AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Judicial Power and Constitutional Authority

Attorney General Caesar Rodney, **Letter to President Thomas Jefferson** (1808)[1]

The effort to enforce the embargo led the Jefferson administration to return to the issues raised in the Marbury *case and in particular the question of whether the courts had the authority to issue writs of mandamus to executive branch officials directing them to perform specified tasks. In an opinion prepared by Attorney General Caesar Rodney for the president, the administration once again concluded that judges could not direct the actions of executive officers without subverting the president's responsibility as the chief executive.*

Given the widespread evasion of the embargo, the president ordered the secretary of the treasury to have all ships suspected of intending to evade the embargo detained. The treasury secretary in turn directed the federal custom collectors at the ports to detain all vessels attempting to set sail with "excessive" loads of commodities such as rice and cotton, since experience indicated that such shipments were in fact bound for foreign ports. When Adam Gilchrist's ship attempted to leave the Charleston harbor with such a shipment, ostensibly for Baltimore, the port collector denied him the clearance letter that would allow him to set sail. Sitting in circuit court in South Carolina, Justice William Johnson, Jefferson's first appointee to the Supreme Court, issued a writ of mandamus directing the collector to issue the letter of clearance. Johnson concluded that the embargo law vested the discretion for issuing such letters to the port collector, not to the president or the treasury secretary, and that Gilchrist's shipment was not suspicious enough to justify the collector's "increasing restraints upon commerce" under the embargo law. Johnson later suggested that he had only granted the mandamus in the case because of the unusual circumstance of the port collector agreeing to the suit to escape the "embarrassment resulting from conflicting duties," presumably the conflicting duties to the statute and to the treasury secretary.[2]

Johnson's opinion was heavily publicized, and the administration sought to quickly counter its effects. The president asked his attorney general to draft a response to the opinion (the letter excerpted below), which Jefferson then had published in friendly newspapers. Johnson in turn felt obliged to publicly defend his opinion after this "unprecedented" effort "to secure the public opinion on the side of the executive and in opposition to the judiciary." "Individual security," Johnson maintained, depended on "a judiciary sufficiently independent to disregard the will of power, and sufficiently energetic to secure to the citizen the full enjoyment of his rights." As a consequence, the power to issue a writ of mandamus to executive officers was "a mere incident of judicial power." It was the law, not the courts, that required the Charleston collector to issue the clearance papers. Since the "laws have no legal meaning but what is given them by the courts," the president could not claim the right to take care that the laws be faithfully executed in any way other than how the courts direct.[3]

Rodney complained privately to Jefferson that Johnson's rebuttal showed an arrogance "so fashionable on the Bench" and that would tend to make the courts "omnipotent," swallowing all the powers of the government. Although Gilchrist's ship had long since sailed, the port collectors were instructed to ignore Johnson's opinion in conducting their duties in the future.[4]

Note that Rodney challenges Marshall's claim that a writ of mandamus should usually be available even for ministerial acts. Is there a conflict between the presidential duty to see that the laws are faithfully executed and the

[1] Excerpt taken from *Gilchrist et al. v. Collector of Charleston*, 10 Fed. Cas. 225 (1808), 357–359.
[2] M'Intire v. Wood (1813).
[3] George Haskins, "Law Versus Politics in the Early Years of the Marshall Court." *University of Pennsylvania Law Review* 130 (1981): 17.
[4] Oliver Schroeder, Jr., "The Life and Judicial Work of Justice William Johnson, Jr." *University of Pennsylvania Law Review* 95 (1946): 181.

judicial duty to decide cases under the law? To what degree should the judiciary be able to mandate that the executive branch take a particular action to implement the law, and to what degree must the executive maintain discretion over how and when the law is implemented?

Sir,

I have read and considered the papers and documents referred to me relative to the case of a *mandamus*, issued by the circuit court of the United States for the district of South Carolina to compel the collector of the port of Charleston to grant clearances to certain vessels.

The first question that naturally presents itself, is, whether the court possessed the power of issuing a *mandamus* in such a case?

. . . .

In the first place, the law gave the collector complete discretion over the subject. According to the opinion he might form, he possessed competent authority to grant, or refuse a clearance. And I apprehend where the law has left this discretion in an officer, the court, agreeably to the British practice and precedents, ought not to interpose, by way of mandamus.

Secondly. In this case there was a controlling power in the chief magistrate of the United States. There was in fact, an express appeal given to the President by the very words of the act of Congress, which authorizes the collectors to detain vessels, "until the decision of the President of the United States be had thereupon." By the mandamus the reference to the President is taken away, and the collector is commanded to clear the vessel without delay. Agreeably to the English authorities under such circumstances, it is not the course I believe to issue a mandamus.

. . . .

Its results from this view of the subject that the mandamus issued by the circuit court for the district of South Carolina, was not warranted by any power vested in the circuit court by statute, nor by any power necessarily incident to courts . . . .

It might perhaps with propriety be added that there does not appear in the constitution of the United States anything which favors an indefinite extension of the jurisdiction of courts, over the ministerial officer within the executive department. On the contrary, the careful discrimination which is marked between the several departments, should dictate great circumspection to each, in the exercise of powers having any relation to the other.

The courts are indubitably the source of legal redress for wrong committed, by ministerial officers, none of whom are above the law. This redress is to be administered by due and legal process in the ordinary way. For there appears to be a material and an obvious distinction, between a course of proceeding, which redresses a wrong committed by an executive officer, and an interposition by a mandatory writ, taking the executive authority out of the hands of the President, and describing the course, which he and the agents of any department must pursue. In one case the executive is left free to act in his proper sphere, but is held to strict responsibility; in the other all responsibility is taken away, and he acts agreeably to judicial mandate. Writs of this kind if made applicable to officers indiscriminately, and acts purely ministerial, and executive in their nature, would necessarily have the effect of transferring the powers vested in one department to another department . . . and that part of the constitution perhaps divided, which makes it the duty of the President to take care, that the laws be faithfully executed. . . .

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