AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 5: The Jacksonian Era – Separation of Powers

Ex Parte Hennen, 38 U.S. 230 (1839)

In 1834, Duncan Hennen was employed as the clerk of the U.S. District Court in Louisiana, which included the additional duties of serving as clerk for the U.S. Circuit Court when it met in that district. He had been hired by Judge Samuel Harper, an appointee of President Andrew Jackson. In 1837, Judge Harper died, and his replacement, Philip Lawrence, was nominated by Martin Van Buren and confirmed by the Senate in 1837. In 1838, Judge Lawrence informed Hennen that his services would no longer be needed and appointed John Winthrop to the fill the position of clerk. Lawrence was clear that Hennen had performed his duties admirably but that Winthrop was a close friend of the new judge and so Hennen was out.

Hennen protested that he had not been legally removed from his position as district court clerk. Moreover, when the circuit court next met, both Hennen and Winthrop claimed the office of clerk for that court. Although Judge Lawrence was adamant that Hennen was the new clerk for both the district and circuit courts, the circuit judges were divided over who was the rightful clerk and adjourned without conducting any business. Hennen then sought a writ of mandamus from the Supreme Court ordering Judge Lawrence to reinstate him to his office.

The case had important resonance in Jacksonian America. The Jacksonian Democrats had become known for their view that to the electoral victors go the spoils of office. Patronage appointments greased the wheels of the Democratic political machine. When the Democrats won an office, they expected to be able to clean house and appoint their own friends and supporters to the government jobs under their influence, from tax collectors to postmen to clerks. By his lights, Judge Lawrence was exercising the prerogative of his office and doing the politically expected thing.

But this view was new and controversial. Hennen's lawyers instead argued that as a constitutional matter it had never been settled that inferior offices such as court clerk could be removed by the same official that appointed them (in this case, the district court judge). They argued instead that the British practice should hold: the clerk held a property interest in his office and could not be removed except for "good cause," such as "flagrant breach of public duty, and a flagrant abuse of power." Moreover, it was a "sound constitutional doctrine" that it was a "gross and flagrant abuse" of power by the judge to attempt to remove Hennen simply to appoint his own friend to the position. The constitutional default, when the relevant statute or constitutional provisions did not say otherwise, was for a civil service. Hennen merited a judicial hearing to determine whether he deserved to have his employment terminated.

The case had wide-ranging implications for how government and politics were to be organized. The Supreme Court endorsed the emerging Jacksonian ethos. The Constitution would not stand in the way of the spoils system.

How did the Court come to this conclusion?How plausible was an alternative reading? What options would have been available to the Jacksonians had the Court ruled the other way?

JUSTICE THOMPSON delivered the opinion of the Court.

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The Constitution is silent with respect to the power of removal from office, where the tenure is not fixed. It provides, that the judges, both of the supreme and inferior Courts, shall hold their offices during good behavior. But no tenure is fixed for the office of clerks. Congress has by law limited the tenure of certain officers to the term of four years, Story [*Commentaries on the Constitution*]; but expressly providing that the officers shall, within that term, be removable at pleasure; which, of course, is without

requiring any cause for such removal. The clerks of Courts are not included within this law, and there is no express limitation in the Constitution, or laws of Congress, upon the tenure of the office.

All offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the government, and subject to removal at pleasure.

It cannot, for a moment, be admitted, that it was the intention of the Constitution, that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made. In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. . . . But it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution. . . .

. . . And the Constitution has authorized Congress, in certain cases, to vest this power in the President alone, in the Courts of law, or in the heads of departments; and all inferior officers appointed under each, by authority of law, must hold their office at the discretion of the appointing power. Such is the settled usage and practical construction of the Constitution and laws, under which these offices are held. The tenure of ancient common law offices, and the rules and principles by which they are governed, have no application to this case. The tenure in those cases depends, in a great measure, upon ancient usage. But with us, there is no ancient usage which can apply to and govern the tenure of offices created by our Constitution and laws. They are of recent origin, and must depend entirely upon a just construction of our Constitution and laws. . . .

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. . . . If the power to appoint a clerk was vested exclusively in the District Court, and the office was held at the discretion of the Court, as we think it was; then this Court can have no control over the appointment or removal, or entertain any inquiry into the grounds of removal. . . .