

DECISIONS OF THE COURT:

The Supreme Court and Reconstruction

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As we enter a new age according to Newt, it may be instructive to look back to another era of "Radical Republican" dominance over a weakened executive. The years after the Civil War even carry the traditional label of Radical Reconstruction, taking half of this title from the Republicans who dominated Congress briefly in the late 1860s. With the Congressional Republicans of that era approaching veto-proof status, certain of their opponents attempted to force the Supreme Court to curb alleged radical excesses. The focus of the next few minutes will be on those years, specifically the actions and reactions of The Supreme Court, as it came to play an important role during those crucial years.

Although the Court effort ultimately proved futile, while it continued, the attempt provides a fascinating look at the arguments and reasoning of the parties to the litigation. Central to the cases under consideration are the Military Reconstruction Acts of 1867. These acts provided the framework for the rehabilitation of the 'rebel' areas. Spearheaded by Thaddeus Stevens, Roscoe Conkling, and George Boutwell, the first measure passed March 2, 1867. The act "to Provide for the more efficient Government of the Rebel States" divided ten Southern states into military districts and authorized the President to assign a military commander for each district. The military commanders then had authority to organize military courts to replace or supplement civil courts. Section five of the act established general procedures for the readmission of the States into the Union. Each state had to draft a constitution, written by an elected convention. The new constitutions were then subject to Congressional

approval and the subsequent state legislatures were required to ratify the Fourteenth Amendment. The act defined eligible voters for this purpose, as male citizens of twenty-one years "of whatever race, color, or previous condition" excepting those disfranchised by Congress for their wartime activities. When it immediately became apparent that the "provisional" state governments would not take action, Congress passed a supplemental act March 23.

The supplemental bill established, in detail, procedures for readmission. It gave the district commanders authority to register voters and supervise elections. Also included was a lengthy oath required of all persons to be registered. This oath effectively removed from the electorate virtually all the pre-war Southern leadership.

President Johnson's vigorous vetoes were immediately overridden. He then appointed the military commanders who quickly began registering citizens, pursuant to the Reconstruction Acts. Moving with great swiftness, the existing government of the state of Mississippi on April 5, 1867 sought leave in the Supreme Court to file a bill to achieve a permanent injunction against the President of the United States to restrain him from executing the two acts of Congress, of March 2 and 23, the Reconstruction Acts. Thus began a series of attempts to use the Court to thwart the Congressional Radical's plan of Reconstruction.

Chief among the lawyers for Mississippi, as he would be in the subsequent cases below considered, was William Lewis Sharkey. The aged former Mississippi Chief Justice attempted to file a strongly worded brief that at length traced Mississippi political history as a state in the United States and declared:

that forever after (Mississippi's union with the United States) it was impossible for her people, or for the State in its corporate capacity, to dissolve that connection with the other states, and that any attempt to do so by secession or otherwise was a nullity; (Mississippi) now solemnly asserted that her connection with the Federal government was not in anywise thereby destroyed or impaired; (and charged) that the Congress of the United States cannot constitutionally expel her from the Union, and that any attempt which practically does so is a nullity.

The brief continued, alleging that the Reconstruction Acts "annihilate the state and its government" and also subjected civil rule to military authority, reversing traditional roles. It condemned the military commander of each district, contending that the Reconstruction Acts gave him such powers that he "assumes the right to control the whole of the domestic concerns of the state." Sharkey concluded with the assertion that since President Johnson had vetoed the acts, his appointment of military commanders was a mere ministerial function (against his better judgment) and therefore subject to judicial restraint. Attorney General Henry Stanbery immediately objected to the acceptance of Mississippi's petition.

Chief Justice Salmon Chase ruled that since objection had been made the only matter to be considered by the Supreme Court was the question of leave to file the brief with the Court. Assisted by the wartime Unionist Robert J. Walker and a former Confederate Senator Augustus H. Garland, Sharkey orally presented the Mississippi case. He spent much time, sounding very much like the 1974 Watergate special prosecutor, arguing that the President was not above the law and indeed was subject to the Court.

Sharkey additionally cited the precise wording of the brief which sought to enjoin "Andrew Johnson, citizen of Tennessee and President of the United States." He sought to restrain an individual, who simply happened to be also the President, from doing certain things. The record of the trial of Aaron Burr was discussed, as well as two state cases in which Ohio and Rhode Island had held their governors accountable as individuals. Sharkey concluded that under the same principle, the President should be treated as any other individual when he was acting in opposition to the Federal Constitution.

The Mississippi lawyer simply wished the Court to prevent the President from executing the Reconstruction Acts. His brief was a masterful attempt to extract, from precedent law, a foundation upon which the Court could construct an injunction against the Chief Executive. Reference to the Burr trial really had no direct relationship to the 1867 litigation, but was part of the attempt to find some way of holding the President accountable to the Court.

Attorney General Stanbery's rebuttal reached great rhetorical heights before settling into a legal brief. Stanbery appeared to become quite carried away in his presentation. "I deny that there is a particle less dignity belonging to the office of President than to the office of King of Great Britain or of any other potentate on the face of the earth." From such a lofty, though seemingly irrelevant plain, Stanbery argued that the office placed the President above any court. Only the Congress through impeachment had the power to bring a President to account. Stanbery pictured the spectacle of the President rotting in jail for contempt of court. After delving into English precedents, the Attorney General declared the suit not fit to be brought before the Court.

R. J. Walker countered with a dramatic forecast of great catastrophe if the military commanders were allowed to exist. Again the Burr case was used in an attempt to justify the Mississippi position. Finally Walker declared that "whoever shall resist that [the] mandate of the Court by force will be guilty of treason."

Apparently the Court was unimpressed, for only three days later, April 15, the Chief Justice delivered the Court's unanimous opinion denying the motion for leave to file the bill. In his written decision, Chase quickly narrowed his scope to a specific question "Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?" The Chief Justice rejected the contention that execution of the law in question was a ministerial

function, one carried out without exercise of judgment or discretion by the executive. Instead, Chase declared the appointment of commanders and their subsequent supervision "purely executive and political." The Court, exercising its traditional distaste for things "political", refused to involve itself in the matter.

Of great importance in Chase's opinion was the total lack of precedent for such a judicial action as Mississippi requested. The "precedents" discovered by Sharkey were found to be inadequate. It was the first time an incumbent President had been named as an individual party in a suit in any United States' court. Furthermore, the Court had no power to enforce an injunction against the Chief Executive. The decision of the full Court was unanimous. Even the Justices who opposed the Reconstruction Acts, Stephen Field, Samuel Nelson, Nathan Clifford, Robert Gier, and James Wayne regarded *Mississippi v. Johnson* an improper method of curtailing the Radicals. To further clarify the Court's position, the Court included a declaration that regardless of whether the President was described in a bill as President or simply as a state citizen, the Court had no power to restrain him by injunction "from carrying into effect an act of Congress alleged to be unconstitutional."

Not to be defeated by one case, Georgia joined Mississippi and filed a new petition the very day the decision was delivered in *Mississippi v. Johnson*. This bill named Secretary of War Edwin Stanton, General of the Army U.S. Grant, and Major General John Pope, commander of the third military district, and sought to restrain them from carrying into execution the

Reconstruction Acts. The Court with Stanbery's consent accepted the case and heard arguments almost immediately.

The Georgia petition demanded specific restraints upon the defendants:

From issuing any order, or doing, or permitting any act or thing within or concerning the State of Georgia, which was or might be directed or required of them, or any of them, by or under the two acts of Congress.

From causing to be made any registration within the State, as specified and prescribed in the last of the aforesaid acts.

From administering, or causing to be administered within the State, the oath or affirmation prescribed in said act.

From holding, or causing to be held within the State, any such election, or elections, or causing to be made any return of any such election for the purpose of ascertaining the result of the same according to said act.

From holding, or causing to be held within the State, any such convention as is prescribed therein.

If the Court accepted any of these demands, Radical Reconstruction was dead. The brief further maintained that the State owned real estate (Capitol building, etc.) exceeding \$5,000,000 and that execution of the acts would deprive the State of the possession and enjoyment of that property. However, the property claim was included only to show consequences resulting from the threatened "destruction" of the State.



The Attorney General's argument against the Georgia bill centered around the political nature of the questions involved. Not only was the status of Georgia as a state a political question, but a premature political question. "It involves, therefore, a political question which may never arise." He then cited the five specific requests for restraint and proceeded to dismiss each, declaring that the suit was an attempt to prevent, through the courts, a political election. Furthermore, since both the registration and election were voluntary matters,

The people that the State of Georgia comes here to protect, can protect themselves against all this mischief by not going to the election, because the mischief is the election of a government that is going to replace the existing government.

Stanbery continued his predictions, declaring that even if a new constitution was framed, it would have to be ratified by the people. "If the people ratify it, it will be because they like it. It is left to them to do it or not." Even then if a dispute arose, it would be for the Congress to decide the rightful state government, not the courts.

The Georgia lawyers argued that a bill *quia timet* was quite proper. While granting that the fear of harm must be a well grounded one, Georgia declared that the combined threat from the President and the military force of the country was indeed a substantial menace. As representatives of the existing state government, the attorneys condemned the

Reconstruction Acts as "a direct attack upon the constitution and fundamental law of the State."

Quickly dispensing with the legal arguments, Georgia's champions soon reached the heart of their objections to the Reconstruction Acts.

It [the Acts] violently thrusts into the constituent body, as members thereof, a multitude of individuals-- negroes-- not entitled by the fundamental law of Georgia to exercise political powers. The State is to be Africanized.

Following this open declaration of the actual reason for the suit, the litigants waited the decision of the Court.

Justice Nelson read the ruling May 16, 1867. The Court accepted Stanbery's distinction between judicial and political activity. Nelson's lengthy opinion removed the Court from consideration of political matters. "The rights in danger...must be rights of persons or property, not merely political rights...." Nelson left the distinct impression that had the case been presented so as to claim that the execution of the Reconstruction Acts would result in loss of property, the Court's decision would have been reversed. However, an immediate attempt to amend the suits to emphasize property rights failed. The Court presented a near unanimous front on such a distinction. Chief Justice Chase merely noted his disagreement with the reasoning involved, not the points of the decision.

By year's end, the issue of the validity of the Reconstruction Acts was again being raised from a different angle. The arrest by military

authorities of William H. McCardle, a Mississippi newspaper editor, provided the impetus for a prolonged court battle involving much more than the celebrated Reconstruction Acts. McCardle had been arrested and held for trial before a military commission under the Reconstruction Acts for publishing inflammatory and libelous articles and for generally opposing Reconstruction. McCardle filed for a writ of *habeas corpus* to the Circuit Court in November 1867. Finding his petition denied, appeal was made to the Supreme Court and McCardle was released pending the outcome of the appeal. On February 3, 1868, the Court ruled it had jurisdiction and would hear the case.

McCardle's appeal was based on the Habeas Corpus Act of 1867, an amendment to the Judiciary Act of 1789. The 1867 amendment had been intended to aid Reconstruction. It had extended to Federal judges the power to grant writs of *habeas corpus* "in all cases" where a person was held in violation of the Constitution, a treaty, or a law of the United States. The 1789 act had limited such power of Federal judges to Federal cases. After the 1867 amendment, however, the Federal courts could grant writs to persons held by state officials.

The Congress moved quickly, after the February acceptance of jurisdiction, to deny such jurisdiction by repeal of the 1867 amendment. However, arguments before the Court began March 2, prior to the Congressional action. Three days after arguments began, the Chief Justice left the Court to preside over the Senate impeachment trial of President Johnson. This complicated an already confused situation even

further. The absence of the Chief Justice could force postponement of a McCardle decision, but Congress chose not to wait. James Wilson of Iowa, March 12, introduced legislation in the House of Representatives adding to a routine bill an amendment repealing the 1867 Habeas Corpus Act. With the Chief Justice absent, and Congressional action in progress, the Court elected to delay a decision on McCardle. Finally, with little actual debate, on March 27, Congress passed, over Johnson's vigorous veto, the repeal bill.

The next term, (December 1868) the Court heard new arguments as to the effect of the repealing legislation. William Sharkey was back again and argued forcefully that the Court's power came from the Constitution, not the Congress. He urged the Court to exercise its co-equal status and pass judgement on the merits of the McCardle case. He further contended that since the case had been fully argued prior to the final congressional action, the Court was obligated to render a decision. The completion of arguments, Sharkey maintained, had placed the case in the hands of the Court, beyond the reach of Congress. Senator Lyman Trumbull of Illinois, government counsel, urged the case be dropped. "It can make no difference at what point...the jurisdiction ceases. After it has ceased, no judicial act can be performed."

In April 1869, Chief Justice Chase announced dismissal of the case for want of jurisdiction. Chase began by citing the Constitution (Article III, Section 2) which provided the Supreme Court appellate jurisdiction "with such exceptions and under such regulations as Congress shall make."

Therefore since Congress had withdrawn jurisdiction, the Court had to dismiss the case.

In the words of the opinion:

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given in express words.

However, the Chief Justice forcefully noted, in his closing paragraph that the jurisdiction had only been removed in cases arising from the Habeas Corpus Act of 1867, and did not effect any previous exercise of jurisdiction. Within six months, the Court had affirmed its authority to issue writs.

Edward Yeager, another Mississippi editor held in military custody, filed for a writ of *habeas corpus*. Yeager's attorneys brought their case before the Supreme Court under the Judiciary Act of 1789, arguing precisely Chase's final point in *McCardle*. Yeager was granted a Supreme Court hearing. In his opinion accepting jurisdiction, the Chief Justice engaged a lengthy discussion of the 1789 act, the 1867 amendment, and its repeal. His conclusion was that the Supreme Court did, indeed, have appellate *habeas corpus* jurisdiction and that the net result of the 1867 activity had in no way effected jurisdiction as granted by the Judiciary Act of 1789. Therefore, the Court was acting properly in accepting jurisdiction in Yeager's case.

The Court's acceptance of jurisdiction prompted yet another round of Republican protest in Congress, most notably from Senator Charles Drake of Missouri. Congressional activity was cut off, however, when the government and Yeager's lawyers reached an out of court settlement. With the settlement, of course, the Court dropped consideration of the case.

While in all its actions during the first years of Reconstruction the Court showed its desire to forestall or prevent conflict with the Congress, this desire was tempered by the Court's regard for the law. Despite long use of the above cases, except Yeager, as evidence to prove the weakness of the Court, the Court's position appears sound. While the Court avoided the broader Constitutional issues, it judged the cases by law, not whim. Clearly, the Supreme Court has discretion to accept or reject cases and to limit the scope of accepted litigation. This the Court did to its ultimate advantage. However, even *McCardle* was decided strictly on a cautious interpretation of the law. The numerous critics of the Court's supposed weakness during this period often tend to minimize the tremendous power of the 'Radical' dominated Congress. Simply maintaining the integrity of the Court was no small task.

Finally, in 1869, the Chief Justice did discuss the constitutional status of the Southern states. Chase noted the Congressional power to guarantee "republican government" to the states, and acknowledged Congressional

power to define "republican government." Therefore, the Chief Justice found authority for a Congressional 'reconstruction' of the South to achieve 'republican' state governments. Chase's opinion was in perfect agreement with the earlier cases. The 1869 ruling, additionally, reaffirmed the Court's long-standing refusal to become involved with 'political' questions.

Reconstruction was overwhelmingly a "political" question. The greatest political question of the day concerned the return of the former rebel areas to "their proper relation" with the rest of the nation. Attempting to force an abnormal situation into the 'normal' mold of judicial proceedings would have created an impossible situation, potentially a structure changing one. To its credit, the Chase led Court managed to retain its integrity. The 1870s Court would develop into an even stronger institution than its pre-war counterpart. It is unrealistic to assume that the Court could have prevented Reconstruction.

These cases have long been used to prove the Court's acquiescence in Reconstruction. However, the Court did not "cave-in." The picture that emerges from a reading of the cases reveals a Court conscious of the limits of its power during this troubled period, yet remaining on legally sound footing when faced with potentially explosive issues.

## TABLE OF CASES

Ex parte McCardle 6 Wallace 318 (1867); 7 Wallace 506 (1869).

Ex parte Yeager 8 Wallace 85 (1869).

State of Georgia v. Edwin M. Stanton, Ulysses S. Grant, and John Pope 6 Wallace 50 (1868).

Texas v. White 7 Wallace 700 (1869).

The State of Mississippi v. Johnson, President 4 Wallace 475 (1867).