AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 6: Secession, Civil War and Reconstruction – Constitutional Authority and Judicial Power

**Mississippi v. Johnson, 71 U.S. 475** (1867)

*The state of Mississippi sought an injunction from the Supreme Court prohibiting President Andrew Johnson from implementing the Reconstruction Acts on the grounds that legislatively mandated military rule in the South violated state sovereignty and individual rights. Attorney General Henry Stanbery (1803–1881) objected to the motion seeking the injunction. He claimed the president could not be made the subject of judicial proceedings. Furthermore, Stanbery insisted, courts could not issue injunctions to presidents which compelled them to execute or refrain from executing a law. Members of the Johnson Administration thought the Reconstruction Acts were unconstitutional, but they did not welcome this form of judicial intervention. With Congress considering impeachment and the Reconstruction laws not yet declared unconstitutional, President Johnson could not afford to have his hands tied by the courts over whether and how congressional mandates were implemented.*

*The justices unanimously ruled that the Supreme Court could not issue an injunction to the President requiring him to refrain from implementing an unconstitutional law. The Supreme Court in* Marbury v. Madison *(1803) had ruled that courts were empowered to order executive officials to deliver a judicial commission. Chief Justice Salmon Chase’s opinion in* Mississippi v. Johnson *distinguished* Marbury v. Madison, *a case in which Chief Justice John Marshall had ruled that courts were empowered to order executive officials to deliver a judicial commission, by claiming that, in* Marbury, *“nothing was left to discretion.” The Court could not issue an injunction in* Mississippi v. Johnson *because the duty to faithfully execute the law was political and discretionary. Such presidential duties could not be reviewed by courts. There was no legal duty owed to any particular individual to be enforced in court, and thus no judicial case to be heard.*

HENRY STANBERY, Attorney General, contra [arguing on behalf of President Johnson].

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The allegation is, that he is about to execute certain laws passed by Congress; that he considers it his duty to execute those laws; but that this court is a better judge of his duty as President than the President himself; and that when he seeks to execute a law, and to avoid impeachment and denouncement as unfaithful to his duty as Executive, this court is to interfere and tell him what his duty is in the premises, and compel him to perform it.

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It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President. There is only one court or quasi court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal but one that sits in another chamber of this Capitol. There he can be called and tried and punished, but not here while he is President; and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the government, then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people.

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Now let us suppose the case to go so far as it must go in order to give the relief that is claimed; what sort of a spectacle have we? One great department of this government has arraigned another, and the executive department of the government, represented by the President, brought before the judicial department—for what purpose? To be punished criminally; for if he stands out and makes no apology to the court, and does not purge himself of the contempt in failing to obey its orders, the court is bound to put him in jail or to fine him; ordinarily to put him in jail, and, if he still persists, to keep him in jail without any remedy. . . .

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But although counsel, in their bill, have said that the President have vetoed these acts of Congress as unconstitutional, I must say, in defense of the President, this, that when the President did that he did everything he intended to do in opposition to these laws. From the moment they were passed over his veto there was but one duty in his estimation resting upon him, and that was faithfully to carry out and execute these laws. He has instructed me to say that in making this objection, it is not for the purpose of escaping from any responsibility either to perform or to refuse to perform.

ROBERT J. WALKER[[1]](#footnote-1), in reply [arguing on behalf of the State of Mississippi]:

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The Attorney-General has said that if this court, in the performance of its duty, should proceed under its oath of office to defend the Constitution of the United States from violation, even by the hands of the President, the President could not obey its order, and that there would be brought on a direct and fearful conflict between the President and this great tribunal.

But who has contended more strongly and with more ability than this very President of the United States, in various veto messages, for the final character of the decisions of the Supreme Court of the United States in all cases involving a construction of its Constitution? Who has urged, from time to time, with more ability and force than this President the great doctrine that all the departments of this government are sworn to support the Constitution of the United States, and that this great tribunal, this arbiter, was created by the Constitution to avoid just such a result as the Attorney-General has referred to; was created for the peaceful and final and ultimate decision of all such questions as this? What! The President of the United States not obey the mandate of this court? If he does not, he disobeys the mandate of the Constitution.

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If there is anything that is definitely settled for three-fourths of a century by repeated and manifest decisions of this court, the opinions of the framers of the Constitution, and the great statesmen of the day, it is that this is the tribunal and the only tribunal created by the Constitution whose decision is final and conclusive upon the interpretation of the Constitution. . . .

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The Attorney-General has shown a picture of the calamities which would follow, if the President of the United States should disobey the mandate of this court. Let us look at the calamities that might follow, on the other hand, if this court declines to exercise the power which I think is granted by the Constitution, and permits these military laws to go into effect. What then? According to the President’s own opinion, as expressed in his veto messages, the Constitution of the United States is, by the Reconstruction Acts, subverted and overthrown, and a military despotism is erected upon its ruins. Ten States are to be expelled from the Union; ten millions of people are to be deprived of all the benefits of the Constitution; deprived of the right of trial by jury. These ten States are cut up into five military districts; people are to be tried outside of their States for offences unknown and undefined, merely at the will of a military officer. . . .

CHIEF JUSTICE CHASE delivered the opinion of the Court.

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The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

The case of Marbury v. Madison, *Secretary of State*, furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the Secretary of State. It was held that the performance of this duty might be enforced by mandamus issuing from a court having jurisdiction.

[N]othing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus.

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as “an absurd and excessive extravagance.”

It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.

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The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

 . . . [W]e are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.

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The motion for leave to file the bill is, therefore, denied.

1. . Former U.S. Senator and Secretary of the Treasury. [↑](#footnote-ref-1)