JAMES S. WILES, Appellant, v. **C. L. SIMPSON**, Secretary of State of Liberia, Appellee.

APPEAL FROM THE CHAMBERS OF MR. JUSTICE RUSSELL.

Argued October 18, 20, 1944. Decided November 17, 1944.

1. In performing a duty specifically devolving upon the Secretary of State or upon other cabinet officials by the Constitution or by law, the Secretary is subject to the ordinary process of the courts. Therefore, since the issuance of passports to citizens of Liberia is a duty imposed upon the Secretary of State by statute, mandamus will lie to compel the said Secretary to issue same.

2. It is only when acting as the agent of the President in a matter in which discretion is by the Constitution or by law lodged in the President, and in him alone, that the Secretary of State and other cabinet officers are not subject to the ordinary process of the courts.

Petitioner had applied to the Secretary of State, respondent below, for a passport. Upon denial of same, petitioner had filed in the Chambers of Mr. Justice Russell a petition for an alternative writ of mandamus directing the said Secretary to show cause why a peremptory writ of mandamus should not issue to compel him to grant the said passport. Upon said notice to show cause, the said Secretary filed returns resisting the issuance of the writ. After a hearing in Chambers, Mr. Justice Russell denied the writ. On appeal to this Court *en banc,* wherein the Solicitor General filed a submission conceding the legality of petitioner's position, petitioner ordered to apologize to respondent for petitioner's discourtesy and *petition granted.*

James S. Wiles for himself, assisted by *A. B. Ricks. The Attorney General* and *D. Bartholomew Cooper,* Solicitor General, for appellee.

MR. CHIEF JUSTICE GRIMES delivered the opinion of the Court.

On March 25, 1939 Mr. James S. Wiles, the present appellant, by himself in person and by counsel, filed in the Chambers of our distinguished colleague, Mr. Justice Russell, a petition for a writ of mandamus, the subject of these proceedings. Said petition rehearses in substance that:

The petitioner James S. Wiles, a citizen of Liberia, had on March 20, 1939 applied to

the Honorable C. L. Simpson, then Secretary of State, for a passport to enable him to travel beyond the limits of the Republic in order to attend to certain personal affairs of his. The Secretary of State, although apparently acquiescing in his request, had ordered his passport photographs returned, pointing out that they had been taken in the uniform of a Consul General which office he had ceased to hold and that, in consequence, before the passport could be issued new photographs not in such uniform would have to be submitted. New photographs of petitioner not in uniform were sent in, but were accompanied by a letter that gave offense. The petition then submits as exhibits copies of correspondence of an acrimonious nature which had passed between the petitioner and the said Secretary and concludes by praying for the issuance of an alternative writ of mandamus directed to the Secretary of State to appear and show cause why a peremptory writ of mandamus should not issue to compel the said Secretary to grant the passport applied for.

Upon a notice to show cause why such a peremptory writ of mandamus should not be granted, the Honorable C. L. Simpson, Secretary of State as aforesaid, appeared before said Justice on April 5, 1939, and filed returns which are substantially as follows:

(1) A passport to a citizen is in the nature of a license and, as such, is permissive and discretionary in character; hence a refusal to grant same because of reasons which appear to the Secretary of State as valid cannot be made the subject of judicial inquiry. Such refusal is properly a question which can only be examined politically.

(2) Because the correspondence exchanged between the petitioner and the Secretary of. State on the subject of the passport, as per copies annexed to said returns, was both discourteous and threatening, until petitioner withdraws said correspondence and tenders a satisfactory apology the Department of State, in the exercise of its discretion, would be reluctantly obliged to deny the passport to the petitioner.

(3) Because under the Constitution of Liberia the Supreme Court of Liberia has original jurisdiction only in certain classes of cases of which this is not one. Hence, were this Court to undertake to issue a mandamus to the Secretary of State of Liberia to issue such a passport, this Court would be exercising original jurisdiction which in such a case would be unconstitutional.

Our distinguished colleague, after hearing both parties, on April 11, 1939 handed down his opinion and judgment to the effect that: "Because the duties required to be performed are of political character where judgment and discretion are to be

exercised, the judiciary cannot interfere by mandamus." To this opinion and judgment of the Justice in Chambers the petitioner excepted and prayed for a rehearing of the matter before the full Bench.

Within the past five years the case has been repeatedly assigned for hearing before the full Court without success because of motions for continuance filed by one or by the other of the parties. However, the Court at this term threatened that if neither party were ready when again called at this term said cause would be stricken from the docket of this Court in accordance with Rule III section 3 of the Revised Rules of the Supreme Court. Thereupon said cause came on for trial before us on October 16 when Mr. Wiles appeared in his own behalf assisted by Counsellor A. B. Ricks, and the Honorable C. L. Simpson, Secretary of State at the time the case began and now Vice President of the Republic, was represented by the Honorable Attorney General and by the Solicitor General with the approval of the Honorable Vice President, who at the time of the commencement of these proceedings as aforesaid was Secretary of State.

Several very interesting and important points were argued before us, but it would now seem that our investigations have to be limited to those points reserved in the application from the Honorable Solicitor General on October 23, which reads as follows :

"The Honourable D. Bartholomew Cooper, Solicitor General of Liberia, representing the above named appellee, respectfully moves this Honourable Court for Court's Order of Abatement of these Mandamus Proceedings, and to pass upon the Constitutional issue involved in this suit, since it is apparent, that, His Honour Mr. Justice Russell, Associate Justice of the Supreme Court, presiding in Chambers omitted to do so; whereupon said decision was appealed from him to this Honourable Court en banco, and submits the following as grounds, to wit:—

"1. Because Appellee concedes soundness of the legal proposition, that it is not within the prerogative of the Secretary of State to exercise discretion in the granting of passports to citizens of Liberia ; as such a duty is imposed upon him by statute, and, therefore becomes mandatory and not discretionary.

"2. And also because, in the issuance of passports the Secretary of State performs a duty definitely made encumbent on him by law; and, in thus acting, he does not function as an Agent of the President, therefore Mandamus will lie to compel the discharge of such a duty.

"3. And also because, it is a settled principle of Constitutional law, that, if an executive officer is charged with a purely ministerial duty, involving the exercise of no discretion on his part, as appears to be the case in these Mandamus proceedings, the Secretary of State being an executive officer, the courts may compel his performance of such expressed duty. And also because it is a fundamental principle that the duties of Secretary of State are of two kinds, and he exercises his functions in two distinct capacities ; as a public ministerial officer of the State, and as Agent of the President. In the first *[sic],* his duty is to the President; in the one, he is an independent and accountable officer; in the other, he is dependent upon the President, is his Agent, and accountable to him alone. . . ."

The famous case of *Marbury v. Madison, 1* Cranch 137, 2 L. Ed. 60 (1803), cited in the briefs of both appellant and appellee, seems to be the leading case on this subject.

In that case the mandamus was prayed for to compel the Secretary of State of the United States to deliver to the said William Marbury a commission which the President had duly signed and had sent to the Secretary of State to be sealed with the great seal and turned over to Marbury and to others who like him had been appointed to similar offices. The points argued in that case seemed to have been raised for the first time in judicial history, and Chief Justice Marshall who delivered the opinion of the Supreme Court of the United States made such a complete survey of the law bearing upon the principles at issue that said opinion has since then been considered a buoy light to guide the progress of lawyers and of judges in the study of the issues then involved, which issues will be considered and disposed of in this opinion.

First of all, in what instances the Secretary of State is amenable to judicial process and in what instances he is not is settled in *Marbury v. Madison* by Chief Justice Marshall, speaking for the Supreme Court of the United States as aforesaid :

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

"In such cases, their acts are his acts ; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the

nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

"But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; *and cannot at his discretion sport away the vested rights of others.*

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Id. 1* Cranch 137, 165-66, 2 L. Ed. 60 (1803) . (Emphasis added.)

In this way the President's political advisers, now known as members of the Cabinet, partake in some measure of the President's immunities, which immunities, however, they cannot enjoy in full for reasons made clear in Watson, *The Constitution of the United States.*

"The immunity of the President is because of his official position. He is a great and necessary part of our government. The legislative branch is composed of many members, while the judicial branch is a collective body and it would be difficult to injure either numerically so as to interfere with the administration of the Government. But it is wholly different with the executive branch. One man constitutes all there is of that, and upon him the Constitution has placed many great and important duties, and these duties are constant. He does not sit in authority at stated intervals like Congress and the courts. There is no recess in the discharge of his official duties. From the time he takes the oath until his office expires there is a continuity of official obligations and duties, sacredly and solemnly imposed upon him by the Constitution. Anything which impairs his usefulness in the discharge of his duties, however slight,

to that extent impairs the operation of the Government. If in any way he is rendered incapable of performing his duties, to that extent the Government is weakened. There is no sacred charm in the personality of the President that protects him. It is only because of his official relation to the Government. If he should be imprisoned that would prevent the discharge of many official duties which the Constitution imposes upon him. How could he receive ambassadors, and other public ministers, while in jail? How could he see that the laws were faithfully executed when the law was keeping him a prisoner in a dungeon? How could he command the army or the navy in time of war if he were locked in a cell? Subjecting him to civil process might result in his being imprisoned and therefore he is not amenable to it. The President is the only constant and continuing factor in the division of governmental power under our Constitution which is necessary to its existence. This is because the Constitution has imposed upon him many duties which he must discharge and he must be personally free—that is, there must be no restraint of his person in order that he may be able to discharge them. The President enjoys no privileges not given to every American citizen, except such as flow from his official position. It is only because the Constitution makes him a necessary part of the Government that he is protected from legal process." 2 *Id.* 1023-24 (1910).

Hence it is that only when acting as the agent of the President in a matter in which discretion is by the Constitution or by law lodged in the President and in him alone, is the Secretary of State or other cabinet officer not subject to the ordinary process of the courts. For were it otherwise, the act of the agent might involve the principal, and were that action adjudged a violation of law the legal consequences that might flow therefrom might, as a logical sequence, end in the detention of the President, which would be in violation of the Constitution both in fact as well as in spirit. But in all other matters, especially in performing a duty specifically imposed upon the Secretary of State or upon other cabinet officials by the Constitution or by law, the Secretary is fully amenable to the ordinary process of the courts.

The annotation to *Marbury v. Madison* in the unofficial report, *supra,* gives several examples of the principle that the courts have no

"[R]ight to intermeddle in the political or discretionary duties of the executive. . . . [I]n an action of false imprisonment against a state governor for enforcing a draft of soldiers ordered by the president of the United States, the court declined to consider the question whether the executive was justified in calling out troops, holding that in such a matter the judgment and discretion of the executive was supreme. . . . [A]t the suit of a municipal corporation court [a court of law will not interfere to] . . . stay an

investigation instituted by the municipal executive into the conduct of the chief of police. . . . An order of the executive through the secretary of the navy for the bombardment of a certain port is a political act; and an action for damages will not lie against the latter for the destruction of the private property of a neutral in the bombarded town. . . . [I]n arresting and surrendering over an English fugitive from justice, a United States Commissioner would seem to be acting politically so that habeas corpus will not lie to review the detention. . . . [A] department of the executive, such as the treasury, cannot be compelled to divulge the name of the informant who procured the prosecution of a charge for defrauding the revenue. The case has been likened to that of official or cabinet secrets which the leading case intimates are not the subject of judicial investigation. . . . And it has been held that a public officer of the United States cannot be garnisheed as to moneys due from the United States to a private individual. . . .

"A State governor is acting politically in issuing a proclamation calling for a convention of the legislature; and the act may not be called in question in a court of law. . . . Until the granting or refusal of a patent to land by the land department there is no ground for judicial interference. . . . But the question of eligibility to political office is a legal and not a political question. . . .

"[Immunity of the executive from judicial supervision was unsuccessfully pleaded in a case in which] . . . an indictment for obtaining money by false pretenses [was presented] . . . against the fourth auditor of the United States, in which were alleged certain frauds perpetrated against the government by that officer in the discharge of his duties. [In said case] defendant . . . argued . . . that in deciding his guilt or innocence it was necessary to inquire into the extent of his powers and duties as fourth auditor; that no judicial tribunal had power to question his official acts unless they violated the vested rights of some individual; and that so long as they affected the public only they must be left to the control of his superior executive officer. Marbury v. Madison was cited in support of this position, which, it is scarcely necessary to say, was not accepted as sound by the courts [and the plea of the fourth auditor was consequently overruled]." 1 Rose, Notes on U.S. Reports 153-155 (1899), 2 L. Ed. pp. 153-55 following Appendix of Cranch.

As late as July 9, 1909, in the case *Cooke v. Iverson* Chief Justice Start of the Supreme Court of Minnesota, delivering the opinion of the court, said the following in the headnote :

"Courts cannot, by injunction, mandamus or other process, control or direct the head

of the executive department of the state in the discharge of any executive duty involving the exercise of his discretion; but where duties purely ministerial in character are conferred upon the chief executive, or any member of the executive department, as defined by our constitution, and he refuses to act, or where he assumes to act in violation of the constitution and laws of the state, he may be compelled to act or restrained from acting, as the case may be, at the suit of one who is injured thereby in his person or his property, for which he has no other adequate remedy." *Id.* 108 Minn. 388, 122 N.W. 251, 52 L.R.A. (n.s.) 415.

In the annotation to the above case the discussion of and quotations from *People* ex rel. *McCauley v. Brooks,* 16 Cal. 11 (1860) are pertinent:

" 'There is something repugnant to all just notions of good government, and of civil liberty, in the claim that these executive officers of the state, in matters purely ministerial, are supreme in their respective departments; that they can give effect or not, at their discretion, to the appropriations of the legislature, and thus advance or suspend at their will the public works, and that they can pass absolutely upon the rights of individuals, without hearing, or any of the formalities provided for the protection of such rights.' After citing a number of illustrations to show the practical impossibility of conducting the affairs of government if such officers could not be compelled by the courts to perform purely ministerial duties, or, in other words, if their duties were all to be considered discretionary, the chief judge said : 'We have supposed, for the purpose of illustrating the practical effect of the doctrine asserted by the respondent, that the exemption from legal control in matters ministerial is limited to those who are specially termed state officers, though we have shown that immunities, if existing as to them, must extend in like manner to all the officers of the executive department. This being the case, the administration of the government would, for all useful purposes, be dissolved. All officers of that department, upon that doctrine, would be and are independent, not only of all process of the courts, but of each other ; or rather, the action of each is dependent for its efficacy upon the view which the others may take of their own duties. If this doctrine can be maintained, the government must cease to be one of law, and must sink into merited contempt for its weakness and inefficiency.'

"In this case it was also declared that 'there is nothing in this distribution of powers which places either department above the law, or makes either independent of the other. It simply provides that there shall be separate departments, and it is only in a restricted sense that they are independent of each other. There is no such thing as absolute independence. Where discretion is vested in terms, or necessarily implied

from the nature of the duties to be performed, they are independent of each other, but in no other case. Where discretion exists, the power of each is absolute, but there is no discretion where rights have vested under the Constitution, or by existing laws. The legislature can pass such laws as it may judge expedient, subject only to the prohibition of the Constitution. If it overstep those limits and attempt to impair the obligation of contracts, or to pass ex *post facto* laws, or grant special acts of incorporation for other than municipal purposes, the judiciary will set aside its legislation and protect the rights it has assailed. Within certain limits it is independent; when it passes over those limits, its power for good or ill is gone.' " Annot. 52 L.R.A. (n.s.) 415, 421-22 (1914).

In *Marbury v. Madison, 1* Cranch 37, Chief Justice Marshall declared that:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." *Id.* at 163.

That the Secretary of State is, and other members of the Cabinet are, amenable to the courts in all matters in which they are not acting solely as agents of the President and upon his discretion, is abundantly clear from the opinion of said Chief Justice in the above case and from the authorities he cites in support of his views.

"And [on] . . . p. 109, of [vol. 3 Blackstone] .. . says, `. . . And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

"If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

"Is it to be contended that where the law in precise terms, directs the performance of

an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

"Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3, p. 255, says, 'but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.' " *Id.* at 163-165.

After reviewing the correspondence which passed between the appellant and the appellee on the application for a passport, one wonders why Mr. Wiles, the appellant, became more and more discourteous as the correspondence proceeds and why some of his language was so unbecoming as to be positively offensive. We have failed to discover anything in the record to justify or warrant such language from a citizen to one who is head of such an important department of government nor, for that matter, does the context seem to warrant any such retort to any other person merely because said citizen was requested to withdraw passport photographs in the uniform of a Consul General, when he had ceased to hold that office, and to substitute other photographs in civilian attire. We refuse to be convinced from anything in the record that the Secretary of State did not concede the correctness of the legal position herein expounded, but it is unfortunate that the Secretary of State allowed himself to become more and more irritated as the correspondence progressed and to have appeared to have denied to Mr. Wiles certain vested legal rights of his. We have herein laid down what in our opinion are those inalienable rights of the appellant which the Secretary of State, the appellee, is alleged to have violated, which rights the said Secretary has conceded, as we have seen in the submission of the Honorable Solicitor General in which the latter moved this Court for an order of abatement of these mandamus proceedings. As all other legal issues appear to us to have been waived by said submission, it is hoped that the appellant will make the *amende honorable* by apologizing to the Secretary of State for his dis-courtesy; and that the Secretary of State will promptly, upon appellant's filing proper photographs and paying the necessary legal fees, issue to appellant the passport prayed for. In our opinion there should be no costs assessed in these proceedings; and it is hereby so ordered.

Petition granted.