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

## Mississippi v. Johnson

71 U.S. (4 Wall.) 475, 18 L.Ed. 437 (1867).

After the Civil War, Congress passed a series of statutes called the Reconstruction Acts. In essence, these imposed martial law on the states of the former Confederacy, disfranchised many ex-Confederates, and established a lengthy procedure through which these states could be readmitted to the Union—a Union, so Lincoln had consistently claimed, they had never left. Officials of Mississippi filed suit in the Supreme Court, invoking its original jurisdiction to hear cases to which a state is a party, asking the justices to enjoin President Andrew Johnson from enforcing two of these statutes.

The Chief Justice [**CHASE**] delivered the opinion of the Court. . . .

The single point which requires consideration is this: Can the President be restrained 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 [1803] 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.

So, in the case of Kendall, Postmaster–General v. Stockton & Stokes [1838] an act of Congress had directed the Postmaster–General to credit Stockton & Stokes with such sums as the Solicitor of the Treasury should find due to them; and that officer refused to credit them with certain sums, so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced.

In each of these cases nothing 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.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it.

Had it been supposed at the bar that this court would, in any case, interpose, by injunction, to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

Occasions have not been wanting. . . .

It will hardly be contended that Congress [the courts?] can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

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 wonder of an attempt by this court to arrest proceedings in that court?

These questions answer themselves. . . .

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a State.

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

*Denied.*

## Editors' Notes

(1) Within a few days, Georgia's officials tried a different tack. They sued under the Court's original jurisdiction for an injunction against the Secretary of War, forbidding him to enforce the Reconstruction Acts. The Court dismissed that suit: "[T]he rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property . . . is presented by the bill, in a judicial form, for the judgment of the court." Georgia v. Stanton (1867).

(2) The timing in these cases—the question of WHEN to interpret—was critical. *Mississippi* was argued in April and *Georgia* in May of 1867. Ex parte McCardle (1867; reprinted below, p. ____), in which a private citizen who had been sentenced to death by a military court challenged the validity of that section of the Reconstruction Acts imposing martial law, had been argued in March. While *McCardle* was in progress and just before *Mississippi* and *Georgia* were argued, Congress, fearing the justices would invalidate the statute, removed the Court's appellate jurisdiction under which it was hearing *McCardle*. Furthermore, Congress was also warring against the President; indeed, he and the ex–Confederates were Congress' main targets, not the justices. The House had recently impeached President Johnson and his trial was scheduled to begin soon in the Senate. Thus there was no doubt that the Radical Republicans were firmly in control of Congress, determined to curb the presidency, and even more determined to maintain martial law in the South. The justices, as in *McCardle,* undoubtedly thought it wiser to avoid unnecessary conflict with such a Congress.

(3) For general discussions of constitutional interpretation during Reconstruction see: Michael Les Benedict, *A Compromise of Principle* (New York: Norton, 1974); Charles Fairman, *Reconstruction and Reunion, 1864–1888* (New York: Macmillan, 1971); Harold M. Hyman, *A More Perfect Union* (New York: Knopf, 1973); and Stanley I. Kutler, *Judicial Power and Reconstruction Politics* (Chicago: University of Chicago Press, 1968).