THE LIFE AND JUDICIAL WORK OF JUSTICE WILLIAM JOHNSON, JR.

By OLIVER SCHROEDER, JR.†

INTRODUCTION

Associate Justice Felix Frankfurter has described his predecessor, Justice William Johnson, Jr., as a "much neglected figure." ¹ This paper is an attempt to reveal in some measure the judicial career of Chief Justice Marshall's associate, who labored in the crucial years from 1804 to 1834.

BIOGRAPHICAL SKETCH

The Johnson family of Charleston, South Carolina, traced its ancestry to England. About 1660 the predecessors moved to Holland where the lineage split—some went to New Amsterdam in the American Colonies while others came to Charleston.² In this Carolina seaport, William Johnson, Sr., father of the Justice, arose to prominence as a respected businessman. Neither wealthy nor well-educated, the elder Johnson was intensely patriotic. His activity in organizing an armed rebellion against the British crown has been warmly praised by Christopher Gadsden, the leader of the small but vociferous band of South Carolina rebels.³ No public office was ever sought by father Johnson except his annual election to the Colonial Legislature.⁴

On December 27, 1771, William Johnson, Jr., was born in Charleston. After the customary boyhood, he attended Princeton College. Graduation around 1790 brought the College's highest honors to the Charleston youth who returned to his native city to study law. By January, 1793, admission to the State Bar occurred as the result of able tutoring by General Charles Cotesworth Pinckney. Success followed. Affiliated with the Jeffersonian Republicans, the youthful politician matured rapidly along with his political party. The younger Johnson was elected to the State Legislature for successive terms in 1794, 1796, and 1798. By the last term he had become Speaker of the State House of Representatives. Much of his legislative work

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1. FRANKFURTER, THE COMMERCE CLAUSE (1937) 5.
4. Ibid.
was devoted to the reorganization of the State Judiciary with the Act of 1799 culminating this task. As the greatest support for the Statute came from Speaker Johnson, he was naturally selected to fill one of the new judgeships in the Common Pleas Court. Prior to this achievement, Judge Johnson had married Sarah Bennett, sister of Governor Thomas Bennett of South Carolina.5

Thus was the stage set for his appointment to the Supreme Court of the United States. In 1804, Justice Albert Moore resigned because of ill health, and the first opportunity for a High Court appointment presented itself to President Jefferson. He proceeded cautiously. The Federalist flavor of the Court was to be altered. A skillful judge imbued with Republican principles must be found. Albert Gallatin, Secretary of the Treasury, tendered his opinion to the President on the possible appointments in a letter on February 15, 1804:6

"The importance of filling this vacancy with a Republican and a man of sufficient talents is obvious but the task is difficult. As there are now two circuits without a presiding Judge (the circuits of Virginia and North Carolina having yet two), the person may be taken from either. If taken from the second district,7 Brockholst Livingston8 is certainly the first in point of talents, and, as he is a State judge, would accept. If taken from the sixth district,9 unless you know some proper person, inquiry would be necessary. Parker, the district attorney, seems qualified, but he is a Federalist. I am told that the practice is as loose in Georgia as in New England, and that a real lawyer would not easily be found there. But South Carolina stands high in that respect, at least in reputation."

When the President had decided a South Carolina man should be selected, he requested a memorandum on the possible choices. Senator Charles Sumter and Congressman Wade Hampton, both from that State, submitted a report discussing the five best qualified men.10 They were John Julius Pringle, Thomas Waites, Johnson, Judge Lewis C. Trezevant and Theodore Gaillard, Speaker of the South Carolina House of Representatives in 1804.

After mature consideration of the men proposed, Jefferson sent the nomination of William Johnson, Jr., to the Senate on March 23,

5. Ibid. A numerous family was produced by this union, but only two daughters outlived the judge. The elder married Romulus Saunders, Congressman from North Carolina and Minister to Spain under President Polk. The younger married James Rowe, an Alabama planter.
8. Appointed in 1806 as a Justice, he was Jefferson's second appointment.
9. South Carolina and Georgia.
1804, where it was duly confirmed. Senator William Plumer of New Hampshire in a letter to James Sheafe on March 22, 1804, summarized his opinion of Johnson's ensuing confirmation: "a man of fair moral character and not destitute of talents."

After becoming acquainted with Johnson shortly thereafter, this strong Federalist Senator who was not unfavorable to Johnson's confirmation warmly praised the new Justice: "He is a zealous Democrat, but is said to be honest and capable. He has without the aid of family, friends, or connections, by his own talents and persevering industry raised himself to office."

Thus William Johnson ascended to the high judicial office in the new nation carrying with him the hopes of the Republicans, especially Jefferson, who had elevated him to this responsible position.

Numerous changes in the Supreme Court occurred during Johnson's tenure in office. The Supreme Court as a separate department of the National government had not attained much prominence by 1804. In fact, when John Marshall took the oath of office as Chief Justice several years before, no space was available for the ceremony. Finally, the Senate consented to the use of one of its vacant committee rooms. New public buildings had been provided for the Legislative and Executive branches of the government, but not for the Judiciary. By 1827, however, a vast improvement in the physical appearance of the courtroom had taken place. Representative Oliver Smith of Indiana in his first visit to a court session in the Capital was greatly impressed:

"The form of the courtroom oblong, the bar some three feet below the surrounding platform, one door only for entrance. The floor of the bar handsomely carpeted, with a long table standing in front of the judges; cushioned, roller arm-chairs for the lawyers, the judges seated in a row, on a seat some few feet from the wall, so as to leave a passage behind . . . The room plain, with side, cushioned sofas for ladies and auditors. In front of the judges, on the opposite wall, was seen the Goddess of Justice, holding the scales equally balanced, while busts of Chief Justices Ellsworth and Jay, stand on either side."

11. Wolfe, Jeffersonian Democracy in South Carolina (1940) 196.
12. Id. at 288.
13. Id. at 288.
14. The terms Republican and Democrat were used interchangeably in that period to describe the Jeffersonian party.
15. Bates, The Story of the Supreme Court (1926) 84. See 4 Beveridge, The Life of John Marshall (1919) 130. The Supreme Court met in a basement room of the Capitol building until 1814 when the British burned the Capitol. Then sessions were held in the private home of the Court Clerk.
16. Smith, Early Indiana Trials and Sketches (1858) 137.
The financial appearance of the Court also improved. In 1789 the salary for an Associate Justice was fixed at $3500 annually. Congress in 1819 increased this to $5000. Several months before the increase Justice Johnson had considered retiring from the Supreme Bench to a position of less dignity but more pay—Collector of Customs at Charleston. Obviously, then, during Johnson's term in the High Court progress was recorded in both the physical and financial complexion of the Bench.

But greater than these was the political growth. The Judiciary had assumed new importance in 1803 under Marshall's dominating hand. An act of Congress for the first time was held unconstitutional and void in Marbury v. Madison. President Jefferson was infuriated at Marshall's dicta which criticized the policy of refusing to deliver the Judicial Commission to Marbury and which recognized the power of the Judiciary to command the Executive department if jurisdictional authority were present. The President bitterly denounced this opinion as late as 1823 in a letter to Justice Johnson. Marshall, too, by 1804 was at odds with the Republican Executive and Legislature. He had assumed the Chief Judgeship on the express condition that no circuit duties would be imposed. The Republicans violated this condition in the Judiciary Act of 1802 which restored circuit riding for the Justices. In addition, both leaders differed on their ideas of what role the Federal Judiciary was to play in the National government. Marshall believed the Supreme Court should have a dominant part, but Jefferson objected.

Onto this complex political scene, so filled with probabilities of a struggle over the philosophy of the new Federal government and

17. 1 Warren, op. cit. supra note 12, at 416 n. 1. To Justice Story went the credit for the increase in salary. In 1815 he reported to Congress that living expenses had risen 100% to 200% since 1789, while the work of the Supreme Court had quadrupled in that same period. Story also had been tempted to resign from the Court in 1815 to take the private practice of Attorney-General William Pinckney.

18. 1 Cranch 137 (U. S. 1803), Marbury's Commission of appointment as Justice of the Peace for the District of Columbia had been signed and sealed by President Adams in the last hours of his term on March 3, 1801. Such "midnight" appointments were an attempt by the Federalists to assure their control over the Judiciary after losing the Executive and Legislative branches in the 1800 election. Several of the commissions including Marbury's had remained undelivered, so mandamus proceedings were brought to force Secretary of State Madison to relinquish the papers thereby assuring Marbury of his office. Marshall held the Judiciary Act of 1789 giving original mandamus jurisdiction to the Supreme Court repugnant to the Constitution. Since the Constitution enumerated the specific instances of original jurisdiction and the mandamus authority was not included, the framers did not intend to give original mandamus jurisdiction to the Supreme Court. Congress by statute could not grant this power so the enactment violated the Constitution, contended the Chief Justice. See Bates, op. cit. supra note 15, at 87-94.

19. 4 Randolph, Jefferson's Correspondence (1830) at 368-375. Letter to Johnson on June 12, 1823.


especially the Judiciary, Johnson entered. The political development during Johnson's term was best disclosed in his constitutional opinions, but some helpful facts concerning his relationship with the Court and his fellow men must also be observed.

The new Justice was quick to sense the significance of his position when he comprehended the control which Marshall asserted over the Court. An early message to President Jefferson revealed Johnson's attitude toward this situation:

"When I was on our State Bench, I was accustomed to delivering *seriatim* opinions in an Appellate Court, and was not a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions . . . But I remonstrated in vain; the answer was, he is willing to take the trouble, and it is a mark of respect to him. I soon, however, found out the real cause. Cushing was incompetent, Chase could not be got to think or write, Patterson was a slow man and willingly declined the trouble, and the other two judges (Marshall and Bushrod Washington) you know are commonly estimated as one judge."

The youthful Justice soon altered this practice of the Chief Justice delivering the only opinion. His concurring and dissenting opinions restored an ancient procedure which had been neglected. In *Gibbons v. Ogden* he explained:

"... in questions of great importance and great delicacy, I feel my duty to the public best discharged, by an effort to maintain my opinions in my own way."

Jefferson heartily approved his appointee's reestablishment of the old practice. Fearful of Marshall's apparently irresistible power over the Justices in the conference chamber, the Republican leader felt this process would restrain the Court. No majority of three or even two as the result of absences, infirmities, or reluctance to oppose the Chief Justice would be given the weight of a unanimous decision when each Judge offered his personal opinion.

"I rejoice in the example you set of *seriatim* opinions. I have heard it often noticed, and always with high approbation. Some of your brethren will be encouraged to follow it occasionally, and in time, it may be felt by all as a duty, and the sound practice of the primitive court again restored."

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23. 9 *Wheaton* 1, 223 (U. S. 1824).

This commendation reached Justice Johnson in Jefferson's letter of June 12, 1823.

The characteristics exemplified in Johnson's independent opinions have been acknowledged by his contemporaries. Joseph Story's message to Samuel Fay in February, 1808, noted: 25

"I ought not to pass Judge Johnson, though I scarcely know how to exhibit him individually. He has a strong mathematical head, and a considerable soundness of erudition. He reminds me of Mr. Lincoln, 26 and in the character of his mind he seems to me not dissimilar. He has however less of metaphysics and more of logic."

One historian of the mid-Nineteenth century has succinctly portrayed the Justice as: 27

"... strongly imbued with the principles of Southern democracy, bold, independent, eccentric, and sometimes harsh."

While Justice Frankfurter summarized the mental attributes of the South Carolina Justice: 28

"In William Johnson ... Marshall had a colleague of intellectual independence and power."

"Johnson's opinions reveal a downright character, toughmindedness, and intellectual energy not second to that of the Chief Justice."

This bold independence on at least one occasion evoked strong criticism from no less a personage than John Quincy Adams. In 1820, Justice Johnson had bitterly assailed in open Court, President Monroe, Attorney General William Wirt, and Secretary of State Adams for interfering with the Judiciary. Although he threatened to publish his expose, no record ever appeared of the particular facts. Adams wrote in his diary: 29

"This Judge Johnson is a man of considerable talents and law knowledge, but a restless, turbulent, hot-headed, politician cabal-

27. I Ingersoll, History of the Second War between the United States and Great Britain (2d Ser., 1852) 74.
28. Frankfurter, The Commerce Clause (1937) 5, 43. Edward S. Corwin in Marshall and the Constitution (1919) at 115, remarked that Johnson was a man of no little personal vanity affected by a greater independence from Marshall than the other judges of that period. Charles Warren has described Johnson as "... marked by a high degree of independence and by a series of opinions noted for individuality and freedom of expressive phrase." See 2 Warren, op. cit. supra note 12, at 254.
29. 5 Adams, Memoirs of John Quincy Adams (1875) 43
ling judge. He has been an ardent canvasser for Crawford, and, though a judge flaringly independent, a place hunter for himself. . . .”

Undoubtedly, Justice Johnson’s rapid advancement to the Supreme Bench had resulted from this aspiring and independent nature which he possessed. Only by these qualities could he have progressed with such amazing rapidity “without aid of family, friends, or connections” as Senator Plumer remarked.

Mr. Justice Johnson’s life outside the courtroom also manifested these characteristics which distinguished him on the Bench. John Quincy Adams disclosed a graphic story about them in 1818 in his Memoirs:

“In the boat I met . . . Judge William Johnson . . . We sat an hour or two after dinner at the table, conversing upon topics of literature and the arts. Judge Johnson, I find, is one of the anti-classical despisers of Homer and Virgil and admirers of Ossian, Falconer, Walter Scott, Lord Byron and Southey. He is a very ingenion and learned man, and defends his opinions with so much earnestness and vigor that I found it advisable, after some discussion to waive the subject; and I left him philosophizing with another of the passengers upon the construction of the steamboat, and the conflicting pretensions of Fitch and Fulton.”

Another revelation of these particular traits of the Justice was found in his own non-legal writings, especially, The Sketches of the Life and Correspondence of Nathaniel Greene. Begun at the request of General Greene’s youngest daughter, meticulous preparation for this two volume biography was made. Letters were collected, battlefields were visited, maps were drawn, and friends of Greene were interviewed. The result in 1822 was a detailed study of the life of the popular Southern General. Popular criticism, however, fell heavily upon the biographer. He had daringly asserted that Count Pulaski fell asleep at the critical moment in the battle of Germantown causing Washington’s defeat; that former Associate Justice James Wilson conspired in the Conway Cabal to remove General Washington from command and promote General Gates; and that Gouveneur Morris was the author of the

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30 Crawford was Monroe’s opponent for the presidency in 1816. The accusation of being a place hunter was based on Johnson’s plan to become Collector of Customs for Charleston in 1819. See ibid.; 4 id. at 513.
31. 4 ADAMS, op. cit. supra note 29, at 128-129.
32. 1 O’NEALL, op. cit. supra note 3, at 77.
33. 1 JOHNSON, SKETCHES OF THE LIFE OF NATHANIEL GREENE (1822) 83-92.
34. Appointed by President Washington on the first Supreme Court in 1789. See THE WORLD ALMANAC (1940) 296.
35. 1 JOHNSON, op. cit. supra note 33, at 151-187.
treasonous Newburgh letters sent to the officers of the Continental Army proposing a monarchy for the American States.\textsuperscript{36} None of these conclusions was approved by the reading public who revered Pulaski, Wilson, and Morris as heroes of the Revolution. And there was considerable evidence to disprove Johnson’s bold accusations.\textsuperscript{37} The Judge stood his ground in the controversy which emerged over this eulogistic biography with characteristic fearlessness. He remained unperturbed by the literary critic who described the work as a poorly developed arrangement of topics, an improper use of obscene sentences, a dismal failure in its use of affected language, a neglected acquaintance with the literal meaning of the words employed.\textsuperscript{38} The only recorded praise for his literary achievement was penned by Jefferson who “rejoiced that . . . at length a fair history of the Southern War had been produced.”\textsuperscript{39} A subsequent letter lauded Johnson for illustrating the Republican heroes of the Revolution. Thereby exposing, remarked Jefferson, that all of the great leaders of the nation were not Federalists.\textsuperscript{40} Despite the Justice’s dauntless replies to his critics, the publication was a financial failure, even worse than Chief Justice Marshall’s biography of George Washington, fourteen years previously.\textsuperscript{41}

To complete the historical portrait of William Johnson, fleeting glances at his physical appearance on the Bench must be made. This unusual comparison was made of the Court around 1814: \textsuperscript{42}

“Marshall’s neglected clothing was concealed by his flowing black robes and his unkempt hair was combed, tied and ‘fully powdered.’ The Associate Justices were similarly robed and powdered, and all ‘looked dignified.’ Justice Bushrod Washington, ‘a little sharp-faced gentleman with only one eye, and a profusion of snuff distributed over his face,’ did not, perhaps, add to the impressive appearance of the tribunal; but the noble features and stately bearing of William Johnson, the handsome face and erect attitude of young Joseph Story, and the bald-headed, scholarly looking Brockholst Livingston, sitting beside Marshall, adequately filled in the picture of which he was the center.”

A subsequent impression of Johnson came in 1824 from a New York newspaperman listening to the arguments in Gibbons v. Ogden: \textsuperscript{43}

\begin{itemize}
\item \textsuperscript{36} 2 id. at 394-398, and Appendix F, at 474-476.
\item \textsuperscript{38} \textit{United States Magazine}, loc. cit. \textit{supra} note 37.
\item \textsuperscript{39} \textsuperscript{12} Ford, \textit{op. cit. supra} note 24, at 246. Letter from Jefferson on October 27, 1822.
\item \textsuperscript{40} \textit{Id.} at 277-279.
\item \textsuperscript{41} \textsuperscript{3} Beveridge, \textit{op. cit. supra} note 15, at 267 n. 1.
\item \textsuperscript{42} 4 id. at 131.
\item \textsuperscript{43} I Warren, \textit{op. cit. supra} note 12, at 468.
\end{itemize}
a large, athletic, well built man of sixty or upwards, with a full, ruddy and fair countenance, with thin white hair and partially bald."

The judicial career of the Justice closed after thirty years' service. Absent from the 1832 Term of Court, he suffered from an attack of Southern fever. He returned to the 1833 Term, but participated only infrequently in the writing of opinions. At the conclusion of the 1833 Term, a bitter struggle over the Nullification question was being waged. Johnson's sympathies were opposed to the doctrine allowing States to nullify Federal acts despite the fact that his native State was its leading proponent. The aging Justice believed judicial discretion required his silence in this political controversy. He moved to Western Pennsylvania after the 1833 Term instead of returning home, in order to escape public discussion of the issue. Death came in Brooklyn, New York, on August 16, 1834.

The Judiciary Clauses

One major defect of the National government under the Articles of Confederation was the lack of a Federal judiciary. The Constitution rectified this error. Generally speaking, no criticism arose in the Constitutional Convention of 1787 over the creation of such a body. The only problems which required settlement were the manner of constituting the judiciary and the extent of its power. Little debate appeared on the records of the Convention concerning the Federal judiciary. When the delegates convened, two theories of judicial power were obvious, however. One group headed by James Madison and James Wilson, an able counsel and leader of the Philadelphia Bar, attempted to establish a judicial body similar to the French Parlement. This court nullified French legislation which the King and his Council adopted when it considered such to be unwise. In reality the Parliament had acquired almost complete control over all legislation. A continuous battle, therefore, progressed between the judicial power of the court and the legislative power of the King. Under the Madison and Wilson proposal the Supreme Court and President would act as a Council of Revision. This Council was empowered to void Congressional or State Statutes deemed either unauthorized by the Constitu-

44. 2 Story, op. cit. supra note 25, at 80 and 91. Letters from Story to Prof. Ashmun of Harvard Law School on January 17, 1832, and March 1, 1832.
45. 1 Carson, op. cit. supra note 2, at 229.
46. 1 O'Neill, op. cit. supra note 3, at 78.
47. U. S. Const. Art. III.
49. Farrand, The Framing of the Constitution of the United States (1913)
tion or inexpedient. Three attempts to pass this scheme failed. Instead the other theory of a judiciary body was approved. The federal judicial power was to be a separate department of the government, comparable in strength to the executive and legislature. Such had been the governmental concept of Montesquieu whose theories swayed a majority of the delegates.\(^5\)

With this, the drafters created one Supreme Court and invested in it the judicial power of the Federal government. Then arose the major question leading to considerable discussion. What inferior courts were to be formed? Luther Martin and John Rutledge\(^5\) proposed no Federal inferior courts, but rather State courts were to try Federal cases. The proponents of this plan contended that two systems of lower courts would lead to rivalry and jealousy while the appeal to the Supreme Court adequately protected national rights and the uniformity of judgment required in the Federal system. The opponents led by James Madison and John Randolph\(^5\) offered the proposition of a separate system of lower courts for the Federal judiciary. Only in this manner would verdicts on local prejudices and innumerable oppressive appeals be eliminated and the National administration fully protected. This controversy ended by adopting unanimously the compromise offered by Roger Sherman\(^5\) with the Constitution investing in Congress the discretion for creating inferior courts if it believed such were desirable.\(^5\)

Next, the jurisdiction of the Federal judicial power had to be circumscribed. Madison offered a broad authority for the Federal courts:\(^5\)

"... the jurisdiction of the National Judiciary shall extend to cases under laws passed by the General Legislature; and to such other questions as involve the National peace and harmony."

This direction to the Committee on Detail, who wrote the manuscript of the Constitution, was adopted without dissent. Then the power was reduced to narrower limits which was the apparent intent of the Convention members. The express enumeration in Article III defined

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\(^5\) A delegate from South Carolina and Chief Justice of the United States from 1795-1796.

\(^5\) See Yazoo Valley land question infra, Part II.


\(^5\) Warren, op. cit. supra note 54, at 331.
the precise jurisdiction of the courts. Also confronting the Committee was the question of whether the Supreme Court could review and nullify improper State legislation. On the Convention floor, the delegates had rejected a plan to permit Congress to negative State laws. Yet Luther Martin's proposal to make the Constitution and Federal laws the "supreme law" of the nation was accepted unanimously. Also the first draft which stated that the "jurisdiction of the Supreme Court" extended to all cases arising under "laws passed by the Legislature of the United States" was soon corrected to read as it now stands: "The judicial Power shall extend" to cases "arising under this Constitution, the Laws of the United States and Treaties." Note that the "Legislature of the United States" was removed inferring the broader power of a review of State legislation. Although no express words of the power to declare legislative enactments null and void were stated, the general assumption of the leading delegates obviously indicated that this authority was implied. Seventeen of the fifty-five Convention members unmistakably said that the Federal judiciary had this nullifying power; only three made a contrary construal. The Legislatures were not to be supreme, but rather the Constitution. The Supreme Court had the duty, then, of restraining the Legislatures—both Federal and State:

"It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity, ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the Statute, the intention of the people to the intention of their agents."

Understanding these desires and purposes for the Federal judiciary, Johnson's interpreting decisions may be studied.

In 1806, the nation was shocked by the escapades of Aaron Burr and his cohorts. President Jefferson suspected Burr of contemplating the capture of the port of New Orleans, provoking war with Spain,

56. Id. at 534-536.
57. CORWIN, op. cit. supra note 54, at 9-12.
59. HAMILTON, THE FEDERALIST No. 78, op. cit. supra note 48, at 397. See also No. 80 at 405 for the same analysis of the judicial power over State legislation.
and thereby establishing in the Southwest an independent government. Colonel Swarthout, Chief of Staff of Burr's army, delivered a letter in code from Burr to General Wilkinson, the military Governor of the Orleans Territory, which allegedly indicated the plans for moving the band of Burr's men down the Ohio and Mississippi Rivers to New Orleans. After capturing this seaport, the army was to proceed into Mexico. Wilkinson revealed the contents of the treacherous letter to the President who denounced it in an official proclamation. Federal officers then seized Swarthout, Bollman, one of his emissaries, and others. A writ of habeas corpus was issued but Governor Wilkinson violated its order by sending the prisoners to Charleston. Here the United States court again issued a habeas corpus writ which was evaded by transporting the men to Washington. Jefferson, fearful of the issuance of another writ, prevailed upon the Senate to suspend the writ of habeas corpus on January 23, 1807. The House of Representatives, however, was in Federalist control; hence, it refused to accept the act contending that no danger to the peace, safety or neutrality of the United States existed.

Despite his failure to bar the habeas corpus writ, Jefferson was satisfied when the Circuit Court for the District of Columbia issued a bench warrant for the arrest of Bollman and Swarthout on the charge of treason. This issuance came after a personal message from the President had requested that the men be transferred from military imprisonment to the civil authorities to be tried for the crime of treason without an opportunity for bail and no statement when or where they were to answer to the charge.

Since these prisoners were committed to the indefinite custody of the Federal authorities on an ex parte proceeding and without a grand jury indictment, the Circuit Court was most extreme. A motion was, therefore, brought before the Supreme Court for a writ of habeas corpus which introduced the famous case of Ex parte Bollman and Swarthout. Chief Justice Marshall stated the majority opinion. He began by disclaiming all jurisdiction for the Supreme Bench which was not given by the Constitution or laws of the United States. This

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60. U. S. Const. Art. I, § 8: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."
62. United States v. Bollman, et al., 24 Fed. Cas. 1189 (C. C. D. C. 1807) No. 14,622. Chief Judge Cranch dissented from this order, stating at page 1192: "Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude."
63. 4 Cranch 75 (U. S. 1807).
64. Id. at 93-101.
disclaimer of all common law power forced the Court to investigate its authority derived from the Judiciary Act of 1789. In the fourteenth Section were these words: 65

“...That all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs, not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as the judges of the district courts, shall have power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment. Provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by colour of the authority of the United States.”

A literal construction of this provision as indicated in the first sentence would restrict the issuance of the habeas corpus writ only to situations where it was necessary to exercise the courts’ respective jurisdictions. This textual limitation was abandoned by Marshall. He looked to the context of the statute to discover that an unrestricted habeas corpus power was vested in the High Court: 66

“...and as it is granted to all in the same sentence and by the same words, the sound construction would seem to be, that the first sentence vests this power in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States.”

To buttress this interpretation was Section thirty-three of the Act which gave the Supreme Court power to bail prisoners not committed by itself. This power was exercised appropriately by habeas corpus, so the bail power provision 67

“...obviously proceeds on the supposition that this power (habeas corpus) was previously given, and is explanatory of the 14th section.”

Nor did Marbury v. Madison 68 cause the Chief Justice any trouble. In that case the court had held no original jurisdiction could be exer-

65. 1 Stat. 81, 82 (1789).
66. 4 Cranch 75, 96 (U. S. 1807). Italics are the writer's.
67. Id. at 100. See 1 Stat. 91 (1789): “...and upon all arrests in criminal cases bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and of the usages of law.”
68. See page 167, supra.
cised except so far as that jurisdiction was granted by the Constitution. In the present case, the court was asked to exercise its appellate jurisdiction to revise the decision of the inferior court which had committed the citizens to the gaol. Therefore, the motion for a writ of habeas corpus must be granted.

Justice Johnson dissented from the majority. First, he was required to disembarass himself from two precedents which Marshall had already relied upon—United States v. Hamilton and Ex parte Burford. The Associate Justice contended that the Hamilton case was once good law but Marbury v. Madison had annihilated its doctrine. As for Burford's case it was an unwarranted exception to the Marbury case and should be overruled. The Justice displayed no uneasiness over accomplishng this task, even though he was a member of the Court which had decided Ex parte Burford a year before.

"Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right, or exempted from the necessity, of examining into the correctness or consistency of its own decisions, or those of any other tribunal. Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle is not law, and in a thousand instances have such cases been declared so by courts of justice."

Then he offered his interpretation of Section fourteen. The power which was invested there was an original power, for an appellate jurisdiction revises and corrects the proceedings in the cause already instituted. Here the district judge and the Supreme Court were given the same latitude of discretion by the same words with no indication of any limit to revision power only, thus attempting to create an authority of original jurisdiction in the High Court which Marbury v. Madison had held was limited strictly to those situations enumerated in the

69. 4 Cranch 75, 100, 101 (U. S. 1807).
70. Id. at 101-107.
71. 3 Dall. 17 (U. S. 1795). The prisoner was committed for high treason upon the order of the Federal District Judge of Pennsylvania. The Supreme Court granted a writ of habeas corpus ordering the prisoner to be admitted to bail. No discussion of the authority to issue habeas corpus appeared in the opinions.
72. 3 Cranch 447 (U. S. 1806). The Supreme Court issued a writ of habeas corpus to bring before it a prisoner committed to the gaol of the District of Columbia. Marshall stated at page 448: "There is some obscurity in the Act of Congress, and some doubts were entertained by the court as to the construction of the constitution. The court, however, in favour of liberty, was willing to grant the habeas corpus. But the case of United States v. Hamilton is decisive."
73. 4 Cranch 75, 103, 104 (U. S. 1807). Johnson apprized the court in Burford's case of his dissent to their decision and "submitted in silent deference to the decision" of his brethren. See at 107. Further criticism of the effect of these bad precedents was stated by Johnson in his dissent in Ex parte Tobias Watkins, 7 Peters 568, 581 (U. S. 1833).
Constitution itself. In this manner did Johnson skillfully employ Marshall's own opinion in the Marbury case to refute the Chief Justice in the present controversy. The qualifying second sentence of the fourteenth Section extended the authority to issue the writ only to the Justices when riding circuit or in their individual capacity in their chambers, but it did not permit the exercise of the habeas corpus power from the full bench.

This dissent was significant. Popular opinion had been aroused over Burr's daring scheme. Some desired speedy punishment for the conspirators, while others feared the strong Presidential pressure which was exerted to suppress this dream of a Southwest Empire. Marshall by granting habeas corpus thus foiled the rival plan of Jefferson to destroy Burr and all his colleagues. Johnson, perhaps recalling his appointment but three years previously, had defended the Chief Executive. In view of his express desire to overrule Ex parte Burford, some suspicion might be produced that the Justice had altered his original opinion on the habeas corpus authority. Was this express reversal based upon the wish to aid his political party—the Jeffersonian Republicans? Absolutely not! The Associate Justice revealed he had objected to the Burford rule at the time of its pronouncement. No dissent was registered, however, since political issues had not been injected into the argument. The converse situation was now true, and the Justice caustically inferred his objection to Robert Harper, counsel for Bollman and a leading Federalist, who utilized political arguments in an endeavor to convince the Court:

"In the case of Burford . . . I did not then comment at large on the reasons which influenced my opinion, and the cause was this: the gentleman who argued that cause confined himself strictly to those considerations which ought alone to influence the decisions of this court. No popular observations on the neces-

74. Id. at 104-106.
75. See Carson, op. cit. supra note 2, at 216, where this use of Marbury v. Madison was praised.
76. 4 Cranch 75, 107 (U. S. 1807).
77. 1 Warren, op. cit. supra note 54, at 305-308.
78. In fact the Chief Justice completely stymied Jefferson's scheme. In the final disposition of Ex parte Bollman and Swarthout Marshall discharged the prisoners for no adequate proof was offered of their "levying war against" the United States which was the definition of treason in Section 3 of Article III. No expressed dissent was recorded to this opinion. See 4 Cranch 75, 125-136 (U. S. 1807). In the spring and summer of 1807, Marshall tried Aaron Burr himself in the Richmond Circuit Court. No less than 12 decisions were required to carry through the bitterly fought contest over the law and facts. Finally, the Chief Justice discharged Burr from the indictment of treason but committed him for the misdemeanor of "preparing and providing the means for a military expedition against territories of a foreign prince, with whom the United States were at peace." These decisions were all recorded in 25 Fed. Cas. 1-207 (1806-1807), where the cases of United States v. Burr were reported.
79. 1 Warren, op. cit. supra note 54, at 306.
80. 4 Cranch 75, 107 (U. S. 1807).
sity of protecting the citizen from executive oppression, no animated address calculated to enlist the passions or prejudices of an audience in defence of his motion, imposed on me the necessity of vindicating my opinion.”

No political significance, therefore, could be drawn from Johnson's dissent which in its practical result would have aided the President's cause in subduing Burr's aides.

Any satisfaction which Jefferson might have experienced from his appointee's alleged support soon waned. In the very next year, the Justice struck a devastating blow at the Republican leader's most favored legislation—the Embargo Laws. While sitting in Charleston on the Circuit Court, Gilchrist, half owner of the American ship Resource, sought a mandamus writ to compel the Collector of Charleston to issue clearance papers. The petitioner desired to send the vessel to Baltimore for repairs as worms were eating the ship's bottom. For the trip, he had chartered 600 bales of cotton and 140 barrels of rice as cargo. The Collector under the Embargo Act of April 25, 1808 had power to deny clearance papers if in his discretion the vessel intended to violate the embargo provisions. In May, 1808, the Secretary of the Treasury had sent a letter to all collectors ordering them to deny clearance papers to any vessel. Although the Charleston Collector believed the Resource did not intend to violate the Embargo Act, he felt bound to obey the executive order released by his superior and so denied the proper sailing papers. In Gilchrist v. Collector of Charleston, Johnson issued the mandamus commanding the Collector to grant the clearance papers. The Justice contended that the executive order did not apply to this situation since the Collector was to deny clearance only where the cargo was destined for a port where it was not wanted for consumption or to a port which usually exports the articles in the cargo. Neither of these prerequisites applied to cotton and rice being shipped to Baltimore. In addition, however, the Judge warned the executive department:

"We are of the opinion that the act of congress does not authorize the detention of this vessel. That without the sanction of law, the collector is not justified by the instructions of the executive, in increasing restraints upon commerce, even if this case had been contemplated by the letter alluded to. . . ."

This direct rebuke to the President was keenly felt. Most informed persons had believed the mandamus writ would be denied because of

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82. Id. at 357.
83. Johnson was always a stout defender of the freedom of commerce. See chapter on the Commerce Clause, infra Part II.
Johnson’s political beliefs, because of the attitude of his native city which supported the Republican legislation, and because of the fact that Jefferson, who had appointed the Justice, strongly supported the Embargo laws.  

No court decision up to that time except United States v. Burr produced so much publication or was given such widespread newspaper notice. The Federalist press seized upon it as a rebuke by a Republican Judge to the Republican President, while the Republican press either minimized the decision or denounced the independence of the judiciary for giving an absurd interpretation to the law. The President himself already warned by criticisms from the citizens, State authorities, and Federal officers on the ill effects of the embargo had remained unimpressed; hence Johnson’s opinion occurred as a deep shock. It was safe to say that the Justice never regained the complete confidence of Jefferson after this case. The President’s immediate reaction was expressed in his letter to Governor Pinckney of South Carolina on July 18, 1808:

“Your favor of May 28 has been duly received, and in it the proceedings of the court on the mandamus to the Collector of Charleston. I saw them with great concern because of the quarter from whence they came, and where they could not be ascribed to any political waywardness.”

The President was supported in his views by Attorney General Rodney who submitted a legal opinion to the Chief Executive on July 15, 1808. This memorandum stated that the Circuit Court had no authority to issue a writ of mandamus under Section fourteen, since Section thirteen of the 1789 act had given this power specifically to the Supreme Court alone, while the the opening sentence of Section fourteen gave the courts of the United States “power to issue writs of scire facias, habeas corpus, and all other writs not specifically provided for by Statute. . . .” Since the mandamus writ was already “specifically provided for by statute,” no issuing power was given to the Circuit Court. In addition Rodney believed the judiciary could not control the executive branch through the mandamus writ, else the spirit of the Constitution’s separation of governmental powers into three independent departments would be destroyed.

84. 3 McMaster, History of the People of the United States (1896) 302, 303.
85. See page 178, note 78, supra.
86. 1 Warren, op. cit. supra note 54, at 326-329.
87. 4 Adams, The History of the United States (1890) 263, 264.
88. 5 Washington, The Writings of Thomas Jefferson (1853) 322.
Justice Johnson submitted a reply to this paper. He approved of the private message to the President, but bitterly assailed Jefferson for publishing the Attorney General’s letter in the newspapers. This bias which the President attempted to give the public provoked the Judge’s answer since he feared silence would imply his being borne down “by weight of reasoning or awed by power.” The judicial power required, he submitted, that the courts should judge and have authority to enforce physically the exercise of this judgment. Then he utilized the powerful dictum of Marshall in *Marbury v. Madison* to buttress his argument that the courts had the power to command the executive where the propriety for such an order existed and the court had the jurisdiction for issuance of the order. Jurisdiction, he claimed, rested on Section two of the Process Act of 1789 which gave the inferior Federal courts the judicial process used by the States wherein the Circuit Court had sessions. In South Carolina the mode of procedure would be mandamus; hence, the Federal court process was identical. The propriety of the mandamus writ was Johnson’s last observation. He indicated that mandamus proceedings were the usual method of procedure where damages were inestimable. The accusation of judicial usurpation was entirely false as the Circuit Court had merely followed the dictation of the Embargo Act. Any complaint over the difficulty which the executive department suffered should be directed to the legislative branch which enacted the law, not to the judiciary which merely enforced the act. The Justice finished by denying any desire to elevate the Federal courts to a supreme position over the President and his subordinates.

The last word on this important problem had not yet been written, however. Rodney sent this communication to his Chief Executive on October 31, 1808, after reading the Justice’s answer:

“He (Johnson) has enlisted fairly under the banner of the judiciary and stands forth the champion of all the *high-church* doctrines so fashionable on the bench. . . . The judicial power, if permitted will swallow all the rest. They will become omnipotent. No other administration than yours could progress under such circumstances. It is high time for the people to apply some remedy to the disease. You can scarcely elevate a man to a seat in a Court of Justice before he catches the leprosy of the Bench. . . . He breathes throughout a spirit of hostility to the present Executive, and, has, perhaps, some view as to the election of a

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90. *Id.* at 350-366. The Judge read the Attorney-General’s opinion in a Charleston paper and forwarded his answer from the Edgefield District of his Circuit on August 26, 1808.

91. See page 167, *supra.*


future, from the period at which he has published. His piece may be easily assailed, for it is extremely vulnerable. Shall I enter the lists with him in a temperate review of his observations?"

In addition popular dissent to Johnson’s decision grew rapidly in the Jeffersonian South. The grand jury of the Circuit Court of Georgia, for example, condemned “the improper interference with the executive” displayed by the Judge, and hoped that the occurrence would never be repeated.94

Assailed from all sides except the Federalist front, which was amazed at the Republican Judge who had actually applied Marshall’s dictum expressed in *Marbury v. Madison*, the Justice made one last thrust at his opponents on December 15, 1808: 95

“If you are prepared, gentlemen, to waive the government of the laws and submit without repining to every error or encroachment of the several Departments of government, avow it to your fellow citizens, and prevail on them to abolish the Constitution, or get into office a feeble and submissive Judiciary. For what cause are we now reproached? For interposing the authority of the laws in the protection of individual rights, of your rights and the rights of succeeding generations. If such is to be the reward of his discharge of a painful and invidious duty, so important to the security of those who censure us, small will be the inducement to discharge it with fidelity.”

As a practical matter Johnson’s decision was never enforced since the Collectors almost unanimously followed the directions of the Treasury Department and detained all vessels which fell within the executive order. 96 Thus closed an episode in Supreme Court history which demonstrated a most striking illustration of judicial independence. 97 Marshall’s youthful associate had now revealed he was fitted for a cardinal role in shaping the Constitutional Law of the new nation.

The legal decision of Johnson’s boldly independent opinion in the *Gilchrist* case was swept away by *M’Intire v. Wood* 98 in 1813. The Ohio Circuit Court certified the question of whether the register of the Federal land office in Marietta could be commanded by mandamus to grant final certificates of purchase to the Plaintiff for lands to which the Plaintiff was entitled. The Justice in a one page opinion presented the Supreme Court’s answer. No mandamus could be issued. Under Sec-

94. *Id.* at 337.
95. *Id.* at 337, 338.
96. *Id.* at 338. The solution of the embargo problem was thereby left to Congress. See also 5 *WASHINGTON, op. cit. supra* note 88, at 324.
97. *Id.* at 324.
98. 7 Cranch 504 (U. S. 1813).
tion fourteen the Circuit Court had authority to issue the mandamus writ only in those cases where it was necessary for the exercise of its jurisdiction. This interpretation was not discussed in *Gilchrist v. Collector of Charleston*. Justice Johnson excused his notorious decision in the *Gilchrist* case as a voluntary submission by the Collector and District Attorney "to extricate themselves from an embarrassment resulting from conflicting duties." \(^9\)

Another opportunity to elucidate the mandamus jurisdiction in the Federal Courts arose in *M'Clung v. Silliman*.\(^10\) The Plaintiff had been denied a writ of mandamus to order the Federal land-office register to issue a certificate of a pre-emptive interest in a land tract by the Federal Circuit Court. When the Federal Court denied the writ, the Plaintiff brought the same application to the Ohio Court which acknowledged its jurisdiction over the Federal officer but dismissed the case on its merits. On appeal from the Ohio Supreme Court, Johnson's opinion for the Supreme Bench denied the authority of any State to issue a mandamus to any officer of the United States.

In explaining the *M'Intire* decision, the Justice indicated that the counsel's argument, contending that the authority to issue a mandamus to a Federal ministerial officer was granted as an implied incident to the judicial powers of the United States set out in the Constitution, was renounced. The Legislature alone had absolute control over inferior Federal courts, and had delegated only partial judicial powers which did not include the mandamus authority.\(^11\) In the *M'Intire* controversy, the mandamus writ was not to be exercised where jurisdiction was already acquired by the Federal Court, but rather the mandamus writ was necessary first to obtain the execution of the legal document or the party could not sue. This original issuance of a mandamus was impossible under Section fourteen which allowed the court to grant this writ only for the "exercise of its jurisdiction." Where jurisdiction already existed then mandamus would lie as an auxiliary power.

A ticklish legal difficulty was faced here, however. Since the Federal officer won on the merits in the State Supreme Court he could not appeal the jurisdictional decision, and plaintiff had to maintain the jurisdictional point to achieve his reversal on the merits. So both

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99. *Id.* at 506. Jefferson had also recognized this fact of voluntary submission, but disapproved of it, in his letter to Governor Pinckney on July 18, 1808: "The attorney for the United States seems to have considered the acquiescence of the Collector as dispensing with any particular attentions to the case, and the judge to have taken it as a case agreed between plaintiff and defendant, and brought to him only formally to be placed on his records. But this question has too many important bearings on the constitutional organization of our government to let it go off so carelessly." 5 *Washington, op. cit. supra* note 88, 323, 324.

100. 6 *Wheaton* 598 (U. S. 1821).

101. *Id.* at 599-601.
parties were interested in sustaining the jurisdictional holding in order to get the decision on the merits either upheld or reversed. The Court issued an affirmance of the Ohio Court's ruling on the merits with an additional statement warning that the State Court had no authority to issue the mandamus. In this manner Justice Johnson extinguished "the growing pretensions of some of the State Courts over the exercise of the powers of the general government." 102

One further declaration of the Justice was also the subject of study. He considered the fact that this Federal officer was disposing of Federal land under Federal laws passed for that purpose. Only the power which created this official could control him. Johnson then broadly asserted: 103

"... whatever doubts have from time to time been suggested, as to the supremacy of the United States, in its legislative, judicial or executive powers, no one has ever contested its supreme right to dispose of its own property in its own way."

The spirit of these words was echoed by Chief Justice Hughes in Ashwander v. Tennessee Valley Authority104 where the validity of the Authority to sell electric energy, generated at the Federal navigation and flood control dams, to neighboring municipalities and private enterprises was sustained. The Chief Justice could find no constitutional limitation on the disposal of Federal property and remarked: 105

"The United States owns the coal, or the silver, or the lead, or the oil, it obtains from its lands, and it lies in the discretion of the Congress acting in the public interest to determine how much of the property it shall dispose.

"We think that the same principle is applicable to electric energy. ... Would anyone say that, because the United States

102. Id. at 598. For a detailed discussion of the mandamus cases in which Johnson gave opinions see Evans, Jurisdiction in Mandamus in the United States Courts (1885) 19 Amer. L. Rev. 505, 522, 529. Evans submitted that both the M'Intire and McClung cases have not been analyzed correctly. The M'Intire holding was simply this: "Cases arising under the laws of the United States are not per se included in Section eleven" of the 1789 Judiciary Act which defines the original jurisdiction of the Circuit Courts. In other words, unless statutory permission to hear these cases has been given, the inferior courts were without authority. As for the McClung controversy no mandamus could be issued for it would be no exercise of the revision of the State decision which was all the Supreme Court could do under its appellate power. But in both cases Johnson used language indicating that mandamus could be granted only as an auxiliary measure after the circuit court had jurisdiction already. The further dictum in the McClung case that no mandamus could be issued to either Federal or State officers because it was extraordinary and unprecedented was also questionable. In those days mandamus was really a well established method of relief. Probably on the actual decisions of the two cases, Evans was correct. But even he admitted that the dicta expressed have become the source of law for later decisions while the narrow holdings have been almost forgotten.

103. 6 Wheaton 598, 605 (U. S. 1821).
105. Id. at 336, 337.
had built its own dam and plant in the exercise of its own constitutional functions, and had complete ownership and dominion over both, no power could be supplied to the communities dependent on it, not because of any unwillingness of the Congress to supply it, or of any over-riding governmental need, but because there was no constitutional authority to furnish the supply?"

Not only did Justice Johnson entrench the inability of the Federal and State Courts to issue mandamus orders to Federal officers in *M'Clung v. Stillman*, but also he defined at an early date in American constitutional history the complete control which the National government maintained over its own property.

A different but just as vital jurisdictional problem was raised in *United States v. Hudson and Goodwin*. The Connecticut Circuit Court certified this question to the Supreme Bench. Did the Circuit Court of the United States have common law jurisdiction in cases of libel? The facts which prompted this problem were based upon an article in the *Connecticut Currant* of May 7, 1806, charging the President and Congress with secretly giving $2,000,000 to Napoleon Bonaparte for leave to make a treaty with Spain. The United States attorney had the Defendants indicted for publishing this alleged libel. A general demurrer raised the issue of jurisdiction. In a short opinion for the Court, Johnson indicated that this issue had been settled by public opinion, for the "general acquiescence of legal men" showed that they favored a negative answer. The Constitution itself produced the same reply: 108

"Of all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none, but what the power ceded to the general Government will authorice them to confer."

Since Congress, the creator of the Federal inferior courts, had expressed no common law criminal jurisdiction the Courts had no authority to indict the Defendants for their common law crime. The only implied authority which existed was the courts' powers to fine for contempt, imprison for contumacy, or enforce the observance of an order. These

106. 7 Cranch 32 (U. S. 1812).
107. Ibid.
108. Id. at 33.
authorities accompanied the express delegation as a necessary means for exercising the statutory powers.

A similar dispute confronted the Supreme Court in 1816. An indictment was granted in the Massachusetts Circuit Court for forcibly rescuing a prize on the high seas which had been captured by two American privateers. The vessel was en route to Salem for adjudication. The question of Federal jurisdiction over common law offenses against the United States was certified to the High Court in United States v. Coolidge et al. The Attorney General felt the precedent of the Hudson case controlled, but the Justices did not agree. Story, Washington and Livingston did not believe that the former decision had settled the issue; Johnson, however, did consider the question settled by this precedent. When the Attorney General refused to argue, Johnson delivered the Court’s opinion. Under the circumstances of no argument the precedent had to be followed and a negative certification was issued. The Justice recognized the differences of opinion on the problem and would have been most willing to have heard argument on the “solemn” issue.

Congressional proceedings over the Judiciary Act of 1789 would indicate that the Coolidge decision reinforced an erroneous rule of law. Under Section ten of the Draft Bill, the District Courts had:

"... cognizance of all crimes and offences that shall be cognizable under the authority of the United States and defined by the laws of the same."

But under Section nine of the adopted Statute this clause was enacted destitute of the italicized phrase which had been deliberately struck out. Much discussion had raged both in Congress and out over Federal common law criminal jurisdiction with Jefferson and his followers denying such power. In the light of this alteration in the Draft Bill it clearly appeared that when the statutory criminal jurisdiction was attempted, the framers of the legislation were dissatisfied. The express restriction allowing only statutory crimes was eliminated. If the Supreme Court had utilized Senate records, quite possibly the Hudson and Coolidge certifications would have given opposite answers. Nevertheless the principle enunciated by Johnson in these two early cases has been constantly reaffirmed by the Supreme Bench.

111. I Stat. 76 (1789).
112. See Warren, supra note 110.
The first case to establish the right of appeal from a State Court to the Supreme Court was the important decision of *Martin v. Hunter's Lessee* \(^{114}\) in 1816. This momentous holding definitely announced the authority of the Supreme Court to determine whether State decisions were compatible to the Federal Constitution, Treaties, and Laws.\(^{115}\) In 1813, the Supreme Bench had reversed the Virginia Court of Appeals in *Fairfax's Devises v. Hunter's Lessee* \(^{116}\) with Justice Johnson dissenting.\(^{117}\) The majority held that Virginia could not confiscate the waste lands of Lord Fairfax in the Northern Neck of the State until title had been perfected by possession. Since this was not done before the United States-British Treaty of 1794, absolute title was confirmed by that Treaty in Fairfax's devisee, an alien enemy at the time of the devise in 1781. Johnson disagreed on the grounds that the devisee had only an insignificant interest, *scintilla juris*, in the tract so upon the State's appropriation not even this *scintilla* remained. Nothing, therefore, could be confirmed by the Federal Treaty. Johnson had agreed, nevertheless, with the majority that on the face of the record enough appeared to bring the case under Section twenty-five of the 1789 Judiciary Act which permitted a writ of error to be issued to the Virginia Court of last resort.

But the Virginia Court of Appeals refused the mandate to reverse its judgment claiming that the Supreme Court had no jurisdiction over the appeal which arose on a writ of error.\(^{118}\) It was not mere abstract theory over the jurisdiction of Federal and State power which led to this controversy, however. Material issues were involved.\(^{119}\)

“Immense landed property values, the Virginia confiscation acts, the unpopular British debts treaties, the personal fortunes of John Marshall and his relations with his political rival, Judge Spencer Roane,\(^{120}\) the resentment towards a decision in favor of British claimants in a country which had just emerged from a second war with England—all these factors were involved.”

Because he had represented certain citizens claiming under Fairfax's title, Marshall did not sit on the *Martin* case. The Court's opinion was left to Justice Story.

\(^{114}\) Wheaton 304 (U. S. 1816).  
\(^{115}\) 13 Hart, *The American Nation* (1906) 300, 301.  
\(^{116}\) 7 Cranch 603 (U. S. 1813), reversing Hunter v. Fairfax's Devises, 1 Munf. 218 (Va. 1810).  
\(^{117}\) 7 Cranch 603, 628-632 (U. S. 1813).  
\(^{118}\) Hunter v. Martin, Devises of Fairfax, 4 Munf. 1 (Va. 1813). See especially Judge Roane's opinion from 25-54 where the able Judge championed the cause of State's Rights.  
\(^{119}\) Warren, *Legislative and Judicial Attacks on the Supreme Court* (1913) 47 Amer. L. Rev. 1, 7.  
\(^{120}\) This bitterly anti-Federalist son-in-law of Patrick Henry and the leading jurist in the Virginia judiciary was a rabid State's rights proponent. Warren, *supra* note 119, at 10.
The great problem which now had to be decided was the validity of Section twenty-five of the Judiciary Act of 1789 which permitted a writ of error to the highest State court; where the Federal Constitution, Treaties, or Laws were involved if the decision be against their validity; where the State statute or authority was questioned as repugnant to the Federal authorities and the decision was in favor of its validity; where the State decision was against the title, right, privilege, or exemption granted by the Federal Constitution, Treaties, or Laws. After issuing the writ, the Supreme Bench was authorized to re-examine and reverse or affirm the State holding. Story contended that since the Constitution gave appellate jurisdiction to all cases the Supreme Court could not be denied appellate power over State decisions for then all would have been interpreted as some which was clearly not intended. In addition the clear intent to make the Federal Constitution, Treaties, and Laws supreme under Article VI necessitated protection of the Federal government by the National judicial power.

Justice Johnson concurred. But his concurring opinion has been heralded as an even more nationalistic dissertation than Justice Story's. The Justice viewed the collision between the judicial powers of the union and one of the greatest States as a "most delicate and difficult" point to be adjusted. Since the American people could not enjoy the blessings of free government whenever the State sovereignties "shall be prostrated at the feet of the general government" he rejoiced that Virginia had resisted. Nevertheless the general government would cease to exist if it lost the power of protecting itself, so the High Court's decision must be supreme.

Since his dissent in Fairfax's Devisee v. Hunter's Lessee was not shared by the Court, Johnson acquiesced in the title rights established by that decision to state his strong opinion on the right of the Supreme Court to have its orders obeyed. The very purpose of the Federal Judiciary was to erect a tribunal where the welfare of the whole nation could be protected from petty State jealousies, prejudices, and partialities.

As a practical matter, since the Presiding Judge of the Supreme Court of the State could issue the writ of error himself no oppression was exerted on the local government. If he refused to grant the writ

121. 1 Stat. 85, 86 (1789).
122. 1 Wheaton 304, 339-342 (U. S. 1816).
123. Id. at 362-382.
125. 1 Wheaton 304, 363 (U. S. 1816).
126. Ibid.
127. Id. at 364, 365.
128. Id. at 373, 374.
then the Federal courts could issue the same and the record, which is common property, would be brought forth. No revision of the State court’s opinion was accomplished, for the Federal Court merely decided the Federal issue in its own opinion. Perhaps in form this contention was valid, but in substance the rights and duties determined by Judge Roane and the Virginia Court of Appeals in *Hunter v. Fairfax’s Lessee* were given no effect. Johnson’s rationalization here was very thin—in fact transparent.

These two opinions—Story’s and Johnson’s—did much to destroy the “States Rights” argument. The spirit of the Virginia and Kentucky Resolutions died hard, but after 1816 they were destined to be a lost cause. The immediate reaction to Story’s opinion was most embarrassing. The Republican Congress rejected his proposal for an increase in the salaries of the Justices who were “starving in splendid poverty.” Also Judge Roane gathered his forces to fight the new spirit of nationalism and to advance “States Rights” after the reversal of the Virginia decision. Undoubtedly, the Supreme Court feared a strong opposition from the Virginia Court of Appeals for it issued its process directly to the District Court of Shenandoah County where the suit originated instead of issuing a second mandate to the Court of Appeals. After *Martin v. Hunter’s Lessee*, however, no serious doubts have arisen as to the appellate power of the Supreme Court over decisions of the State Courts involving Federal questions. Chief Jus-

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129. Id. at 379, 380. This attempt to appease the State as well as his rejoicing over Virginia’s resistance were examples of the sort which led Beveridge to criticize Johnson’s opinion as a stump speech which mingled National and States rights in an astounding fashion. See 4 Beveridge, op. cit. supra note 124, at 165.

130. 1 Munf. 218 (Va. 1810).

131. 13 Hart, loc. cit. supra note 115. The Virginia Resolutions of 1798 and the Kentucky Resolutions of 1798 and 1799 were adopted by the two State Legislatures as the outcome of the Federalist Administration’s Alien and Sedition Acts. In principle they asserted the supremacy of the individual States with power to judge for themselves the validity of the Federal government’s laws. Sent to the Governors of all the sister States, the Resolutions provoked most unfavorable replies from the Legislatures of New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, and Delaware. MacDonald, Documentary Source Book of American History (1908) 267-278.

132. 4 Beveridge, op. cit. supra note 124, at 166. See also page 167, supra.

133. 1 Warren, op. cit. supra note 54, at 450.

134. An unusual controversy arose in Williams v. Bruffy, 102 U. S. 248 (1880) which emphasized the full import of the *Martin* decision. The Plaintiff, a citizen of Pennsylvania, sought to recover for goods sold to Defendant’s intestate, a citizen of Virginia, sometime during the War between the States. The Defendant answered that by a law of the Confederacy the intestate had paid to a Confederate official his debt to Plaintiff. Plaintiff demurred and a Virginia inferior court overruled the demurrer. After an agreed statement of facts, judgment was given to Defendant. On a petition for a writ of supersedeas which was comparable to a writ of error, the Court of Appeals denied the writ. A writ of error to the Supreme Court was had. The Supreme Bench held the judgment in error, ordered the denial of supersedeas reversed, and remanded the case. The Court of Appeals refused to obey the order. On the second writ of error to the Supreme Court it was held that no question of appellate jurisdic-
tice Marshall had his opportunity to uphold Section twenty-five in *Cohens v. Virginia* five years later. Writing the unanimous opinion he allowed a writ of error to lie for a judgment from the Court of Appeals of Virginia where the State itself had been given the judgment. This remarkable decision, silently approved by Johnson, settled definitely the validity of Section twenty-five and the strength of the Federal judicial power.

One of the most troublesome periods for the Federal government occurred under the existence of the Second Bank of the United States. Three vital controversies arose—*McCulloch v. Maryland*, *Osborn v. Bank of the United States*, and *Bank of the United States v. Planter's Bank of Georgia*. The Supreme Court survived this crucial test with the Chief Justice guiding the majority while Justice Johnson dissented in the last two cases.

In order to understand his dissents, the *McCulloch* case must be briefly discussed. Chief Justice Marshall's opinion for a unanimous Court held unconstitutional the Maryland statute which taxed the banknotes issued by the Baltimore branch of the United States Bank, a Federal bank created by Congress. Since the Federal Legislature had authority to create the Bank, the State could not interfere with the
Federal legislation by taxing a necessary and proper function of the Bank. Maryland's suit to recover penalties from McCulloch, the Bank's Baltimore officer, for failure to pay the tax had to be dismissed, therefore. After this decision, Judge Roane, who for three years now had organized opposition to fight the usurping Federal Judiciary, found much aid for his cause from all the Southern States against the alien and unsympathetic Supreme Court.\footnote{141. Beveridge, op. cit. supra note 124, at 167.}

Maryland was not alone in taxing a branch of the United States Bank. Ohio in February, 1819, enacted a tax of $50,000 on each branch of the Federal Bank in the State—two existed at that date, one in Cincinnati, the other in Chillicothe. This action was forecast by the bitter State elections of 1818 where the local politicians held that since the Constitution expressed no authority to create a Bank, Congress had acted unconstitutionally. The Branches in Ohio had been guilty of restricting credits to the State banks and demanded immediate payment of the State banks' balances in order to protect the National Bank from bankruptcy; hence, the political attack was explainable.\footnote{142. Bogart, Taxation of the Second United States Bank in Ohio (1912) 17 Amer. Hist. Rev. 312-322, wherein an excellent description of the Ohio banking situation was stated.}

Relying on the \textit{McCulloch} decision an injunction was granted against the State of Ohio by the Federal Circuit Court to prevent the collection of the tax. In 1820 the Ohio Legislature adopted explicit resolutions refusing to be bound by the \textit{McCulloch} holding and declaring that the Federal Courts were not exclusively vested with the authority to determine in the last resort the true interpretation of the Constitution. In conclusion the resolutions warmly reaffirmed the Kentucky and Virginia Resolutions. After dispatching the Resolution to Congress and all the States, Ohio discovered that only Kentucky endorsed them while the Massachusetts Legislature upheld the supremacy of the Federal Courts by its own resolutions.\footnote{143. Warren, supra note 119, at 15-16.}

But even more drastic action was taken by Ohio. Under direction of the State Auditor the Chillicothe Branch was entered forcibly and $100,000 taken as payment for the taxes. The Federal injunction was thus violated. This gross abuse of the legal procedure provoked sharp criticism from even the strongest adherents to the "States Rights" doctrine.\footnote{144. Warren, op. cit. supra note 54, at 530-533.} The National Bank now sought to enjoin the use of this fund and to have it returned to the Chillicothe vault. These facts introduced the case of \textit{Osborn v. Bank of the United States}. By the time that the controversy arrived at the Supreme Court the bad effects of the finan-
cial crisis of 1819 had vanished, prices were rising, and popular excitement had turned to other more pressing issues.\textsuperscript{145}

The Chief Justice, following his customary practice, assumed control over the majority of the Court and wrote the opinion enjoining the use of the segregated fund, ordering its return to the Bank but charging no interest for the period during which it was held.\textsuperscript{146} His views were easily explained. Since the Bank was created by a Federal act and had power to sue through its charter, the Federal judicial power extended to the suit. If such suit were denied then each State could attack the National government and arrest its progress while the Union "stands naked, stripped of its defensive armor." \textsuperscript{147} The objection that this suit violates the Eleventh Amendment \textsuperscript{148} was untenable for the State was not a party on the record.\textsuperscript{149} As for the taxing question, \textit{McCulloch v. Maryland} was adequate authority that a tax on the National Bank fettered an act of Congress, hence, was invalid. On these grounds the decree to restore the fund was ordered.

Johnson's dissent \textsuperscript{150} recognized first the concerted attack being made upon the Federal government: \textsuperscript{151}

"I have very little doubt that the public mind will be easily reconciled to the decision of the Court here rendered; for, whether necessary or unnecessary originally, a state of things has now grown up, in some of the States, which renders all the protection necessary, that the general government can give to this Bank."

Not only was the Justice contemplating attacks upon the Bank which had by now greatly subsided, but also he noticed the attack on the Federal Tariff policy which was emanating from the South. Then, too, the Judge was angered by the defiance of his native State in refusing to obey his decision in \textit{Elkison v. Deliesseline.}\textsuperscript{152} After a powerful appeal for the maintenance of the Bank, the reasons which caused his dissent were given. He did not believe that the Constitution sanctioned a Federal right of action in the Bank where the cases were "exclusively personal" or where a constitutional issue might "possibly" be raised.\textsuperscript{153} Only where the case "lives, moves, and has its being" in the

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\item \textsuperscript{145} Bogart, \textit{supra} note 142, at 330.
\item \textsuperscript{146} 9 Wheaton 738, 816-871 (U. S. 1824).
\item \textsuperscript{147} \textit{Id.} at 848.
\item \textsuperscript{148} "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U. S. \textit{CONST. AMEND. XI.}
\item \textsuperscript{149} 9 Wheaton 738, 857 (U. S. 1824).
\item \textsuperscript{150} \textit{Id.} at 871-903.
\item \textsuperscript{151} \textit{Id.} at 871, 872.
\item \textsuperscript{152} 4 \textit{BEVERIDGE, op. cit. supra} note 124, at 394. For the \textit{Elkison} decision see chapter on Commerce Clause \textit{infra}, Part II.
\item \textsuperscript{153} 9 Wheaton 738, 874 (U. S. 1824).
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laws of the United States should Federal jurisdiction be granted under
the Constitutional provision of "cases arising under the laws of the
United States." 154 The grant in the Bank's charter giving the right
to sue in Federal courts, if such were actually conferred,155 would admit
an "enormous accession if not an unlimited assumption of jurisdic-
tion." 156 To this the Justice objected.

The argument that this was only a personal action of the Bank
was supported technically by the fact that in the averments was no
statement that the case arose under the laws of the United States.157
The true character of the National Bank then had to be summarized to
buttress the contention that business here was not governmental but
only private.158

"The latter (Bank) is a mere agent or attorney, in some instances;
in others, and especially in the cases now before the Court, it is a
private person, acting on its own account, not clothed with an
official character at all."

None disputed the claim that the United States Bank was a private cor-
poration, yet if it were not protected in its personal business from
prejudiced State laws it would soon have been bankrupt. So this
policy argument of Johnson's was most questionable. His other argu-
ment that no Federal question could be recognized where it was merely
possible that such might arise was comprehensible if a strict theory of
pleading were applied. The plaintiff Bank had alleged that jurisdic-
tion rested on the law of the United States creating the corporation.
Johnson contended that no Federal question could be considered until
the State Auditor's defense was made.159 Even if this view were too
formal at least it was more plausible than the policy contention holding
the Bank a private person.

Meanwhile the State of Georgia was fighting the Second Bank
with as much bitterness and tenacity as Ohio. In 1819 after much

154. Id. at 887, 888.
155. In Bank of the United States v. Deveaux, 5 Cranch 61 (U. S. 1809) Mar-
shall held that the First National Bank could not sue in the Federal Courts for it was
not authorized by its charter to do so. Johnson believed this was precedent for inter-
preting the second charter in the Osborn case. In the first charter the Bank could
"sue and be sued in Courts of record or any other place whatsoever," while in the
Second charter the Bank could sue and be sued "in all State Courts having competent
jurisdiction, and in any Circuit Court of the United States." Marshall held the Second
charter did not expand the State courts' jurisdiction over the first charter grant, so
Johnson felt that if such were the result there could be no expansion of the Federal
Court's jurisdiction which was nothing under the interpretation of the former charter.
This clause, therefore, was merely an enumeration, not an enacting provision granting
the Bank authority. See 9 Wheaton 738, 876-881 (U. S. 1824).
156. Id. at 889.
157. Id. at 900, 901.
158. Id. at 902.
159. Id. at 903.
economic warfare between the State banks and the United States Bank, the Georgia Legislature repealed the law permitting the National Bank 25% damage penalties for the failure of the State banks to redeem their notes in specie. In 1821, the Legislature enacted a statute prohibiting specie payment unless the person redeeming the notes swore that they were not notes procured from the National Bank for the purpose of drawing specie from the State banks.\(^{160}\) The United States Bank sued the Planter's Bank of Georgia to recover on notes which it held. The Planter's Bank pleaded to the jurisdiction stating that the State of Georgia was a stockholder in the bank. The Plaintiff demurred, the Circuit Court judges certified a division of opinion, and the case of Bank of the United States v. Planter's Bank of Georgia was argued with Osborn v. Bank of the United States.

Marshall rested the question of jurisdiction of National Bank suits on the Osborn decision entirely, then proceeded to demonstrate why the sovereign immunity of Georgia under the Eleventh Amendment did not apply to the Defendant.\(^{161}\) Again, since the State was not a party to the record, this immunity was disallowed. In addition the State was a private citizen when it became a partner in a trading company divesting itself of its sovereign character: \(^{162}\)

"It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

The provision of Section eleven of the Judiciary Act of 1789 which denied jurisdiction of promissory note cases brought by the assignee where the suit would not be cognizable if brought by the payee was also held not to apply to the National Bank since the members of the Bank lived in all the States. If applicable, no note debt could be collected, for the Bank would also be a citizen of the same State as the maker, and no Federal suit could be brought where no diversity of citizenship occurred; hence, Section eleven by implication was not to apply to the United States Bank.\(^{163}\) Recovery was then allowed the plaintiff.

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\(^{160}\) Catterall, Second Bank of the United States (1903) 84-89.

\(^{161}\) 9 Wheaton 904-910 (U.S. 1824).

\(^{162}\) Id. at 907.

\(^{163}\) Id. at 908-910.
Johnson took issue with the right to sue a corporation in which the State owned stock. An original suit against a corporation was a suit against each stockholder. The case of Bank of the United States v. Deveaux had held this. Since the original Defendants included the State under the Deveaux rule, none of the Defendants operating as the Planter's Bank of Georgia were suable, else the Eleventh Amendment immunity would be extinguished. The Justice thus felt bound by the Deveaux precedent although without it he admitted the case would not be within the purview of the Eleventh Amendment.

These observations concluded the great Bank cases. In both Ohio and Georgia the decisions were accepted and obeyed. Johnson, in spirit, had supported the National power to create the Bank, but his legal analysis of the questions had forced him to deny jurisdiction where he felt it did not extend and to abide by precedent.

Before measuring the validity of the Justice's attitude toward sovereign immunity, two further cases must be noted. In one, the Governor of Georgia had sold a number of negro slaves which were captured while being illegally imported. Such power to sell was given by a Congressional act and a State statute. Then the Governor petitioned the Federal District Court in Georgia for permission to sell the remainder of the slaves. When a claim was entered for these slaves the controversy of Sundry African Slaves, Governor of Georgia v. Madrazo arose. Simultaneously, Madrazo filed his libel against the Governor who entered a claim for the State. The Chief Justice had little difficulty in denying the libel, but in doing so he deviated from his strict test of requiring the State to be a party on the record before the Eleventh Amendment could apply. Since the Governor in his official capacity was the party on record and because he acted on behalf of the sovereign power, to allow Madrazo's libel would permit a foreign citizen to sue a State which the Eleventh Amendment denied.

Johnson interpreted these facts differently. As the suit was in Admiralty, the problem of sovereign immunity did not exist according

164. Id. at 910-914.
165. 5 Cranch 61, 86-92 (U. S. 1809).
166. Johnson did not hesitate to recommend the overruling of Ex parte Buford, see page 177, supra; so it was unusual that he should refuse to overrule United States v. Deveaux if he actually believed that the ambit of the Eleventh Amendment did not include banks in which a State was a stockholder. Even if the Court would look behind the State bank to determine the stockholders individually to acquire the requisite diversity of citizenship as was done in Bank of the United States v. Deveaux, it might be argued that such a procedure would yield no support to the argument that the State's immunity from suit should also be recognized. Thurston, Government Proprietary Corporations (1935) 21 Va. L. Rev. 351, 375.
167. Bogart, supra note 142, at 331; Catterall, op. cit. supra note 160, at 89.
168. 1 Peters 110 (U. S. 1828).
169. Id. at 123.
170. Id. at 124-135.
to him. Admiralty jurisdiction acted upon the *res subjecta* not upon
the State: \(^{171}\)

"But in the proceedings, *in rem*, the admiralty wants no consent
or concession to enlarge its jurisdiction. All the world are parties
to such a suit, and bound by it, by the common consent of the
world. The interest of a state, or the United States, in the *res
subjecta*, must be affected by such a decision."

As the District Court had control of the res—Negro slaves—Georgia
was bound by the decree which favored Madraza’s claim. The Jus-
tice’s sweeping definition of admiralty jurisdiction which included even
the sovereign powers has not been adopted. Sovereign immunity gen-
erally, has been recognized by the admiralty courts just as by the law
and equity tribunals.\(^{172}\)

In the final controversy over sovereign immunity, Justice Johnson
in *Bank of Kentucky v. Wistar et al.*,\(^ {173}\) accepted Marshall’s reason-
ing and acquiesced in the rule established by the *Planter’s Bank*
decision. When the Bank of Kentucky defended on the grounds that the
State of Kentucky was a stockholder in the Bank, the Justice spoke for
the Court and replied that where Georgia had been both a stockholder
and an incorporator the Supreme Court had denied the plea of im-
immunity under the Eleventh Amendment, *a fortiori* this plea by the
Kentucky Bank must be refused. Wistar was thereby given a judg-
ment requiring specie payment when he demanded his deposit. Justice
Johnson’s reasoning was not flawless. Since the State of Kentucky was
sole proprietor of the Bank’s stock, it would seem that the State could
be an incorporator just as easily as if it were one of several original
stockholders. But the Judge rested on the grounds that the President
and Directors alone were the incorporators since the enacting statute
termed these persons the corporate body, a difficult interpretation to be
followed in substance.\(^ {174}\) Also the particular facts were most dis-
tinguishable from the *Planter’s Bank* case. Johnson could have argued
that where a State owns the entire stock of a corporation it had not
descended to the level of a private shareholder. Rather the sovereign
authority had the sole interest in the Bank exercising control for the
State’s benefit; hence, any judgment against this State agency would
substantially affect the sovereign authority by diminishing its prop-

\(^{171}\) Id. at 133.

\(^{172}\) ROBINSON, ADMIRALTY LAW (1939) 244-248. See also The Western Maid,
257 U.S. 419, 432-433 (1922); The Johnson Lighterage Co., No. 24, 231 Fed. 365, 366
(D. N. J. 1916).

\(^{173}\) 2 Peters 318 (U. S. 1829).

\(^{174}\) Id. at 323. Thurston, *supra* note 166, at 375, 376.
Yet, since this decision by Johnson buttressing the Chief Justice's earlier opinion, no question has been raised to dispute the rule that when a State enters a business enterprise its cloak of sovereign immunity under the Eleventh Amendment is cast off.\footnote{176. Ohio v. Helvering, 292 U. S. 360, 369-370 (1933). Ohio sought to file a bill to enjoin the Commissioner of Internal Revenue from collecting Federal liquor taxes upon the State-operated system retailing liquor through State-owned stores. In denying the injunction, Justice Sutherland relied on the Planter's Bank and Bank of Kentucky cases, stating at 369: "When a state enters the market place seeking customers it divests itself of its quasi sovereignty pro tanto, and takes on the character of a trader, so far, at least, as the taxing power of the Federal government is concerned."} One decision, or rather dictum, on the admiralty power of the Supreme Court characterized Justice Johnson's great passion for confining each court to its own jurisdiction. In Ramsay v. Allegre,\footnote{177. 12 Wheaton 611 (U. S. 1827).} Marshall held that since the record had not displayed the tendering of a note for payment, the Plaintiff, who received the note for repairs performed on Defendant's ship, could not attach the vessel. The District Court had dismissed the libel for lack of jurisdiction, but the Supreme Court majority refused to put the affirmance on this basis. Johnson's concurring opinion\footnote{178. Id. at 640.} blasted this refusal and condemned any extension of the jurisdiction of the admiralty court to such in personam actions:\footnote{179. Johnson distinguished himself on other occasions as the champion of the trial by jury. See Bank of Columbia v. Okely, 4 Wheat. 235 (U. S. 1819).}

"I am fortifying a weak point in the wall of the constitution. Every advance of the admiralty is a victory over the common law; a conquest gained upon the trial by jury. The principles upon which alone this suit could have been maintained, are equally applicable to one half the commercial contracts between citizen and citizen. Once establish the rights here claimed, and it may bring back with it all the Admiralty usurpations of the fifteenth century. In England there exists a controlling power, but here there is none. Congress has, indeed, given a power to issue prohibitions to a District Court, when transcending the limits of the Admiralty jurisdiction. But who is to issue a prohibition to us, if we should ever be affected with a partiality for that jurisdiction.

I, therefore, hold that we are under a peculiar obligation to restrain the Admiralty jurisdiction within its proper limits."
The famous case of *Cherokee Nation v. Georgia* \(^{181}\) came to the Supreme Court in 1831 testing the original jurisdiction authority of the Court. Often considered to be the most serious crisis in the history of the High Court, the issues presented were most delicate—both politically and legally. Since the Federal government had failed to extinguish the land titles of the Indians in Georgia, the Cherokees in 1828 held a convention adopting a Constitution for a permanent government. The United States had always negotiated with the Indian tribes as individual foreign groups. Numerous treaties bound both governments. Georgia was especially discontented, for the Indians now had created virtually a sovereign body within the State's borders. Colonization was precluded; the mining of newly-discovered gold on the Cherokee lands was prohibited. The State, therefore, asserted its sovereignty over the Indian lands despite the protection given to the Cherokees by the National Government's treaty.\(^{182}\)

President Adams faced a serious problem at this period. When Georgia ordered its surveyors onto the Indian land, the Indians imprisoned them. Governor Throop of Georgia ordered a troop of State militia to protect the surveyors and to force the surveying work. This action violated the Indian Treaty of 1802, which forbade surveying and authorized Federal military force to apprehend any trespassers on the Cherokee land. Although Secretary of State Henry Clay appealed for military protection for the Indians, the President felt that the civil process offered a better solution.\(^{183}\) A criminal suit was expected to be prosecuted by the Cherokees in the Federal Court. When Justice Johnson, before whom the case would be presented at the Circuit Court, was told of the anticipated prosecution by the Chief Executive he reassured Adams that he would laugh the parties out of the momentous controversy.\(^{184}\) The Justice's bold confidence soon disappeared. He revealed to the President that a constitutional difficulty arose. If the trespass had occurred in Georgia, certainly Congress could not enact a criminal law prohibiting surveys by the sovereign authority within its borders. Also Alabama claimed the land on which the trespass was committed; so, if true, the trial would have to be in that State which

\(^{181}\) 5 Peters 1 (U. S. 1831).

\(^{182}\) 2 Warren, op. cit. supra note 54, at 189-192.

\(^{183}\) 7 Adams, Memoirs of John Quincy Adams (1875) 219, 220.

\(^{184}\) Id. at 223.
was not within Johnson's Circuit. President Adams wrote that:

"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."

This specific criminal prosecution never materialized. Instead the Cherokees sued for an injunction in the Supreme Court to restrain the State of Georgia and its officers from enforcing State legislation within the Cherokee nation as defined by the Federal Treaties. A supplemental bill was filed to indicate further Georgia's intention to assert criminal jurisdiction over the Indian Land. Popular feeling thus ran high when the Cherokee Nation sought to invoke the original jurisdiction of the High Court, contending it was a foreign nation suing a State.

Marshall denied the injunction in his opinion for the Court. The Cherokee Indians were not a State for no voting representation was allowed in Congress. Also the Commerce Clause of the Constitution expressed the individual character of the tribes for it granted Congress power to regulate commerce with foreign nations, among the several States, "and with the Indian Tribes." Then the Indians were not a foreign nation since they were under the protection of the Federal government, their trade was regulated by the National government, also they could send a non-voting deputy to Congress. Neither a foreign nor domestic state, the Cherokee Nation represented a ward dependent upon its guardian, the United States, for certain protection and regulation while in its internal functions it was free. Since original jurisdiction would lie only for foreign or domestic States under Article III, the Supreme Court had no authority to recognize the bill in equity. In conclusion, the Chief Justice said that his personal belief held the bill not a judicial action but political. No suitable exercise of the ju-

186. Id. at 237.
187. A Cherokee, Corn Tassel, murdered another Indian within the Cherokee Territory. Georgia indicted, prosecuted, and convicted Tassel for this crime. When a writ of error was issued by the Supreme Court for the illegality of the State decision, the Governor refused to obey the writ and the Legislature denounced the Supreme Bench. Threatening to use military force against any Federal interference, the Governor executed Tassel on December 24, 1830. The absolute disregard for the judicial process stirred much bitter argument both pro and con over the question of the legality of Georgia's action. 2 Warren, op. cit. supra note 54, at 192-196.
188. 5 Peters 1, 14-20 (U. S. 1831).
dicial power was possible when a restraint upon the Georgia Legislature was attempted, so the bill was in error on this ground too.\footnote{189} Johnson concurred with the Court's decision.\footnote{190} He considered the various Federal Treaties with the Indians as recognizing no absolute fee in the Tribes but rather only a hunting ground tenure. In addition since the various States claiming the title to the Indian lands had never consented to the creation of a new State out of their Territory none could have been formed else Article IV, Section 3\footnote{181} would have been violated. In reality Johnson viewed the controversy as a conflict between two treaties respecting the same property—Georgia's relation to the Federal government, as a sovereign State, the Cherokee Nation's relation as a co-signer with the National government to the Indian Treaties. This conflict involved political issues which the Chief Executive could better decide. Expediency, therefore, demanded that the Judiciary should not accept this bill.\footnote{192}

In holding that the Cherokees had no title to the lands in question, Justice Johnson reversed an earlier conception which held the Cherokee Nation an independent people with a fee simple in the land over which its sovereignty was exerted.\footnote{193} Justice Thompson's dissent in the Cherokee Nation case, with which Justice Story concurred,\footnote{189} Perhaps Marshall saw the great danger of Georgia's refusal to obey the Supreme Court's mandate. Already having lost much prestige after Corn Tassel's case, the Court could not risk further violations of its orders which revealed its impotence. Georgia left no doubt in the Court's mind that it would refuse any new order by the High Bench because it refused to be represented by counsel. 2 Warren, op. cit. supra note 54, at 191, 192.

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190. 5 Peters 1, 20-31 (U. S. 1831).

191. "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well of the Congress." U. S. Const. Art. IV, § 3.

192. 5 Peters 1, 30 (U. S. 1831). "Courts of justice are properly excluded from all considerations of policy, and therefore are very unfit instruments to control the action of that branch of government (executive); which may often be compelled by the highest considerations of public policy to withhold even the exercise of a positive duty."

"There is then a great deal of good sense in the rule laid down in the Nabob of Arcot's case, to wit, that as between sovereigns, breaches of treaty were not breaches of contracts cognizable in a court of Justice; independent of the general principle that for their political acts states were not amenable to tribunals of justice." Prof. Louis Jaffe accepted these statements of Justice Johnson's "denying in his usual forceful and emphatic manner of the existence of a justifiable issue," to explain by comparison why the Courts should refuse as a matter of policy to accept jurisdictional labor disputes arising entirely under a central parent labor organization which created the disputing affiliates. Jaffe, Inter-Union Disputes in Search of a Forum (1940) 49 Yale L. J. 424, 449.

193. Fletcher v. Peck, 6 Cranch 87, 146-147 (U. S. 1810). Johnson dissented from the Court's decision that Georgia had a fee simple title to certain Yazoo valley land contending that since the Cherokees held this title, Georgia's interest amounted to nothing but a mere possibility of a fee when the United States should purchase the land from the Indians. This purchase had been agreed to by the United States when Georgia ceded this claim to the lands in 1802 to the Federal government. See 2 Warren, op. cit. supra note 54, at 189.
held that the Cherokees were a foreign State; therefore, the bill for an injunction would lie in the Supreme Court. Johnson's earlier reasoning was relied upon by Thompson to support this opinion. Apparently, Justice Johnson shared the fear which his Chief Justice also must have had—that the Supreme Court could not enforce its mandate, hence to protect its prestige jurisdiction should be denied. The strongly Nationalistic statements found in *Ex parte Gilchrist*, *Martin v. Hunter's Lessee*, and *Osborn v. Bank of the United States* did not foretell the *Cherokee Nation* opinion where no dicta defending the Federal Judiciary was presented. In prior opinions, the Justice would support the National government in spirit even if not in his legal holding. Here even the spirit was missing; no censure of Georgia's action was discernible; only his sympathy for the Indians was expressed. The *Cherokee Nation* opinion came, then, as a disappointing climax to the series of nationalistic opinions which preceded this final case.

Generally, in these decisions invoking the Judicial power, the strong judicial sense of Justice Johnson was best disclosed. Where Marshall frequently overrode jurisdictional barriers to establish the power of the Federal government, Johnson generally sacrificed his expressed desires for a strong National government to require a strict adherence of the Federal Judiciary to its defined scope of authority—constitutional and statutory.

*To be Continued*

194. 5 Peters 1, 50-80 (U. S. 1831).
195. Id. at 57.
196. No proof of the political character of these opinions by Marshall and Johnson could be found. Marshall, being feeble in health and seventy-five years old, seriously considered resigning from the Court as he feared further struggle over the Judicial power in its effect upon the individual States. Certainly the States rights men hailed the decision as a singular victory. See 2 Warren, *op. cit.* supra note 54, 209-213. This trend away from a strong Nationalism had started in 1830 with Craig *v. State of Missouri*, 4 Peters 410 (U. S. 1830).
197. See page 179, supra.
198. See page 187 *et seq.*, supra.
199. See page 191, supra.