CHAPTER NINETEEN

THE CHEROKEE CASES AND PRESIDENT JACKSON

1831–1833

The case which was destined now to bring about the most serious crisis in the history of the Court arose in Georgia and had its roots in a treaty, made forty years prior, between the United States and the Cherokee Indians, a tribe which occupied a tract of country lying within the limits of Georgia, North Carolina, South Carolina, Tennessee and Alabama. In this Treaty, in 1791, the United States "solemnly guaranteed to the Cherokee Nation all their lands not therein ceded." Eleven years later, Georgia, in ceding to the United States all that portion of its territory now constituting the States of Alabama and Mississippi, did so upon the express condition that the United States should extinguish for the use of Georgia the Indian title to lands within the remaining limits of the State, "as soon as it could be done peaceably and on reasonable terms." Unfortunately, the United States failed to perform its agreement; and though, from 1805 to 1819, it purchased over eight million acres from the Cherokees in Alabama and Mississippi, it bought only about one million out of the five million acres owned by that tribe in Georgia. Moreover, it adopted a fostering and humanitarian policy towards the Georgia Cherokees which developed them into a civilized settlement, very little open to persuasion, and very little desirous to emigrate. The increasing permanency, however, of an Indian tribe within its borders, claiming and exercising a totally independent govern-
ment, exempt in every respect from the jurisdiction of the State, was a political anomaly which was bound to meet later with fierce opposition from the people of Georgia. Moreover, an important decision of the Supreme Court of the United States, in 1823, in Johnson v. McIntosh, 8 Wheat. 543, had settled the question of the nature of the Indian title to the soil, and had held that the fee to lands in this country vested in the British Government, by discovery, according to the acknowledged law of civilized nations; that it passed to the United States by the Revolution; and that the Indian tribe had a right of occupancy only. This decision confirmed the determination of Georgia to exercise full right of sovereignty over its soil and over those who lived within its borders. Accordingly, in 1824, it formally asserted its complete jurisdiction over the Indians, and declared that the Federal Government lacked the power to bind a State by a treaty made with Indian inhabitants. At the same time, the State asserted its sovereignty over lands within its borders owned by the Creek Indians, and almost came to actual military conflict with the United States, owing to the policy maintained by President Adams in upholding treaties with that tribe.

1 This case involved an immense tract of land in Illinois (upwards of 50,000,000 acres between the Illinois and Wabash Rivers). It was argued by R. G. Harper and Webster against W. H. Winder and Murray, the former losing the case. . . . Of the decision, the Washington Republican said: "The great importance of the subject matter in controversy seems to require rather a more detailed notice than is usual. . . . One of the most luminous and satisfactory opinions, we recollect ever to have listened to." See Niles Register, XXIV, March 8, 1823.

2 See State Documents on Federal Relations (1911), by Herman V. Ames. An attempt to enforce a prosecution of Georgia surveyors who had entered the Creek Indian Territory in violation of the Act of Congress of March 30, 1802, "to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers", is interestingly referred to by John Quincy Adams in his Memoirs (during his Presidency) as follows: Feb. 9, 1827. Company to dine. The Judges and Bar of the Supreme Court. I spoke to Judge Johnson of this controversy with Georgia, which, I told him, would first be tried by him. He said he would laugh them out of it.
Additional complications also arose through the discovery of gold in the Cherokee lands. A crisis came, in 1828, when the Cherokees held a convention and adopted a Constitution for a permanent government, displaying their intention to remain on their lands. The Legislature of Georgia responded by passing, in 1829, a series of laws of the most cruel and stringent nature, invalidating all laws and ordinances adopted by the Indians, and providing for a division of their lands. As these laws were clearly in violation of the treaty with the United States, Congress was forced now to take cognizance of the situation, but its action was feeble; and the new President, Andrew Jackson, was in entire sympathy with the State of Georgia in its claim of right to legislate over all persons within its territory, regardless of the Federal treaty. To an application made by the Cherokees for protection by Federal troops against the efforts made by Georgia to remove the Indians by force, Jackson replied “that the President of the United States has no power to protect them against the laws of Georgia.” The Cherokees, after obtaining a favorable legal opinion from Ex-Chancellor James Kent, retained John Sergeant of Philadelphia and William Wirt, ex-Attorney-General of the United States, as counsel to bring a case in the United States Supreme Court to test their rights as a sovereign Nation.¹

March 10, 1827. When Judge Johnson last dined with me, he promised to look into the Act of Congress . . . upon which the prosecution of the Georgia surveyors within the Indian Territory has been directed. The Judge now suggested that there might be a constitutional difficulty in the execution of the law . . . . The Judge appeared very desirous of being relieved from trying the cause, and said there could be no possible reliance upon a Georgia jury to try it. But he said he should take occasion as soon as possible to send it for trial to the Supreme Court, and he said he had decided many years ago the principle that Indian territory was not within the civil jurisdiction of the United States.

¹ This opinion was concurred in by Daniel Webster, Ambrose Spencer (formerly Chief Justice of New York), Horace Binney and other leaders of the Bar. It must be admitted, however, that the Cherokee Nation did not display great tact or any disposition to conciliate the President in their choice of counsel, inasmuch as both
a suggestion made by Wirt that the State should join in this test case, the Governor of Georgia answered by an indignant and sarcastic letter of refusal, in which he claimed the absolute immunity of the State from any suit in the Federal Courts and its right to decline obedience to any Federal mandate. The leading newspaper of Georgia voiced public sentiment in that State by an editorial saying: "Has it come to this that a sovereign and independent State is to be insulted, by being asked to become a party before the Supreme Court, with a few savages residing on her own territory!!! Unparalleled impudence!" On the other hand, the view of those who denied Georgia’s assertion of a nullifying power was expressed by Niles Register. "The people are not ripe for such a state of things — and until they are, the authority of the Supreme Court will be supported. . . . Without some high and common arbiter for the settlement of disputes of this character, the Union is not worth one cent. . . . There must needs be some tribunal of a last resort; something which the common sense of all men, for self-preservation, shall accept, not as infallible, but as the nearest possible approach to perfection." 1

The form of action decided upon was an original bill in equity, to be filed in the Supreme Court by the Cherokee Nation as an independent state, against the State of Georgia, seeking an injunction to restrain it from executing the laws claimed to be illegal and unconstitutional. Before this suit was begun, however, another case arose in the State of Georgia which pre-

men were bitter political opponents of the President,— Wirt as Attorney-General under Jackson’s predecessor, and also as a rival for the Presidency — Sergeant as chief counsel for the Bank of the United States, Jackson’s ‘bête-noire.’ That Wirt appreciated his situation was shown in an eloquent and honorable letter to James Madison, Oct. 5, 1830; see letter of Wirt to Judge Dabney Carr of Virginia, June 21, 1830. Wirt, II, 255, 261.

1 See Niles Register, XXXIX, Sept. 18, 1830.
sented the same issues. A Cherokee named Corn Tassel had murdered another Indian within the territory occupied by the tribe. He was arrested by the State authorities under one of the recent State laws, tried and sentenced to be hanged. Application was at once made to the United States Supreme Court for a writ of error to the State trial court, on the ground of the illegality of the State laws. The writ, which was issued on December 22, was treated by the Governor of Georgia, Gilmer, with utter disdain. He transmitted it to the Legislature, then sitting, with a message in which he referred to the subpoena as "a copy of a communication, received this day, purporting to be signed by the Chief Justice of the United States and to be a citation of the State of Georgia to appear before the Supreme Court, on the second Monday in January next, to answer to that tribunal for having caused a person who had committed murder within the limits of the State to be tried and convicted therefor." And he declared that any attempt to execute the writ would be resisted with all the force at his command, saying: "If the judicial power, thus attempted to be exercised by the Courts of the United States, is submitted to or sustained, it must eventuate in the utter annihilation of the State Governments or in other consequences not less fatal to the peace and prosperity of our present highly favored country."

1 The Legislature responded with a violent resolution bitterly denouncing the action of the Supreme Court; and it "requested and enjoined the Governor and every officer of the State to disregard any and every mandate and process

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1 *Niles Register, XXXIX*, Oct. 2, 1830, Jan. 8, 15, 1831. The name of the party suing out the writ in this case, is given in 5 Peters 1, 12, as "Corn Tassel", and I have used the name in this form. In the Resolutions of the Georgia Legislature of Dec. 22, 1830, and as given by some historians, the name appears as "George Tassels." See speech of Everett, Feb. 14, 1831, 21st Cong., 3d Sess.
that should be served upon them." Two days later, on December 24, 1830, Tassel was executed. This absolute disregard of the process of the Court (characterized mildly by Judge Story as "intemperate and indecorous") was, in fact, practical Nullification. "It is idle to pretend to wink this question out of sight. The integrity and permanence of the Union are at stake," said a Boston Whig newspaper.\(^1\) "If we continue in a false security, we shall find too late that the sheet-anchor of our National being is lost forever." And another paper said very truly that: "The plain question which the rashness of these intemperate politicians has forced on the country is whether the judicial arm of the General Government shall be amputated, or armed with additional vigor, and whether by the mere volition of one of the States of the Union, the structure of our government shall be at once and violently overthrown." To these views, on the other hand, the Administration paper in Washington, the United States Telegraph, replied editorially, that "the position in which the Supreme Court is placed by the proceedings of Georgia demonstrates the absurdity of the doctrine which contends that the Court is clothed with supreme and absolute control over the States." To the Whig paper, the National Intelligencer, which deplored the "awful consequences" of aiding Georgia, and the "extraordinary circumstance of the present conjuncture, that the Official Gazettes are engaged in a combination to weaken the Supreme Court of the United States in the confidence and esteem of the People", the Telegraph retorted by referring to "affected hysteria" and said: "No one is more desirous than we are to preserve for the Supreme Court that veneration and confidence upon which its

\(^{1}\) Boston Courier, Jan. 21, 1831; National Journal, Jan. 4, 1831.
usefulness, if not its existence, depends; and for that purpose we would guard against all political collisions with public sentiment. A difference of opinion as to the extent of the powers vested in that Court has existed since its organization. . . . All who desire to perpetuate our institutions and look to our Courts as the arbiters of justice must regret the attempt to identify them with political aspirants.” Violent remarks in other Northern papers to the effect that resistance to the Court by Georgia might be treason, that the Supreme Court was not to be intimidated, and that President Jackson must enforce the laws, brought forth the countercharge that: “There is a determination on the part of some of the political managers to bring the Supreme Court in collision with the Executive of the Union as well as with the States . . . a determination to enlist the influence of the Court and the spirit of the Judiciary and Bar in opposition to the Administration. . . . Why else is it said that the Court will not be intimidated? Is it that the pride of the Court may be roused under the pretense of vindicating its authority? Every friend of the Court must condemn the effort to enlist it as a party to an angry political contest. The friends of Andrew Jackson know that he is not to be intimidated.” The Richmond Enquirer,
noting that the Georgia and South Carolina papers had expressed their "astonishment and resentment" at the issuing of a summons to the State of Georgia, stated that Georgia "is being dragged to the bar" as Virginia was in the Cohens Case; and that in cases like this, the two Governments,—the Federal and the State—"ought to bear and forbear." ¹

The position taken by the State of Georgia and its adherents was further indorsed by the determined effort which was being made in Congress, early in 1831, to repeal the much feared Twenty-Fifth Section. Before Congress met in December, 1830, it had become known that such an attack on the Court's appellate jurisdiction was impending. The National Intelligencer warned "the friends of the Union to awake from their dreamy indolence. . . . Repeal the vital part of the Judiciary Act and we would not give a fig for the Constitution. It will have become a dead letter." "There is obviously a determination, on the part of the politicians of a certain school, to curtail the constitutional jurisdiction and destroy the influence and independence of the Supreme Court of the United States," said a leading Whig paper in New York.² "This disposition has existed in the minds of some persons from the early history of the Government, but it has more recently become the policy not only of individual politicians, but of large numbers, and even of majorities in some of

¹ United States Telegraph, Jan. 8, 10, 26, 1831. See also Washington Globe, Jan. 5, 1831: "But it seems now there is to be a crusade carried on against the South by the party of whom the Chief Justice has been always the uniform representative. He has achieved for them infinitely more in the Court than all the rest of the party have been able to effect elsewhere." The New York Daily Advertiser, Jan. 10, 1831, quoted a correspondent of the Charleston Mercury applauding Georgia, and rejoicing that the "high-handed, and now at least palpable, usurpations" of the Federal power "have been bravely met." The National Intelligencer, Jan. 11, 12, 15, 1831, quoted the New York Courier and Southern Times (Columbia, S. C.) as approving Georgia's course.

the States; and there now appears to be a regular organized system of measures and operations calculated to produce the result so long and so eagerly desired and sought after. At the present period of the world, no intelligent and honest man will call in question the necessity of the absolute independence of Courts of popular sentiment and party clamour. . . . Every attempt, therefore, to destroy their independence, from whatever source it proceeds, is a direct effort to violate the spirit of the Constitution in one of its vital principles. One mode of producing this effect is to impair the influence and reputation of the Court by calumny and slander, representing it as greedy of power, desirous of extending its jurisdiction, and, in the end, of consolidating the National Government by taking away the legitimate powers of the State governments, and rendering them mere cyphers in the construction of the confederation. . . . Accusations of this sort are calculated for effect. The object is to alarm the fears and excite the jealousies of the States. They are, however, wholly without foundation.” All this outcry, it was urged, came from interested sources—the opposition of the Southern States to the tariff policy of the Government, the “licentious desires” to obtain Indian territory, the refusal of Georgia to allow Federal interference in her treatment of the Indians and to submit the validity of her acts “to this learned, able, upright and respectable tribunal.” That the people of the country would “stand carelessly by and see this great branch of their government trampled under foot by interested, ambitious and unprincipled politicians”, the New York paper said, was not to be believed. “When the Supreme Court are stripped of their constitutional powers and prerogatives, the government itself will be undermined, and its destruction
cannot be avoided. . . . Once deprive the Court of the power of determining constitutional questions, and the Legislatures of the States will be let loose from all control, and as interest or passion may influence them, will reduce the National Government to a state of dependence and decrepitude, which would be more characteristic of the authority of a feeble colony than that of a large, powerful, independent nation. . . . If the people do not manifest a determination to support the Judiciary, they may make up their minds to part with the Government.”

Shortly after Congress convened, the House of Representatives instructed its Judiciary Committee to inquire into the expediency of a bill to repeal this Section; and it was under such “very peculiar and trying circumstances” that the Court assembled for its January, 1831, Term. “The Court has met, with a knowledge that it will be violently assailed in the House of Representatives, and that an attempt will be made to deprive it of its constitutional right to decide on the constitutionality of State laws,” said a New York Whig paper. “A bill to that effect will be reported in a few days. If it shall become a law, the Government will be at an end. There is no law of the United States that may not be rendered wholly inoperative by any one of the States. The Supreme Court has been justly considered as the sheet-anchor of the Constitution; and while every other department of the Government has been contaminated within less than two years, our hopes have been placed on this anchor. . . . The appointment of Judges McLean and Baldwin by the present Administration was wholly fortuitous and produced by a combination of political causes beyond the control of the President. If their seats were now va-

1 New York Daily Advertiser, Jan. 18, 14, 15, 1831.
cant, there is no doubt they would be filled with thorough-going nullifiers.” On January 24, 1831, a repeal bill was reported favorably by a majority of the Judiciary Committee by Warren R. Davis of South Carolina.¹ A minority report, however, was made at the same time, which must be regarded as one of the great and signal documents in the history of American constitutional law. It was drafted by James Buchanan of Pennsylvania, and signed also by William W. Ellsworth of Connecticut (son of Chief Justice Ellsworth) and Edward D. White of Louisiana (father of Chief Justice White).² Though Thomas F. Foster of Georgia, one of the signers of the majority report, stated that the passage of the bill was necessary, since the powers of the Court were so “vast and alarming that the constantly increasing evil of interference of Federal with State authorities must be checked”, the measure was, in fact, an offspring of the doctrine of Nullification then prevalent in the South. Such a connection between the two was admitted by John C. Calhoun, who, in writing that he thought the report would pass the House, said: “However strange it may seem, there are many who are violently opposed to what they call Nullification. The discussion of the report will doubtless strengthen our doctrines.”³

¹ The Boston Courier said, Feb. 1, 1831: “The bill will be supported by the ultra-exclusive friends of State-Rights and probably meets the views of the Executive and the Cabinet, so that the country is in the singular position of being ruled by an Administration, opposed to the powers of the Federal Government and which recommends and adopts every measure calculated to break up the Union.” How false a statement of Jackson’s position this was, his course, two years later in the Nullification movement, showed conclusively. See also National Journal, Feb. 17, 1831.


Another great statesman, James Madison, saw equally clearly at this time that to deprive the Court of its power to construe the Constitution and to place this power in the hands of the separate States were correlative propositions, and he wrote: "The jurisdiction claimed for the Federal Judiciary is truly the only defensive armor of the Federal Government, or rather for the Constitution and laws of the United States. Strip it of that armor, and the door is wide open for nullification, anarchy and convulsion, unless twenty-four States, independent of the whole and of each other, should exhibit the miracle of a voluntary and unanimous performance of every injunction of the parchment compact." And Judge Story wrote to George Ticknor of Boston: "If the Twenty-Fifth Section is repealed, the Constitution is practically gone. It is an extraordinary state of things, when the Government of the country is laboring to tread down the power on which its very existence depends. You may depend that many of our wisest friends look with great gloom to the future. Pray read, on the subject of the Twenty-Fifth Section, the opinion of the Supreme Court, in *Hunter v. Martin*, 1 Wheaton's Reports, it contains a full survey of the judicial powers of the General Government, and Chief Justice Marshall concurred in every word of it."

Writing more fully, six days later, Story termed the bill: "A most important and alarming measure. . . . If it should prevail (of which I have not any expectation) it would deprive the Supreme Court of the power to revise the decisions of the State Courts and State Legislatures, in all cases in which they were repugnant to the Con-

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1 Madison, IV, 298, letter to Joseph C. Cabell, April 1; 1833.
stitution of the United States. So that all laws passed and all decisions made, however destructive to the National Government, would be utterly without redress . . . the measure would enervate the whole power of the United States. I have said that it will not probably succeed; indeed, the expectation is that it will fail by a very large vote; but the introduction of it shows the spirit of the times.”

This prediction of the defeat of the bill was accurate; for on a motion to order to second reading it was rejected on January 29, practically without debate, and by a vote of 158 to 51, all but six of the minority votes coming from Southern and Western States. “The House by a vote of more than 2 to 1 have rejected a bill the tendency of which was to shake our institutions to their very foundation,” said the United States Gazette. “The audacious attempt of a few hot-headed demagogues to break up the Supreme Court has been foiled,” said a Boston Whig paper, and its Washington correspondent wrote that the reason for disposing of the bill by a motion to lay on the table was “the very solid one that the subject is one which it is sacrilegious to touch and which will be defiled by the rude handling of partisan soldiers. . . . Mr. Doddridge said in debate that he considered himself voting on the question whether the Union should be preserved or not, and though the language is strong, yet the declaration is correct and in common use.”

"This is a momentary respite for the

2 See editorial in National Intelligencer, Jan. 31, 1831.
3 Boston Courier, Feb. 1, 5, 1831. The Washington correspondent of the United States Gazette, wrote Jan. 29, 1831: “I understand that a great many of the friends of the Judiciary are very much disconcerted with this motion for the previous question, as they were very desirous that the subject should be fully discussed, in order that the advocates and enemies of the Judiciary might have an opportunity to measure their strength. Many on the other side, equally confident, were desirous to bring on a debate; whether good or harm would have resulted from a fuller discussion of so delicate a matter it is bootless now to inquire."
THE SUPREME COURT

Judiciary of the Union,” wrote John Quincy Adams in his diary, “and to the Union itself, both of which are in imminent danger. . . . I had a short visit from Judge Thompson of the Supreme Court. He is alarmed for the fate of the Judiciary . . . and thinks, as I do, that the leading system of the present Administration is to resolve the Government of the Union into the National imbecility of the old Confederation.” “We rejoice here (in Massachusetts) most heartily at the rejection by so large a majority,” wrote one of Webster’s correspondents. “That such a proposition ever could be made is, however, ominous of a bad spirit. The times are critical.”

The adherents to the bill were not discouraged by the vote, but showed the violence of their feelings in a subsequent heated debate, which took place over the motion to print 600 copies of the Report of the Judiciary Committee for wide public distribution. “The strides of Federal usurpation begin to alarm the most indolent. The spirit of indignation has already gone abroad in the land, and the people are now seeking a remedy for the evil. It cannot be stifled nor subdued,” said Henry Daniel of Kentucky. “The exercise of power by virtue of the 25th Section strikes directly at the root of State sovereignty and levels it with the dust. . . . In some instances, the Federal Government, the harmony of the country, has been shaken to its very centre by these collisions. Nearly every State in the Union has had its sovereignty prostrated, has been brought to bend beneath the feet of the Federal tribunal. It is time that the States should prepare for the worst, and protect themselves against the assaults of this gigantic tribunal.” And William F.

Gordon of Virginia urged that the repeal of the Section, more than anything else, would tend "to compose the present agitation of this country and allay the prevailing excitement." On the other hand, Philip Dodridge of Virginia said that he considered the proposition to repeal, "as equivalent to a motion to dissolve the Union." ¹

Though defeated on the question of repeal, another form of attack was at once devised by the extreme State-Rights men, and a resolution was introduced in the House, in 1831, by Joseph Lecompte of Kentucky, calling on the Judiciary Committee to inquire into the expediency of amending the Constitution so as to limit the term of office of Federal Judges. This resolution, however, was also lost by a vote of 115 to 61.²

Nevertheless, in spite of these defeats of Congressional measures to change the Judiciary system, the situation was extremely serious; and Judge Story wrote with much reason: "I have for a long time known that the present rulers and their friends were hostile to the Judiciary, and have been expecting some more decisive demonstrations than had yet been given out. The recent attacks in Georgia and the recent Nullification doctrine in South Carolina are but parts of the same general scheme, the object of which is to elevate an exclusive State sovereignty upon the ruins of the General Government. . . . The opinions upon this subject have been yearly gathering strength, and the

² 21st Cong., 2d Sess., Jan. 28, 1831. A similar resolution for a Constitutional Amendment was offered by Lecompte, Jan. 30, 1832, and was defeated by a vote of 144 to 27, 22d Cong., 1st Sess. A similar resolution offered by Thomas L. Hamer of Ohio, Jan. 7, 1833, was defeated by a vote of 84 to 90, 23d Cong., 2d Sess. See also similar resolutions offered by Benjamin Tappan of Ohio, in 1832, 1840, 1842 and 1844, all of which were defeated. See Proposed Amendments to the Constitution, by Herman V. Ames, Amer. Hist. Ass. Rep. (1896), II. See also J. Q. Adams, IX, 107; and Niles Register, Feb. 24, 1831, as to resolution of the Pennsylvania House of Representatives, upholding the 25th Section.
non-resistance and passive obedience to them exhibited by the rest of the Union, have encouraged, and indeed nourished them. If, when first uttered, they had been met by a decided opposition from the Legislatures of other States, they would have been obsolete before now. But the indifference of some, the indolence of others, and the easy good-natured credulity of others, have given a strength to these doctrines, and familiarized them to the people so much, that it will not hereafter be easy to put them down.”

That the Chief Justice and his Associates on the Court, however, were not in any way intimidated by these attacks, or to be deterred from following the path of official duty, by any fear of legislation diminishing their jurisdiction, was seen by a decision made very soon after the Court assembled for its 1831 Term. In *Fisher v. Cockerell*, 5 Pet. 248, in which the occupying claimant laws of Kentucky were again before the Court, Marshall, in dismissing the case on a procedural point, referred to the hostile attitude of the States and of Congress as follows:

In the argument, we have been admonished of the jealousy with which the States of the Union view the revising power intrusted by the Constitution and laws of the United States to this tribunal. To observations of this character, the answer uniformly given has been that the course of the Judicial Department is marked out by law. We must tread the direct and narrow path prescribed for us. As this Court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it.

1 Story, II, 47, letter of Jan. 30, 1831.
2 The Washington correspondent of the *Boston Courier*, Feb. 2, 1831: “The Supreme Court, during the repeated attempts to ascertain whether it would exist after losing the principle of life, has gone on with its business in an almost forgotten corner of the Capitol, with its usual dignity. Notwithstanding the necessity of passing over all the cases in which Members of Congress were engaged as counsel, the Court has disposed of an extraordinary number of cases.”
Such was the situation when the bill had been filed by the Cherokee Nation in the Court for an injunction "to restrain the State of Georgia, the Governor, Attorney General, Judges, justices of the peace, sheriffs, deputy sheriffs, constables and others, the officers, agents and servants of that State, from executing and enforcing the laws of Georgia, or any of these laws, or serving process, or doing anything towards the execution or enforcement of those laws within the Cherokee territory, as designated by treaty between the United States and the Cherokee Nation." 1 A subpoena was served on the Governor of Georgia in this suit on December 27, 1830, just three days after the execution of Tassel and five days after the nullifying resolution of the Legislature. The Governor, in accordance with the Legislative instruction, and recognizing "no authoritative arbiter between the State and its Cherokee inhabitants" paid absolutely no attention to the subpoena. 2 No appearance was entered for the State in the Supreme Court at Washington, and the State preserved officially an "ominous and sullen silence"; although unofficially it was freely stated that, in case of an adverse decision by the Court, the State would refuse to abide by any of its mandates. Whig papers at the North furthermore asserted that "the President has very recently and vehemently declared that he would not lend any assistance to support the authority of the Court, in case Georgia should be, as no doubt she

1 See The Cherokee Nation v. The State of Georgia, 5 Pet. 1. On March 12, 1831, a supplemental bill in equity was filed by the Cherokee Nation in the Supreme Court, describing the proceedings in the Tassel Case, the deliberate violation of the mandate of the Court, and the adverse legislation of December, 1830, in Georgia.

2 The sympathy of other States holding extreme views of State-Rights and of the interference of the Supreme Court with such rights was shown at this time by a resolution offered in the House of Delegates of Maryland for an Amendment of the National Constitution, so as to provide for the decision of all cases in which the constitutionality of a State law should be brought in question, by a two thirds vote of the United States Senate. See Niles Register, XXXIX, Jan. 15, 1831.
will, in contempt." Though no official or authentic statement by Jackson could be cited to this effect, and though his supporters stated that the charge was merely designed by his party foes to rouse a prejudice against him, there was sufficient likelihood of its truth to make the Court extremely reluctant to have the issue raised between it and the Executive and the State of Georgia. "The affair of Georgia, so far as Tassels is concerned has probably passed by with his death," wrote Story on January 22. "But we are threatened with the general question in another form. At this moment, it would have been desirable to have escaped it, but, you know, it is not for Judges to choose times and occasions. We must do our duty as we may."

On March 5, 1831, Mr. Sergeant moved the Court for an injunction. The argument was interrupted, March 7-11, to allow another of Wirt's cases to be argued (Charles River Bridge v. Warren Bridge). It was renewed by Sergeant on March 12, in "a very able and profoundly legal argument", and by Wirt, who delivered "one of the most splendid discourses ever pronounced in the Court, and as powerful in argument, as it was beautiful in diction", the peroration being described by newspaper correspondents as "sublime indeed", "of deep feeling and pathos."

1 Boston Courier, Feb. 16, 1831; National Journal, March 17, 1831; the Washington correspondent of the New York Daily Advertiser wrote in its issue of Jan. 15, 1831: "The Court has assembled under a very peculiar and trying circumstance. Hitherto it has met with the certainty that its orders, judgments and decrees would be carried into effect by the Executive branch of the Government, however much they might conflict with the interests, prejudices, or prepossessions of the parties or of the States. It has now met with a full knowledge that the Executive will not enforce its decisions, if they are counter to his views of constitutional law." Story, II, 48, letter of Jan. 22, 1831.

2 National Intelligencer, March 7, 14, 16, 18, 1831; Niles Register, March 26, 1831, quoting New York Journal of Commerce; the National Journal, March 15, 1832, said: "The Court was considerably crowded throughout the day; some of the Cherokees delegation were present, one of whom of very respectable and intelligent appearance, shed tears copiously." See Story, II, 51, letter of March 18, 1832.
A picturesque account was given by John Quincy Adams in his diary:

March 12, 1831: I walked to the Capitol and heard J. Sergeant for about three hours, before the Supreme Court, upon the injunction prayed by the Cherokee Nation. . . . Sergeant and Wirt are now arguing the question of jurisdiction without any counsel to oppose them; but the weight of the State will be too heavy for them. The old vice of confederacies is pressing upon us— anarchy in the members. . . . Mr. Sergeant’s argument made it necessary for him to maintain that the Cherokee Nation are a foreign State, and this is the very point upon which the judgment of the Court may be against them. The argument was cold and dry. . . . There were however several ladies among the auditory who sat and heard him with exemplary patience.

March 14: Walked to the Capitol again to hear the conclusion of the argument on behalf of the Cherokee Indians by Mr. Wirt. . . . His health is much broken down, but his voice is strong and his manner animated beyond the condition of his strength. After finishing the argument upon the constitutional points and chiefly on the jurisdiction of the Court he concluded by a short appeal to the sympathies of the case in a low tone of voice and that accent of sensibility which becomes doubly impressive by being half subdued. The deep attention of the auditory was the indelible proof of its power. His argument was little more than a repetition of what has been said by Sergeant. His pathos was his own.

The closing words of Wirt’s oration are particularly significant, in showing the grave fears that were popularly felt Georgia might continue to set the Supreme Court at defiance:

Shall we be asked (the question has been asked elsewhere) how this Court will enforce its injunction, in case it shall be awarded? I answer, it will be time enough to meet that question when it shall arise. At present, the question is

1 Wirt, II, 336-341.
whether the Court, by its constitution, possesses the jurisdiction to which we appeal. . . . In a land of laws, the presumption is that the decision of Courts will be respected; and, in case they should not, it is a poor government indeed in which there does not exist power to enforce respect.

What is the value of that government in which the decrees of its Courts can be mocked at and defied with impunity? Of that government did I say? It is no government at all, or at best a flimsy web of form, capable of holding only the feeblest insects, while the more powerful of wing break through at pleasure. If a strong State in this Union assert a claim against a weak one, which the latter denies, where is the arbiter between them? Our Constitution says that this Court shall be the arbiter. But, if the strong State refuses to submit to your arbitrament, — what then? Are you to consider whether you can of yourselves, and, by the mere power inherent in the Court, enforce your jurisdiction, before you will exercise it? Will you decline a jurisdiction clearly committed to you by the Constitution, from the fear that you cannot, by your own powers, give it effect, and thus test the extent of your jurisdiction, not by the Constitution, but by your own physical capacity to enforce it? . . .

But, if we have a government at all, there is no difficulty in either case. In pronouncing your decree you will have declared the law; and it is part of the sworn duty of the President of the United States to “take care that the laws be faithfully executed.” . . . If he refuses to perform this duty, the Constitution has provided a remedy. But is this Court to anticipate that the President will not do his duty, and to decline a given jurisdiction in that anticipation. . . . Unless the Government be false to the trust which the people have confided to it, your authority will be sustained. I believe that if the injunction shall be awarded, there is a moral force in the public sentiment of the American community, which will, alone sustain it and constrain obedience.

On the last day of the Term, March 18, and only four days after the close of the argument, Chief Justice Marshall, after saying that “if Courts were permitted
to indulge their sympathies, a case better calculated to excite them can scarcely be imagined”, held that the Cherokee Nation was not a foreign nation and that the Court had no original jurisdiction of the cause. “If it be true,” he said in closing, “that wrongs have been inflicted and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.”

The decision of the Court was greeted with a singular and contradictory variety of opinion. Van Buren (probably representing Jackson’s view) considered that Marshall’s dictum at the end of his opinion stating that “the mere question of right to their lands might perhaps be decided by the Court in a proper case with proper parties” was a deliberate “design to operate upon the public mind adversely to Georgia and the President”, and to affect the political situation.

Georgia, the Nullifiers and the extreme State-Rights papers were elated at the decision, and sought to give to the public the impression that the Court had decided in favor of Georgia’s contentions and had given “sanction to the pretensions and conduct of that State with regard to the Indians.” The extreme Whigs of the North were correspondingly disconcerted. “The nullifying politicians of Georgia,” said a Boston paper, “must be not a little astonished to find themselves accidentally on the side of the Union and receiving aid from its highest legal tribunal, when they have been laboring so hard to convince their constituents that they were traduced, abused

1 The National Intelligencer, March 28, 1831, noted with regret the publication in the New York Journal of Commerce the fact that Story and Thompson dissented. “This fact, if true, made the decision that of a bare majority of the Court, as Duval was absent.”


3 Richmond Enquirer, March 22, 1831; see protests of National Gazette at this misrepresentation, March 22, 24, 26, 1831.
and oppressed by the Federal Government.” 1. While it was greatly to the honor of a tribunal, which had been so often taxed with a spirit of usurpation, that it should have refused to decide the merits of the case on which it held very clear views, its refusal to do so, on the ground that it had no jurisdiction, subjected it now to severe criticism by those who had hitherto been its ardent supporters; for in the North and the East the treatment of the Cherokees was felt to be a moral issue almost equal to the slavery question. “It is certainly much to be regretted,” said the North American Review, “that a case of this importance should have been decided, on any other principle than that of doing substantial justice between the parties.” And Judge Story himself vehemently wrote to a friend: “The subject touches the moral sense of all New England. It comes home to the religious feelings of our people; it moves their sensibilities, and strikes to the very bottom of their sense of justice. Depend on it, there is a depth of degradation in our National conduct, which will irresistibly lead to better things. There will be, in God’s Providence, a retribution for unholy deeds, first or last.” 2 On the other hand, the American Jurist said in defense of the Chief Justice that: “Aspersed by a great statesman (now no more) as amplifying jurisdiction, this case shows he cannot do it, even to amplify justice; and together with

1 Boston Courier, March 25, 1831.
2 See North Amer. Rev., XXXIII, 136; see also Review of the Cherokee Case, by Joseph Hopkinson, Amer. Quar. Rev., X (March, 1832), Story, II, 46, letter of June 24, 1831, to Richard Peters. Writing to his wife, Jan. 13, 1832, Judge Story said: “At Philadelphia, I was introduced to two of the Chiefs of the Cherokee Nation so sadly dealt with by the State of Georgia. They are both educated men, and conversed with singular force and propriety of language upon their own case, the law of which they perfectly understood and reasoned upon. I never in my whole life was more affected by the consideration that they and all their race are destined to destruction. And I feel, as an American, disgraced by our gross violation of the public faith towards them. I fear, and greatly fear, that in the course of Providence, there will be dealt to us a heavy retributive justice.” Ibid., 79.
Burr’s trials, the steamboat case, and the case of Marbury and Madison, abundantly evinces how, with equal solicitude and firmness, he can exercise whatever jurisdiction the Court has and renounce whatever of jurisdiction it has not.”

Since it was evident that this Cherokee question was not definitely settled and that it was likely to involve the Judiciary in a further struggle, Chief Justice Marshall, whose health had been feeble for some time and who was now in his seventy-fifth year, seriously considered resigning his office. But in response to many protests, he finally decided to postpone such a step, although he wrote to Judge Story: “I am most earnestly attached to the character of the department, and to the wishes and convenience of those with whom it has been my pride and my happiness to be associated for so many years. I cannot be insensible to the gloom which lours over us. I have a repugnance to abandoning you under such circumstances which is almost invincible. But the solemn convictions of my judgment, sustained by some pride of character, admonish me not to hazard the disgrace of continuing in office a mere inefficient pageant.” The feeling of the country in general, at the mere rumor of Marshall's resignation, had been voiced by a New York Whig paper, which stated that it would be considered “one of the greatest National calamities that could at this time befall the United States. In our estimation, he is, beyond question, the most important public character of which the Union can now boast. Probably much more that is interesting to the welfare of the country may depend upon the continuance of his

1 *American Jurist* (Oct., 1831), VI.


judicial life for some time to come, than upon that of any other individual in existence. The loose and heterodox sentiments, openly professed by men occupying important stations in the General Government, and, among them, by him who holds the highest office under that Government, renders it a dangerous thing to vacate so immensely important an office as that of Chief Justice. The safety of the very Union might be hazarded by the appointment of a successor. . . . The mischief which a nullifying Chief Justice might introduce into the execution of the laws and the administration of justice would be boundless and in the highest degree fatal to the peace and safety of the Union.”

The Whig fear so expressed as to the character of Marshall’s possible successor was made clear in a characteristically pungent comment of John Quincy Adams in his diary at this time: “Wirt spoke to me also in deep concern and alarm at the state of Chief Justice Marshall’s health. He is seventy-five years of age and has until lately enjoyed fine health, exercised great bodily agility and sustained an immense mass of bodily labor. . . . His mind remains unimpaired, but his body is breaking down. He has been thirty years Chief Justice, and has done more to establish the Constitution of the United States on sound construction than any other man living. The terror is that, if he should be now withdrawn, some shallow-pated wild-cat like Philip P. Barbour, fit for nothing but to tear the Union to rags and tatters, would be appointed in his place. Mr. Wirt’s anticipations are gloomy, and I see no reasonable prospect of improvement.”

As seen in the calm

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1 This editorial closed by saying that it had learned that the rumor as to resignation was untrue, and it stated: “It is not improbable that the story was set on foot with the hope of inducing him by a broad hint to do that which some violent party politicians may be anxious he should do — leave his office to some thorough-going nullifier.”

light of history, all these fears as to the fate of the Judiciary at Jackson's hands were unwarranted; and Adams's characterization of Barbour was of course unjust, for the latter, when appointed on the Supreme Court in 1836, made an excellent and broad-minded Judge; but they accurately picture the alarm felt by the more conservative of the community over the attacks on the integrity of the Union and on its Judiciary.

This alarm was now enhanced by the even more serious conflict between the Court and the State of Georgia which arose in the following year. Among the statutes passed by the Georgia Legislature, pending the excitement over the first Cherokee case in December, 1830, was one requiring all white persons living within the Cherokee country after March 11, 1831, to obtain a license and to take an oath of allegiance to the State. Two missionaries, Samuel A. Worcester and Elizur Butler, who refused to obtain a license or to leave the country when ordered by the State, were arrested, convicted in the Georgia State Court and sentenced to four years' imprisonment at hard labor. On an appeal to the United States Supreme Court, a writ of error was issued by that Court to the Superior Court of Georgia, October 27, 1831, and was duly served on the Governor and on the Attorney-General. On receipt of the writ, Governor Lumpkin transmitted it to the Georgia Legislature in a message inspired by the same spirit of defiance as the message of Governor Gilmer, the preceding year, and saying that: "Any attempt to infringe the evident right of a State to govern the entire population within its territorial limits, and to punish all offences committed against its laws within those limits (due regard being had to the cases expressly excepted by the Constitution
of the United States) would be the usurpation of a power never granted by the States. Such an attempt, whenever made, will challenge the most determined resistance; and if persevered in, will inevitably eventuate in the annihilation of our beloved Union." 1 And the Legislature, as in the prior case, responded by passing rebellious resolutions, stating that: "Any attempt to reverse the decision of the Superior Court . . . by the Supreme Court of the United States, will be held by this State as an unconstitutional and arbitrary interference in the administration of her criminal laws and will be treated as such. That the State of Georgia will not compromit her dignity as a sovereign State, or so far yield her rights as a member of the Confederacy, as to appear in, answer to, or in any way become a party to any proceedings before the Supreme Court, having for their object a reversal or interference with the decisions of the State Courts in criminal matters." It also directed the Governor to pay no attention to any subpoena or mandate of the Supreme Court and required him, "with all the power and means placed at his command, by the constitution and laws of this State to resist and repel any and every invasion from whatever direction it may come, upon the administration of the criminal laws of this State."

This second Cherokee Case was finally argued on February 20, 1832, no counsel appearing for the State of Georgia, but William Wirt and John Sergeant making eloquent pleas for the missionaries. "Sergeant's speech was equally creditable to the soundness of his head and the goodness of his heart," wrote a Washington correspondent. "The belief was, when he had resumed his seat, that he had left little or no ground for Mr. Wirt to occupy. Were I to judge from Mr.

1 Niles Register, XLI, Dec. 24, 31, 1831.
Wirt's speech today, I should say the subject is inexhaustible. He spoke until after three o'clock, and was obliged, from fatigue, to ask the Court to adjourn. So interesting was the subject, so ably did he present it to the Court, that in addition to the number of gentlemen and ladies who attended from curiosity, so many of the Members of the House resorted to the Court-room that an adjournment was moved before two and after several unsuccessful attempts, it was carried before three o'clock. Several Cherokees, delegated by their Nation, were present; and the deep solicitude depicted in their countenances must have moved the sympathy of every one present whose heart was not as hard as adamant.”

“Both of the speeches were very able and Mr. Wirt's in particular was unusually eloquent, forcible and finished,” wrote Judge Story, February 26. “I confess that I blush for my country when I perceive that such legislation, destructive of all faith and honor towards the Indians, is suffered to pass with the silent approbation of the present Government of the United States.”

Ten days after the argument, Chief Justice Marshall, on March 3, 1832, rendered the opinion of the Court, holding the Georgia statute unconstitutional, on the ground that the jurisdiction of the Federal Government over the Cherokees was exclusive, and that the State had no power to pass laws affecting them or their territory. The judgment of the Georgia Superior Court convicting the prisoners was reversed, and a

1 New York Daily Advertiser, Feb. 27, 1832. The National Intelligencer said Feb. 22, 1832: “The Supreme Court-room has attracted a numerous audience for the last two days. The writ of error in behalf of the missionaries tried and punished under the laws of Georgia, has been under argument, learned and eloquent.” John Quincy Adams wrote in his diary, February 21: “This is a cause of deep interest and there were 50 or 60 members of the House who left their seats to hear him (Wirt).” See Worcester v. Georgia, 6 Pet. 515.
special mandate was ordered to issue to that Court, March 5, ordering their release. The Judges who delivered opinions showed that they were deeply impressed by the gravity of the issue presented to the Court. To the argument that the Supreme Court had no power to review final decisions of the State Courts, Chief Justice Marshall replied: "It is, then, we think, too clear for controversy, that the Act of Congress, by which this Court is constituted, has given it the power and of course imposed upon it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the Judicial Department have no discretion in selecting the subjects to be brought before them." ¹ The impression created upon the public was described by a newspaper correspondent as follows: ² "The Chief Justice was an hour and a quarter in delivering the opinion. His voice was feeble, and so anxious were the audience to hear him that the space in the rear of the Justices, and in front of the bench, was crowded with Members of Congress, gentlemen of the Bar and visitors. . . . The original manuscript, in the handwriting of the Chief Justice, should be preserved; and the friends of the Union and of the Constitution will look upon it with veneration, when its author shall be removed from amongst us." And Judge Story wrote to his wife, March 4: "It was a very able opinion, in his best manner. Thanks be to God, the Court can wash their hands clean of the iniquity of oppressing the Indians and disregarding their rights." Writing four days later to George Ticknor, Story expressed the fear which prevailed in the minds of

¹Judge Story said to his law students, Nov. 18, 1844, that "Judge Marshall was affected to tears by the eloquent peroration of Wirt. He then said 'I have not shed a tear before, since Webster delivered his speech in the Dartmouth College Case. I then did not expect ever to shed another upon such an occasion.'" See Life of Rutherford Birchard Hayes (1914), by Charles R. Williams, I.
²New York Daily Advertiser, March 7, 1832.
many men, lest the judgment of the Court should not be executed: "Georgia is full of anger and violence. What she will do, it is difficult to say. Probably she will resist the execution of our judgment, and if she does, I do not believe the President will interfere unless public opinion among the religious of the Eastern and Western and Middle States should be brought to bear strong upon him. The rumor is, that he has told the Georgians he will do nothing. I, for one, feel quite easy on this subject, be the event what it may. The Court has done its duty. Let the Nation now do theirs. If we have a Government, let its command be obeyed; if we have not, it is as well to know it at once, and to look to consequences."¹ These apprehensions as to the President's attitude were voiced by many newspapers. Jackson's bitterest antagonist, the New York Daily Advertiser, stated that: "The President has said within a few days past, that he had as good a right, being a co-ordinate branch of the Government, to order the Supreme Court as the Court have to require him to execute its decisions. . . . If he refuses to exercise the power vested in him to execute the laws, either he must be impeached and removed from office or the Union of the States will be dissolved. . . . Whatever General Jackson and Georgia may do, the great majority of the Union will support the Judiciary."² "We will not anticipate contumacy on the part of Georgia; nor, in that event, inertness in the Executive Department of the General Government," said the National Gazette. "But if both should prove delinquent, the question will then arise, is the Constitution indeed the supreme law of

¹ Story, II, 86, 88. See 22d Cong., 1st Sess., March 5, 1832, pp. 2010 et seq.
² New York Daily Advertiser, March 7, 8, 9, 13, 1832; see New York Commercial Advertiser, which also advocated impeachment; National Gazette, March 14, 1832; National Intelligencer, March 12, 1832, quoting Richmond Whig.
the land? . . . Was the Supreme Court intended to be an efficient tribunal? Will Congress allow any one of its rightful decisions to be treated as a mere *brutum fulmen*?" "The prevalent opinion here," said the *Richmond Whig*, "seems to be that the President will do his duty and see that the laws be enforced; but from the tone of the Court Journal, we have little expectation of this. If it be asked, ought the judgment of the Court to be carried into execution by arms, we retort and ask what will be the consequence of failing to execute it? Will not the Federal Government be virtually dissolved? Is that, in truth, any longer a Government which is too feeble to execute its laws? We are brought at once to the point—is it better to have recourse to the bayonet to attempt to keep the Union together, or to permit a peaceable withdrawal of its members, or lastly, to hobble on like the old Confederation, each State obeying such laws as she liked and disobeying others?" "Will a final mandate issue from the Supreme Court to deliver the missionaries during the present Term?" wrote a virulent opponent of Jackson, ex-Chief-Justice Amibrose Spencer of New York, to Daniel Webster. "If not, is it not all important to collect and embody proof, if such exists, that General Jackson declares he will not aid in enforcing the judgment and mandate of the Court? It seems to me very important, if he has made the declarations imputed to him; but the proof of them should be spread before the public, in an authentic shape. The effect of fastening upon him such declarations would be incalculably great."¹ "It

¹ *Webster MSS*, letter to Webster, March 14, 1832; Spencer wrote July 23, 1832, as to the necessity of "inviting the whole strength of the State to rid the Nation of the monster now holding the reins of Government"; and on Jan. 11, 1834, he wrote of Jackson's "despotism" and his "unbalanced attempt to concentrate all power in himself." *Clay*, IV, letter of Clay, March 17, 1832.
is rumored," wrote Henry Clay, "that the President has repeatedly said that he will not enforce it, and that he even went so far as to express his hope, to a Georgia member of Congress, that Georgia would support her rights." "Well, John Marshall has made his decision, now let him enforce it," was the President's commentary on the decision according to the recollection of a Massachusetts Congressman.1 It is a matter of extreme doubt, however, whether Jackson ever uttered these words. He certainly did not, in fact, refuse to aid in enforcing the Court's decision; and the charge so frequently made in modern histories and legal articles that Jackson actually defied the Court's decree is clearly untrue; for the time never arrived when the exercise of Executive power to enforce the law was called for. Moreover, the debate in 1832 as to whether the President, at some time in the future, would or would not perform such limited functions as he possessed in aiding the Court to execute its decrees was largely hypocritical. Much of the criticism of his alleged attitude towards the Court arose, not so much from sympathy for the Judiciary, as from political hatred of Jackson and his financial policies; and it is certain that most of the attacks came from

1 The first reference to such a remark is in The American Conflict (1864), by Horace Greeley, I, 106, as follows: "The attorneys for the missionaries sought to have this judgment enforced but could not. General Jackson was President and would do nothing of the sort. 'Well, John Marshall has made his decision, now let him enforce it,' was his commentary on the matter. (Note: I am indebted for this fact to the late Governor George N. Briggs of Massachusetts who was in Washington as a member of Congress when the decision was rendered.)"

No previous historian appears to have quoted the alleged remark, but it has been given currency by William G. Sumner in his Life of Andrew Jackson (1899) and by many later writers. John Spencer Bassett in his Life of Andrew Jackson (1910), II, 890-891, says with reference to it, that it is "a popular tradition, first printed, so far as I know, by Horace Greeley. It is not sure that the words were actually uttered, but it is certain, from Jackson's views and temperament, that they might have been spoken." Bassett further expresses his own view that Jackson "could hardly have known his own mind" on the question of whether there was power in the Government to enforce a Court decree in this case, and on this point Bassett cites two unpublished papers from the Jackson Papers MSS.
partisans of the Bank of the United States. "It is truly melancholy to see the mad, malignant fury with which certain opposition papers already urge on the President to enforce the decision of the Supreme Court . . . even before it is ascertained whether the State of Georgia will resist or not," said a New York Democratic paper, which reprobated the denunciation of Georgia, and stated that the safety of the Union lay "in forbearance and moderation, not in coercion. . . . We have no apprehension of any insurrectionary movement, and consequently do not believe that it will become necessary for the President to interfere. The President is not the Executive Officer of the Court. . . . Bitter and unrelenting opposition to the Administration may be masked under an affectation of universal philanthropy. . . . The coalition against Jackson and the fanaticism of his opponents is the key to their affected sympathy with the Indians."¹ So too a Baltimore Democratic paper said: "Many of the opponents of General Jackson have illy disguised, while many of them have openly expressed, their delight at the decision of the Court, not impelled by any feeling of humanity towards the Indians or any admiration of even-handed justice, as they have pretended, but in the hope that it might work injury to the popularity of the President, that he might be brought into collision with the Supreme Court." The United States Telegraph (a Washington paper formerly pro-Jackson and then pro-Calhoun) warned the Court as to the effect of reports of impeachment of the President: "The bare suspicion that the Supreme Court participate, in any degree, in the contemplation of such a proceeding cannot fail to impair the high character which it has maintained, which is essential to

¹ New York Courier, March 20, May 7, 8, 1832.
an acquiescence in its decisions, and to the peace and harmony of society. It becomes every friend of the Court to mark with the most decided disapprobation all attempts to bring its character and influence within the infected sphere of party politics. We should all feel that that tribunal is sanctified to the cause of justice."  

As this Georgia controversy had occurred during the extremely passionate political debate in Congress and in the country which had been taking place, from January to June, 1832, over the bill to renew the charter of the Bank of the United States, the influence of partisan prejudice must be considered in testing the accuracy of statements made by the President's opponents, and particularly with reference to his alleged refusal to execute the law as laid down by the Supreme Court. It is probable that a misconception of Jackson's exact attitude towards the Court in the Cherokee Case arose from his known views as to Presidential authority, which he later set forth at length in his message to Congress vetoing the Bank charter, July 10, 1832. In this veto, he had replied to the point raised by the advocates of the bill to the effect that the Supreme Court had already decided the Bank's charter to be constitutional. Such a decision "ought not to control the co-ordinate authorities of this Government," said Jackson. "It is as much the duty of the House of Representatives, of the Senate and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Judges when it may be brought before them for judicial

1 Baltimore Republican, March 23, 1832; United States Telegraph, April 5, 13, 1832; The Washington Globe (the Administration Organ) said, March 13, 1832, as to previous articles in the Telegraph that "it has at last boldly raised the flag of nullification."
decision. The opinion of the Judges has no more au-

thority over Congress than the opinion of Congress
has over the Judges; and on that point the President
is independent of both. The authority of the Supreme
Court must not, therefore, be permitted to control
the Congress, or the Executive, when acting in their
Legislative capacities, but to have only such influence
as the force of their reasoning may deserve." This
statement of the President was assailed by his political
opponents, as being the assertion of the right of the
Executive to refuse to respect and carry into effect the
decisions of the Court; and it was undoubtedly on
such a basis that the numerous charges were made
against Jackson that he intended to disregard the
Court's opinion in the Cherokee Case.¹ That the Presi-
dent's real meaning and intention was grossly mis-
conceived at that time and in later years is now certain;
and in a recently published letter of Roger B. Taney
to Van Buren, the true interpretation of the President's
doctrine has been made very clear.² Jackson never
asserted a right to decline to carry out a Court decision,
when acting in his Executive capacity. It was when
exercising his part of the law-making function of the
Nation, and when deciding upon signature or veto
of a bill presented to him, that he claimed the privi-

¹ The National Gazette said March 10, 1831, referring to the report that Presi-
dent Jackson denied the constitutionality of the laws and treaties as to the Indians:
"Such denial is the exercise of an ex-post-facto veto-power, unknown to the Constit-
tution, and, indeed, places the authority of the Executive above all the laws and
processes of legislation. Heretofore, it had been supposed that a law . . .
was to be universally obeyed as constitutional until the Supreme Court declared
it otherwise. . . . This new doctrine or practice of nullification is worse than that
of South Carolina." The National Gazette of April 7, 1832, said that if the Presi-
dent's view was correct that he had a right to judge for himself of the constitution-
ality of laws and treaties "then with him, no branch of the government can be
deemed co-ordinate in fact; the prerogative of nullifying laws and political deci-
sions, by denying their conformity to the Constitution, makes him supreme — the
final arbiter — the very Celestial Majesty."

² Taney's Letters to Van Buren in 1860, in Maryland Hist. Mag. (March, 1915), X,
28, letter of June 30, 1860.
lege of determining for himself the constitutionality of the proposed measure. As Taney wrote:

He has been charged with asserting that he, as an Executive officer, had a right to judge for himself whether an act of Congress was constitutional or not, and was not bound to carry it into execution if he believed it to be unconstitutional, even if the Supreme Court decided otherwise; and this misrepresentation has been kept alive for particular purposes of personal ill-will, and has, I learn, been repeated in the Senate during its late session. Yet no intelligent man who reads the message can misunderstand the meaning of the President. He was speaking of his rights and his duty, when acting as a part of the Legislative power, and not of his right or duty as an Executive officer. For when a bill is presented to him and he is to decide whether, by his approval, it shall become a law or not, his power or duty is as purely Legislative as that of a member of Congress, when he is called on to vote for or against a bill. If he has firmly made up his mind that the proposed law is not within the powers of the General Government, he may and he ought to vote against it, notwithstanding an opinion to the contrary has been pronounced by the Supreme Court. It is true that he may very probably yield up his preconceived opinions in deference to that of the Court, because it is the tribunal especially constituted to decide the questions in all cases wherein it may arise, and from its organization and character is peculiarly fitted for such inquiries. But if a Member of Congress, or the President, when acting in his Legislative capacity, has, upon mature consideration, made up his mind that the proposed law is a violation of the Constitution he has sworn to support, and that the Supreme Court had in that respect fallen into error, it is not only his right but his duty to refuse to aid in the passage of the proposed law. And this is all the President has said, and there was nothing new in this. For that principle was asserted and acted upon in relation to the memorable Sedition Law. That Law had been held to be constitutional by every Justice of the Supreme Court before whom it had come at Circuit, and several persons had been punished by fine and imprisonment for offending against
it. Yet a majority in Congress refused to continue the law, avowedly upon the ground that they believed it unconstitutional, notwithstanding the opinion previously pronounced by the judicial tribunals. But 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 of the constitutional question.

All this discussion in 1832 as to Jackson's intention was, however, as has been above pointed out, wholly premature. The Court had adjourned on March 17, without issuing any mandate in the case; nothing could be done in regular course of legal procedure until it reconvened in January, 1833, when, after issue of the mandate and in case of disobedience, it was supposed that the Court would issue a writ of habeas corpus in behalf of the prisoners, or would direct the United States marshal to summon a posse comitatus to execute its mandate, or would summon the State officials before it for contempt. Not until after such proceedings could the President be called upon to set in motion the military force of the Nation. It appears, however, that owing to a deficiency in the statute law at that time, there was no method by which the Court could enforce its mandate; for the habeas corpus law then only applied to prisoners in custody under Federal authority, and there was no provision for a writ of error in case a State Court refused to make any record of its action. Advice to this effect was given by William Wirt to a Congressman; and an unsuccessful attempt was made in Congress to secure additional legislation as to judicial process. Wirt further stated

1 See hitherto unpublished letter in Wirt Papers MSS, letter (12 folio pages) from Wirt to Lewis Williams, a Member of Congress, April 28, 1832. 22d Cong., 1st Sess., May 28, June 11, 1833, petition for legislation introduced in the House by Pendleton of New York, and debated.
2 John W. Burgess in The Middle Period (1897), 219–220, says: "It was certainly
that he believed that the only remedy was for the President to declare the State of Georgia to be in rebellion and to demand the submission of the State to the law by discharging the prisoners. "If this step cannot be taken, I see none that can. The authority of the Supreme Court is annihilated," he wrote. "Thus the State of Georgia is likely to be victorious at every point, and the President has the pleasure of seeing his will the law of the land. Be it so, I have endeavored to do my duty, in my humble sphere, to vindicate the Constitution, treaties and laws of the United States. If they are prostrated with impunity, the fault will not rest with me. But ought not a consultation to take place among their friends in Congress to see what measures can be devised for the restoration of the National authority?"

The Whigs, in general, believed that Jackson was determined to make a political issue of the case and their views were well represented by a letter written to Webster by Theodore Dwight. 1 "It will be but a very short time before the leading Jackson papers all over the country will come out in favour of Georgia against the Court... As soon as that takes place,... it will be the duty of those who favour the Constitution and consider it as worth preservation, to make an effort for that purpose, and, it appears to me, if the necessary pains are taken and in the right manner, a sufficient number of our countrymen can be roused to the support of the Judiciary, and the discomfiture of the duty of the President of the United States to have executed this decision of the Court with all the power necessary for the purpose which the Constitution conferred upon him. He did not do it." This statement, like many similar statements by historians and law-writers as to Jackson's refusal to enforce the Court's decree, is erroneous; for the case never reached the stage when the exercise of the President's authority could have been properly called for, or employed.

1 Webster Papers MSS, letter of April 5, 1832.
man and his myrmidons who are obviously bent on sacrificing both the Constitution and the Union. I cannot but believe that, when the point is ascertained that Georgia will resist the execution of the sentence of the Court and General Jackson refuses to enforce it, a majority of the people of this country will support the Constitution."

Such forebodings as to a general attack upon the Judiciary by the Jackson newspapers were not justified; for only a few assailed the correctness of the opinion of the Court, criticizing it as an infringement upon State-Rights; and most of them simply deplored the heated charges made by the Whigs, and counseled exercise of patience, and moderation of language and action both on the part of Georgia and of the anti-Jacksonians. The New York Courier, speaking of the Court's opinion as "learned and temperate", said: "Let Georgia ask herself whether the game is worth the candle — whether these treaties with the Indians have not checked the action of the State authorities, — whether their miserable strip of land is worth quarreling about, and keeping alive the

1 The Boston Statesman said: "Of all the attempts made at a 'Federal' consolidation, this last decree of the Supreme Court on the Georgia question is the boldest; though, of all the opinions heretofore given, this is the least creditable to the intellectual character of the Court. There is not a constitutional lawyer in the United States who will not be shocked by the heresies which it contains; there is not any man of any capacity who, after a full examination of it, will not pronounce it to be an open defiance of all common sense, as well as of law and precedent, and a total perversion of the facts of the case." The Baltimore Republican, March 21, 1832, said: "Frenzy or infatuation seems to have taken possession of the minds of many of the people of the North in relation to the Indian question. In indulging their sympathy for the Indians in Georgia, they seem to lose sight of all other considerations, and to forget that the State has rights and feelings equal to their own"; see also ibid., March 19, 1832, quoting Petersburg Intelligencer (Va.). The Onondaga Standard (N. Y.) said: "In regard to the intimation of Judge McLean that upon the enforcement of this decision, depends the resolution of the Court ever to convene again, we have only to say that we trust in heaven they will adhere to their determination. We should rejoice in the event. A new Bench might be organized into which should enter some portion of the spirit of the age." Niles Register, XLII, April 14, 1832.
hopes of open and concealed traitors that this Union
can be broken down. If Georgia is wise, tranquil,
and patient, justice will be done her, and the fanatics
will be discomfitted.”¹ Niles Register said: “The
feeling in Georgia, as shown in the remarks in the news-
papers etc., is, to go on—let the consequences be what
they may; and we notice some proceedings of the peo-
ple which exhibit an uncalled-for spirit of violence, and
speak great things about ‘force’ and ‘judicial despot-
ism’, as though a child’s play was only concerned in
this matter. We are sick of such talks. If there is
not power in the Constitution to preserve itself, it’s
not worth the keeping. But an awful responsibility
rests somewhere, and history, too, may give up persons
to the infamy of ages. Many, however, entertain a
hope that Georgia, being allowed time to get cool, and
content with executing her laws over the Indians and
their lands, will quietly release Messrs. Worcester and
Butler, and so remove the present cause of action—
and cast future controversies on their own precarious
issue.” Some of the more moderate Whig papers
joined in these sentiments, the National Intelligencer
saying that it had “too much confidence in the love of
country and the common sense of the Georgian to
apprehend that the present collision between the judi-
cial authorities of that State and of the United States
will terminate tragically. Let all parties keep their
temper as well as they can; let the friends of the

¹ Washington Globe, March 31, 1832; and as to this latter, see letter of Ambrose
Spencer, to Henry Clay, Dec. 14, 1833, in Works of Henry Clay (1904); Niles Reg-
ister, XLII, March 31; ibid., June 23, 1833, reproduced an editorial from the
Cincinnati Gazette, calling the attention of Georgia to the fact that when Pennsyl-
vania in 1809, in the Olmstead Case, came into conflict with the Federal Court,
the State of Georgia supported the Court, and that though since that time “both
Georgia and Ohio have had their turn at dissatisfaction with the Supreme Court,
. . . the Court nevertheless retains the confidence of the Nation, because that
confidence is founded in the plain good sense of all, when uninfluenced by extrinsic
circumstances.” National Intelligencer, April 5, 1832.
Union stand firm by the sheet anchor; let no one doubt the safety of the gallant ship.”

Meanwhile, the State of Georgia was in process of ferment which was just short of open rebellion. As soon as the decision of the Court had been rendered, its Senator, George M. Troup, had issued an open letter saying: "The people of Georgia will receive with indignant feelings, as they ought, the recent decisions of the Supreme Court, so flagrantly violative of their sovereign rights. I hope the people will treat it, however, as becomes them, with moderation, dignity and firmness; and so treating it, Georgia will be unhurt by what will prove to be a brutum fulmen. The Judges know you will not yield obedience to mandates, and they may desire pretexts for enforcement of them which I trust you will not give.” Protests, voiced in equally violent terms and of an insurrectionary nature, were made in the newspapers and at public meetings in the State. Finally, when the mandate of the Court was served on the Judge and upon the Clerk of the Georgia Superior Court, motions to reverse the judgment, and to place the mandate on the records of the Court were denied. The two prisoners remained in prison. And everything went on exactly as if the Court had rendered no decision. On November 6, 1832, Governor Lumpkin referred in his message to the Legislature to the decision as, “an attempt to prostrate the sovereignty of the State in the exercise of its constitutional criminal jurisdiction.” To the American Board for Foreign Missions, President Jackson had

1 *National Intelligencer*, April 3, 5, 1832; on March 14, 1832, it printed a copy of the mandate; on March 22, it said that it deplored “the infatuation under the influence of which this course will be pursued;” on March 24, it printed Gov. Troup’s letter; on March 27, it quoted the *Newark Advertiser* as stating that it did not doubt that “every State in the Union would promptly furnish the Executive of the Nation its requisite portion of patriotic freemen to aid him in upholding the Judiciary and preserving the integrity of the Nation.”
already officially announced his position, the previous year, saying that he was satisfied that the State Legislatures "had power to extend their laws over all persons living within their boundaries," and that he possessed "no authority to interfere." A forged letter, couched in more extreme language and containing caustic comments on the Missionaries as "obnoxious" "by their injudicious zeal," purporting to be written by Jackson to the Board, was widely circulated in many States by Jackson's political opponents.¹

Such were the conditions of affairs in the fall of 1832, just prior to President Jackson's re-election; and they had impressed themselves so seriously upon the mind of Chief Justice Marshall as to lead him to write to Judge Story, as follows:² "If the prospects of our country inspire you with gloom, how do you think a man must be affected who partakes of all your opinions and whose geographical position enables him to see a great deal that is concealed from you? I yield slowly and reluctantly to the conviction that our Constitution cannot last. I had supposed that North of the Potomack a firm and solid government competent to the security of rational liberty might be preserved. Even that now seems doubtful. The case of the South seems to me to be desperate. Our opinions are incompatible with a united government even among ourselves. The Union has been prolonged thus far by miracles. I fear they cannot continue."

¹See Washington Globe, Oct. 22, 24, 1834, denouncing the letter as a forgery. The letter was quoted in the first edition of this book from A History of Travel in America (1815) by Seymour Dunbar, 596, citing the letter in the St. Joseph Beacon of South Bend, Ind., Sept. 27, 1832. The fact that the letter was a fabrication for political purposes was pointed out by Bernard C. Steiner, in Amer. Hist. Rev. (1924) X, 722, who also printed the actual letter sent by Secretary of War Cass to the American Board of Commissioners for Foreign Missions, Nov. 14, 1831, by Jackson's direction.

The fears thus expressed as to the sentiment of the North had undoubtedly been enhanced by the fact that, in two other cases, involving Northern States pending before the Court in 1831 and 1832, there had appeared an opposition to its jurisdiction and an outcropping of much the same State-Rights sentiment as was rampant in Georgia and South Carolina. The first was a case which had involved a long conflict and much friction between New York and New Jersey.\(^1\) In a bill in equity brought in *New Jersey v. New York*, 3 Pet. 461, in 1829, on motion of William Wirt and Samuel L. Southard, counsel for New Jersey, a subpoena had been awarded by the Court, returnable in August; no appearance having been entered by the State of New York, an alias subpoena had been issued, returnable in January, 1830. Meanwhile, the Attorney-General of New York had written to the Clerk of the Court, July 27, 1829, and to each of the Judges, January 8, 1830, alleging that the State considered such service of process on a State "as utterly void," since the Court could not exercise jurisdiction in controversies between States, without the authority of an Act of Congress carrying into execution that part of the judicial power of the United States. On March 6, 1830, the Court, stating that "the precedent for granting the process has been established upon very grave and solemn argument", in the cases against Georgia and Virginia, forty years before, issued a further subpoena, returnable in August, 1830. Again the State of New York failed to appear. In this refractory attitude, the State Attorney-General was largely supported by the Democrats, but the Whigs assailed what they termed "the Nullification doctrines of the law officer of the State." An

\(^1\) See *Brief History of the Boundary Dispute between New Jersey and New York*, by Joel Parker, *New Jersey Hist. Soc. Proc.*, VIII.
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attempt to procure an Act of Congress, said a New York paper, "would be considered by Georgia as a brilliant achievement—being nothing less than enlisting the State of New York under the banner of the State of Georgia in opposition to the legal and constitutional authority of the National Judiciary." 1 New Jersey having moved that this cause be proceeded with in the absence of the State of New York, the Court, after an argument from Wirt as to the existence of its authority to hear cases within the original jurisdiction of the Court without further legislation by Congress, decided that it possessed power to proceed, and it entered an order that, unless the State of New York appeared and answered before August, the Court would hear the cause at the next Term (New Jersey v. New York, 5 Pet. 284). "The Court has proceeded with great forbearance and moderation towards this State," said the New York paper. "Whatever the object may be, in those under whose influence the State has been placed in the predicament in which it now stands, the loss of jurisdiction over one half of the breadth of the Hudson will probably be the smallest of the evils which may be the consequence of the refusal to acknowledge the legitimate power of the Supreme Court." In 1832, Attorney-General Bronson filed a demurrer denying the Court's jurisdiction, which the Court ruled was to be treated as an appearance (6 Pet. 323); and the direct question of its jurisdiction was then presented for its final decision. The proceedings which followed were vividly described by a Washington correspondent of a Democratic paper, who expressed a belief that the Cherokee and the New York litigation had "some affinity to each other. No one will impute any wrong intention; but this ugly question has been

put: Why hurry the decision of the Cherokee Case and delay that of the New York Case? Did the principles growing out of both come in conflict? Some of your city journals have been blaming most erroneously Mr. Bronson, the able Attorney-General of New York for delay. . . . Nothing can be farther from the fact. It was the Court itself which very unceremoniously cut his argument in the middle (after three hours) and sent it over to the next Term. The New York case has been peculiar. It has brought the Supreme Court into a temper of reflection on the subject of State-Rights, more than any case ever before them. It is the first time in the history of our general legislation that a sovereign State ever consented to employ counsel to contest the jurisdiction of the Court. On the first day in which the case was begun, by Mr. Bronson, he entered into a long and learned argument showing the entire unconstitutionality of the jurisdiction assumed by the Court. I understand from good authority that the array of names and authorities in favor of the ground assumed by the Attorney-General of New York startled, in no small degree, the Supreme Bench, particularly the Chief Justice. Mr. Bronson occupied the Court several hours with the argument and yet he had scarcely concluded his first point—the ground of jurisdiction. On the morning of the next day, the Chief Justice, I believe it was, said that as the case had assumed a more important aspect than had been contemplated, the Court had agreed to postpone any further proceeding till next session.”

\[1\] New York Courier, March 21, 1832; United States Telegraph, March 8, 1832; National Intelligencer, March 16, 1832.
The other case which had awakened a feeling of State-Rights in the North was the famous Charles River Bridge v. Warren Bridge, as to which a bitter fight had been waged in Massachusetts for many years over the right to charter a free bridge in competition with a previously chartered toll bridge. When the case was first argued before the Court, March 7-11, 1831, a committee of the Massachusetts Democratic Convention reported that "in the Warren Bridge Case the Supreme Court at Washington has no more constitutional right to meddle with the question than the Court of King's Bench." The case was not decided at this Term, and at the end of the 1832 Term, it was ordered continued, "one Judge before whom the case was argued at the last Term being absent and the Judges differing."

1 United States Telegraph, Jan. 27, 1831.
2 National Intelligencer, March 14, 1832. Judge Story wrote as to this case, March 10, 1831: "We have been sadly obstructed of late in our business by very long and tedious arguments, as distressing to hear as to be nailed down to an old-fashioned homily. We are now upon the Charlestown Bridge Case, and have heard the opening counsel on each side in three days. Dutton, for the plaintiffs, made a capital argument in point and manner, lawyerlike, close, searching, and exact; Jones, on the other side, was ingenious, metaphysical, and occasionally strong and striking. Wirt goes on today, and Webster will follow tomorrow. Six Judges only are present, which I regret; Duvall having been called suddenly away by illness of his wife." To Mason, Story wrote, Nov. 19, 1831, that he had prepared his opinion and wished Mason to read it over, saying: "It is so important a constitutional question, that I am anxious that some other mind should see, what the writer rarely can in his zeal, whether there is any weak point which can be fortified or ought to be abandoned." On Dec. 23, 1831, he wrote that his opinion was prepared and that he had written it "in the hope of meeting the doubts of some of the brethren which are various and apply to different aspects of the case." On March 1, 1832, he wrote that the case was not yet decided, as Judge Johnson had been absent for the whole Term, and the Judges were "greatly divided in opinion and it is not certain what the finale will be." Story, II, 51, 91; Mason. It seems that, as the Court stood in 1832, Story, Marshall and Thompson were in favor of reversing the decree of Massachusetts Court, McLean was doubtful as to jurisdiction, Baldwin dissented, and Johnson and Duval had been absent. When the case was finally decided in 1837, seven Judges took the contrary view, and Story and Thompson dissented; see 11 Peters, 420, 583, App. 2, 194.
Before the Court met to hold its 1833 Term, the situation of the country had been miraculously altered, and the danger of a clash between the Federal and State authorities in the Missionaries Case had disappeared. For President Jackson had stepped forward as the staunch and vigorous upholder and defender of the Union, and of the National authority. Startling events had rapidly ensued after Chief Justice Marshall's despondent letter in September, 1832, above quoted. On November 24, 1832, the Legislature of South Carolina had passed its Nullification Ordinance, one section of which constituted a serious attack upon the jurisdiction of the Supreme Court. It provided that in no case in law or equity decided in the Courts of the State, involving the validity of the ordinance or of any Act of Congress, should any appeal be taken or allowed to the Supreme Court of the United States, nor should any copy of the record be permitted or allowed for that purpose; and if any such appeal should be permitted to be taken, the Courts of the State should proceed to execute and enforce their judgments according to the laws and usages of the State, without reference to such attempted appeal, and the person or persons attempting to take such appeal should be dealt with as for contempt of court. This was flat rebellion or treason; and so it was held by President Jackson. He at once issued his celebrated Proclamation, December 10, 1832, and recommended the enactment by Congress of rigorous and radical legislation giving to the Federal Courts and officials adequate powers to deal with the situation. A bill which became known as the Force Bill (or "Bloody Bill") was introduced amidst the hot opposition of the more extreme

1 To the everlasting honor of the Supreme Court of South Carolina, it held unconstitutional, a year later, the legislation of which this bill was a part. *State v. McCready* (March, 1834), 2 Hill, 1-282.
State-Rights men. Many of Jackson's former supporters were unable to see any difference between Georgia's refusal to recognize the mandate of the Court in the Cherokee Cases, and South Carolina's announcement of a similar intention; and the Calhoun newspapers rang with abuse of Jackson's inconsistency and tyranny. This bill, said the Richmond Enquirer, "constitutes Gen. Jackson Monarch of the American Empire, and must be resisted to the death."¹ "Is it not very extraordinary," said the United States Telegraph, "no person but a Jackson or Van Buren man can see any essential difference between the cases of Georgia and South Carolina? This is really passing strange. Georgia refuses to obey the decisions of the Federal Judiciary. Not a word is said by the Executive or his minions, except that she is right in doing so. South Carolina says that she will do so at a future period. And the Palace is in arms. Denunciations fall thick and heavy from its enraged occupant."²

The debate in Congress, during the months of January and February, 1833, over the passage of the Force Bill evoked once more violent attacks upon the Court and its functions in relation to the States. The transformation, however, of Nullification from a mere theory, as it was in 1830 during the Foote Resolution debate, to an actuality had profoundly modified the views of many of its former upholders; they now saw that it meant either anarchy, subjugation of a State by force or dissolution of the Union; they realized that Webster's great argument in behalf of National supremacy had been fully justified, and that only by submission to the settlement of constitutional questions through

¹ See National Intelligencer, Jan. 29, 1833.
² United States Telegraph, Dec. 19, 1832, Jan. 3, 1833; see an interesting letter from Martin Van Buren to Roger B. Taney in 1833, Maryland Hist. Mag., March, 1910, V, describing his attitude and that of Jackson towards Nullification.
judicial decision could peace and Federal unity be preserved; consequently the Court received a stronger and more widely distributed support throughout the debate than had been given to it in Congress for the past fifteen years.¹

Even before the final passage of the Force Bill, the officials of the State of Georgia perceived that the President’s insistence on the supremacy of the National authority in South Carolina would render it impossible for him to countenance disobedience to the mandates of the National Court in any other State; and early in January, a Washington correspondent of a New York paper predicted a settlement of the Cherokee Case, writing: “The President has said, since the Proclamation was promulgated, that he would carry any decision the Supreme Court should make in the imprisonment of the missionaries into effect. The Georgians have been restive under the Proclamation, and there is much to induce a belief that they will in some way avoid a direct collision with the General Government.” This prophecy was soon fulfilled; for the Governor of Georgia, influenced by the President’s determined stand and by political reasons relating to Presidential candidates, finally issued a pardon to the missionaries upon their withdrawal of their suit; and thus the crisis in the history of the Court was averted.²


² New York Daily Advertiser, Jan. 16, 1833; the United States Telegraph said, Jan. 4, 1838, that the Van Buren Administration had been “intriguing to get Georgia to release the missionaries. By so doing they will avoid the evident collision that would take place if the principles of the Proclamation are carried” — and it said that it was necessary to get Georgia in order not to have it lost to Van Buren; again it said, Jan. 18, that if Georgia were dis-
The settlement of this dangerous litigation, and the inflexible determination of the President to defend the principles of the Union against Nullification, revolutionized the sentiments which had hitherto been held towards him in many parts of the country. "The Proclamation, but more especially the Message, adopt all your principles," wrote Ambrose Spencer to Daniel Webster. "Notwithstanding I am 'the most dangerous man in America', the President specially invited me to drink a glass of wine with him. But what is more remarkable, since his last Proclamation and Message, the Chief Justice and myself have become his warmest supporters, and shall continue so just as long as he maintains the principles contained in them. Who would have dreamed of such an occurrence?" so wrote posed of, Jackson would "have full play with South Carolina." On Jan. 23 it said as to the issue of the pardon: "They say that they are induced to take this step from considerations of a public nature! What these considerations are does not admit of a doubt. It is that the whole force of the Administration and of the interest which controls the Board of Foreign Missions may be made to bear on South Carolina. It was necessary to keep the South divided, and therefore Georgia, who had been threatened with the bayonet, is to be paid for the desertion of her own principles and bribed into the coalition against South Carolina." See also United States Telegraph, Jan. 23, March 12, 1833. One of the missionaries, S. A. Worcester, wrote to their counsel John Sergeant, Jan. 22, 1833, inclosing a copy of a letter which they had sent to Governor Lumpkin, Jan. 8, notifying him of their instructions to counsel to discontinue prosecution of their case. "We beg leave respectfully to state to your Excellency that we have not been led to the adoption of this measure by any change of views in regard to the principles on which we have acted, or by any doubt of the justice of our cause, or of our perfect right to a legal discharge in accordance with the decision of the Supreme Court, in our favor already given, but by the apprehension that the further prosecution of the controversy under existing circumstances, might be attended with consequences injurious to our beloved country." Worcester continued: "We soon learned that the Governor was very much irritated by our assertion of our rights and considered the latter part of our communication as an indignity to the State"; and he said that they had written again to the Governor, Jan. 9, as follows: "We are sorry to be informed that some expressions in our communication of yesterday were regarded by your Excellency as an indignity offered to the State or its authorities. Nothing could be further from our design. In the course we have now taken it has been our intention simply to forbear the prosecution of our case and to leave the question of the continuance of our confinement to the magnanimity of the State." Niles Register, XLII, Feb. 16, 1833.

1 Webster Papers MSS, letter of Feb. 21, 1833; Story, II, 117, letter of Jan. 27, 1833.
Judge Story of a dinner at the White House, January 27. And since no man gave to Jackson warmer support than his former opponent, Daniel Webster, it was even reported that Jackson was contemplating the appointment of Webster as Chief Justice, in case of Marshall’s death.¹

With this union of Andrew Jackson, Daniel Webster and John Marshall in support of the supremacy of the Nation, the Court, which had done so much to establish such supremacy, now found itself in a stronger position than it had been for the past fifteen years. The attacks directed against it from the moment of its vital decision in *McCulloch v. Maryland*, and the Legislative attempts to impair its functions now ceased; and it was not until nearly twenty years later that it became the subject of serious criticism or antagonism by either Congress or the people. In connection with this renewed respect for the Constitution and the renewed confidence in the Court, it should be noted that in this year, 1833, Judge Story published his famous *Commentaries on the Constitution of the United States*. Its appearance was acclaimed, by lawyers and laymen alike, as an important contribution to the defense of the principles on which the American Government had been founded and which had recently been subjected to assault. “Constitutional law, in our day, instead of being the calm occupation of the schools or the curious pursuit of the professional student, has become, as it

¹James Louis Petigru wrote to Hugh Legarde, March 5, 1833: “But is it not very strange to think of Webster and Jackson? It has been hinted, and I think not improbable, that Webster will be Chief Justice.” *Life, Letters and Speeches of James Louis Petigru* (1820), by James Petigru Carson. *Harper's Weekly*, Sept. 20, 1873, quoted Senator Foote of Mississippi, as stating in his reminiscences of R. Y. Hayne, that after development of the Nullification contest, “General Jackson became so great an admirer of the Senator of Massachusetts that he thought seriously of making him Chief Justice of the Supreme Court of the United States upon the decease of the venerable Marshall.” See also *New York Courier*, Feb. 8, 1833; *United States Telegraph*, Feb. 8, 1833.
were, an element of real life. The Constitution has been obliged to leave its temple, and come down into the forum and traverse the streets,” wrote Edward Everett; and a writer in the American Jurist said that the work appeared “very opportune, since we have most strangely, now at this late day, been unexpectedly thrown back to the very threshold, to the agitation of the question whether we have, in fact, any constitution of government, or are entirely destitute of a supreme law; and which is, in effect, equivalent, whether we have any tribunal to interpret and apply, and an authority to enforce that law.” And Marshall wrote to Story: “I greatly fear that south of the Potomack, where it is most wanted, it will be least used. It is a Mohammedan rule, I understand, ‘never to dispute with the ignorant’, and we of the true faith in the South abjure the contamination of infidel political works. It would give our orthodox nullifyer a fever to read the heresies of your Commentaries... Nothing in their view is to be feared but that bugbear, consolidation; and every exercise of legitimate power is construed into a breach of the Constitution. Your book, if read, will tend to remove these prejudices.”


Note. That Jackson upheld the power of the Court to determine the validity of Acts of Congress seems to be clear; for in a letter from Washington in the Mobile Commercial Register, April 23, 1834, a conversation is reported between a Georgia delegation and the President in which Jackson said, “that the power of deciding on the constitutionality of the laws belongs to the Judiciary, and that his own power extended only to see that they were executed.”

The Act of March 2, 1833, known as the Force Bill, was the first permanent statute enlarging the jurisdiction of the United States Circuit Courts and extending Federal authority. It provided for removal into those Courts of any suit or prosecution commenced in a State Court against any Federal officer or other person for any act done under the Federal revenue laws; and also habeas corpus in cases of prisoners in State jails committed for any act done or omitted in pursuance of a Federal law. See Federal Criminal Laws and the State Courts, by Charles Warren, Harv. Law Rev. (1926), XXXVIII.