ANDREW JACKSON AND THE JUDICIARY

IN 1822, protesting a recent attack on the judiciary, a future President of the United States wrote to his nephew, "the constitution is worth nothing and a mere buble [*sic*] except guaranteed to them by an independent and virtuous judiciary."[1] President Jackson is not remembered as a great defender of "an independent and virtuous judiciary" but instead has gained notoriety and fame for the legendary statement, "John Marshall has made his decision; now let him enforce it." Because this statement appears with bothersome regularity in studies of our constitutional past, it seems appropriate to reinvestigate Jackson's views on the place of the judiciary in our governmental system.

Reëxamination of Jackson's attitude toward the judiciary reveals more than the defiance historians have associated with Jackson's conflict with John Marshall during the famous Georgia controversy. Jackson's attitude was ambivalent and to some extent contradictory. He was defiant, but mixed with his defiance were two other significant elements: the belief that the executive was independent of judicial control in certain situations and an attitude of deep-rooted respect for the judicial function in others. The President did not try to resolve his ambivalence, although in retrospect all three components of his attitude—defiance, independence and respect—were based on the shifting constitutional sands of the separation of powers.

Respect for the Marshall court was not a part of the Jacksonian creed. The Jacksonians, as lineal descendants of the Jeffersonians, were vigorous critics of the federal judiciary, and Jackson's election in 1828 was in part a popular repudiation of the institutional aggrandizement of the judicial branch. All Americans revered the Constitution but worship of the document did not presuppose worship of the Supreme Court

[1] Andrew Jackson to Andrew Jackson Donelson, July 5, 1822, *The Correspondence of Andrew Jackson* (Washington, 1926–1935), III, 167 (hereinafter cited as *Correspondence*).

or the Chief Justice, whose nationalism, according to Jackson men, threatened the sovereignty of the states. There is no evidence, however, that the President shared the extreme hostility of many of his lieutenants, and at no time did he cooperate with their proposals for drastic judicial reform.

Before discussing the President's attitude in specific instances it is necessary to mention the rôle which personal feelings played in contributing to an antagonistic environment. Jackson certainly objected to the institutional imbalance resulting from the Court's aggressiveness under John Marshall, but his displeasure was as much personal as institutional. It is a mistake to confuse Jackson's lack of esteem for John Marshall with presidential hostility toward the judiciary.

The famous statement reads, "John Marshall has made his decision . . .", not "The Supreme Court has made its decision. . . ." As a republican, Jackson could be expected to frown upon the Chief Justice as a symbol of centralization, but his republican objections were far outdistanced by his attitude toward Marshall the man. Marshall had offended Jackson in the campaign of 1828 by siding with Clay and Adams. Jackson was personally affronted and believed Marshall had gone beyond the bounds of "non-partisanship". In 1828 Marshall allegedly declared, "should Jackson be elected, I shall look upon the government as virtually dissolved," and stated his intention to vote for the first time in twenty years to contribute to Jackson's defeat. His subsequent denial of this report did little to assuage the mercurial Jackson, for Marshall publicly admitted

> having said in private that though I had not voted since the establishment of the general ticket system and had believed that I should never vote during its continuance, I might probably depart from my resolution in this instance, from the strong sense I felt of the injustice of the charge of corruption against the President and the Secretary of State.[2]

Such statements were not calculated to evoke presidential sympathy. Thus Jackson's personal resentment toward Marshall was compounded with a prejudice against the federal

[2] Albert J. Beveridge, *The Life of John Marshall* (Boston, 1919), I, 463–464.

judiciary among some of his advisers to produce an environment that was, superficially at least, unfriendly to the courts. The personal factor, Marshall's nationalism, and the President's view of the separation of powers and the nature of the Union were mixed together in opposition and accord in the whirlpool of events in the 1830's. The result was not simple hostility but a more complex equation of defiance, independence and respect.

Presidential Defiance: The Georgia Controversy

One of the most explosive problems in John Quincy Adams' bequest to his successor was the Indian question in the South and Southwest. The storm center was in Georgia, where the Governor and legislature exhibited increasing resistance to Adams' efforts to enforce treaties with the Indians. Jackson was known to be sympathetic to the interests of the whites in this region and this was a major factor in his electoral success there in 1828. Emboldened by Jackson's election and offended by the efforts of the Cherokee tribe to establish its own government within the bounds of the state, Georgia passed stringent laws invalidating the Indian enactments and authorizing the division of Cherokee lands. Georgia's action was in apparent conflict with treaties negotiated by the Cherokees and the United States but especially an act of 1802 in which the state had ceded all the lands now comprising Alabama and Mississippi to the United States on the condition that the government extinguish the Indian titles by negotiation as soon as possible.[3] Included in the Act of 1802 was a guarantee that intruders on Indian lands be ousted by the federal government until the land titles were extinguished.

In three instances the Cherokees or persons identified with them engaged the state of Georgia in litigation in the federal courts and in all three cases Georgia, with the tacit approval of the President, ignored the mandates of the Supreme Court.[4]

[3] See Ulrich B. Phillips, "Georgia and State Rights", *Annual Report of the American Historical Association*, II, 34–35, 67–69 (1901), and the *18th Annual Report*, Bureau of Ethnology, pp. 652, 696.

[4] In another important case the Cherokees tried to enjoin the operation of the new state laws but the case was dismissed by the Supreme Court for want of jurisdiction. *Cherokee v. The State of Georgia*, 30 U. S. (5 Pet.) 1.

The first incident concerned an Indian, George Tassels, who was convicted of murder under the laws recently extended throughout the Cherokee territory. On appeal from the decision of the Georgia courts the Supreme Court issued a writ of error which was ignored by Governor Troup, and Tassels was executed. The failure of the President to enforce the Court's writ led John Quincy Adams to observe: "The Constitution, the laws and treaties of the United States are prostrate in the State of Georgia . . . because the Executive of the United States is in league with the State of Georgia. He will not take care that the laws be faithfully executed."[5]

A second incident occurred two years later when one James Graves was tried and convicted of murder in Georgia. Again the state refused to obey an order issued by the Supreme Court to show cause why a writ of error should not issue.

Of greater importance was the trial of two white missionaries to the Cherokees who had violated state law. The incident culminated in the famous case of *Worcester v. Georgia.* In this instance the President not only defied the Supreme Court by refusing to enforce the mandate but coöperated with Georgia by removing Worcester from a postmastership as a reprimand.[6] The Georgia law of December 1830 required licenses and an oath of all whites in Cherokee territory, and when Worcester refused to apply for the license he was convicted in the Georgia courts.

On appeal John Marshall held the Georgia statute unconstitutional because it was in conflict with the Act of 1802 and treaties with the Cherokees. Marshall asserted that "the treaties and laws of the United States contemplate the Indian territory as completely separate from that of the states."[7] Directing a personal blow at Jackson, Marshall pointed out

[5] Charles F. Adams, ed., *The Memoirs of John Quincy Adams* (Philadelphia, 1876), VIII, 262–263.

[6] George R. Gilmer to Colonel John Sanford, April 20, 1831, *Correspondence on the Subject of the Emigration of the Indians,* I, 451. Sen. Doc. No. 512, 23rd Cong., 1st Sess. (1834).

[7] 31 U. S. (6 Pet.) 500, 497, 498.

that Worcester had been sent to Georgia by the President with a commission granted under the laws of the United States to instruct the Indians. He called the decision of the Georgia courts a "violation of the acts which authorize the chief magistrate to exercise this authority."[8] The President again refused to execute the mandate of the Supreme Court, an action which would have required the removal of all Georgia authority, forcibly no doubt, from the Cherokee lands.

On what constitutional grounds did the President base this doctrine of defiance and inaction? In reply to a Senate resolution inquiring why he had not enforced the Act of 1802, the President gave a partial answer. Jackson said that, though the purpose of the statute was to remove white intruders from Indian lands, "The authority of the President . . . is not imperative." The President believed it was lawful to use military force to remove intruders only in cases where military force was absolutely necessary. In this instance, he reasoned, it was unnecessary and would violate the rights of Georgia, for the statute was applied only so long as Georgia did not "extend her laws throughout her limits." In a rare and uncharacteristic case of broad statutory construction the President concluded that because Georgia had extended her laws throughout the state the statute was no longer applicable within Georgia's boundaries.[9]

Secondly, Jackson did not accept the Court's holding that the Cherokees had rights independent of state authority. Under the Constitution Congress possessed the power "to regulate commerce with Indian tribes", but only dangerous construction,

[8] *Ibid.*, pp. 557, 562.

[9] "Special Message to Congress", February 22, 1831. James D. Richardson, comp., *Messages and Papers of the Presidents* (Washington, 1899), II, 536–537 (hereinafter cited Richardson). Jackson authorized the Secretary of War to write the following in reply to protests of the American Board of Commissioners of Foreign Missions: "I am instructed by him to inform you that having on mature consideration satisfied himself that the Legislatures of the respective States have power to extend their laws over all persons living within their boundaries, and that when thus extended, the various Acts of Congress . . . become inoperative he has not authority to interfere." Lewis Cass to William Reed, November 14, 1831. Bernard E. Steiner, "Jackson and the Missionaries", *American Historical Review*, XXIX, 722 (July 1924).

the President contended, could bestow on Congress the power to interfere with a state's jurisdiction over Indian lands within its limits; for the clause was designed to give "the General Government complete control over the trade and intercourse of those Indians only who were not within any state." To give the Chief Executive the power to interfere with the relations between a state and the Indians within the state would, from Jackson's point of view, "place in his hands a power to make war upon the rights of the States and the liberty of the country—a power which should be placed in the hands of no individual."[10]

The President said that if he were to execute the writs of the Court or its mandate in favor of Worcester, he would be going beyond his own power and compounding the erroneous decision of the Supreme Court with his own unconstitutional action.

Finally, the President denied that he was empowered to enforce the law against a state. In a letter to the Secretary of War he wrote, "No feature in the Federal Constitution is more prominent, than that the general powers conferred on congress, can only be enforced, and executed upon the people of the Union."[11] He closed his argument by saying he could not enforce a decision which violated the constitutional provision, "no new state shall be formed or erected within the jurisdiction of any other state . . . without the consent of the legislatures of the States as well as of the Congress."

These are Jackson's arguments, and when one recalls his opposition to the Nullifiers in South Carolina less than a year afterward, the constitutional reasoning falls far short of a full explanation for his defiance of the Supreme Court. Besides a vague urge to defend the rights of the states against an aggressive Court, it seems that the President, during the Georgia controversy, was singularly unclear about his obligations to the Constitution.[12] Since Jackson's constitutional argument was

[10] Richardson, II, 536–547. See also James A. Hamilton, *Reminiscences* (New York, 1869), p. 134.

[11] *Correspondence*, IV, 220.

[12] John Spencer Bassett, *The Life of Andrew Jackson* (New York, 1911), II, 690–691.

largely feeble rationalization, it is necessary to turn elsewhere to discover the underlying reasons for his defiance and inaction.[13]

Jackson's resistance to the Court was certainly conditioned by a personal distaste for John Marshall, but this was not all. Among other reasons was Jackson's lack of sympathy for the Indians and his apprehension lest any concession damage the core of his Indian policy—removal across the Mississippi. Long experience in fighting and negotiating with the Indians convinced Jackson years earlier that removal was the only sound policy. He informed Congress in his First Annual Message that the Indians had already been told "that their attempt to establish an independent government would not be countenanced by the Executive . . . [and had been advised] to emigrate beyond the Mississippi or submit to the laws of the states."[14] Also, as an Indian fighter turned president he could not easily forget "the prowling lion of the forest who has done us so much injury."[15] In short, he had respect for Indian rights so long as they were exercised on the western bank of the Mississippi.

[13] Several authorities contend that Jackson was not empowered to enforce the *Worcester* decision since an effort to give the decision legislative sanction failed of passage in the House; for example, in Charles Warren's *The Supreme Court in United States History* (Boston, 1922, II, 224), where the questionable point is made that a mandate was never issued by the Supreme Court. Warren contends it is "clearly untrue" that Jackson defied the court decree. The crucial fact is, of course, that Jackson did not want to enforce this particular decision and, had he wanted to, his ingenuity would have found a way. Commentators like Warren perhaps forget that the Act of 1802 was still good law despite Jackson's interpretation of it. He might just as well have read the statute in favor of the executive instead of the states. Also he was not beyond using his autonomous power to execute the laws faithfully during the Nullification crisis in South Carolina. No doubt if Jackson had believed it possible and desirable to enforce the law against Georgia he would have done so.

[14] December 8, 1829, Richardson, II, 458.

[15] Jackson to Secretary Crawford, June 13(?), 1816, *Correspondence*, II, 249. It should be remembered that Jackson witnessed the ghastly results of the notorious Fort Mims massacre and this memory did not leave him. In 1812 he wrote to Willie Blount, "my heart bleeds within me on the recept [*sic*] of the news of the horrid cruelty and murder committed by a party of Creeks, on our innocent wives and little babes." June 4, 1812, *ibid.*, I, 225–226. It is difficult to see how the Cherokees expected to evoke presidential sympathy by engaging William Wirt and John Sergeant as counsel. Wirt was presidential nominee for the Anti-Masonic party and Sergeant was vice-presidential nominee as well as chief counsel for the Bank of the United States.

But there were more urgent reasons for the avoidance of a clash with Georgia, particularly when, as Jackson knew, armed force would be necessary to carry out the mandate. Paradoxically, a President who is noted for his quick temper and rashness often attained his goal by being temperate and avoiding an open struggle. This factor has too often been overlooked in past commentary on the Georgia controversy. Jackson's forbearance was rooted partly in his aversion to the use of military force.[16] Also, the President was in the midst of his fight with the Bank of the United States and was soon to stand for reëlection. Certainly he did not forget that Georgia, largely in reaction to Adams' inflexible Indian policy, had repudiated Adams and strongly supported Jackson in 1828. A proper Indian policy was important for holding Georgia, Tennessee, Alabama and Mississippi within the party during a crucial election year.[17] Finally, Jackson needed Georgia's support against the South Carolina Nullifiers. If Jackson did not consider this the primary justification for his defiance of the Supreme Court, history should. While the President saw the Indian problem as a temporary one, the nullification issue presented a basic national crisis. He and his advisers were not unaware that the Nullifiers counted on him to chastise Georgia and thus draw that state into their ranks. As one Jacksonian wrote:

> They [South Carolinians] hope to see Georgia embroiled with the General Government, in which they may join and make a common cause . . . [a permanent injunction by the Court] will be disregarded by Georgia, and any attempt to enforce it will be promptly resisted. This is precisely the State of Things which our Nullifiers are anxious to see brought about. And should this happen, I can see no other result but civil war and the dismemberment of the Union. . . . One thing is certain, General Jackson will not lend his official aid to enforce the injunction. This may avert disaster for awhile. . . .[18]

[16] See for example, *Correspondence on the Subject of the Indians*, IV, 811, *supra*, footnote 6.

[17] Thomas B. Govan, "John M. Berrien and the Administration of Andrew Jackson", *Journal of Southern History*, V, 447 (November 1939).

[18] William Smith to D. E. Huger, February 16, 1831, Poinsett Papers, Historical Society of Pennsylvania.

Of utmost importance as a cause of Jackson's defiance of the Supreme Court was his awareness that enforcement—had he wanted to act—would be difficult and bloody. Here it seems is the significance of Jackson's refusal to enforce Marshall's decision. Whether or not the famous statement is apochryphal is a moot question, although it does not seem out of character and expressed the President's feelings.[19] But what does the sentence mean? It certainly suggests defiance of Marshall, but it means more. Drawing on a declaration that is similar and expands the cryptic pronouncement, one is led to believe Jackson meant not only that the Chief Justice and the Supreme Court were institutionally incapable of enforcing the mandate but that all of the national government would be unable to coerce Georgia:

> The decision of the supreme court has fell still born and they find it cannot coerce Georgia to yield to its mandate . . . if orders were issued tomorrow one regiment of militia could not be got to march to save them from destruction and this the opposition know, and if a colision was to take place between them and the Georgians, the arm of the government is not sufficiently strong to preserve them from destruction. . . .[20]

Jackson might have expanded his original statement to read: "John Marshall has made his decision and he can try to enforce it. I cannot. Even if the Executive wished to enforce the mandate it is not powerful enough to oppose the tide of feeling in the South."

[19] The statement can be traced to Horace Greeley's *American Conflict: A History of the Great Rebellion in the United States of America, 1860–65* (Hartford, 1864), I, 106. Greeley said, "I am indebted for this fact to the late Governor George N. Briggs, of Massachusetts, who was in Washington as a member of Congress when the decision was rendered." The quotation as Greeley transcribed it is as follows: "Well: John Marshall has made his decision: *now let him enforce it.*" See Edward S. Corwin, *The President: Office and Powers, 1787–1948* (New York and London, 1948), p. 409, whose note contains an apparent *non sequitur* which should be corrected by consulting Marquis James, *Andrew Jackson: Portrait of a President* (Indianapolis, 1937), pp. 304–305, and Warren, *op. cit.*, II, 219.

[20] Jackson to John Coffee, April 7, 1832, *Correspondence*, IV, 430. See also Peter A. Brannon, "Removal of the Indians from Alabama", *Alabama Historical Quarterly*, XII, 96, 100 (1950).

Added to the note of personal defiance of Marshall and the inference that the Court was powerless without the coöperation of the executive is the President's recognition of political reality. In sum, Jackson's defiance of the Court was compounded of constitutional argument, personal and political considerations, and an awareness of what was politically and militarily feasible. Considering the prospect of active resistance in Georgia and the explosive situation in South Carolina at the time, one is left to wonder whether Jackson should not be praised for prudence instead of being condemned for inaction.

Presidential Independence: The Bank Veto

In 1832 President Jackson vetoed the bill rechartering the United States Bank despite a clear expression of Congressional will favoring the Bank and the Supreme Court's recognition of the Bank's constitutionality in *McCulloch v. Maryland* some years before. In the Veto Message the following statement appears:

> Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it. . . . It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.[21]

Two key ideas appeared in this passage and the later refinements of the veto by administration leaders in the ensuing Senate debate: (1) the President has an unqualified right to use the veto power to block "unconstitutional" legislation despite

[21] "Veto Message", July 10, 1832, Richardson, II, 582. Note also Jefferson's declaration, "My construction of the Constitution . . . is that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially where it is to act ultimately and without appeal." Jefferson to Judge Spencer Roane, September 6, 1819. A. A. Lipscomb and A. E. Bergh, eds., *The Writings of Thomas Jefferson* (Washington, 1907), XV, 214. Another Jeffersonian precept appearing in Jackson's veto is summed up in Jefferson's words, "Each generation is independent of the one preceding, as that was of all which had gone before." Jefferson to Samuel Kercheval, July 12, 1816, *ibid.*, p. 42. Both suggest a balance between the three branches and an independence which must be used in the service of new social forces. Both, of course, reject a sacrosanct position for the judiciary.

judicial precedents affirming the constitutionality of similar statutes; (2) the President is not required to enforce "unconstitutional" statutes.

Jackson clearly believed he possessed an independent right to judge the validity of legislation even if the judgment were contrary to judicial precedent. In reply to friends of the Bank who contended that *McCulloch v. Maryland* settled the question of the Bank's constitutionality, Jackson declared: "Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the states can be considered as well settled."[22]

Drawing upon his power as representative of the whole people and his oath to support the Constitution, Jackson said in effect that if the President believed the statute in question was a "danger to our liberty", and the people and the states agreed with the President, then the Chief Executive's opinion was superior to mere judicial precedent in judging questions of constitutionality. He averred as well that the instant case dealt with new facts and a new situation which could not be governed by *McCulloch v. Maryland*, and therefore "ought not control the coordinate authorities of the Government." This assertion of independence was based on Jackson's belief that it was the autonomous duty of the executive to pass on constitutional questions in preparing his veto:

> Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, not as it is understood by others . . . the opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.[23]

But was the President obligated to enforce statutes which he considered to be unconstitutional? The controversy and confusion over this question arose partly from the opening words of the passage cited above—"Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it". The President's opponents

[22] Richardson, II, 581.

[23] *Ibid.*, p. 582.

seized on this as a flagrant extension of executive power and an effort to destroy the judiciary. The point at issue was serious enough to lead Taney to write the following passage in a letter twenty-six years later. He defended the President:

> He [Jackson] was speaking of his rights and his duty, when acting as part of the legislative power and not of his right or duty as an executive officer. For when a bill is presented to him and he is to decide whether, by his approval, it shall become law or not, his power or duty is as purely legislative as that of a member of Congress, when he is called on to vote for or against a bill. . . . But General Jackson never expressed a doubt as to the duty and the obligation upon him in his executive character to carry into execution any act of Congress regularly passed, whatever his opinion might be of the constitutional question.[24]

Taney's interpretation after the fact seems acceptable. But Martin Van Buren inadvertently introduced conflicting evidence when he wrote years later that Jackson "contented himself with frequent and unreserved concurrence in the views which had been taken of the subject, on the floor of the Senate by Judge White."[25]

An examination of White's interpretation of the veto, however, shows it to be in direct contradiction of Taney:

> If either of these coordinate departments is . . . called upon to perform an official act, and conscientiously believe that performance of that act would be in violation of the Constitution, they are not bound to perform it, but, on the contrary, are as much at liberty to decline acting, as if no such decision had been made. . . . They ought to examine the extent of their constitutional powers for themselves; and when they have had access to all sources of information within their reach, and given to everything its due weight, if they are satisfied that the constitution has not given a power to do the act required, I insist they ought to refrain from doing it.[26]

[24] Roger B. Taney to Martin Van Buren, June 20, 1860, "Taney's Letters to Van Buren in 1860", *Maryland Historical Magazine*, X, 23 (1915).

[25] Martin Van Buren, *An Inquiry into the Origin and Course of Political Parties in the United States* (New York, 1867), p. 329.

[26] *Congressional Debates*, VIII, 1243–1244 (1833).

It is impossible to reconcile these two conflicting statements, for there is no extant evidence of Jackson's view written in his own hand. Since Taney assisted in the preparation of the Bank veto perhaps his word should be given more weight than Judge White's. It seems safe to conclude, however, that Jackson, Taney, Van Buren and White were one and all confused about the matter.[27] If Jackson agreed with White's speech in the Senate, it was agreement with an extreme claim of executive independence; but Taney, who was closer to the President, denied in later years that this was the proper interpretation. This enigma notwithstanding, there remains the generous extension of executive independence in Jackson's vigorous assertion that he, in judging constitutionality, while considering a veto, was not bound by the precedents of the Supreme Court.

Presidential Independence: Kendall v. United States

Of equal importance in illustrating a broad doctrine of the executive independence were the arguments put forward by two of Jackson's advisers, Amos Kendall and Benjamin F. Butler, in *Kendall v. United States*, *United States v. Kendall*, and *Kendall v. Stokes*.[28] Although *Kendall v. United States* was decided against Kendall, the Postmaster General, the doctrine expressed by representatives of the President before the Court typifies the Jacksonian view of presidential independence. There is no positive evidence of the President's opinion on the outcome of these famous cases, but it is believed his attitude can be established by inference.

The parties involved in *United States v. Kendall* were the Postmaster General and Stockton and Stokes, a mail-carrying firm. Kendall succeeded William Barry as Postmaster General in 1835 and upon reviewing the departmental accounts disallowed a claim awarded to Stockton and Stokes by his predecessor. Kendall considered the claim excessive, in some respects

[27] Carl B. Swisher, *Roger B. Taney* (New York, 1935), pp. 196–197.

[28] 37 U. S. (12 Pet.) 1181 (1838); 26 *Fed. Cas.* 62 (1837); 44 U. S. (3 How.) 506 (1845). In the present analysis *United States v. Kendall* will be relied upon, for it was more immediate to Jackson's presidency and the arguments are more precise.

fraudulent, and refused to pay the firm.[29] Stockton and Stokes turned to Congress and after a brief investigation Congress passed a resolution directing the Solicitor of the Treasury to review the claim, a review which ended in an order for payment. Once again Kendall refused to honor the claim and Stockton and Stokes appealed to the President. Jackson replied that since Congress was then in session, "and the best expounder of the intent and meaning of their own law, I think it right and proper, under existing circumstances, to refer it to that body for their decision."[30]

The second appeal to Congress resulted in a Senate resolution affirming the carriers' claim for the full amount and Kendall countered once again by arguing that only the Senate had ordered payment, not both Houses of Congress. In desperation Stockton and Stokes turned to the Circuit Court for a writ of mandamus. In June 1837, three months after Jackson's departure from office, the Circuit Court held that a mandamus should issue to force Kendall to pay the award, a decision which the Supreme Court affirmed in January 1838.[31] The Court declared that an act of Congress, empowering the Solicitor of the Treasury to pass on the claim and the subsequent resolution of the Senate, imposed a ministerial duty on the Postmaster General who had no choice but to pay the award.

Two documents express the administration viewpoint: a letter to Chief Judge Cranch written by Kendall explaining his refusal to obey the mandamus and an opinion written by Attorney General Benjamin F. Butler at Kendall's request. Both Kendall and Butler denied the right of the federal courts to issue a writ forcing an executive officer to perform any act, and both based their argument on a strict interpretation of the separation of powers.

[29] For the situation in the Post Office Department see Leonard D. White, *The Jacksonians* (New York, 1954), pp. 274–279.

[30] Jackson to L. W. Stockton, December 1836, 26 *Fed. Cas.* 704. "Special Message to Congress", February 15, 1837, Richardson, III, 280. Kendall reported to the President his refusal to pay and asked him to request Congress to pass an explanatory act, "which, if it confirms the opinion of the solicitor, I shall implicitly obey." Kendall to Jackson, December 27, 1836, 26 *Fed. Cas.* 704.

[31] 26 *Fed. Cas.* 705; 37 U. S. (12 Pet.) 1214.

Kendall's letter to Judge Cranch contained an unqualified denial of the power of any judicial officer to control the acts of the executive.[32] Kendall reasoned that under the separation of powers the President alone has the power to execute the laws. If the mandamus issued by the Circuit Court was valid, Kendall argued, "the effective and controlling Executive of this great republic will not be the Chief Magistrate elected by the people, but three judges of the Circuit Court for the District of Columbia."[33]

In sum, the proper function of the judiciary was to expound the law, the executive's to enforce it. Kendall assured the Court that he did not consider an executive officer above accountability, for each officer was responsible to the President and ultimately to Congress.

In his exegesis the Postmaster specifically denied to the judiciary the power to issue a writ for the execution of a ministerial duty:

> No such distinction is to be found in the Constitution. It is the duty of the President to "take care that the laws be faithfully executed"—*special* laws as well as *general;* but no such duty is enjoined upon the judiciary. . . . The officer whose particular province it is to execute the law is under the immediate eye of the President, holds office at his will, and may be removed if he refuses. . . . The Executive power is ONE—*one* in principle—*one* in object. Its object is *the execution of the laws.* It is not susceptible of subdivisions and nice distinctions as to its duties and responsibilities. To execute the laws, and *all the laws,* are its duties.[34]

To yield to the writ, Kendall declared, would violate his oath to discharge the duties of his office faithfully and to support the Constitution.[35]

At the Postmaster's request Attorney General Butler prepared

[32] *Letter of the Postmaster General . . . In Reference to the Power of the Circuit Court for the District of Columbia to Control Executive Officers in the Performance of Their Official Duties* (Washington, 1837).

[33] *Ibid.*, p. 7.

[34] *Ibid.*, p. 5. Italics in original.

[35] *Ibid.*, pp. 1, 12. Kendall allowed room for a tactical withdrawal by declaring that even if a mandate could issue to enforce a ministerial act—a premise he did not for a moment accept—his action on the claim had not been ministerial.

an opinion supporting his fellow cabinet officer. He agreed with Kendall that the mandamus should not issue, for it involved a crucial surrender of executive independence. No law, Butler wrote, "can confer on any court in the United States the power to supervise and control the action of an executive office of the United States in any official matter, properly appertaining to the Executive Department in which he is employed."[36] Butler emphasized that the President could resist actively a writ of mandamus, a fact which exhibited "in the clearest light, the incapacity of any court to issue such a writ."[37]

It is difficult to determine Jackson's attitude toward these extreme claims of executive independence. Butler and Kendall were the President's constitutional advisers and Jackson did declare at one time that he would, and his cabinet officers should, defer to the Attorney General in questions of this nature.[38] The case arose at the end of the President's second term, however, and he either did not have a sustained interest in the problem or was busy with other affairs of state. The only written record touching on Kendall's difficulty with the courts was a comment Jackson made in defense of Kendall when Stockton's search for a settlement led to a private suit for damages against Kendall. Jackson was in retirement at the Hermitage and wrote to Kendall:

[36] This opinion does not appear in the *Opinions of the Attorney General.* See 26 *Fed. Cas.* 724–729 and *Opinions of the Attorney General,* I, 1010–1027, for Butler's earlier advice to Kendall assuring him that he had the power and obligation not to pay the claim.

[37] 26 *Fed. Cas.* 730–731. When arguing the case before the Supreme Court he retreated somewhat by admitting that a federal court could be invested with "jurisdiction to issue writs of mandamus to any ministerial officer of the United States to compel the performance of his duty," and included the President in this category. Nevertheless, Butler defined "ministerial" very narrowly and claimed the statute in question offered discretion to the Postmaster General and thus his actions were not controllable by the writ of mandamus. 37 U. S. (12 Pet.) 1209, 1186, 1187.

[38] Concerning the Attorney General's opinion on the withdrawal of deposits from the United States Bank, Jackson declared that the Attorney General's view "ought to govern the heads of departments as it did the President." Jackson to Martin Van Buren, September 15, 1833, *Correspondence,* V, 187. This is not to suggest that Jackson placed his own constitutional views in an inferior position. He respected his Attorneys General and they, in turn, were sensitive and sympathetic.

> I have just received your letter of the 19th instant, and it rends my heart with sorrow to read that you who so ably and faithfully watched over the interests of the government as Postmaster Genl. should be crushed and deprived of your personal liberty, by such a cruel and unjust judgement against you. . . . This precedent must lead to make the President and all the heads of Depts., subject to be harassed by suits, by every villain who wished to put his hand into the public crib, and is prevented by them. . . .[39]

Unfortunately Jackson made no direct comment about the other decisions, *Kendall v. United States* or *United States v. Kendall.* Congress was the proper board of appeal as "the best expounder of the interests and meaning of [its] own law."[40]

Although the President's attitude can be established only by inference,[41] three facts point to his tacit acknowledgement of an ample interpretation of presidential independence. Jackson was emphatically opposed to the private suit against Kendall and saw the dangers to the executive in such a suit; he stated a specific preference for a settlement in Congress, not the courts; and, despite a thorough search, there is no evidence of presidential disagreement with the reasoning of his constitutional advisers. Their mildest argument placed the President beyond the arm of the judiciary when Congress had not made its intentions crystal clear. In its most extreme form the interpretation empowered the executive to resist a writ even in the face of a clear statement of Congressional intent. Both arguments presumed an ample area of presidential freedom in determining

[39] The judgment was reversed by the Supreme Court. 44 U. S. (3 How.) 512.

[40] See Jackson to Kendall, September 29, 1842, *Correspondence,* VI, 170, and Jackson to Kendall, May 15, 1841, *ibid.,* p. 113. Jackson importuned Justice Catron to have Kendall's case accepted quickly by the Supreme Court (*ibid.,* p. 174), and suggested to one congressman that a bill be passed for Kendall's relief. "Should the head of a department be made personally responsible for resisting a fraudulent claim, what becomes of the safety of the revenue, this precedent is a very dangerous one, to remain unrevoked." Jackson to Cave Johnson, November 25, 1842, *ibid.,* p. 179.

[41] Jackson's successor believed the mandamus was a violation of the separation of powers and hinted that Jackson agreed with him when he advised Kendall to resist the writ and added that he "considered the disposition made by his predecessor as final." See Van Buren's "Second Annual Message", December 3, 1838, Richardson, III, 503–505.

how the laws were to be executed and a guarantee against judicial "legislation". Submission to a writ of mandamus, these advisers contended, would do injury to the separation of powers, confound the proper rôle of the judiciary, and place an irresponsible superior above the highest representative of the people.[42] The theory fits the Jacksonian pattern, and the most cautious generalization is that the President's advisers, in their arguments before the courts, expressed a Jacksonian view of executive independence, and probably the view of the President himself.

The President and the Courts: The President Sustains the Judiciary

Defiance and independence only partially characterize Jackson's attitude toward the judiciary. Hidden behind the traditional description of Jackson, the antagonist of the judiciary, is evidence of deep-rooted respect and support for the judicial function. It can be argued that the courts were stronger in 1837 than in 1828 partly because of Jackson's defense of the federal courts during the Nullification controversy and his apparent unwillingness to succumb to proposals for far-reaching judicial "reform".[43]

Before investigating these aspects of the President's relations with the judiciary mention should be made of an unusual theory of executive accountability which arose during Jackson's presidency. In three separate instances Jackson or his advisers claimed that the President was personally liable to private

[42] *Letter of the Postmaster General*, p. 6.

[43] It can be argued that Jackson's appointments to the Supreme Court strengthened the judiciary by replacing Marshall nationalists with Taney moderates. The President wanted to be assured that potential appointees reflected his interpretation of the Constitution and he was willing to consider a candidate only "if his principles on the Constitution are sound, and well fixed." He was aware of the importance of life tenure as a vehicle for transporting his beliefs beyond his years in the presidential office. Jackson to Van Buren, October 27, 1834, in Samuel G. Heiskell, *Andrew Jackson and Early Tennessee History* (Nashville, 1920), III, 507. Jackson relieved some of the pressure on the judiciary by appointing men sensitive to contemporary social trends. None of Marshall's decisions were overturned but many were made more palatable to a new generation. See Charles G. Haines, *The Role of the Supreme Court, 1789–1835* (Berkeley, 1944), and Warren, *The Supreme Court in United States History*, II, 273–274.

suits while in office—a doctrine that ceased to be good law (if ever it was) after *Mississippi v. Johnson.*

This argument was used on two different occasions by counsel for Kendall in *Kendall v. United States.* Benjamin Butler told the court:

> Where the President has controlled and directed the action of the inferior executive officer, they [counsel for Stokes, defendant in error] contend that the inferior is not responsible; and, as the President's liability to private action has been doubted, there will then, it is said, be no responsibility. The answer is, that whenever the President takes an active part in an illegal action, to the injury of an individual, though it be done by the hand of his subordinate, he will be responsible in a civil suit, along with that subordinate: and that the latter cannot be excused from doing an unlawful act, by pleading the command of his official superior.[44]

There is no evidence in Jackson's correspondence that he subscribed to this principle of accountability but it is mentioned in one of his major messages to the Senate. Since Jackson reviewed and helped to write all of his important messages, he certainly knew that the following statement appeared, although he may not have realized its implications.[45] Reviewing the ways in which the President could be held accountable Jackson said in his Protest to the Senate, "He is also liable to private action of any party who may have been injured by his illegal mandates or instructions in the same manner and to the same extent as the humblest functionary."[46]

One can hardly believe, knowing Jackson's character and his views of executive independence, that he would have submitted to a private suit for any reason while in office. But there is a trace of respect for the judicial function and the need for executive accountability which deserves mention.

The President's attitude toward the federal judiciary during the Nullification controversy is more conclusive and enduring.

[44] 37 U. S. (12 Pet.) 1211. Butler said the remedy should be used sparingly! "Opinion of Attorney General Butler" in *Letter of the Postmaster General,* p. 26.

[45] Butler helped Jackson with this message. Jackson to Kendall, April 1834, *Correspondence,* V, 258.

[46] "Protest to the Senate", April 10, 1834, Richardson, III, 71.

One major tenet of the Nullifiers' creed was the freedom of state power from the judgments of the federal courts. The radical doctrine of the Nullifiers was not accepted by Jackson. Although the President did not hesitate to assert his own freedom from court precedent under the separation of powers and appeared to believe in a large degree of administrative independence, it did not follow in Jackson's reasoning that a state could ignore the federal judiciary and the supremacy of national law. If South Carolina objected to the tariff acts of 1828 and 1832, according to Jackson, her proper recourse was to the courts, not nullification. He condemned this heresy. South Carolina, the President wrote, "has not only not appealed in her own name to those tribunals under the Constitution and laws of the United States but has endeavored to frustrate their proper action on her citizens by drawing cognizance of cases under the revenue laws to her tribunals."[47]

The President declared that there were two avenues of appeal from an unconstitutional law: a constitutional amendment or a suit in the federal courts. Unilateral action by one state to nullify a law—the right which South Carolina believed was hers—would destroy the supremacy of national law that the President, the Congress and the Supreme Court were duty bound to defend. It is of the utmost significance that Jackson, reputedly an opponent of the Judiciary Act of 1789, affirmed the usefulness and validity of this statute in his Special Message to Congress on Nullification and his Proclamation to the people of South Carolina:

> The Constitution declares that the judicial powers of the United States extend to cases arising under the laws of the United States and that such laws, the Constitution, and treaties shall be paramount to the State constitutions and laws. The judiciary act prescribes the mode by which the case may be brought before a court of the United States by appeal when a State tribunal shall decide against this provision.[48]

[47] "Special Message to Congress", January 16, 1833, Richardson, II, 623.

[48] "Proclamation", December 10, 1832, Richardson, II, 647. The Administration newspaper, *The Globe*, was outspoken in its defense of the Judiciary Act and the supremacy of the federal courts. See *The Washington Globe*, December 4, 1832.

By defending the federal courts against the destructive doctrine inherent in nullification Jackson put his stamp of approval on the usefulness of judicial review in a federal system and showed his respect for the judiciary. His enemies attacked him for his behavior during the Georgia controversy and their opinions have been passed down as the correct view of the President's attitude toward the judiciary. Nevertheless, his greatest antagonists, Story and Marshall, recognized the President's service to the judiciary. As Story wrote to his wife, "since the last proclamation [on nullification] and message, the Chief Justice and myself have become his warmest supporters."[49] In the final analysis, Jackson's defense of the Judiciary Act of 1789—the cornerstone of the federal judicial power—was possibly more important than his record of defiance and independence. While affirming the rôle of the judiciary in maintaining the integrity of the Union, Jackson rose above narrow partisanship and dissolved some of the odium associated with his defiance of the Supreme Court in the Georgia controversy. As we have seen, in fact, the two events were closely related in Jackson's mind.

It should be recalled that many of Jackson's followers were children of the Jeffersonian era and consequently hostile to the judiciary. Jackson's alliance with the courts in his struggle with the Nullifiers is all the more impressive because of this. The decade preceding Jackson's first term burgeoned with court decisions—*McCulloch v. Maryland*, *Ogden v. Saunders*, *Cohens v. Virginia*, and *Craig v. Missouri*, to name only a few—which aroused the fear of the South and the West and stored up resentment which threatened to explode in a burst of legislation

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Section 25 of the Judiciary Act of 1789 was the linchpin of the federal judicial system and the guarantor of the supremacy clause of the Constitution. It established clear channels of appeal from state court decisions when a state tribunal ruled against the constitutionality of a federal law or treaty, ruled in favor of a state law in conflict with the Constitution, federal law, or treaty, or ruled against a constitutional right or privilege. It guaranteed that national courts, not state tribunals, be the final interpreters of national law. See Justice Story's opinion in *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816).

[49] Joseph Story to Mrs. Story, January 27, 1833. William W. Story, *Life and Letters of Joseph Story* (Boston, 1851), II, 119.

designed to cripple the federal judiciary. In the early years of Jackson's presidency frequent attempts were made in Congress to weaken the judiciary, although they seemed to taper off after Marshall's death and the influx of Jackson appointees into the federal courts.

The attacks usually centered on the 25th Section of the Judiciary Act of 1789. In January 1831, for example, the Committee on the Judiciary reported favorably on a bill to repeal the 25th Section but it was defeated on the floor of the Senate soon afterward. As was to be expected, most of the attacks originated with the delegations from the South and West. They did not hesitate to propose repeal of the entire Judiciary Act of 1789, a constitutional amendment limiting the judges to seven years' tenure, unanimity in the Supreme Court on questions of constitutionality, and an outright prohibition against decisions touching on the rights of the states.[50]

The President certainly felt the force of demands for "reform", for important members of his inner circle of advisers were among the most vigorous critics of the judiciary. The atmosphere of hostility was doubtless charged by the attitude of Martin Van Buren, Amos Kendall, Louis McLane and Andrew Stevenson, all close presidential advisers. Van Buren attacked the Supreme Court while a member of the Senate in 1826 and while John Marshall lived feared his control over the Court. Like many Jackson men he followed Jeffersonian doctrine; when Jefferson told him of his proposal to limit judicial tenure to four or six years, Van Buren recalled: "Fresh from the Bar, and to some extent at least under the influence of professional prejudices, I remember to have thought his views extremely radical, but have lived to subscribe to their general correctness."[51]

Thomas Hart Benton in the Senate and Andrew Stevenson in the House, both legislative lieutenants of the President, deplored Marshall's invasion of state sovereignty. Stevenson

[50] *House Report*, #43, 21st Cong., 2nd Sess. (1831). See Haines, *op. cit.*, pp. 593–596; Joseph Story to Mrs. Story, January 28, 1831, Story, *op. cit.*, II, 43, 44; William Pope to Andrew Jackson, December 25, 1829, Jackson Papers, Library of Congress; and Warren, *op. cit.*, II, 198–201.

[51] John C. Fitzpatrick, *Autobiography of Martin Van Buren* (Washington, 1918), pp. 183–184, and Warren, *op. cit.*, II, 130.

was Judge Spencer Roane's protégé, Marshall's most celebrated opponent in the states, and carried his prejudice against the Court with him to Congress.[52] Amos Kendall's hostility toward the judiciary dated from his experience as an editor in Kentucky and the rise of the New Court party there. At one time he proposed a special court to which each state was to appoint a judge to handle conflicts between the states and the federal government.[53] Louis McLane, another presidential confidant, proposed to Van Buren that judicial tenure be limited and the President be given power to remove judges on petition of two thirds of the state legislatures. And a Tennessee politician, in one of many similar letters, asked Jackson to propose to Congress a change in the Judiciary Act which would restrict appeals from the state to the federal courts.[54]

There is abundant evidence that Jackson was subjected to arguments against the judiciary by influential presidential advisers and political leaders in the states. Some men close to the President, such as Edward Livingston, Roger B. Taney and James Buchanan, did not take part in the attack. James Buchanan, in fact, wrote the minority report of the Judiciary Committee which had reported favorably on repeal of the Judiciary Act of 1789. But the unfavorable climate of opinion and the commitment of many of his advisers to judicial reform suggest that if the President had used his popularity and power to support anti-judicial legislation, "reform" would have carried the day. The fact is that Jackson did not recommend proposals to weaken the judiciary in his messages to Congress, nor is there evidence of hostility in his correspondence. On the crucial issue of repeal of the Judiciary Act of 1789 he was persistently silent.

[52] Francis Wayland, *Andrew Stevenson* (Philadelphia, 1949), p. 27; Warren, *op. cit.*, II, 185.

[53] William Stickney, *Autobiography of Amos Kendall* (Boston, 1872), pp. 206, 253.

[54] Louis McLane to Van Buren, July 20, 1830, Van Buren Papers, Library of Congress. "The judiciary ought not to have the power to impose an *absolute* control over the other departments of the government. I would much rather trust the Senate with Constitutional questions than the Judges." Richard Riker to Van Buren, April 14, 1828, *ibid.*; Worden Pope to Jackson, December 25, 1829, Jackson Papers.

Conclusion

What were the results of eight years of defiance, independence and respect? The President brought with him to office party leaders who were hostile to the federal judiciary and demanded reforms that included the recall of judges and repeal of the Judiciary Act of 1789. The President did not put his weight behind these efforts. For more significant and complex reasons than dislike of John Marshall and loyalty to states' rights, Jackson defied the Supreme Court during the Georgia controversy, argued for the President's independence of the Supreme Court on constitutional questions in his Bank veto and inferentially in his attitude toward the Kendall episode. On the other hand, defiance and independence are only the most obvious parts of an involved picture. The President also reaffirmed the value of judicial review during the Nullification controversy when the integrity of the Union was at stake and indirectly strengthened the federal judiciary by appointing men who were more in tune with their times than their aging predecessors. Jackson did claim a coördinate and independent standing for the President but it did not follow that the states were independent of the federal judiciary. These observations indicate that caution should be exercised when quoting that highly quotable remark, "John Marshall has made his decision; now let him enforce it." This statement has been accepted generally as the touchstone of Jackson's attitude toward the judiciary. One can argue, conversely, that this was the exception to a rule of guarded but genuine respect for the judiciary based on Jackson's constitutional sense and his own past. Closer scrutiny suggests that a happy but probably apocryphal statement should not be accepted as conclusive evidence of Jackson's disposition toward the judiciary.

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