States. They needed an extension of credit--not a reduction of it. But the directors did not consent to the wishes of the now-desperate debtors and the only thing left for thousands of Americans was bankruptcy.

The bankruptcy laws in most of the states were unfair and were administered poorly. In numerous instances wealthy

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[45] Ibid., pp. 39-40, 42: Catterall points out that there was much fraud connected with the dealings of James A. Buchanan, President, and James W. McCulloch, Cashier of the Baltimore branch of the Bank of the United States; Robert V. Remini, Andrew Jackson and the Bank War (New York, 1968), p. 27.

[46] American State Papers, Finance, III, 326-327.

individuals claimed bankruptcy in order to annul their debts while they continued to live in affluence. Some unscrupulous businessmen converted most of their assets to cash, claimed bankruptcy, offered up their property and later began their businesses again, debt free.[47] Eventually, in March, 1820, Senators Harrison Gray Otis and Prentice Mellon of Massachusetts and James Burrill of Rhode Island proposed a national bankruptcy act to alleviate the inequalities inherent in the state acts.[48] Prior to this John Marshall rendered a great service to the financial well-being of the country by declaring certain state insolvency laws to be in violation of the federal Constitution.

New York's bankruptcy act, passed April 3, 1811, provided the test case. Josiah Sturges of Massachusetts sued Richard Crowninshield of New York for recovery of debts based upon two promissory notes signed March 22, 1811. The defendant claimed bankruptcy under the New York statute and refused to pay. Marshall, speaking for a unanimous Court, stated the main questions of the case: Does a state have the authority to pass bankrupt laws, and if so, does the New York act in question impair the obligation of contracts within the meaning of the Constitution?[49] After discussing

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[47] Niles Register, October 23, 1819; Annals, 16th Congress, 1st Session, p. 513.

[48] Annals, 16th Congress, 1st Session, pp. 505, 513, 516-518.

[49] Sturges v. Crowninshield, 17 U. S., 363 (1819).

the arguments Marshall concluded that the states are not forbidden from passing bankruptcy laws unless such laws conflict with federal laws on the same subject or impair the obligations of previous contracts.[50] He found that since there were no uniform bankrupt laws passed by Congress, the states did have the right to pass such laws. In the absence of federal legislation, the states could act.

Marshall then questioned whether the New York law violated the obligation of a previous contract. He stated that the defendant had promised to pay a sum of money to the plaintiff on a certain day. This promise was a contract. The New York bankrupt law released the defendant from his obligation to live up to the terms of his contract. The law then violated the contract clause of the Constitution as found in Article I, Section 10 of that document.[51]

The decision of Sturges v. Crowninshield, along with those of Fletcher v. Peck, Dartmouth College v. Woodward, and McCulloch v. Maryland gave strength to that Constitutional principle to which Marshall was deeply committed, the sanctity of contracts.

The Sturges decision excited and roused many people throughout the nation,[52] but the reaction was trifling

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[50] Ibid., p. 368.

[51] Ibid., p. 367.

[52] Niles Register, March 28, 1818.

compared to that following Marshall's decision in McCulloch v. Maryland. Since 1816, most legislatures of the western and southern states had passed laws placing taxes on the various branches of the Bank of the United States.[53] The new state constitutions of Indiana (1816) and Illinois (1818) prohibited the existence of any bank chartered outside their respective boundaries. This type of legislation indicated the growing hatred of the states and state banks to the Bank of the United States.[54]

In 1818 the legislature of Maryland passed an act requiring all banks operating in that state either to agree to certain banking regulations or to pay an annual tax of $15,000 to Maryland on the note issue of the bank.[55] These regulations included printing paper money only on paper bought from and stamped by the state for that purpose and only in denominations set by the state.[56] The act imposed a $500 fine for each offense. The Baltimore branch of the Bank of the United States refused to abide by the regulations and pay the tax and Maryland brought legal action against the Bank for recovery of the fine.

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[53] Catterall, The Second Bank of the United States, pp. 64-65. Maryland, Tennessee, Georgia, North Carolina and Kentucky all placed taxes on the Bank of the United States.

[54] Ibid., p. 64.

[55] McCulloch v. State of Maryland, 17 U. S., 417 (1819).

[56] Ibid.

The most notable lawyers in the United States ably argued the case before the Supreme Court. Daniel Webster, William Pinkney, and William Wirt made up the counsel for the Bank while Luther Martin, Joseph Hopkinson, and Walter Jones represented Maryland.[57] But the man whose lasting fame stems chiefly from this case was the Chief Justice. Marshall wrote a brilliant opinion that clearly defined the relationship between the states and the national government and established some enduring principles of American constitutional law. Marshall recognized the magnitude of the case when he declared that "no tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision."[58]

"Has Congress the power to incorporate a bank?," asked Marshall.[59] Answering his own question in the affirmative, he declared:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.[60]

Thus, in Hamiltonian fashion, Marshall interpreted the implied powers doctrine of the Constitution. He then asked

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[57] Ibid., p. 418.

[58] Ibid.

[59] Ibid.

[60] Ibid., p. 430.

if Maryland could constitutionally tax the Baltimore branch of this legal corporation chartered by the federal government.[61] Borrowing a phrase from Webster as argument in the case, he declared "the power to tax involves the power to destroy."[62] The framers of the Constitution did not intend to make the national government dependent on the whims of the states, therefore the states must be denied this power. He concluded that the Maryland "tax on the Bank of the United States was unconstitutional and void."[63]

Niles Register declared that "A deadly blow has been struck at the sovereignty of the states, and from a quarter so removed from the people as to be hardly accessible to public opinion. . . ."[64] This newspaper, which had attacked the questionable policies of the state banks with the same venom that it attacked the National Bank, was nevertheless a strong states' rights journal. The Register now began a scorching assault on the McCulloch decision which continued for several months. While declaring the decision to be the most important ever delivered by the "exaulted tribunal," Editor Niles added that it was more dangerous to the well-being of the nation than "fifty Hartford conventions."[65]

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[61] Ibid., p. 432.

[62] Ibid., p. 436.

[63] Ibid., p. 439.

[64] Niles Register, March 13, 1819.

[65] Ibid., March 13, 1819, March 20, 1819.

During the course of the tirade Niles argued against the right of Congress to grant a charter, especially when that charter was in effect a grant of monopoly power.[66] He urged all "honest people, who hate monopolies and privileged orders, to arise . . . and purge our political temple of the money-changers and those who sell doves."[67] Other newspapers responded to the call. The Natchez Press editorialized that because of the McCulloch decision, "the last vestige of sovereignty and independence of the individual states . . . is obliterated at one fell sweep."[68]

The most dangerous and learned assault on the Court stemming from the McCulloch decision came from Virginia and the man who had wanted to be Chief Justice in 1801, Spencer Roane. From April until June, 1819, Roane examined and criticized the McCulloch decision from the pages of Thomas Ritchie's Richmond Enquirer. Using the pen name "Amphictyan," Roane used every states' rights argument imaginable to castigate Marshall and the Court. He declared that the consequences of the decision were grave, for the decision endangered the "very existence of states' rights." Roane warned that the Court's liberal interpretation of the elastic

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[66] Ibid., March 13, 1819; April 24, 1819.

[67] Ibid., April 3, 1819.

[68] Ibid., May 22, 1819, citing the Natchez Press, n.d.

clause would lead to the destruction of all state powers and authority.[69]

Relying on the Virginia and Kentucky Resolutions of 1798-99 for many of his arguments, Roane asserted that the doctrine of implied powers of Congress naturally leads to unlimited powers. He urged the people and the states to exert vigilance "to counteract that irresistible tendency in the federal government to enlarge their own dominion. . . ." Roane declared that Virginia would continue to draft resolutions protesting unconstitutional acts passed by Congress and would try to "unite and combine the moral force of the states against usurpation." He concluded one editorial stating that Virginia would "never employ force to support her doctrines till other measures had entirely failed."[70]

In April, 1819, "Amphictyan" proposed the introduction in Congress of a constitutional amendment denying the power of Congress to create a corporation except in the District of Columbia. No corporation could be established in a state without the state's authority and control. He again characterized the principles on which the McCulloch decision was based as "alarming" and called for the people of the states to "rouse from the lap of Delilah and prepare to meet the Philistines." "The national government," cried Roane, "is again encroaching on the rights of the states and the

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[69]Richmond, Enquirer, March 30, 1819.

[70]Ibid., April 2, 1819.

people. There must be a fixed, a determined resistance to these encroachments, not of arms, but of the moral energy of a free people."[71]

Changing his pseudonym to "Hampden," Roane continued his assault on the Court and its nationalistic doctrines. He declared the McCulloch decision gave a general right to all future Congresses to "tread under foot all those parts and articles of the Constitution which had been, heretofore deemed to set limits to the power of the federal legislature." He said that constitutional limitations placed on Congress meant nothing if the implied powers doctrine were allowed to stand.

Roane concluded his arguments against the McCulloch decision in June by again laboriously stating the states' rights arguments which had been presented by Madison and Jefferson in 1798-99. He said that the Union was created by the states--not by the people as members of a union, and inferred that the states were still as supreme as they had been under the Articles of Confederation. He warned that "a great crisis" now enveloped the Union and that "the crisis is one which portends destruction to the liberties of the American people."[72]

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[71] Ibid., April 20, 1819.

[72] Ibid., June 11, 1819.

Roane's denunciation of the Supreme Court and the power which Congress had taken was soon assumed by the Virginia legislature. A resolution in the House of Delegates of the General Assembly denied that the Supreme Court had the authority to take away the sovereign power of the states and asserted that the McCulloch decision would "change the whole character of the government itself [to one of] undefined and unlimited powers." The resolution charged that this new interpretation of the elastic clause (Article I Section 8) meant that Congress could now "conform the Constitution to their own designs." The resolution intimated that every power not expressly given to Congress by Article I was categorically denied to that body.[73]

The Virginia House of Delegates then called for a constitutional amendment creating a tribunal composed of the highest member of each state judiciary. This tribunal would settle conflicts between the states and the national government when their power and authority conflicted.[74] This amendment would, of course, have taken the power of judicial review over state laws away from the Supreme Court and placed it in the hands of the state judges. The resolution

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[73] "Legislative Records," Journal of the House of Delegates of the Commonwealth of Virginia (Richmond, 1819), pp. 56-69, Records of the States of the United States; a microfilm compilation, North Texas State University Library.

[74] Ibid., p. 59.

calling for the constitutional amendment passed the House of Delegates on February 12, 1820, by a vote of 117 to 38. It also instructed Virginia's United States Senators to work for the passage of such an amendment in Congress.[75]

Virginia was joined in her protest against Marshall and the McCulloch decision by the Ohio legislature. A joint committee of the House and Senate of the Ohio General Assembly completed on January 22, 1821, a resolution which asserted that the national judiciary had no right of judicial review over state actions. This resolution, presented to Congress on February 1, declared that McCulloch v. Maryland was a "manufactured" case designed to "prop up" the sinking credit of the Bank of the United States.[76] Ohio denied the power of the national government to create corporations and maintained that the Bank was a private company subject to the states' taxing powers. The resolution reaffirmed the arguments of the Virginia and Kentucky Resolutions and concluded by recommending that Ohio not allow the state's jails, judges, or courts to be used by the national government to protect the Bank.[77] The legislature thus defied in positive terms the authority of the

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[75] Annals of Congress, 16th Congress, 2nd Session, pp. 1696-97.

[76] Ibid., p. 1696.

[77] Ibid., pp. 1709-1712.

United States government and in effect warned Congress that it would not cooperate in protecting this unconstitutional institution.

The resolutions of the Ohio legislature were prompted by the state's own difficulties with the national Bank. On February 8, 1819, Ohio had passed an act which required all banks operating in the state to obtain approval of the legislature before conducting business. If this approval were not obtained, the state could place an annual tax of $50,000 on the bank. The act also gave the state auditor authority to enter, after September 15, 1819, any bank not having complied with the law and take enough currency and notes to satisfy the tax.[78]

The auditor of Ohio, Ralph Osborn, employed John L. Harper to collect the money, and Harper collected almost $100,000 from the bank at Chillicothe "by violence."[79] The Bank then got a court order against Harper to keep him from delivering the money to the state treasurer. Harper, ignoring the order, delivered the money to H. M. Curry, the state treasurer. The Bank then secured a court order and after arguments in court, Curry was directed to return the money by January, 1821.[80]

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[78]Osborn v. Bank of the United States, 9 U. S., 740(1824).

[79]There were two branch banks in Ohio and he collected the tax on both from the bank at Chillicothe.

[80]Beveridge, The Life of John Marshall, IV, 330.

The case was appealed to the United States Supreme Court which delivered its opinion in 1824. Ohio claimed that a clause in the Bank's charter authorizing it to sue in a Circuit Court was unconstitutional and invalid. Marshall, delivering the opinion of the Court in Osborn v. Bank of the United States (1824), declared that the act incorporating the Bank was constitutional and that all the "faculties and capacities" which the Bank possessed were also constitutional and valid.[81] The Chief Justice then once more relied on the "elastic clause" of Article I of the Constitution in furthering his nationalistic principles against states' rights.

Between 1819 and 1823, Maryland, Virginia, and Ohio were joined by several other states in their attacks on the Supreme Court, Congress and the National Bank. On November 19, 1819, the Pennsylvania legislature proposed a constitutional amendment which stated that "Congress shall make no law to erect or incorporate any bank or other monied institution, except within the District of Columbia. . . ."[82] This proposed constitutional amendment was soon approved by the legislatures of Tennessee, Ohio, Indiana and Illinois.[83]

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[81] Osborn v. Bank of the United States, 9 U.S., 864 (1824).

[82] Herman V. Ames, editor, State Documents on Federal Relations (Philadelphia, 1906), pp. 89-90.

[83] Ibid., p. 91.

While the denunciations of the Supreme Court spread to other states during the early 1820's, Virginia continued to assail the Court and its nationalistic principles in a vehement way. In 1820 John Taylor of Caroline County published a book entitled Construction Construed and Constitutions Vindicated. In this little volume, the noted advocate of localism and states' rights philosophy mustered all the logic at his command to convince his readers that the nationalistic doctrines of Marshall and Congress violated the spirit and the letter of the Constitution.

Thomas Ritchie, in his foreward to Taylor's work, explained that the "crisis" caused by Marshall's decision was justification for the book. Ritchie warned that "we have seen a decision promulgated from the federal bench which is calculated to sweep down the dearest rights of the states." In order to keep their sacred rights from being taken, the people must be awakened to the danger. "If there is any book capable of arousing the people," predicted Ritchie, "it is the one before us."[84]

Four chapters of Taylor's volume directly concerned the McCulloch decision, while others dealt with the basic nature of the American union. Taylor asserted that the Union was

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[84]John Taylor, Construction Construed and Constitutions Vindicated (Washington, 1820), foreward.

not formed by the people in open association with each other but was rather a compact of states. In paraphrasing essay thirty-nine of the Federalist Papers Taylor stated, "The sources of the Constitution [are not] individuals composing one entire nation, but as composing the distinct and independent states to which they belong . . . ."[85] Because of this the national government is no more sovereign or supreme than any state government. Taylor went so far as to assert that our federal government is not national in character but is rather a "league between nations."[86] He concluded that neither Congress nor the Supreme Court had any business interfering in the affairs of any state. This would in effect deny that a national court could declare an action of a state to be outside the scope of the Constitution.

After publication of Taylor's book, Ritchie sent a copy to Jefferson, asking the former President's opinion of Taylor's arguments. The response came in a letter to Ritchie dated December 25, 1820, in which Jefferson praised all of Taylor's works and commented that the present volume would prove to be "orthodox." Jefferson went on to blast the Court himself. He spoke of the judges as a "subtle corps of sappers and miners constantly working under ground to

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[85] Ibid., p. 50.

[86] Ibid., p. 234.

undermine the foundations of our confederated fabric." Since impeachment has proved "impracticable" the judges considered themselves non-expendable and free from "responsibility to public opinion."[87] Jefferson asserted that "an opinion is huddled up in a conclave, perhaps by a majority of one, delivered as if unanimous; and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning." He concluded his assault by declaring that an independent judiciary is necessary but, that in a republic, judges cannot be independent from the will of the people.[88]

Jefferson, as well as Niles, Roane and Taylor, honestly felt that Marshall and the Supreme Court were gaining too much power. They felt that the nature of the Union was being changed by a judiciary which time and again had neglected the will of the majority of the people in this country. Virginia, Ohio, Maryland, Pennsylvania and other states had cried out against the Court. In the face of this criticism and with the tranquility of the country being threatened by the debate over admittance of Missouri as a slave state, Marshall was again to play a significant role in the constitutional history of the nation with his decision in the lottery case.

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[87] Bergh, editor, Writings of Thomas Jefferson, XV, 297.

[88] Ibid., p. 298.

CHAPTER III

VIRGINIA AND KENTUCKY ATTACK THE COURT

The most persistent and widespread attacks on Chief Justice Marshall and his Court came during the early 1820's. Marshall had already laid down most of his basic nationalistic principles by this time, especially in the Marbury, McCulloch, and Osborn cases, but one of his most controversial decisions, Cohens v. Virginia, was yet to be decided.

Prior to the Cohens case, former President Thomas Jefferson in numerous letters kept up a barrage of protests against Marshall and the power of the Supreme Court. From Jefferson's correspondence it is clear that the former President greatly feared the logical consequences of the recent decisions of the Court. He correctly saw that the Republican principles of states' rights and limited national authority were being swept away by the pronouncements of his masterful adversary.

Jefferson could never accept the principle of judicial review over actions of Congress and the states. He asserted that it was the responsibility of each department in the national government to read the Constitution and decide its proper functions under that instrument. Judges were no more qualified to be the interpreters of the

Constitution than were legislators or Presidents.[1] The justices of the Supreme Court had already begun to "twist and shape" the Constitution to fit their own scheme of values, and those values were primarily national supremacy and judicial superiority.[2] Indeed, Jefferson saw the members of the Court as dangerous subversives who constantly worked behind the scenes to accomplish their purpose of destroying the federal system and substituting a despotic oligarchy.[3] Jefferson was especially perplexed as to ways in which the judiciary could be brought under control. Since the judges were appointed for good behavior (life), they had no responsibility to any constituency for their offices, and as Jefferson had found impeachment of judges "an impracticable thing, a mere scare-crow," there was little if any remaining control.[4]

According to Jefferson, the judges simply could not be the "ultimate arbiters" of constitutional questions. They were no better than other people. Judges possessed the

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[1]Bergh, editor, Writings of Thomas Jefferson, XV, 294, Thomas Jefferson to James Madison, November 29, 1820.

[2]Ibid., p. 213, Thomas Jefferson to Spencer Roane, September 6, 1819.

[3]Ibid., pp. 277, 297, Thomas Jefferson to William Jarvis, September 28, 1820 and to Thomas Ritchie, December 25, 1820.

[4]Ibid., p. 297, Thomas Jefferson to Thomas Ritchie, December 25, 1820.

same lust for power as other politicians, but the power they had was more dangerous because they were not responsible to the people for their positions.[5] Jefferson said that the only real arbiters in our society must be the people themselves. The people must decide the limits of national and state governments and the great constitutional questions. If the people were not prepared to perform this vital task, they must be educated to do so.[6]

The assertion that "the people" had the responsibility to draw the boundary lines between national rights and state rights was somewhat vague. The impracticality of holding national referendums on all constitutional questions of a jurisdictional nature is obvious. Perhaps Jefferson meant that the elected representatives of the people in the state and national legislatures should decide these questions. Although he was unclear on this point, he obviously opposed the judiciary having the power to determine limits of authority. He feared that under Marshall's leadership the judiciary would soon become the dominant branch of the national government and would also destroy all rights and powers of the states unless something were done to stop

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[5] Ibid., p. 277, Thomas Jefferson to William Jarvis, September 28, 1820.

[6] Ibid., p. 278.

it. He even hinted at armed resistance on the part of the states to "shield themselves" from the Court "and meet the invader foot to foot."[7]

This prolonged attack by Jefferson on the Court was of a general nature. He could see what he believed to be the destruction of the federal system of government by the actions of the judiciary. Most of his criticisms came in letters to his friends who had similar opinions.

While Jefferson and other states' rights advocates assailed the Supreme Court for its nationalistic tendencies, John Marshall again upheld the doctrine of national supremacy over the states through a forceful opinion in the case of Cohens v. the State of Virginia, 1821. The city of Washington was incorporated by an act of Congress on May 3, 1802. By provisions of the act the city had the right to conduct lotteries to raise money to support municipal public improvements. On January 21, 1821, the Virginia legislature passed an act prohibiting the sale of lottery tickets in the state unless authorized by the state.[8] On June 1, P. J. and M. J. Cohens sold some Washington lottery tickets in Norfolk, Virginia, in

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[7] Ibid., p. 307. Thomas Jefferson to Archibald Thweat, January 19, 1821.

[8] Charles Warren, The Constitution in United States History (Boston, 1926), II, 7; Beveridge, The Life of John Marshall, IV, 344.

violation of the state statute. They were arrested and found guilty in the Norfolk court and fined one hundred dollars. The case was carried to the United States Supreme Court on a writ of error.[9]

The distinguished counsel included Senator James Barbour of Virginia for the state and David B. Ogden and William Pinkney for the Cohens. Barbour limited his arguments in the case to the matter of jurisdiction. He contended that the case should be dismissed because of the Supreme Court's lack of jurisdiction. Barbour declared that the Supreme Court could not review a decision of a state court and that it therefore lacked appellate jurisdiction in the case. He also declared that the Supreme Court had no legal jurisdiction over the case as neither the Constitution nor any federal law had been violated.[10] In effect, Virginia was contending that the United States' highest Court had no more legal authority than one of the state's own courts.

In delivering the opinion of the Court, Marshall said that if Virginia's contention concerning jurisdiction were accepted there would be no one tribunal capable of interpreting the Constitution and the laws of Congress and the

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[9] Beveridge, The Life of John Marshall, IV, 345.

[10] Cohens v. Virginia, 9 U. S., 83, 84 (1821).

states. He declared that in such a situation the courts of every state would interpret the Constitution and laws and that there would develop as many interpretations as there were states. This situation would lead to confusion and chaos in our legal system.[11]

Marshall then explained why the federal courts must be supreme over state courts. He contended that while the national government is "limited as to its objects" it is "supreme with respect to those objects."[12] The national government is supreme and since the federal judiciary is a part of the national government, it must also possess supreme authority.[13] The Chief Justice then examined the state courts and found that their judges were sometimes elected and were usually at the will of the legislature for salary and term of office.[14] Because the judges were at the mercy of the legislature for their very existence, they could not possess the independence of thought necessary for fair judicial interpretation. The federal courts were independent and could better assess the true spirit of the Constitution and laws of both the nation and the states.

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[11] Ibid., p. 85.

[12] Ibid., p. 87.

[13] Ibid., p. 106.

[14] Ibid., p. 90.

Marshall went on to explain the need for a strong federal judiciary system by examining the Confederation period of American history. He reminded the states that the laws of Congress were "habitually disregarded" during that period, mainly because of the absence of an adequate judiciary to interpret those laws and establish guide lines for legal action. He warned that if Virginia's contention in this case were upheld the same lack of respect for laws of the United States would result.[15]

"A Constitution," wrote Marshall, "is framed for ages to come . . . its course cannot always be tranquil. It is exposed to storms and tempests . . . ."[16] Because of changes in society, the Constitution, written during one epoch, must be constantly reinterpreted to meet new problems and challenges. The only way to preserve this instrument of government through the "perils it may be destined to encounter" is through interpretation of that document by the federal judiciary.[17]

In combatting another argument of Virginia--that the Supreme Court did not have the authority to review cases from a state court--Marshall quoted essay eighty-two from

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[15] Ibid., p. 91.

[16] Ibid., p. 90.

[17] Ibid., p. 91.

the Federalist Papers to declare that the framers of the Constitution meant for the national courts to have appellate jurisdiction over state courts.[18] If the national courts did not have appellate jurisdiction, "it would prostrate . . . the [national] government and its laws at the feet of every state in the Union."[19]

After establishing the Court's jurisdiction Marshall judged the Cohens case on its merits. He declared that the law which gave the city of Washington authority to run a lottery was local and pertained to the city itself. It did not authorize a state or national lottery, and therefore the city of Norfolk could legally fine the Cohens for violating the Virginia law against lotteries.[20] Marshall then upheld the one-hundred dollar fine which Virginia had placed on the Cohens.

The decision on the merits of the case amounted to practically nothing, the fine being only a small amount, but Marshall, by establishing the jurisdiction of the Supreme Court in the case, again upheld the doctrine of national supremacy over the states. He also strengthened the power of the federal judiciary by declaring that the national courts could review decisions of state courts.

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[18] Ibid., p. 109.

[19] Ibid., p. 89.

[20] Ibid., pp. 118-119.

As could be expected, Virginians responded to the Cohens decision with a rash of protests against Marshall and the Court. The first attack again came from Judge Spencer Roane. Roane, under the pen name, "Algernon Sidney," began a series of editorials in the Richmond Enquirer against the lottery decision. He first asserted that the Constitution and the liberties of the people were "deeply and vitally endangered, by the fatal effects of that decision." Claiming that each state constituted an independent and sovereign government, equal in authority and power to the national government, Roane declared that the courts of one government could not reverse the opinions of the other. The lottery decision vetoed the idea that the "states have a real existence."[21]

Roane then examined the nature of federalism and concluded that the terms federalism and confederation were identical.[22] One party to the federal compact could not have the power to pass finally on the actions of another. He claimed that the lottery decision amounted to nothing less than throwing "as much power as possible into the hands of the federal government."[23]

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[21] Richmond, Enquirer, May 25, 1821.

[22] Ibid., May 29, 1821.

[23] Ibid., June 19, 1821.

Turning his wrath on the justices who pronounced the decision, "Algernon Sidney" declared that the "high and ermined judges themselves" were not exempt from the "love of power which . . . infects and corrupts all who possess it." He claimed that the Court had begun to construe the Constitution to be "whatever it pleases to make it."[24] The reasoning of Marshall was the "blind and absolute despotism which exists in an army, or is exercised by a tyrant over his slaves." By referring to the Sedition Act of 1798 Roane contended that the abuses of the national government had far outstretched those of the states and that the states might be totally abolished if they did not retain a check on the national government.[25]

Roane finally concluded his tirade with a question aimed at the Associate Justices of the Supreme Court. He asked why they had abandoned their principles of constitutional and rational government and had allowed themselves to be led away from the true spirit of American federalism by the fanatical Chief Justice.[26]

Another writer under the pseudonym of "Somers" joined Roane in The Enquirer and called the Cohens decision an "alarming breach in our political institutions." "Somers"

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[24] Ibid., May 25, 1821.

[25] Ibid., June 1, 1821.

[26] Ibid.

accused the justices of moulding the Constitution to fit "their ideas of expediency." The duty of the judges, explained "Somers," is to interpret the Constitution "and not to add or subtract one iota."[27]

While the pages of Thomas Ritchie's Enquirer indicated the wrath of Roane and others, the "Sage of Monticello" began to attack the Cohens decision. Jefferson praised Roane's editorials, saying that the judge's agruments "pulverize every word which had been delivered by Judge Marshall."[28] Still quite bitter toward Marshall because of his lecture in the Marbury decision, Jefferson criticized the Chief Justice for giving opinions on "moot" questions not involved in the cases.[29] Jefferson contended that the Supreme Court justices in deciding constitutional questions should review the spirit in which the framers wrote that document and not try to "see what meaning may be squeezed out of text."[30] He added that the justices seemed to be interpreting the Constitution by using "metaphysical subtleties" when ordinary common sense was all that was required to determine its true meaning.[31] The former

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[27] Ibid., June 19, 1821.

[28] Saul K. Padover, editor, The Complete Jefferson (New York, 1943), p. 320, Thomas Jefferson to William Johnson, June 12, 1823.

[29] Ibid., p. 321.

[30] Ibid.

[31] Ibid., p. 322.

President demanded a balance of state and national powers rather than have all governmental authority transferred to Washington.[32]

The real disagreement between Jefferson and Marshall over the Cohens decision and many other cases concerned their different concepts of federalism. Marshall viewed the states as subordinate to the national government. When the state laws and actions conflicted with national laws, the state must yield. Since the nation was supreme, all national departments of government were supreme over the states. The states' principal role was to act and pass laws in the absence of federal legislation on the same subject.

Conversely, Jefferson believed the states and national government to be equal in power and authority. The national government was supreme and exclusive of the states only when dealing with foreign countries. Where domestic issues were concerned the states possessed the ultimate power. The philosophies of these two great Americans concerning the nature of federalism were bound to clash many times throughout their distinguished careers.

Jefferson admitted that his greatest fear of centralization related to the national judiciary. He viewed the power assumed by the Court in Cohens v. Virginia to review

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[32] Ibid.

the decisions of state courts as alarming. He again warned that the people must not allow the Court to continue to usurp powers which the Constitution did not grant to that body and that the "eye of vigilance [must] never be closed."[33]

Associate Justice Joseph Story acknowledged that Jefferson was the chief enemy of the federal judiciary. From his correspondence it appears that Story was afraid the former President would be able to gain enough support to destroy the Court. He candidly stated that he would prefer "the decisive blow" to be struck while he was still young enough to find another livelihood.[34] Later Story urged his fellow judges to remain resolute in their duty and predicted that the Court would be diverted from its honest course only "when driven from the seat of Justice."[35]

Jefferson's successor to the presidency, James Madison, issued a more moderate attack on the Court in the Cohens decision. Madison disliked the judges' practice of "mingling with their judgments pronounced comments and reasonings of a scope beyond them."[36] Judges were supposed

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[33]Bergh, editor, Writings of Thomas Jefferson, XV, 326, Thomas Jefferson to Spencer Roane, March 9, 1821.

[34]William F. Story, editor, Life of Joseph Story, I (London, 1851), 411, Joseph Story to Jeremiah Mason, January 10, 1822.

[35]Ibid., 412.

[36]Gaillard Hunt, editor, Writings of James Madison, IX (New York, 1910), 56, James Madison to Spencer Roane, May 6, 1821.

to limit their reasonings and decisions to cases before them and not to touch on moot questions. Madison was mildly critical of Marshall's nationalistic doctrines. He believed that the Chief Justice was not allowing the states their due authority under the Constitution and that this would upset the workings of the federal system. He also noted the Court's efforts to "amplify its own jurisdiction" in the Cohens case and stated that the decision had "justly incurred the public censure."[37]

Madison, who had done so much to get the Constitution written and accepted, naturally wanted the federal system established by that document to work in practice. He proposed that federal and state judges should come to an understanding over problems of jurisdiction. He somewhat naively believed that if only the national and state judiciaries would meet together they could work out the problems of federalism and quiet much of the furor over the question of states' rights and limited national authority.[38]

While Jefferson and Madison were criticizing the Supreme Court, the verbal attacks on that body continued from

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[37] Ibid., p. 143, James Madison to Thomas Jefferson, June 27, 1823.

[38] Ibid., pp. 65-68, James Madison to Spencer Roane, June 29, 1821.

the southern press and especially from Virginia.[39] Niles Register joined the chorus of dissenting articles against the lottery decision. It praised the editorials of "Algernon Sidney" and added that "all who do not subscribe to the belief in the infallibility of . . . [the Supreme Court] are in danger of political excommunication."[40]

John Taylor offered another attack on the doctrines of national supremacy and judicial superiority after Cohens v. Virginia. In a new book, Tyranny Unmasked, Taylor criticized a congressionally-proposed protective tariff, but he also reserved some attacks for Marshall's interpretation of the Constitution. "A limited jurisdiction given to the federal Courts, is made to cover all the state courts," declared Taylor.[41] "Cannot the Union subsist unless Congress and the Supreme Court shall make banks and lotteries?"[42]

Taylor pleaded for a strict interpretation of the Constitution. He noted that it took the legislatures of three-fourths of the states to amend the Constitution, but that the Supreme Court had altered that document by faulty interpretation "without the concurrence of a single state."[43]

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[39]William E. Dodd, "Chief Justice Marshall and Virginia," American Historical Review, XII (1906), 776-787.

[40]Niles Register, July 7, 1821.

[41]John Taylor, Tyranny Unmasked (Washington, 1822), p. 133.

[42]Ibid., p. 341.

[43]Ibid., p. 343.

John Taylor was the most noted advocate of basic Jeffersonian principles and to him, as to Jefferson, the national judiciary was the chief villain in changing the governmental system to one of a unitary rather than a federal nature.

Virginia's General Assembly drafted resolutions and proposals against the Supreme Court even before the final decision in Cohens v. Virginia was reached. On December 3, 1821, the House of Delegates proposed a resolution which defended the state in its assertions concerning the lack of federal jurisdiction in the Cohens case. The resolution mentioned the "humiliation" which the state had endured in being brought to the bar of the Supreme Court.[44] It claimed that Marshall's nationalistic principles would ultimately change the character of American government. It was the duty of the states to exercise vigilance to prevent violation of the Constitution by the Court.[45] Finally, the resolution called for a constitutional amendment clearly defining the limits of the federal government and especially the jurisdiction of the federal courts. It ended with a pledge to "rouse other states" to the importance of the crisis.[46]

After the Court's ruling in the Cohens case, Virginia proposed other resolutions protesting the federal judiciary's

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[44]"Legislative Records," Virginia, December 3, 1821, p. 7.

[45]Ibid.

[46]Ibid., p. 8.

jurisdiction in the case. The House of Delegates defeated by a small majority an attempt to introduce several constitutional amendments to Congress. These proposed amendments were designed to invalidate any federal court's jurisdiction over state legislative actions or judicial decisions.[47] Although the resolutions failed to pass the House of Delegates they indicated a strong protest in many sections of the state against the Supreme Court. Representative Andrew Stevenson brought the matter before the United States House of Representatives when he proposed that section twenty-five of the Judiciary Act of 1789, giving the Supreme Court appellate jurisdiction over state courts, be repealed.[48]

Although Congress did not at this time seriously consider the repeal of section twenty-five, other congressional leaders began to make new propositions to curb the Court's authority. On December 12, 1821, Senator Richard M. Johnson of Kentucky proposed a constitutional amendment which in effect would have given appellate jurisdiction to the United States Senate in all cases involving the Constitution or a state.[49] Johnson declared that the power of judicial review over state actions should be taken from the Supreme Court

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[47] Niles Register, February 23, 1822.

[48] Annals of Congress, 17th Congress, 1st Session, p. 1682; U. S. Statutes at Large, I (1789), 85-86.

[49] Annals of Congress, 17th Congress, 1st Session, p. 68.

because the justices were interested only in expanding their own powers.[50] Johnson asked why "would it not be equally the duty of Congress to declare the opinion of the federal judiciary null and void in every case where a majority of Congress might deem it repugnant to the Constitution?"[51] The Kentucky Senator reasoned that passage of a federal law required the approval of both houses of Congress and the President but that seven judges could declare a statute unconstitutional and void. This situation became ridiculous when one remembered that the judges were not responsible to any constituency for their actions.[52] He added that the power assumed by the Court to declare state laws unconstitutional and to review decisions of state courts was even more dangerous as it upset the federal system on which our government was based.[53]

Johnson concluded his remarks by adding several other possibilities for curbing the Court's power. He said the Congress could limit the jurisdiction of the Supreme Court to specific spheres, use the impeachment process more forcefully or limit the term of office for judges. These methods, according to Johnson, were not as practical or useful as a

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[50] Ibid., p. 73.

[51] Ibid., p. 80.

[52] Ibid.

[53] Ibid., p. 81.

constitutional amendment designed to give the Senate the power to control the Court.[54]

Senator Sidney T. Holmes of Maine agreed with Johnson's sentiments in trying to curb the Court, but he thought a better method would be to give the President the power to remove any federal judge with the approval of both houses of Congress. Holmes offered this method as a substitute amendment to that proposed by Johnson.[55] Although neither the Johnson amendment nor the Holmes substitute received much support in Congress, debate did not end concerning curtailment of the Court's power.

While the lottery decision brought much response from Virginia and the South, the case of Green v. Biddle, first argued in 1821, caused excitement only in Kentucky. This case dealt with Kentucky's confusing land claims and land laws. To solve the problem of overlapping and multiple land claims the state legislature had passed laws in 1804 requiring a person who could prove legal ownership of a piece of land to compensate the former occupier for any improvements he had made on the land. If the legal owner refused to pay for the improvements, the title of the land would be awarded to the occupier when he had paid for the

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[54] Ibid., p. 113.

[55] Ibid., p. 114.

value of the land without improvements.[56] Generally these laws had been upheld in the state courts but in 1819 the land claimant laws were contested in the federal courts on the grounds of "impairment of the obligation of a contract which had been entered into between Virginia and Kentucky when the latter became a state in 1791."[57] The contract had provided that all private property in Kentucky would remain secure and would be determined by the existing laws of Virginia. Kentucky claimed that she had not violated this stipulation but in Green v. Biddle the United States Supreme Court held the Kentucky land occupancy laws unconstitutional because of violation of the contract clause in the Constitution.[58] Justice Bushrod Washington, in the majority opinion, indicated the Court's knowledge of the many criticisms of its recent decisions. He wrote that the Justices must perform their task of interpreting state laws in terms of the Constitution "according to the dictates of our best judgment, be the consequences of the decision what they may."[59]

Kentucky sensed the outcome of the case before the Court reached its final decision. The legislature passed

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[56]Charles Warren, The Supreme Court in United States History, II, 96.

[57]Ibid., p. 97.

[58]Green v. Bibble, 21 U. S., 364 (1823).

[59]Ibid.

resolutions to "remonstrate and protest" against any decision on the part of the Supreme Court which would find the occupancy laws void. The legislature also sent commissioners to the Court to oppose any such decision.[60] The Kentucky Gazette spoke of the "slow encroachments and gradual usurpation of the judiciary." This states' rights newspaper declared the judges of the Supreme Court to be "more dangerous to the liberties of the people and the right of the states, than Congress and the President with the army and navy at their command."[61]

When the Court announced the decision in Green v. Biddle, Kentucky Governor John Adair reported that it had "produced much excitement and alarm throughout the state." He declared that it "struck at the sovereignty of the state, and the right of the people to govern themselves."[62] The Kentucky legislature responded to Adair's wishes by passing a set of resolutions protesting the Supreme Court's ruling in Green v. Biddle. These resolutions declared the doctrines of the Court to be "erroneous, injurious, and degrading" and called on Congress to "guarantee to the state its republican form of government."[63]

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[60] Niles Register. February 23, 1822.

[61] Charles Warren, The Supreme Court in United States History, II, 98, citing Kentucky Gazette, March 29, 1821.

[62] Niles Register, November 29, 1823.

[63] Ibid., December 27, 1823.

Kentucky's leading Congressman, Henry Clay, also attacked the Court for its decision in the Green case but he reserved criticism for Virginia in her apathy in the matter. "Has not Virginia exposed herself to the imputation of selfishness by the course of her conduct . . .?"[64] asked Clay. He noted that when the Court ruled against Virginia in the lottery case the Old Dominion had "made the most strenuous efforts against the exercise of power by the Supreme Court" but that when "the thunders of that Court were directed against poor Kentucky" Virginia did not come to her aid.[65] Calling the Green decision the most crippling blow which "ever affected the independence of any state in this Union," Clay remonstrated that "not a Virginia voice" was heard in dissent.[66]

The attitude of Virginia toward the Green case indicates the degree of localism found in state criticisms of the Supreme Court. These attacks were prompted by specific rulings injurious to particular states or regions. Virginia, the state most noted at that time for its states' rights attitude, did not join the attack on a decision which benefited her former citizens although the decision again

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[64] James F. Hopkins and Mary Hargreaves, editors, Papers of Henry Clay, III (Lexington, 1959), 478, Henry Clay to Francis T. Brooke, August 26, 1823.

[65] Ibid.

[66] Ibid., p. 479

violated the states' rights position. The state attacks were not based on ideology so much as on pragmatic considerations.

A year after the ruling in Green v. Biddle and while Congress was still hearing complaints from Kentucky, the Court decided one of the most important cases of the Marshall era. This was Gibbons v. Ogden (1824), the famous steamboat case. In 1798 Robert R. Livingston and Robert Fulton gained the sole right of operating steamboats on the waters of New York. The New York legislature renewed this monopoly grant in 1803 and again in 1808.[67] Any person wishing to establish a separate steamboat line in New York had to obtain a license from Livingston for that purpose. In 1818 former Governor Aaron Ogden of New Jersey purchased a license from Livingston and began a ferryboat line to carry passengers from New York City to certain ports on the New Jersey shore. He later combined with Thomas Gibbons who transported the passengers from the New Jersey landings to Elizabethtown, New Jersey, in his steamboat. Gibbons did not purchase a license to run a steamboat in New York waters but in reality he, together with Ogden, carried

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[67] Louisiana, Massachusetts, New Hampshire, Virginia, and Georgia had also granted monopoly rights to various steamboat lines in their respective states. Charles Warren, The Supreme Court in United States History, II, 57-58; Beveridge, The Life of John Marshall, IV, 399-400.

passengers from New York to New Jersey.[68] The Livingston company issued a bill for an injunction against Gibbons and Ogden for violating the New York law of 1808 which had granted it momopoly water rights. Ogden claimed that he ran boats solely within the New York waters and was within his rights according to his license. Gibbons declared that he operated a boat between New Jersey ports under a coasting license granted by the federal government. He then denied that the monopoly could have exclusive right to run boats from New York to New Jersey.[69]

Chancellor James Kent of New York decided that Ogden was within his rights under his license as he operated boats within New York waters but he enjoined Gibbons from operating steamboats in New York. Gibbons defiantly began his own line from New York to New Jersey in competition with Ogden. Ogden applied to Chancellor Kent for an injunction against Gibbons which was issued. The New York courts upheld the injunction and the Livingston monopoly.[70]

The case reached the United States Supreme Court on a writ of error from the New York Court of Errors and was heard in February, 1824.[71] The principal question of the

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[68] Beveridge, The Life of John Marshall, IV, 409-410.

[69] Ibid., p. 410.

[70] Ibid., pp. 411-412.

[71] Ibid., p. 413.

case was whether the New York monopoly law of 1808 violated that part of the Constitution which gave Congress the power to regulate commerce among the states. In answering this question Marshall also examined the meaning of interstate commerce and determined that "commerce" as used in the Constitution included "navigation."

Marshall first examined the nature of the Union. In response to the contention that the states were absolutely sovereign, the Chief Justice acknowledged that before the Constitution was written they were completely independent. He reminded the New York attorneys that when the states converted the league into a unified government, the character of the states underwent a vast change.[72] No longer were the states absolutely sovereign, for now the nation assumed sovereignty.

Marshall then discussed the merits of strict and loose construction of the Constitution. He asked why the powers of Congress should be strictly interpreted. A narrow interpretation would "cripple the government and render it unequal to the objects for which it is declared to be instituted."[73]

After declaring the word "commerce" meant commercial intercourse rather than mere traffic, Marshall examined

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[72] Gibbons v. Ogden, 22 U. S., 3 (1824).

[73] Ibid., p. 4.

the conflict between state and national laws on this subject. Since Congress had passed laws dealing with coastal trade and traffic denying monopoly rights, Marshall responded that the New York statute of 1808 conflicted with federal laws. Marshall then upheld the supremacy of the laws passed by Congress and declared that the "law of the state, though enacted in the exercise of powers not controverted, must yield to [them] ."[74]

In a harsh criticism of states' rights advocates Marshall reached his eloquent best when he declared:

> Powerful and ingenious minds, taking as postulates, that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and the original powers of the states are retained, if any possible construction will retain them, may . . . explain away the Constitution of our country and leave it a magnificent structure indeed, to look at, but totally unfit for use.[75]

Thus Marshall decided that in the area of interstate commerce, as with so many other subjects, the national government was supreme over the states. The broad interpretation Marshall gave to federal regulation of commerce did much to relieve transportation from restrictive state regulation. The opinion in Gibbons v. Ogden is remembered as one of Marshall's most lasting contributions.

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[74] Ibid., p. 17.

[75] Ibid., p. 23.

Unlike most of Marshall's decisions the steamboat case was popular with most people. The average man of the decade 1820-1840 feared monopolies worse than he did nationalism, and the decision tended to kill state-chartered monopoly in the transportation industry.

One of the few to see the decision as another serious threat to states' rights was Thomas Jefferson. Jefferson declared that the federal government was advancing with "rapid strides" at the "usurpation of all the rights reserved to the states." The government had been able to accomplish this usurpation only because of the Supreme Court's construction of the Constitution which leaves "no limits to their power."[76] The states could not use "reason and argument" on the judges declared Jefferson. "You might as well reason and argue with the marble columns encircling them."[77]

John Randolph also viewed Marshall's opinion as dangerous. He limited his attacks to Marshall's habit of deciding issues not immediately before the Court. Randolph indicated his exasperation over the trend of the Court's decisions by disclaiming to a close friend, ". . .since the case of Cohens v. Virginia, I am done with the Supreme Court."[78]

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[76]Albert Bergh, editor, Writings of Thomas Jefferson, XVI, 146.

[77]Ibid., p. 147.

[78]Hugh A. Garland, Life of John Randolph of Roanoke (New York, 1890), p. 212, John Randolph to Dr. Brockenbrough, March 6, 1824.

As has been shown, the early 1820's brought attacks on the power of the Supreme Court from various sources. During this period there were additional attempts to reform the judicial system not previously discussed. Most of these reforms were also aimed at curbing the Court's power. Senator Richard M. Johnson of Kentucky, after introducing his plan to give the power of judicial review to the Senate, also proposed another resolution dealing with the Supreme Court. It recommended that the Court be increased from seven to ten judges and that a majority of at least seven must concur when declaring a state law invalid.[79] The Senate debated Johnson's resolution, but when it reached the Judiciary Committee, Chairman Martin Van Buren of New York substituted a resolution which would not have increased the Court's membership but would have required the concurrence of five judges to declare a state law void. The resolution also required each judge to deliver a separate opinion in cases involving the validity of state laws. This was tabled in March, 1824.[80]

Thomas Jefferson now proposed that federal judges be appointed for a specified length of time rather than for a life tenure. He suggested that a term of "four or six years

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[79] Annals of Congress, 18th Congress, 1st Session, p. 1291.

[80] Ibid., pp. 336, 419.

and renewable by the President and the Senate" would keep the judges responsible to the people.[81] Richard M. Johnson also supported this idea in the Senate.[82]

Throughout this period, Jefferson was in contact with Justice William Johnson of South Carolina, one of his appointees (1804) to the Supreme Court. Jefferson proposed that all the judges should write separate opinions on decisions which the court handed down as they had done prior to Marshall's appointment. The former President suggested that some of the judges did not even read cases argued before the Court and their consent to the will of the Chief Justice was biased by "party views and personal favor." "The very idea of cooking up opinions in conclave, begets suspicions that something passes which fears the public ear. . . ."[83] Jefferson declared that the public had a right to know the reasoning of every judge in each case.[84]

Jefferson's reasoning did not fall on deaf ears as Justice Johnson wrote separate opinions from time to time during his tenure on the bench, but many of his opinions concurred with rather than dissented from the majority

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[81] Bergh, editor, Writings of Thomas Jefferson, XV, 389. Thomas Jefferson to William T. Barry, July 2, 1822.

[82] Register of Debates, 18th Congress, 2nd Session, p. 531.

[83] Bergh, editor, Writings of Thomas Jefferson, XV, 422, Thomas Jefferson to William Johnson, March 4, 1823.

[84] Ibid., p. 451, Thomas Jefferson to William Johnson, June 12, 1823.

opinion of the Court. Chief Justice Marshall wrote most of the majority opinions of the Court (519 of the 1,106 cases during his tenure and 36 of the 60 cases dealing with major constitutional questions).[85] He was definitely the Court's master during his thirty-four year term as Chief Justice.

By the time of Gibbons v. Ogden, the attacks on the Court had mitigated. The most vocal and doctrinaire opponent of Marshall, Spencer Roane, died in 1822, one year after the Cohens decision. John Taylor died in 1824 after spending over twenty years persuading his readers to accept the states' rights theories of the old Republicans. Thomas Jefferson died two years later.[86] These three Virginians had held to strict construction of the Constitution despite the nationalism which the Chief Justice had repeatedly proclaimed from the high bench.

John Marshall was also growing old, but he was to endure one more battle while he served as Chief Justice, that being the struggle with Andrew Jackson over the Cherokee Indians and Georgia.

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[85] Charles G. Haines, The Role of the Supreme Court in American Government and Politics, 1789-1835 (Berkeley, 1944), pp. 649-650.

[86] "Judge Spencer Roane of Virginia; Champion of States' Rights--Foe of John Marshall," Harvard Law Review, LXVI (May, 1953), 1257.

CHAPTER IV

THE CHEROKEE CASES AND NULLIFICATION

The roots of the difficulties between Georgia and the Cherokee Indians dated back to the late eighteenth century. The Cherokee nation occupied a large tract of land within the states of Georgia, North Carolina, South Carolina, Tennessee and Alabama.[1] In 1791 the United States Government negotiated the Treaty of Holston with the Cherokees in which the Indians ceded much of their lands to the United States. In return the government "solemnly guaranteed to the Cherokee nation all their lands not hereby ceded."[2] In 1800 Georgia ceded to the United States all her lands which now compose the states of Alabama and Mississippi. In return the United States was to "extinguish for the use of Georgia . . . the Indian title to all . . . lands within the state of Georgia."[3] The United States did not completely fulfill her part of the treaty, for from 1805 to 1819 she purchased only one million of the five million acres of

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[1] Warren, The Supreme Court in United States History, II, 189.

[2] American State Papers. Indian Affairs, I, 124.

[3] American State Papers, Public Lands, I, 126; Warren, The Supreme Court in United States History, II, 189.

Cherokee land in Georgia. In addition the United States followed a conciliatory policy toward the Cherokees and helped turn them into a highly advanced and civilized nation with their own governmental and legal systems.[4]

In 1824 Georgia announced that she had sole authority to exercise complete sovereignty over all lands in Georgia. This would include the Indian lands of the Cherokee and Creek nations within the state. From 1825 to 1827 the state had a running argument with President John Quincy Adams concerning authority over the Creek nation and almost came to military conflict with the United States.[5]

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[4] Warren, The Supreme Court in United States History, II, 189.

[5] Ibid., p. 190. The United States concluded the Treaty of Indian Springs with a few Creek chiefs in 1825. This treaty ceded the Creek lands in Georgia to the United States. Most of the Creeks disavowed the treaty, but Georgia immediately took steps to occupy and survey the land. By terms of the treaty the Creeks were given until September, 1826, to evacuate the land. President Adams investigated the activities of Georgia and requested Governor George M. Troup to cease the survey until the Creeks could vacate the land. Troup replied that the state would proceed with the survey.

The United States Government then negotiated the Treaty of Washington, 1826, with the Creeks, which annulled the Treaty of Indian Springs, but Georgia refused to accept the latter treaty as valid. The Creeks appealed to the federal government for protection from the state, and Adams indicated he would use force to keep the surveys from continuing. Governor Troup called for the state militia in defiance of Adams' threat. Adams now put the matter before Congress and no positive action was taken. On November 15, 1827, a treaty was concluded in which the Creeks ceded all their lands in Georgia to the state. Ames, editor, State Documents on Federal Relations, pp. 113-114.

Soon after the conflict between Georgia and the Creeks, gold was discovered in the Cherokee lands. The Indians now adopted a constitution and made plans to remain indefinitely in Georgia.[6] This action by the Cherokees prompted the state legislature to pass an act on December 19, 1829, incorporating the counties of Carroll, DeKalb, Gwinnett, Hall and Habersham into the state. The area comprising these counties, occupied and controlled by the Indians, was now placed under the authority of the state. Georgia's act declared that from June 30, 1830, all Indians residing in those counties would be subject to the laws of Georgia and that all Cherokee "laws, ordinances, orders, and regulations of any kind . . . would be null and void and of no effect."[7] The act further stated that no Indian living within the former Cherokee territory of Georgia could be a "competent witness in any court of the state to which a white person may be a party."[8] Finally, the act made it unlawful for anyone to try and persuade an Indian not to emigrate west of the Mississippi River.[9] In June, 1830, Governor George A. Gilmer issued a proclamation which declared that the

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[6] Warren, The Supreme Court in United States History, II, 191.

[7] Senate Executive Documents, 23rd Congress, 1st Session, No. 512, II, 233.

[8] Ibid., p. 235.

[9] Ibid., p. 234.

state was entitled to all the gold which had been discovered in Georgia.[10]

By this time Andrew Jackson was President and the old Indian fighter favored Georgia in her dealings with the Cherokees. On Jackson's authority Secretary of War John Eaton began to encourage the Indians to emigrate in late 1829 and early 1830. The government procured flatboats and other necessities to facilitate the emigration.[11] In May, 1830, Congress passed an Indian Removal Act which appropriated $500,000 to help move the Cherokees west of the Mississippi. This act guaranteed the Indians title to their new lands.[12] Many Cherokees did move but others refused to leave the Georgia lands, especially after gold was discovered. President Jackson pointed out to the Indians the advantages of emigration. He promised that the government would pay for their removal and would pay them for any improvements they had made on the Georgia lands. He also declared that their lands west of the Mississippi would be enlarged and that the government would survey the new lands to avoid boundary confusion. Jackson further promised as much protection and assistance for the Indians as the government

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[10] Ibid., p. 231.

[11] Ibid., p. 171.

[12] U. S. Statutes at Large, IV, 412.

could provide. He warned that if they did not move they would be under the jurisdiction of the state and could expect no assistance or relief from the President or the federal government.[13] In October, 1830, Secretary Eaton sent John Lowery to attend the Cherokee council in Georgia and try to persuade the Indians to leave the state. The chiefs responded that former treaties with the United States, especially the Treaty of Holston, protected them and guaranteed their right to the lands they occupied. The chiefs then sent a delegation to Washington to protest the actions of Georgia in taking their gold mines and occupying their lands. Eaton refused to recognize the delegation as legal unless the Indians wished to discuss a treaty of removal.[14]

The Indian delegation then went to Congress where they reached some sympathetic ears. On February 15, 1831, the Senate passed a resolution requiring President Jackson to inform the Senate whether an act of 1803, passed to safeguard the Cherokee lands in Georgia, had been executed.[15] On February 22, Jackson answered the Senate resolution with a frank declaration that Georgia possessed complete

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[13] Senate Executive Documents, 23rd Congress, 1st Session, No. 512, II, 14-15.

[14] Grant Foreman, Indian Removal, The Emigration of the Five Civilized Tribes of Indians (Norman, Oklahoma, 1832), 232.

[15] Register of Debates, 21st Congress, 2nd Session, p. 204.

sovereignty over the people residing in that state. He declared, "I can see no alternative for [the Cherokees] but that of their removal to the West or a quiet submission to the state laws."[16]

The Cherokees then took their case to the United States Supreme Court. They asserted that laws passed by the Georgia legislature, especially the statute of 1829 extending state sovereignty over the Cherokee nation, were not valid. The Indians maintained that the Cherokee nation was sovereign and legally constituted to pass laws, make treaties and perform all functions attributed to independent nations. They claimed that the state of Georgia had no legal authority over them.[17]

It is evident that John Marshall wanted to rule in favor of the Indians in Cherokee Nation v. Georgia, 1831. He knew of Georgia's oppressive legislation against the Cherokees and declared, "if courts were permitted to indulge their sympathies, a case better calculated to excite them can scarecely be imagined."[18] He decided, however, that the Court lacked jurisdiction in the case because the Cherokee nation was not a foreign state within the meaning

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[16] James R. Richardson, editor, Messages and Papers of the Presidents, II (Washington, 1904), 541.

[17] Foreman, Indian Removal, p. 233.

[18] The Cherokee Nation v. The State of Georgia, 30 U. S., 179 (1831).

of Article III, Section 2 of the Constitution which gives the Court jurisdiction over cases involving a state and a foreign nation. The Cherokee nation then could not sue in a court of law in the United States and the case was dismissed for lack of jurisdiction.[19]

In assuming the legality of Georgia's jurisdiction over the Cherokee territory, the Georgia courts tried and convicted a Cherokee Indian, George (Corn) Tassels, for the murder of a fellow Indian.[20] On December 12, 1830, John Marshall issued a writ of error in the Tassels trial and admonished state authorities to appear before the Supreme Court. Governor Gilmer submitted the writ to the legislature and stated that he would disregard the order and would resist any attempt to enforce it.[21] The legislature passed resolutions supporting the governor and ordered the execution of Tassels which was soon carried out.[22] In this action a state for the first time had completely disregarded the national judiciary and had asserted her sovereignty, even with an appeal to force, if necessary.

The final case of the Georgia-Cherokee feud, Worcester v. Georgia, is one of the best remembered controversies of

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[19] Ibid., p. 183.

[20] Ames, editor, State Documents on Federal Relations, p. 124.

[21] Niles Register, January 8, 1831.

[22] Ibid.; Foreman, Indian Removal, p. 233.

the Marshall era. In December, 1830, the Georgia legislature passed an act limiting the activities of whites dealing with the Georgia Cherokees. By terms of the act any white desiring to reside within the boundaries of the Cherokee nation had to obtain a license for that purpose from the governor and had to take an oath of allegiance to the state. Failure to comply with the law was punishable by four years of hard labor in the state penitentiary.[23] In May, 1831, a group of Presbyterian missionaries engaged in working with the Georgia Cherokees without license were warned by the legislature that they would be arrested if they did not remove themselves from the Cherokee territory. The Reverand Samuel A. Worcester and Dr. Elizur Butler disregarded the warning and were arrested on July 7.[24] The missionaries were found guilty of violating the Georgia act in the superior court for the county of Gwinnett and sentenced to four years hard labor.[25] Worcester, denying the jurisdiction of Georgia in the case, appealed to the Supreme Court and the case was carried to that body on a writ of error.

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[23] Worcester v. The State of Georgia, 31 U. S., 215 (1832).

[24] Senate Executive Document, 23rd Congress, 1st Session, No. 512, II, 645.

[25] Worcester v. The State of Georgia, 31 U. S., 225, 245 (1832).

In January, 1832, Chief Justice Marshall delivered the opinion of the Court in Worcester v. Georgia. The principal question involved the authority of the state over the Cherokee lands. If Georgia maintained legal sovereignty over this area, the act of 1830 was constitutional; if she did not, the law was invalid. Marshall first examined the treaties signed by the Indians and the United States and cited the 1791 Treaty of Holston as guaranteeing the Cherokees the right to their lands in Georgia and the right of self-government under the protection of the United States.[26] He concluded that all laws and treaties concerning the Cherokees indicated that that nation was separate from and independent of the states and that "all intercourse with them shall be carried on exclusively by the government of the Union."[27] Marshall declared the Cherokee nation to be a "distinct community . . . in which the laws of Georgia can have no force."[28] He also asserted that the Georgia act was in "direct hostility" with treaties made over a number of years between the United States and the Cherokee nation and that the act under which Worcester was arrested was therefore void "and the judgment a nullity."[29]

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[26] Ibid., pp. 238-239.

[27] Ibid., p. 240.

[28] Ibid., p. 243.

[29] Ibid., p. 244.

Following this decision Senator George M. Troup sent a letter to the Georgia legislature declaring that "the people of Georgia will receive with indignant feelings, as they ought, the recent decision of the Supreme Court, so flagrantly violative of their sovereign rights." He again admonished the state not to "yield obedience" to the Court's decision.[30] The state followed Troup's advice and refused to release Worcester and Butler from the penitentiary.[31] In March, 1832, John Quincy Adams, now a United States congressman, presented a memorial to the House of Representatives protesting the actions of Georgia and demanded the release of the missionaries.[32] Georgia refused to yield and Worcester and Butler remained incarcerated for almost a year.

Newspapers began to predict that after passions had time to cool, Georgia and the missionaries could come to a settlement which would avoid a collision between Georgia and the United States. Niles Register expressed the hope that Georgia, "being allowed time to get cool, and content with executing her laws over the Indians and their lands, would quietly release Messrs. Worcester and Butler. . . ."[33] The

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[30]Washington, National Intelligencer, March 24, 1832.

[31]Niles Register, March 31, 1832.

[32]Register of Debates, 22nd Congress, 1st Session, pp. 2010-2011.

[33]Niles Register, March 31, 1832.

National Intelligencer indicated that Georgians had too much common sense to allow a tragic collision between the state and national judiciaries. This National Republican journal pleaded, ". . . let all parties keep their temper as well as they can."[34]

In January, 1832, Governor Wilson Lumpkin acknowledged that if the missionaries would dismiss the proceedings in the Supreme Court against Georgia and apply for a release, they could go free.[35] Worcester and Butler then notified the attorney general of Georgia that they had ceased to prosecute the case against Georgia and they were released on January 14, 1833.[36]

The attitude of President Jackson toward the Worcester case and the actions of Georgia has been disputed by historians. When the attorneys for Worcester and Butler confronted Jackson and asked if he would enforce the decision of the Court, Jackson was reported to have said, "Well, John Marshall has made his decision, now let him enforce it." Whether Jackson actually uttered these words is doubtful.[37]

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[34]Washington, National Intelligencer, April 5, 1832.

[35]Wilson Lumpkin, Removal of the Cherokee Indians from Georgia, 1827-1833 (New York, 1907), 207.

[36]Niles Register, February 2, 1833.

[37]Horace Greeley, The American Conflict, I (Chicago, 1864), 106. Greeley notes that he got this quotation from Governor George N. Briggs of Massachusetts who was a Congressman at the time of the decision.

Many writers declare that his temperament and views on the subject would support the claim. Charles Warren states, however, that Jackson did not refuse to enforce the Court's decision and never actually defied the Court. He declares that the case never reached the stage where the power of the executive was needed. The missionaries were already free before the Court actually ordered the Georgia authorities to release them.[38]

Warren relates that historians claim defiance of the Court by Jackson in the Cherokee case based upon the President's remarks concerning judicial review in his veto of the recharter of the Second Bank of the United States in July, 1832. In his veto message Jackson declared that each of the three branches of the federal government must decide for itself the meaning of the Constitution and that each official must support that document as he understands it. He asserted that "the opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."[39] From this statement it appears that Jackson did proclaim for Congress and the executive an independence of the Court to such a degree that judicial

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[38]Warren, The Supreme Court in United States History, II, 219.

[39]Richardson, editor, Messages and Papers of the Presidents, II, 582.

review would be ineffective. Warren declares, however, that Jackson's contemporaries and later students of the period have misunderstood Jackson's meaning in the veto message--a meaning which was explained by Roger B. Taney in a letter to Martin Van Buren in 1860. In this letter Taney declared that Jackson believed the President had the duty to determine the constitutionality of acts of Congress "when acting as a part of the legislative power and not of his right or duty as an executive officer."[40] By this statement Taney meant that the President had the responsibility to judge the constitutionality of bills which came to his desk for signing into law. However, after a bill became a law, whether or not the President had signed it, he was responsible for its enforcement. Taney stated that "General Jackson never expressed a doubt as to the duty and the obligation upon him in his executive character to carry into execution any act of Congress regularly passed whatever his own opinion might be on the constitutional question."[41]

Warren's view that Andrew Jackson did not defy the power of the Supreme Court has much to support it. Although Jackson personally favored Georgia in her dealings with the

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[40]Bernard C. Steiner, editor, "Taney's Letters to Van Buren in 1860," Maryland Historical Magazine, X (March, 1915), 23.

[41]Ibid., p. 24.

Cherokees, as President he remained neutral and was not forced to officially support either the Supreme Court or the state.

The controversy between Georgia and the Cherokees ended in 1835 when the Indians finally ceded all their lands east of the Mississippi River to the United States for five million dollars.[42] The Georgia-Cherokee cases marked one of the most critical periods of the Supreme Court. For the first time a state had successfully defied orders from the highest legal tribunal in the United States. The prestige of the Court was very low and many felt that its exaulted place in the governmental system had seriously been weakened. Had President Jackson been willing to deliver a death blow to the Court, he probably could have done so at this time by refusing to enforce any of its decisions and by influencing the states to openly defy the justices. That he did not indicates Jackson's regard for the Court.

Andrew Jackson had been a fighter all his life and one of his greatest battles was against the South Carolina nullifiers in the 1830's. In his war on the nullifiers Jackson supported the nationalism of Daniel Webster and defended the power and authority of the judiciary. John Marshall,

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[42] U. S. Statutes at Large, VII, 478, 479.

who had feared that the election of Jackson would destroy the nation, was pleasantly surprised that the old general had become a major defender of the Supreme Court.

The first indication of the crisis between South Carolina and the Union came in the famous congressional debate between Senators Robert Hayne of South Carolina and Daniel Webster of Massachusetts. The debate was in response to Connecticut Senator Samuel Foot's resolution of December 29, 1829, which inquired into the feasibility of limiting the sales of public lands in the west.[43] Senator Thomas Hart Benton of Missouri, chief spokesman for the west, attacked the Foot Resolution. Hayne, attempting to keep the southern-western political alliance alive, argued for an even more liberal land policy.[44] Hayne argued that raising the price of public land would ultimately put too much wealth in the federal treasury and that this money would become a "fund for corruption." Such a fund "would be equally fatal to the sovereignty and independence of the states."[45]

In response to Hayne, Daniel Webster defended the nation against the states' rights arguments of South

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[43] Register of Debates, 21st Congress, 1st Session, pp. 3-4.

[44] Ibid., pp. 22-27, 31-35.

[45] Ibid., p. 34.

Carolina. Webster painted a verbal picture of a benevolent national government doing positive good for the people of the country. He listed such activities performed by the federal government as canal and road building, education and the general improvement of living conditions and asked if any of these blessings seemed "corrupt" to the Senator from South Carolina.[46]

In Hayne's reply to Webster, the South Carolinian put forth a version of John C. Calhoun's doctrine of nullification. Concerning the federal judiciary Hayne declared, ". . . the doctrine that the Federal Government is the exclusive judge of the extent, as well as the limitations of its power . . . [is] utterly subversive of the sovereignty and independence of the states. It makes but little difference . . . whether Congress or the Supreme Court are invested with this power."[47]

Webster, in his famous second reply to Hayne, declared that there must be only one tribunal capable of interpreting the Constitution. Webster asked, ". . . shall constitutional questions be left to four and twenty popular bodies, each at liberty to decide for itself, and none bound to respect the decisions of others. . .?"[48] He concluded that the nation was supreme over the states and that the Supreme

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[46] Ibid., pp. 38-39.

[47] Ibid., p. 58.

[48] Ibid., p. 78.

Court and not the states must possess final jurisdiction over constitutional questions. He concluded his argument with the famous statement, "Liberty and Union, now and forever, one and inseparable."[49]

The Hayne-Webster debate ignited political fire in the Senate. Benton attacked Webster's sentiments of nationalism and the Supreme Court's judicial review over the states. Benton claimed that federal authority was "becoming unlimited under the assumption of implied powers" and that the doctrine of federal judicial review over state actions "would annihilate the states."[50] Senator John Rowan of Kentucky declared the Supreme Court was "an unfit tribunal to dispose of the sovereignty of the states." He urged the states to drive the Court back to "within its appropriate judicial sphere."[51] New Hampshire Senator Levi Woodbury, who himself became a member of the Supreme Court in 1845, castigated the justices of the Court for giving "a diseased enlargement to the powers of the General Government, and throwing chains over state rights."[52]

The reason for South Carolina's proclamation of nullification was not the land sale issue which had ostensibly

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[49] Ibid., pp. 77-80.

[50] Ibid., p. 112.

[51] Ibid., p. 139.

[52] Ibid., p. 185.

prompted Hayne's declaration. It was the hatred which South Carolina upcountry cotton planters had for the protective tariff which benefited eastern manufacturers but which forced southern agrarians to pay inflated prices for manufactured goods. South Carolina suffered an economic depression in the 1820's, which her citizens blamed on tariffs passed since 1815, especially the tariff of 1828.[53]

In late 1830 Governor Stephen Decatur Miller of South Carolina proposed the assembling of a state convention to declare the tariff of 1828 void.[54] President Jackson had made known his feelings on nullification in his famed Jefferson Day toast on April 13, 1830, when he declared, "Our Union, it must be preserved."[55] He also informally warned South Carolinians that nullification would be met with the force of the federal government.[56] The attitude of Jackson simply gave radical South Carolina orators more

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[53] William W. Freehling, Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836 (New York, 1966), pp. IX-X. Freehling contends that a second basic cause for the nullification doctrine in South Carolina was that state's reaction to fears of an anti-slavery campaign. The South Carolina low country was especially sensitive about this issue.

[54] Niles Register, October 9, 1830.

[55] Frederic A. Ogg, The Reign of Andrew Jackson (New Haven, 1919), p. 164.

[56] Niles Register, July 16, 1831.

impetus as they boldly called for defiance of the federal government.[57]

On November 19, 1832, the nullification convention met in South Carolina. The convention passed an ordinance which declared the tariff laws of 1828 and 1832 to be "unauthorized by the Constitution . . . and . . . null and void." The ordinance also declared that South Carolina would "not submit to the application of force, on the part of the federal government to reduce the state to obedience." The convention warned that any military attempt by the United States to force the state to obey the tariff laws would mean the secession of South Carolina from the Union.[58]

Characteristically, Jackson met the challenge from the nullifiers with vigor. In a proclamation to South Carolina he declared that the laws of the United States would be enforced and that any resistance to the enforcement would be met by all the force at the President's command.[59] He declared that the South Carolina ordinance would disrupt the Union by making all national laws dependent on the states. He maintained that if a law were unconstitutional a state could challenge its validity by appealing to the Supreme

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[57] Ibid., July 28, 1832.

[58] Ibid., December 1, 1832.

[59] Richardson, editor, Messages and Papers of the Presidents, II, 654.

Court. It was the Court's duty to decide finally on the constitutional question involved. If the state were displeased with the Court's decision, it could introduce a constitutional amendment to correct the evils.[60] Jackson's defense of the Union and the national judiciary in his proclamation sounded much like Webster or even Marshall himself.

South Carolina reacted to Jackson's proclamation with preparations for war. Robert Hayne, who was now governor of the state, called for volunteers for the state militia.[61] People throughout the state readied themselves to endure what seemed an inevitable military conflict with the United States.[62]

On January 16, 1833, President Jackson delivered a special message to Congress in which he requested that Congress provide the necessary measures for collecting tariff duties in South Carolina. Most of the measures proposed were intended to prevent hostilities with South Carolina rather than suppress the state.[63] Jackson wished to avoid actual military conflict if possible. A bill authorizing

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[60] Ibid., p. 642.

[61] Niles Register, January 5, 1833.

[62] Beveridge, The Life of John Marshall, IV, 566-567; Freehling, Prelude to Civil War, p. 291.

[63] Richardson, editor, Messages and Papers of the Presidents, II, 610-632.

the President to use whatever means necessary to suppress state obstruction by military force of any federal law passed Congress March 1, 1833. The bill also removed the jurisdiction of the state courts in any proceedings resulting from the collection of tariff duties and added such jurisdiction to the United States circuit courts.[64] This "force bill" or "bloody bill," as it came to be called in South Carolina, received congressional approval at about the same time that Henry Clay maneuvered through Congress a compromise tariff bill. This tariff repealed duties on some items and lowered duties on others. It provided for a stair-step reduction of tariff rates exceeding 20 per cent of the value of taxable goods. The duties would be lowered 10 per cent biennially until 1842 at which time most duties would cease.[65] The tariff mollified South Carolina and met little resistance from the industrial community. It also renewed Clay's acclaim as the "Great Compromiser."[66] On March 11, 1833, the South Carolina nullification convention reopened. The delegates to the convention repealed the

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[64] Register of Debates, 22nd Congress, 2nd Session, I, 668, II, 1903; U. S. Statutes at Large, IV, 634. The vote on this "force bill" was 32-1 in the Senate and 149-48 in the House.

[65] U. S. Statutes at Large, IV, 629.

[66] Freehling, Prelude to Civil War, pp. 292-293.

November ordinance of nullification and then in a meaningless gesture nullified the "force bill."[67]

The Union had been saved once more. Military conflict between South Carolina and the United States was averted. President Jackson had come to the aid of the national judiciary in repelling a state from taking judicial review of congressional action into its own hands. John Marshall's nationalism had again triumphed.

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The Georgia-Cherokee cases and the nullification battle in South Carolina marked the last concerted attempts to destroy the power of the national judiciary during John Marshall's term as Chief Justice. The Court had withstood numerous attacks from various sources for thirty-four years but emerged from the Marshall era as a great co-equal branch of the federal government. The two most important principles which the Chief Justice repeatedly expounded from the high bench were the supremacy of nation over state and the role of the national judiciary as an umpire in federal-state disputes.

As this study has indicated, the Marshall Court was attacked because of these two principles, first by Congress

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[67] Ibid., p. 296.

in the impeachment of Associate Justice Samuel Chase and then by several states in response to decisions affecting their sovereignty. Although neither Congress nor the states could ever muster enough support actually to destroy the Court's authority, the national judiciary remained the center of a storm of controversy throughout the Marshall era. The attacks on the judiciary came from both responsible and irresponsible elements. Some criticisms were justified; others were not. At times Marshall issued opinions on questions not directly involved in the cases before the Court. He sometimes handed down decisions on political questions which could have been left to Congress. He undoubtedly controlled the associate justices and personally directed the course of constitutional law during his term on the bench. However, Marshall also freed an infant industrial community from crippling restraints placed on it by state regulations. He gave judicial respectability to a broad construction of the elastic clause which enabled Congress to expand its powers in the face of new developments in society. He also placed the national judiciary in a powerful position as the final tribunal in defining the limits of federalism.

Attacks on the Supreme Court did not end with the retirement of John Marshall. As of the writing of this thesis, the term of Chief Justice Earl Warren is coming to

a close and it is interesting to compare the two periods. One contemporary periodical declares, "By any accounting, the Warren court has been the most influential since the Marshall court . . . ."[68] The Warren court has made major pronouncements in the fields of civil rights, legislative apportionment and criminal procedure and has been subjected to intense criticism for its decisions in all three areas. "Impeach Earl Warren" has been a persistent cry of contemporary opponents of the Court during the Chief Justice's fifteen years of service.

While both Marshall and Warren have made significant contributions to American jurisprudence, neither has been free from vicious attacks nor from attempts to curb the power of the honorable Court. Perhaps this is the fate of truly great Chief Justices.

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[68]"Warren: Out of the Storm Center," Time, XCI (June 28, 1968), p. 12.

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