AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 5: The Jacksonian Era – Separation of Powers

United States v. Jackson (1815)[1]

In 1814, General Andrew Jackson set up camp in New Orleans, Louisiana, in the final days of the War of 1812 with the British. New Orleans was, at the time, the capital of the state, and the legislature was in session. Jackson quickly declared martial law and threatened the state governor with arrest if he interfered with the general's actions in the city. When a member of the state legislator published an editorial in a local paper criticizing Jackson's order that French-speaking residents be deported, Jackson decreed that he be arrested and tried for inciting mutiny. Federal district judge Dominick Hall immediately issued a writ of habeas corpus for the legislator. Jackson responded by ordering the arrest of Judge Hall for the same offense of inciting mutiny and eventually his removal from the city.

In January 1815, Jackson defeated the British army outside of New Orleans and a peace treaty was signed ending the War of 1812. With this success, Jackson became one of the most popular figures in the United States. The general lifted martial law and released both the judge and the legislator. Back in his court, Judge Hall held Jackson in contempt and fined him $1000, which the general paid. As the district court deliberated on the contempt citation, Jackson sought the legal advice of two successful local attorneys and politicians, Edward Livingston and Abner Duncan. They gave somewhat conflicting advice. Livingston, a former U.S. attorney in the Jefferson administration and former mayor of New York City, advised that the general's orders were likely illegal. Livingston concluded that the general's orders could be "justified only by the necessity of the case," and therefore he had done it "at his risk and under his responsibility, both to the government and to individuals. Where the necessity is apparent, he will meet reward instead of punishment."[2] Duncan argued that in wartime the "guardian of public safety" was authorized to suspend civil government and make every member of the community, including civilian government officials, into "soldiers" under his command.[3] When informed of the general's actions, President Madison diplomatically relayed only that he presumed the general had ceased his "extraordinary exertion of military authority." In 1844, Congress refunded the fine plus interest to Andrew Jackson.

The arrest of Judge Hall and Jackson's refusal to comply with the writ of habeas corpus provided a rehearsal for the events at the opening of the Civil War, when Chief Justice Roger Taney feared that he would likewise be arrested for issuing a writ of habeas corpus for prisoners held under the order of President Abraham Lincoln. In justifying his actions, the general pointed to military necessity. How similar is Jackson's argument for suspending the writ of habeas corpus to Lincoln's? Was Jackson more or less justified than Lincoln in his actions? Taney was not arrested; Hall was. Was Jackson justified in arresting Judge Hall for interfering with military affairs? Did the outcome of the battle of New Orleans vindicate the general's earlier actions? Should he have been fined?

General Jackson's Answer to the Contempt Charges

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[1] Excerpt taken from "Andrew Jackson and Judge D.A. Hall. Report of the Committee of the Senate (of the State of Louisiana, 1843)," *Louisiana Historical Quarterly* 5 (1922): 509.
[2] John Spencer Bassett, ed., *Correspondence of Andrew Jackson*, vol. 2 (Washington, D.C.: Carnegie Institution, 1927), 197.
[3] John Spencer Bassett, ed., *Correspondence of Andrew Jackson*, vol. 2 (Washington, D.C.: Carnegie Institution, 1927), 198.

A powerful, disciplined, and royally appointed army was on our coast, commanded by officers of tried valor and consummate skill; their fleet had already destroyed the feeble defense on which alone we could rely to prevent their landing on our shores; their point of attack was uncertain. . . . Our men were few, and those few but badly armed; our prospect of aid and supply was distant and uncertain; our utter ruin, if we failed, at hand and inevitable; every thing depended on the prompt and energetic use of the means we possessed – on calling the whole force of the community into action; it was a contest for the very existence of the State, and every means in our power were to be strained in its defense. The physical force of every individual, his moral faculties, his property, and the energy of his example, were to be called into action and into instant action. No delay, no hesitation, no enquiry about rights, or *all* was lost; and every thing dear to man, his property, his life, the honor of his family, his country, its constitution and laws, were swept away by the avowed principles, the open practice of the enemy with whom we were to contend. . . .

In this crisis, and under a firm persuasion that none of these objects could be effected by the exercise of the ordinary powers confided to him . . . under a religious belief that he was performing the most important and sacred duty, the respondent proclaimed Martial Law. He intended, by that measure, to supersede such civil powers as in their operation interfered with those he was obliged to exercise. He thought that in such a moment, constitutional forms must be suspended for the permanent preservation of constitutional rights, and that there could be no question whether it were best to depart for a moment, from the exercise of our dearest privileges, or have them *wrested* from us forever. He knew that if the civil magistrate were permitted to exercise his usual functions, none of the measures necessary to avert the awful fate that threatened us could be expected. Personal liberty cannot exist at a time when every man is required to become a soldier. Private property cannot be secured when its use is indispensable for public safety. Unlimited liberty of speech is incompatible with the discipline of a camp; and that of the press is the more dangerous, when it is made the vehicle for conveying intelligence to the enemy, or exciting mutiny among the soldiery. To have suffered the uncontrolled enjoyment of any of one of these rights, during the time of the late invasion, would have been to abandon the defense of the country. The civil magistrate is the guardian of those rights and the proclamation of Martial Law was therefore intended to supersede the exercise of his authority so far as it interfered with the necessary restriction of those rights, *but no further*.

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The only responsibility which it is thought has been incurred in the present case is, that which arises from necessity. This, the respondent argues, must not be doubtful; it must be apparent from the circumstances of the case, or it forms no justification. He submits, therefore, all his acts to be tested by this rule.

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[After the order removing French-speaking individuals from the city], aliens and strangers became the most violent advocates of constitutional rights. . . . The order was particularly opposed in an anonymous publication. . . . To have silently looked on such an offense without making any attempt to punish it, would have been a formal surrender of all discipline, all order, all personal dignity and public safety. This could not be done; and the respondent immediately ordered the arrest of the offender. A writ of habeas corpus was directed to issue for his enlargement. The very case which had been foreseen, the very contingency on which martial law was intended to operate, had now occurred. The civil magistrate seemed to think it is duty to enforce, the enjoyment of civil rights, although the consequences which have been described, would probably result. . . .

No other course remained then, but to enforce the principles which he had laid down as his guide, and to suspend the exercise of this judicial power wherever it interfered with the necessary means of defense. The only way effectually to do this was, to place the Judge in a situation in which his interference could not counteract the measure of defense, or give countenance to the mutinous disposition that had shown itself in so alarming a degree. Merely to have disobeyed the writ would but have increased the evil, and to have obeyed it was wholly repugnant to the respondent's ideas of the public safety and his own sense of duty. The Judge was therefore confined, and removed beyond the lines of defense.

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. . . . The powers which the exigency of the times forced him to assume have been exercised exclusively for the public good, and, by the blessing of God, they have been attended with unparalleled success. They have saved the country; and whatever may be the opinion of that country, or the decrees of its courts, in relation to the means he has used, he can never regret that he employed them.