Statement of the case.

THE STATE OF MISSISSIPPI *v.* JOHNSON, PRESIDENT.

1. The President of the United States cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional, nor will a bill having such a purpose be allowed to be filed.
2. It makes no difference whether such incumbent of the Presidential office be described in the bill as President or simply as a citizen of a State.

THIS was a motion made by Messrs. *Sharkey* and *R. J. Walker*, on behalf of the State of Mississippi, for leave to file a bill in the name of the State praying this court perpetually to enjoin and restrain Andrew Johnson, a citizen of the State of Tennessee and *President of the United States*, and his officers and agents appointed for that purpose, and especially E. O. C. Ord, assigned as military commander of the district where the State of Mississippi is, from executing or in any manner carrying out two acts of Congress named in the bill, one "An act for the more efficient government of the rebel States," passed March 2d, 1867, notwithstanding the President's veto of it as unconstitutional, and the other an act supplementary to it, passed in the same way March 23d, 1867; acts commonly called the Reconstruction Acts.

The former of these acts, reciting that no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established, divided the States named into five military districts, and made it the duty of the President to assign to each one an officer of the army, and to detail a sufficient military force to enable him to perform his duties and enforce his authority within his district. It made it the duty of this officer to protect all persons in their rights, to suppress insurrection, disorder, violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, either through the local civil tribunals or through military

commissions, which the act authorized. It provided, further, that on the formation of new constitutions and certain conditions which the act prescribed, the States respectively should be declared entitled to representation in Congress and the preceding part of the act become inoperative; and that until they were so admitted any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede it.

The second of the two acts related chiefly to the registration of voters who were to form the new constitutions of the States in question.

The bill set out the political history of Mississippi so far as related to its having become one of the United States; and "that forever after 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;" and she "now solemnly asserted that her connection with the Federal government was not in anywise thereby destroyed or impaired;" and she averred 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 bill then went on:

"The acts in question annihilate the State and its government, by assuming for Congress the power to control, modify, and even abolish its government—in short, to exert sovereign power over it—and the utter destruction of the State must be the consequence of their execution. They also violate a well-known salutary principle in governments, the observance of which can alone preserve them, by making the civil power subordinate to the military power, and thus establish a military rule over the States enumerated in the act, and make a precedent by which the government of the United States may be converted into a military despotism, in which every man may be deprived of his goods, lands, liberty, and life, by the breath

of a military commander, or the sentence of the military commission or tribunal, without the benefit of trial by jury, and without the observance of any of those requirements and guarantees by which the Constitution and laws so plainly protect and guard the rights of the citizen. And the more effectually to accomplish this purpose the said acts divide the ten Southern States into five military districts, and make it the duty of the President to assign an officer to the command of each district, and to place a sufficient force under him, whose will is to be the law and his soldiers the power that executes it. It is declared to be his duty to protect all persons in their rights of person and property; to suppress insurrections, disorder, and violence; and to punish, or cause to be punished, all disturbers of the peace and criminals; and he may organize military commissions and tribunals to try offenders when he may think proper. But, by what rule or law is he to judge of the rights of person or property? By what rule or law is he to arrest, try, and punish criminals? By what rule or law is he to judge whether they have committed crimes? The answer to these questions is plain,—by his own will; for, though he may adopt the State authorities as his instruments if he will, yet he may reject them if he will. A scope of power so broad, so comprehensive, was never before vested in a military commander in any government which guards the rights of its citizens or subjects by law. It embraces necessarily all those subjects over which the States reserved the power to legislate for themselves, as essential to their existence as States, including the domestic relations, all the rights of property, real and personal; the rights of personal security and personal liberty; and assumes the right to control the whole of the domestic concerns of the State. These acts also provide that the governments now existing in the Southern States are but provisional governments, subject to the paramount authority of Congress, which may at any time abolish, modify, control, or supersede them."

It then charged that, from information and belief, the said Andrew Johnson, President, in violation of the Constitution, and in violation of the sacred rights of the States, would proceed, notwithstanding his vetoes, and as a *mere ministerial duty*, to the execution of said acts, as though they

were the law of the land, which the vetoes prove he would not do if he had any discretion, or that in doing so he performed anything more than a mere ministerial duty; and that with the view to the execution of said acts he had assigned General E. O. C. Ord to the command of the States of Mississippi and Arkansas.

Upon an intimation made a few days before by Mr. Sharkey, of his desire to file this bill, the Attorney-General objected to it *in limine*, as containing matter not fit to be received. The Chief Justice then stated that while as a general thing a motion to file a bill was granted as of course, yet if it was suggested that the bill contained scandalous or impertinent matter, or was in other respects improper to be received, the court would either examine the bill or refer it to a master for examination. The only matter, therefore, which would now be considered was the question of leave to file the bill.

Messrs. Sharkey, R. J. Walker, and Garland, by briefs filed:

Can the President of the United States be made a party defendant to this bill? There is no precedent directly to the point. Yet it is believed the question has been virtually settled. It is important, in this connection, to mark the distinction between what are called political powers and such as are ministerial. In the exercise of discretionary or political powers, courts will not undertake to control the action of officers; but not so with regard to ministerial duties, in the exercise of which no one is above the law, however exalted his position. Fortunately, we have neither a king nor an emperor, nor a parliament, who are omnipotent or above the Constitution.

Our Constitution declares that "the judicial power shall extend to *all* cases in law and equity arising under this Constitution," &c. And thus the judiciary are made the guardians and protectors of the Constitution.

The President is but the creature of the Constitution, one of the agencies created by it to carry it into practical opera-

tion; and it would be strange if he should be permitted to exert his agency in violating that instrument, and then claim exemption from the process of the court whose duty it is to guard it against abuses, because he is the chief executive officer of the government, and especially when he is exerting a mere ministerial duty; for that is all he does exert in executing an act of Congress; he has no discretion in the matter. The Constitution makes no distinction as to parties. The case is the criterion, no matter who is plaintiff or who defendant; and if the President be exempt from the process of the law, he is above the law. On the trial of Aaron Burr, an application was made for a *subpœnâ duces tecum*, to be directed to the President of the United States; and the application was resisted on the ground that the President was not amenable to the process of the court, and could not be drawn from the discharge of his duties at the seat of government, and made to attend the court sitting at Richmond. But Chief Justice Marshall, who tried the case, drew the distinction between the President and the King of England, and held that all officers in this country were subordinate to the law, and must obey its mandate, and, therefore, sustained the application. There, the *subpœnâ duces tecum* was only a command to the President to do a particular thing. Here, the injunction asked for is but a command to him not to do a particular thing under a void authority. The principle is the same in the two cases, as well as the means of coercing obedience; and the reasoning of Chief Justice Marshall reaches and settles the question now before this court. The Constitution provides, indeed, that all officers may be impeached; but this does not exonerate them from personal liability for acts done under color of office, the President as well as other officers.

If the President be exempt, why not all his cabinet officers? They all constitute but parts of the executive department of the government. Yet in *Marbury* v. *Madison, Secretary of State*,* it was decided that the acts of the Secre-

* 1 Cranch, 137.

tary of State were the acts of the President, and that the secretary might be subjected to the process of *mandamus*. Why would it not just as well lie against the President? It would be strange to hold that the subordinate is liable and may be sued for acts which are the acts of his principal, and yet that the principal is not liable and cannot be subjected to the process of law. Even more recently, in the cases of Mr. Kendall, Postmaster-General, and of Mr. Guthrie, Secretary of the Treasury, this court has decided that officers of the executive department are liable to the process of the court.* The case of *Ellis* v. *Earl Gray*,† is a leading case in England, and has been approved in this court. It was there decided that the Lords of the Treasury, constituting the prominent department of the executive government, might be enjoined by the judicial department. In that country, the King is supposed to be above the law, and is the fountain of justice; yet his immediate subordinate departments are not above it. In this country the President is not above the law; it is above him, and hence he must be subject to its restraints.

In *The State of Ohio ex rel.* v. *Chase, Governor*,‡ the objection was raised, that a *mandamus* would not lie against the governor. But, in delivering the opinion, Chief Justice Bartley said:

"Under our system of government, no officer is placed above the restraining authority of the law, which is truly said to be universal in its behests, all paying it homage, the least as feeling its care, and the greatest as not being exempt from its power."

If the chief executive officer of a State is liable to be controlled by the courts of the State in the discharge of ministerial duties, for much stronger reasons is the chief executive officer of the United States liable to be controlled by this court under the provisions of the Federal Constitution. In

* Kendall *v.* The United States, 12 Peters, 524; United States *v.* Guthrie, 17 Howard, 284.

† 6 Simons, 214.

‡ 5 Ohio State, 529.

Greene v. *Mumford*,* the Supreme Court of Rhode Island said, in regard to officers:

"If they are departing from the power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer considers them as acting under their commission, but treats them as individuals."

By the same principle, the President, when acting in opposition to the Federal Constitution, may be treated as an individual.

II. Does the bill present a case proper for the interposition of this court? [The learned counsel then went fully into this point, enlarging upon and enforcing, by argument and authority, the positions set forth in the bill itself.]

Mr. Stanbery, A. G., contra:

It is manifest here that the case made against Andrew Johnson is not made against him as an individual, as a natural person, for any acts that he intends to do as Andrew Johnson the man, but altogether in his official capacity as President of the United States. The evil complained of, so far as he is concerned, is in the execution of what he considers to be his official duty (as they say, notwithstanding his vetoes), to execute certain acts of Congress by appointing the necessary officers. By his seeing to the execution of those laws the mishief ensues of which they complain; and, therefore, they ask this court to make him a party defendant; they ask this court to submit him, as President, to the process of *subpœna;* to compel his attendance; to bring him, as President, within the power of this court; and to compel him, by the power which a court of equity possesses to enforce its decrees, to do that, in regard to these laws, which this court may deem to be proper.

The opposing counsel admit that this is a case of the first impression; that they have no precedent for such a bill; but

* 5 Rhode Island, 472.

they have certain analogies, they think, under which this court will find power to bring the President here, and make him perform the behests of this court. It will be observed that there is no allegation that the President is about to do anything of his own motion, which, as President, he is not authorized to do. 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.

Now, I beg attention to the cases upon which the counsel rely, not as in point, but as in close analogy; and, first of all, is what was decided in the case of Burr, by Chief Justice Marshall. In the course of the prosecution against Colonel Burr, his counsel deemed it necessary that they should have possession of a certain letter written to the then President, Mr. Jefferson, by General Wilkinson. It did not exactly appear whether it was a private letter or an official letter, but it was said to be a letter in the possession of the President. The counsel of Colonel Burr moved for a subpœna to be issued by the court to the President, commanding him to appear and bring with him that paper. The question was argued by the counsel for the United States, and by the counsel for Colonel Burr; and, although the counsel for the United States did not admit that such process could be issued against the President, they waived the point, and the whole argument was upon the right of the party to have the paper itself. They got upon that side issue, and did not argue, but merely stated the other point, that, according to their idea, a subpœna could not issue against the President. However, when Chief Justice Marshall came to decide the matter, undoubtedly he was of opinion that a subpœna might issue against the President, as President, to produce a paper in his possession as President. Counsel in this case argue from that, if the President is liable to the process of the

court by subpœna to testify, he is liable to the process and the action of the court as a party to abide any order which the court may make. I will go a step or two further with that case, to show how, notwithstanding the opinion that was delivered by the Chief Justice, the court came to a point in which they would not take another step.

When the subpœna was received by the President, Mr. Jefferson, he did not give to it any notice. He did not even make any return to the court, nor any excuse to the court. He simply wrote a letter to the district attorney, in which he stated, that he could not conceive how it was that, under such circumstances, the court should order him to go there by subpœna; that he *would not go;* that he did not propose to go; but he said to the district attorney that there was no difficulty in obtaining the paper in the proper way. But he would pay no respect to the subpœna. Thereupon Colonel Burr himself moved for compulsory process to compel the President to come. Of course that was legitimate. If the court, in saying that the President was amenable to subpœna, was right, the court was bound, at the instance of the defendant, to follow it up by process of attachment to compel obedience to its lawful order. At that point, however, the court hesitated, and not a step further was taken toward enforcing the doctrine laid down by the Chief Justice. It then became quite too apparent that a very great error had been committed. I say a very great error, with the greatest submission to the great Chief Justice, who, on circuit, at *nisi prius*, suddenly, on a motion of this kind, had held that the President of the United States was liable to the subpœna of any court as President.

Is not the proposition subversive of all ideas of what government is and of the purposes for which a President is put in the executive chair, that whenever there are controversies between individuals anywhere in the United States, and the President even in his natural capacity happens to know anything about them, wherever the process of the court can extend to him territorially, he is bound to quit

his office, to leave his place at the head of the government, and to attend to the business of the individual citizen; to remit his duties over the whole and attend to his duties to the individual? I know in that case of Burr an attempt was made to distinguish between the President and a king or queen of Great Britain, for it was acknowledged by every one that there was no authority in England for a suit or a subpœna or any command to the head of the government to appear before any court. But it is said that that depended upon the divinity which hedged a king or crowned head; that with us our President had no such immunity; that he could do wrong, although the King of England could not do wrong; that he was liable to punishment, liable under certain circumstances to process, and they attempted to make a distinction between the two. Undoubtedly so far as the mere individual man is concerned there is a great difference between the President and a king; but so far as the office is concerned—so far as his position as the great executive officer of this government is concerned—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. He represents the majesty of the law and of the people as fully and as essentially, and with the same dignity, as does any absolute monarch or the head of any independent government in the world.

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.

But what would be the consequences if the court should issue this subpœna against the President now, and like Mr. Jefferson he should decline to obey it, not out of any disrespect to this court, but out of respect to the high office which he fills? If the court should entertain this case, and direct its subpœna to issue to the President, what will come if, as is inevitable, he will not obey it? No man in the nation entertains a higher respect for this court than he does, but as the custodian of his office, as the person there representing the nation, it is not for Andrew Johnson to speak; it is for the President. He has no particular personal dignity of his own to take care of, but he is bound to take care of the dignity, the rights, and the prerogatives that belong to him as President. The one he may lay down and be as humble as he pleases; the other he cannot lay down. What then will be the consequences? I may suggest them.

If, under such advice and such action as is inevitable if this subpœna is issued, the President declines to obey it, treats the writ issued to him as one which he cannot obey and dare not obey, what next must your honors be called upon to do? Precisely what the Chief Justice was called upon to do in the case of Burr. The gentlemen at once move in this court for an attachment against the President for disobedience of a lawful order of this court that he shall attend and answer this complaint. If the President is liable to the subpœna, as the gentlemen say he is, then he is liable to answer as defendant, and when the subpœna is served upon him, whether he comes or not, if it is a lawful subpœna, he is within the jurisdiction of this court; he is a

party here, and bound therefore by every act and every order which the court makes in this case. What, then, is the order, what is the relief, what is the judgment that the opposite counsel require? It is that he, as President, shall be enjoined from performing and executing two acts of Congress? If, when the President is here by a service of the subpœna, the court proceed in the case, and find it a case in which they are ready to order an injunction to issue to the President to command him not to execute those laws, and notwithstanding, the President goes on to execute them, what follows? That the court must now sustain its own dignity, for the court has a dignity and a power to be observed as well as the President. The next step here, then, is to move for an attachment, or a rule on the President, to show cause why an attachment should not issue against him; for what? For a contempt of this court; that whereas the court ordered him to abstain from proceeding further in the execution of these laws, in defiance of that order the President has gone on to do some acts in execution of the laws. He is therefore brought here by what kind of process? By process *quasi* criminal; by process of attachment to answer for a contempt of the court. Now we have subpœnas no longer; now we have process compelling his attendance, which goes to the marshal, and when we come to the proper point, process that goes to the marshal commanding him to bring the person of the President before this court to answer to this court for a disobedience of its process.

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 per-

sists, to keep him in jail without any remedy, for in cases of commitment for contempt no *habeas corpus*, as every one knows, can ever reach the prisoner. No other court can release the President from this imprisonment, by *habeas corpus* or otherwise. He is there a close prisoner of this court, and to remain there until he dies, unless he performs the orders of the court.

What then? The President deposed; the President made incapable of performing the duties of his office! Certainly a jail, or a dungeon it may be, is not a fit place to perform the duties and functions of President. You have made the President incapable of performing his duties. What is the effect of that? You have removed the President, for that is one of the conditions in which the President's office becomes vacant, that he is incapable of performing his duties. You have done it more effectually than by impeachment, for an impeachment does not deprive him of liberty; an impeachment sets him at large, and simply takes from him his official character; but the order of this court under these circumstances takes him as President and puts him in jail, and keeps him there until he performs what this court orders him to perform. That vindicates, it is true, the right of the State of Mississippi, or it may vindicate the right of any individual who has some claim to have an injunction against the President; but as to all the rest of us! as to the people, as to the government itself, what becomes of them under these circumstances and the exercise of that power? What becomes of the public safety, the *salus populi*, the supreme law of all laws, that this court, a co-ordinate branch of the government, bound to respect the other branches of the government, not to interfere with their duties or their privileges or their rights—that this court has in effect taken, destroyed, annihilated the President who is put there by the people? You leave the government without a head; you leave the office vacant, and the people must go about to get another President to perform these functions and these duties. In the meantime, until that is done, everything is at large, and there is not a law of the United States that can

be executed, not an officer that can be appointed or an officer that can be removed. There is no one left to proclaim insurrection, if that shall happen. There is no one left to perform all the duties which for the safety of this people as a nation are reposed in the President. To correct a particular evil, to guard a particular individual or a particular State against the acts of the President, there is no way, according to the gentlemen, but to depose that President by a proceeding like this, and, for the correction of this lesser evil, to produce that enormous evil which affects not merely the State of Mississippi, but every other State of the Union and every individual.

Is this the way to treat the head of the government?

Take the common case of an ambassador who comes here from another government, who is not the chief of that government, neither a king nor the president of any republic, but who simply comes here to represent a foreign government. Can you sue him? Can you make him liable? Can you bring him within the jurisdiction of this court, or any other court, unless he chooses to come here voluntarily as a plaintiff? Not at all. His person is sacred. Why? Not on account of any natural dignity that pertains to him, but because he represents a sovereign; he is sent here by the chief executive of some other state—it may be a king, it may be a president—and as representing that foreign sovereign he is no more liable to suit here than the foreign sovereign himself would be, no matter what mischief he may do. I say he is not only not liable to civil suit, but not to criminal proceedings. If the representative of some foreign sovereign, should in a moment of passion kill some one in this District, some one of our own citizens, absolutely murder him—a thing most improbable indeed—but suppose the case—is there a court in the United States that could try that representative for that offence? I am putting the strongest case possible. There is a great mischief, to be sure; the representative has done a great injury; he has taken life; but in that extremest of all cases you cannot correct that great mischief and enormous wrong by com-

mitting the greater wrong of making him, the representative of another government, liable here to suit or prosecution. All you can do is to remand him and send him out of the country, and to require his own government to punish him for the offence he has committed. You have no jurisdiction over him.

The counsel, then, are altogether wrong in their argument that wherever there is a right there must be a remedy—wherever there is a wrong done there must be a means of righting that wrong. Not so; at any rate not in this case.

In support of their right to file this bill, opposite counsel refer to some authorities. They are cases that have been before this court, of proceedings not against the President, but against certain high officers of the government who have been brought in the court or made amenable to the process of the court.

First, let me say that there is a clear diversity between those cases and this. The various heads of departments who have been sued here, such as in the case of Mr. Kendall and Mr. Guthrie, and Mr. Madison while he was Secretary of State, are at last but subordinates. They are agents to carry out the executive power, but they are not the depositaries of the executive power. They have functions to perform, and although they are agents, they are public agents, and we must take care to see our way clearly, when we bring them into court for official action or official misconduct, how it should be done, whether at the instance of a private individual or otherwise. The only cases in which the court has maintained jurisdiction over the heads of departments in order to compel them to execute laws are cases of *mandamus* to compel a Postmaster-General, a Secretary of State, or a Secretary of the Treasury to do something; and the court has always been strict in maintaining that jurisdiction; cautious at every step. That jurisdiction has been exercised again and again, but always with this limitation, that the thing required to be done is a simple *ministerial* act required to be done by the officer in virtue of some specific law. It is a thing as to which he has no discretion

whatever; in which not the President merely but some law requires him to do some one thing. He is commanded by the legislative department to do some one thing in which a citizen is interested and he refuses to do it. The court have said in such a matter as that, being purely ministerial and directed by law, we will require that officer to do that thing. They have never said as to the President that where *he* is directed by law to do some single thing, although ministerial in its character merely, involving no discretion or the performance of any particular duty except the duty to obey that particular statute, that a *mandamus* could go against *him*, in such a case. The counsel can find no such *dictum* even. In the case of a mere subordinate officer the court may very well enforce its authority, even to the point of imprisoning him for contempt; because, taking a Secretary from the head of his department, or an Attorney-General from his office, or a Postmaster-General from his department, does not stop the government, does not interfere with any great branch or department of the government. The President is there to make another Attorney-General, or another Postmaster-General, or another Secretary. That does not interfere with the public interests. The government goes on just as well whether one officer is there or another officer is put in his place. But, notwithstanding that, as I have said, this court have exercised that sort of jurisdiction very carefully. I have not, however, found a case like this, a case in which a suit has been entertained by this court against an executive officer as such officer, or an injunction allowed against him, against the performance of his duty as an executive officer.

The English courts have set their faces against such suits. *Macbeath* v. *Haldimand*,* was an action brought against Haldimand for certain things done by him in his capacity of Governor of Quebec. The case was argued in banc, in 1786, and Lord Mansfield, Mr. Justice Ashurst, Mr. Justice Willes, and Mr. Justice Buller held that he was not personally liable for bills of exchange drawn by him as Governor.

* 1 Durnford and East, 172.

The case of *Gidley* v. *Lord Palmerston** establishes the doctrine that on principles of public policy an action will not lie against persons acting in a public character and situation.

The view I maintain has been expressed in this court, so far as the President is concerned. In *Kendall* v. *United States*,† the court say:

"The executive power is vested in the President. As far as his power is derived from the Constitution he is beyond the reach of any other department, except in the mode prescribed by the Constitution,—through the impeaching power."

There it is. As President, he is beyond the control of any other department, except through the impeaching power. For what is he reached by the impeaching power? The highest crimes and misdemeanors. Therefore, according to this, for the highest crimes and misdemeanors, he is, as President, above the power of any court or any other department of the government. Only in that other chamber can you arraign him for anything done or omitted to be done while he is President.

The State of Ohio, ex rel., v. *Chase, Governor*, is relied on by the other side; but that was a case where the Governor was directed by law to issue a certain proclamation upon the existence of certain facts which were admitted to exist; and it was held that, as the thing to be done did not necessarily appertain to the office of Governor, but was simply a duty imposed by a statute, the court might issue a *mandamus* to compel the performance of the ministerial act prescribed by statute.

So far as this bill seeks to make the President a party, I have said from the first that it was scandalous. I mean, of course, in legal language; that is to say, a suit not fit to be brought, and which no court in the United States can sustain. Therefore it is that as *amicus curiæ*, or as law officer next the President, I have felt bound, at the first motion

* 3 Broderip and Bingham, 275.

† 12 Peters, 610.

Reply in favor of filing.

made to file this bill, to attempt to keep so scandalous a thing from the records of this court.

It is with the approbation, advice, and instruction of the President that I appear here to make this objection. I should have felt bound to make it on my own motion, as the law officer of the government. But although counsel, in their bill, have said that the President has vetoed these acts of Congress as unconstitutional, I must say, in defence 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.

Mr. R. J. Walker, in reply:

The main question is whether a bill to restrain the President of the United States by injunction issuing from this court from carrying into effect an act of Congress forbidden by the Constitution, and therefore unconstitutional and void, being a proceeding to enjoin the President from the performance of a mere ministerial duty (for by his veto he admits it to be a mere ministerial duty which he is compelled to do), is, in fact, a proceeding against the government of the United States, and whether such a bill can be entertained by this tribunal.

This is not a suit against the President of the United States only, giving the name of no individual, at all, as was the suit of the *Governor of Georgia* v. *Juan Madrazo*, known to the Attorney-General. That case was different, and the court well remarked that no process could issue unless against the State, because there was no individual named against whom any process could issue. But the President of the United States is not the government of the United States. The President, in a suit like this, does not represent all the departments of the government. The distinc-

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tion is drawn in the clearest manner by Chief Justice Marshall, in the great case of Burr.* He there said:

"The single reservation alluded to is the case of the King. Although he may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate of England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the King can do no wrong, that no blame can be imputed to him, that he cannot be named in debate.

"By the Constitution of the United States, the President, as well as any other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors.

"By the Constitution of Great Britain the crown is hereditary, and the monarch can never be a subject.

"By that of the United States, the President is elected from the mass of the people, and on the expiration of the time for which he is elected returns to the mass of the people again.

"How essentially this difference of circumstances must vary the policy of the laws of the two countries in reference to the personal dignity of the Executive Chief will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of a State, at any rate, under the former Confederation, and it is not known ever to have been doubted but that the chief magistrate of a State might be served with a *subpœna ad testificandum.*

"If in any court of the United States it has ever been decided that a subpœna cannot issue to the President, that decision is unknown to this court."

In that case the awful consequences, which have been referred to so eloquently by my learned brother, of attaching the President of the United States, and compelling him by process of attachment to obey the subpœna, were all argued

* Trial of Aaron Burr, by Combs, p. 45.

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before Chief Justice Marshall gave this opinion. It was owing to entirely extraneous causes that it became unnecessary to carry it out; but this opinion was never recalled, nor changed, nor modified in any respect whatsoever. Of course, if the court had a right to issue a *subpœna duces tecum* to the President of the United States in the same manner as to any other person, it would follow, as a necessary consequence, that the court had a right to follow out a disobedience to that subpœna by the process of attachment for contempt.

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.

It is said that the President merely follows the example of Thomas Jefferson in refusing to obey the subpœna. But the matter in the case of President Jefferson was not carried out. It was not necessary to carry it out. What the court would have done if the necessity had existed may be inferred from the opinion of Chief Justice Marshall. Moreover, I believe that Mr. Jefferson used to boast that he was no law-

yer; we know that he had no very favorable opinion of lawyers, or of judges, and especially no very favorable opinion of the Supreme Court of the United States, or of the great man who presided there—Chief Justice Marshall—during the period when he, Mr. Jefferson, was President of the United States. Upon a judicial question like this I shall not attempt to compare the opinion of President Jefferson with that of Chief Justice Marshall and the Supreme Court of the United States, and of Madison, as shown in the recent publication of the fourth volume of his writings. These carry out the idea set forth by Hamilton, and Madison, and Jay, in the Federalist, at the very time when the Constitution was pending for its ratification before the people, and set forth plainly before them that the Constitution had created one great tribunal, the Supreme Court, for the peaceful decision of all questions of constitutional law. What can be stronger than the language of Mr. Madison, that where two laws conflict with each other, the tribunal which is to expound and interpret the law is to decide which shall prevail? that when you take up an act of Congress on one page, and take up the Constitution on the other, if the act of Congress is in conflict with the prohibitions of the Constitution, that instrument declares it to be utterly null and void? Such was the opinion of Jay, and Madison, and Hamilton. Such was the sense in which the people of all the States understood the Constitution when it was framed, as shown by the debates. Such was the opinion of the first Congress, composed of many of the men who had framed the Constitution, who in the twenty-fifth section of the Judiciary Act gave final jurisdiction to this court in all cases involving the construction of the Constitution, laws, and treaties of the United States, even on appeal from the highest judicial State tribunals.

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 interpreta-

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tion of the Constitution. I think that this court will answer the statement in which the Attorney-General has lapsed as to the inevitable disobedience of the President to a writ of this court, as it answered a menace when the Legislature and High Court of Error and Appeals of Virginia declared that *they* would not obey the final mandate of the Supreme Court of the United States. The answer which was given to that menace by the court, through Chief Justice Marshall, its organ, in delivering its opinion, is found in the case of *Cohen* v. *Virginia.**

"The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts or whatever difficulties a case may be attended we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution."

Such was the answer given by this court, in that day, to the Legislature of Virginia, then all-powerful, and to the unanimous resolve of the High Court of Errors and Appeals of that great State, then composed of distinguished jurists and statesmen; that for this court to refuse to take jurisdiction in a case given them by the fundamental law, whatever the consequences might be, whoever might menace disobedience to the mandate of the court, would be treason to the Constitution. So I say here, that if this court shall issue its mandate, declaring an act of Congress to be unconstitutional, and restraining the President or Secretary of War, or any of the officers of the army or navy, from the execution of that act—whoever shall resist that mandate of the court by force will be guilty of treason.

[Mr. Walker next commented in detail upon the cases which had been cited, arguing from them that no officer is above the law, but that all are amenable and responsible to it.]

* 6 Wheaton, 264.

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; deprived of the right of trial by jury; all this in time of profound peace, when Congress itself, speaking, as it has done in several acts, of "States lately in rebellion," admits that there is no rebellion in the land; deprived of their rights and privileges of American citizens. So far as constitutional liberty is concerned, they might as well be living under a Czar or a Sultan, upon the banks of the Bosphorus or the Neva, as in this free country. Life, liberty, and property may be taken from them without due process of law.

The CHIEF JUSTICE delivered the opinion of the court.

A motion was made, some days since, in behalf of the State of Mississippi, for leave to file a bill in the name of the State, praying this court perpetually to enjoin and restrain Andrew Johnson, President of the United States, and E. O. C. Ord, general commanding in the District of Mississippi and Arkansas, from executing, or in any manner carrying out, certain acts of Congress therein named.

The acts referred to are those of March 2d and March 23d, 1867, commonly known as the Reconstruction Acts.

The Attorney-General objected to the leave asked for, upon

the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this court.

This point has been fully argued, and we will now dispose of it.

We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

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.

* 1 Cranch, 137.

So, in the case of *Kendall, Postmaster-General*, v. *Stockton & Stokes*,* 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 Marshal, 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.

* 12 Peters, 527.

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.

The constitutionality of the act for the annexation of Texas was vehemently denied. It made important and permanent changes in the relative importance of States and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular States. But no one seems to have thought of an application for an injunction against the execution of the act by the President.

And yet it is difficult to perceive upon what principle the application now before us can be allowed and similar applications in that and other cases have been denied.

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress 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 world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we 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.

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.