I.

Stanley Kutler, Judicial Power and Reconstruction Politics[1968]

Key point s in Preface:

Kutler focusing on the court and Reconstruction era finds that the old saw about the Court's decline attributable to the Dred Scott decision allowed Congress to tread all over this branch of the government. He finds this was not the case at all . . .Republicans were not united or intent upon upon "hamstringing" the court at all. Despite Dred Scott the Court displayed a remarkable tenacity, persistent, and toughness, that allowed it to expand its own judicial powers during Reoonstruction. The perpetuation and enlargement of its powers presents then continuity with the ante-bellum period and not a break. . .Helps to make more lucid the strength of the court in the Gilded Age period. . .

He finds in this series of essays, that the pattern of congressional judicial legislation, combined with the Court's responses and decisions reflected the basic impulse of the period--to reconstruct the nation in order to insure constitutional and political hegemony for the politically and physically dominant elements of the nation.

1. Traditions and Alternatives

He recaps the "orthodox" view about the Court's intimidation by the Radicals.. and their determination to press down on the South thier vøews of reconstructin the nation . .
He notes that Stampp in his Reconstruction history, a revision history, relegates the Court to a footnote, p. 146 fn in the paperback edition. . .

2. The Healing Wound: S. Court and National Politics, 1857-1866

K acknowledges that the Cpurt wounded itself with the Dred Scott decision in 1857. . .But that hurt was only temproary and the animosity shown to the Court was really levelled at the Justices and the sectional imbalance that "stacked" the Court with Southerners and "doughfaces." The Court itself and its rôle in the definition of the Consititon, and its powers were not criticized. .. .

The problem was that since 1837 the Court's personnel was tilted toward the South. . .By 1860 the south held a majority of the circuit courts. Despite their minority position in the Union, the south had 5 of the 9 circuit courts. . . With the emergence of the Republicans and the secession of the South there was oppotunity to change this arrnagment. With the 1862 Reorganization ACt the curcuits were rearrnaged giving the northern states the majority of the curcuit courts. . .correcting the previous imbalance. . .according in partb to proportion of the population. The point being, that up until the 1862 act justices came from the curits as defined in the 1837 act. . .This meant that the south was in control of the Court. . .With Lincoln and the Republicans this changed. . .In short, what the Republicans previously objected to was the diminance of the Court by the south. . .It was not the role or the judicial power per se of the Court. . .

Lincoln had the chance to place 5 men on the Court. . .The Court needed "reforming" only . . . .Once the change took place the Court rebounded back in the esteem of the north and the Republicans particularly. . .

Kutler regards the Reforming of the Court--as creative and reflecting a practical regard for the Court's potentaility as a power phenomenon . . .

3. Reconstruction Politics and the S. Court

He notes how "fluid" the Democracy was when it came to the S. Court. . . The history of the party and its greatest leaders--Jefferson and Jackson--are replete with suspicions of the Court as a juggernault for the elites and a threat to representative govt. . .The Democrats changed their attitudes and by the 1850s were looking to the Court to resolve the sectional problem . . .Because the Court was then safely staffed with southerners and south sympathisers . . .

During Reconstruction the minority Democrats depended upon Johnson, then the Constitution and the Court as the final arbiter in blocking the reconstruction program of the congressional majority. . . .
When Johnson's vetoes failed. . .The Democrats looked to the Court. . .

The key was the McCardle case. . .When the Court failed to act to sustain the Democrats then they reverted back to histirical traditional animosity toward the Bench . .

He makes the point particularly for Johnson, the "Last Jacksonian" . . . . Johnson had no love for the court and was not an advocate of expanding its jurisdictional prowers. He signed the 1866 legislation that reduced the number of the Judges from 10 back to 9, preventing himself from making his own appointee. . . . This was more consistent with AJ's whole political relationship with the courts. . .both in Tennessee politics and as President in 1868 he proposed that justices serve only a 12 year term and not for life as this was prejudicial to the spirit of republican govt. ..

4. Congress and S. Court: Game of Numbers and Circuits

Consistent with his overall thesis, Kutler examines the reduction act of 1866 which reduced the circuit courts to six from the previous nine. . . Orthodoxy has called this an act of political vengence against the Court and a slap at Johnson, preventing him from making any appointments to the Court.

Kutler exposes this as a distortion . . . . First off, he notes that CJ Chase had been anxious to reduce the unruly number of 10 justices that resulted from the 1862 act. The number was unwieldy; secondly, Chase wanted to increase the pay of the justices. This could be accomplished by reduction in numbers. Then, too, Andrew Johnson signed the reduction act of 1866 without demurrer(contray to the charge that he vetoed the act; he never did). In short, there were doubtlessly, political motives afloat in this action. . . but they were not the sole and even the central reasons for the reduction.

Kutler notes that when the 1866 reduction act was passed the Milligan and McCardle cases were still in the offing. . .The Republicans were not defensive about the court and what its rulings might portent for their reconstruction policies. . .

Johnson's signing of the act of 1866 without protest indicates what might be his true Jacksonian attitude toward the Court. . . reduce its numbers as a reflection of his antijudiciary biases. . .

5. The "Abortive Revolution"

Those who charge that the Courts came under a headlong attack by the Republicans in congress who wanted to assert congressional supreamcy and that the Court was intimidated to retreat. This retreat was the thing that saved this branch of govt during the Reconstruction era from being swept aside as an equal branch. . . .

Kutler's argument is that there was indeed an "abortive revolution" . . . But first off, Republicans never achieved a consensus over the desire to subordinate the Court to the Congress . . .and the failure to achive a consensus was more instrumental in this "abortive revolution" than any actions or inactions of the Court.

The conflict between the Court and Congress was brought about by certain decisions beginning in 1867. . .In short, it was initiated by certain Court rulings.
He cites the Ex parte Milligan case; the McCardle case; those cases in which the Court struck down federal test oaths in Cummings v. Missouri and Ex Parte Garland. . .

He notes that the majority decisions in the Milligan and the test oath cases were written by David Davis and Field respectively, both were Lincoln appointees. . .

The Democrats of course now reversed their own histirical traditions and came out in defense of the Court. . . .

According to Kutler the Milligan decision is central to contemporary and historical interpretations of how the SC really felt about the Reconstruction program.

In the Cummings and Garland cases the Court struck down loyalty oaths imposed by the state of Missouri and the federal power. . .Congress responded quickly. . .This was the Boutwell bill. . .It excluded any attorney who had been guilty of treason, bribery, murder, or any other felony from practicisng in the federal courts. But the bill was not picked up by the Semate. . .The moderates on the Senate Judiciary Committee did not pass the bill onto the whole senate. It stayed in committee until the end of the congressional session . . .In effect it was allowed to die there.
Kutler's point again was the mixed attitudes among Republicans about their respect for the Courts and judicial review. . .They did not want to make a confrontation out of this issue. Kutler sees this as an example of the limited effectiveness of the extreme opponents of judicial power in the GOP and the party's willingness to tolerate some adverse judicial decions. . .

It also may reflect(a la Hyman)the Republicans considerable respect for civil liberties. . .They may have seen a germ of the argument that the test oaths and the loyalty oaths were bills of attainders and ex post factor legislation . . .Perhaps they erred too much on the side of individual rights(in this case rights of felons and subverters of the rights of blacks). . .

But the party responded in a united and definite fashion when the Reconstruction program seemed endangered by Court rulings. The heart of the confrontation was the Milligan decision . .

The response game in the form of the Trumbull bill to provide a quorum on the Court when it came to voiding congressional legislation . . .
He notes that more extreme memebrs moved that a quorum be changed to a absolute majority,etc. .
But the Republicans could not find an acceptable solution to judicial review. . .Modertates proposing the Trumbull solution . ..Williams of Pennsylvanis proposing an absolute majority. . .And Sumner returning with a 3/4s count for judicial review. . . .It was clear in this matter that most Republicans did not want to remove judicial review. . .
But they could not agree on a position that would carry a majority of the party. . .So the issue rested here with no actoon once again . . .

It was not until the McCardle case was presented to the Court that the Republicans felt forced to act. McCardle's case was to test the validity of the Milligan doctrine. . .To have the Court rule on the constitutionality of the Congressional Reconstruction acts. . .
The Republicans responded with the Wilson amendment that denied the Court the right to accept a writ of habeus corpus to take his case out of the circuit court and place before the S. Court. McCardle, a Mississippi editor, was jailed by a military commission for inflammatory editorializing. McCardle had urged Mississippians to shot down federal agenst like dirty dogs they were,etc. .
The Wilson amendment would deny the Court the power to accept the writ and ~~le~~a leave the circuit court ruling against McCardle standing. . .

The point here, that Wilson himself admitted that the Republicans felt forced to this action because of the rumors in the Democratic press and among congressional Democracts that the Court was going to use the McCardle case to go beyond the narrow question of McCardle's right to use the writ of habeus corpus to take his case out fof the jurisdiction of the circuit court in Mississippi(5th Circuit Court)and, as it did in the Dred Scott case)to go outside the parameters of th case and make a statement about the constiutionality of the reconstruction acts. . .declaring them unconstitutional. . .It is not certain what the Court was intending.
But it seeme clear that the GOP was responding to imminent rumors and threats to their policies in the South.

The GOP tactic was simply to repeal the right of the Court to make a ruling on the habeus corpus issue. . .Sustained by the party in congress.

Because of Johnson's well known prejudice against judicial power the Republicans expected to pass the repeal bill . . .Apparantly even the Democrats were surprised when he vetoed the measure. It was consistent with AJ's efforts to use any opportunity to embarrass the Republicans. . . it was inconsistent with his general antijudicial history not to sign the measure. . .But it gave him a change to play politics at the Republicans expense. . .AJ's veto message was a peon to judicial review and its role in the balance of power,etc. . .It was pure politics. . .

The high road argument of the Republicans in defense of repeal was uttered by Trumbull . . .Importantly, he did not deny the right of judicial review. The Republican majority was not going to try to strip this power away from the Court. . .Trumbull argumed most effectively that the repeal was based upon an "error" on the Court's part. . .He pointed out that the origins of habeus corpus right rested in the Judiciary Act if 1789. . . authorizing the issuing of all such writs to persons deprived of their liberty under the authority of the US. . . The new Habeus Corpus Act of February 5, 1867, was intended to protect federal agenst and military personnel and other citizens from spurious state prosecutions under laws which operated to subject freedmen to new forms of bondage. . . The Court misconstrued the meaning of the 1867 law. . .and it did not apply in the McCardle case. . .

Ultimately, when the Court returned to the McCardle case(after the impeachment trial)CJ Chase conceded the congress' right to alter the Court's appellate jurisdiction . . Had the Court caved in under threats. . .Threats by Republicans aimed at the power of judicial review.

Kutler says not at all . . .He notes that there was a grain of truth in Republican contentions that the repeal act had saved the Court from tredding into waters that would have been divisive and damaging. ..as the Dred Scott case,etc. .

More to the point was the Court's assertion of appellate power in habeus corpus cases in the ex parte Yerger case(1869-1870). . . . The provisions that allowed for a Court ruling in this case after the 1868 repeal was this: the 1868 repeal case was based on the disallowance of ~~appeal~~ habeus corpus on the basis of a denial of same by a ~~cir~~ circuit court seated. . .By habeus corpus was still allowed on the writ of petition or direct petition for the writ to the highest court. In the Yerger case his attorney's applied for a High Court hearing on the latter basis and the Court heard the case. ..asserting its appellate power in habeus corpus cases. . .So Kutler argues the Coutt was not intimidated into conceding vested powers. . .

In effect, the Republicans did not challange the Court on this case. Reconstruction was not threatened. . . In Mississippi it was in the process of being abandoned. . .When some of the extreme Republicans like Senator Drake proposed legislation to stripe the Court of all its judicial review powers the Comiress failed to take up the mateer. . .

M re imporatnt was the defense of the Court by Senator's Drake's fellow Republicans . . .

Senator Edmunds of Vermont gave a ringing defense of judicial review as the basis of all liberties in the Republic. . .

Kutler concludes, with the ending of Reconstruction neither parties took on an antijudicial stance. . .The extremists in the GOP like Drake and Thaddeus Stevens did not get their way . . .Stevens' assertions of congressional or legislative supremacy did not wash. . .The Court would emergence from Reconstruction with its potential for exercising power unadulterated. . .

6. S. Court and Reconstruction: Judicial Impotence?

Deals with the charge by contemporaries and later by historians that the Court crumbled in the face of Congressional excesses. . .

He re-looks at Milligan case. Kutler admits that after the myriad of technical problems are waved aside(problems of habeus corpus, laws of war, military commissions)the issue got right down to the relevance of the case as regards future of Reconstruction.

He notes the timing of the case. . .It was a decision handed down before the institution of the first Reconstruction Acts in March 1867. . . . The 5-4 decion in favor the copperhead Milligan and remanding him to his freedom. . .what did it imply as far as military commissions sitting in "war zones." The Milligan case ossured in Indiana in 1864 . . .There was no war in the state. . .and civil courts were sitting. . .This was the gist of the Milligan decision. . .Where civil courts are in sessions then military commissions and military decisions applying to free citizens cannot apply. . . .But did this affect military commissions sitting in the South . . .state that were in an "insurewctionary state" as evidence of the turmoil and terror in these states was piled document upon document in the US Congress, in the press, before the Joint Committee on Reconstruction etc. .
Kutler argues that the ruling by the Court was at best in terms of how it applied to military govtds in the South . . .David Davis, the author of the majority decision, privately believed that the case did not have relevance for military reconstruction in the South. . .this power was conceded where insurrection exists. The Congress, saw no peace in the south . .

Other cases detractors and critics of the Court argue that the court hide behind technicalities and ambiguities to avert a showdown with Congress are dicsussed. The two noteworthy ones are Johnson vs. Mississippi and Georgia vs, Stanton . . In both cases the state govts under the Johnson reconstruction policies requested the Court to overrule the Reconstruction Acts of 1867. .The argument was that the Congress did not have the power to overthrow govts and deny citizens of their civil liberties and civil rights. The Court simply ruled as it had to in these absurd cases. . . It had no jurisdiction . . .The matters it wqas being asked to rule on were outside its jurisdiction. Tje matter was political and nothing

Some clarifying notes on the McCardie case; What was repealed in the case by the Republican congress was the 1867 Habeus Corpus Act. . .This was the proivision of protection for fredmen and federal agenst working in the South against prejudicial treatment by the civil courts in these states that were manned by ex-Confederates and enemies or Reconsyrcution. It was this Act which was the basis for the McCardie appeal. Once the act was repealed,etc. . .CJ Chase argued that the Court had no jurisdiction left to make a ruling. . .

In the last case, Texas vs. White, the Court had a last opportunity to make a ruling on the sonstitutionality of Reconstruction . . . The case revolved around the Texas bonds,etc. . .

The Chase majority decision was to confirm the Republican approach to the question of Reconstruction . . .Chase argued that the secession and war meant that the rights of the state and its citizens were suspended. . . It was up to the national govt to re-established these disrupted relations. He found clear constitutional authority for the duty in the national govt's obligation to guarantee a republican form of government to each state. . .

Confirning the underlying rationale of congressional reconstruction, Chasem in quoting Taney(Luther vs. Bordem) acknowledged that the power to return the state bonds was primarily a political or legislative question. . . residing in Congress. . .In short, that the Court had no right to intervene in political questions. .
This decision was in perfect accord with the ideas expressed in Georgia vs. Stanton and Johnson vs. Mississippi. . . .That the matter of recpnstructim was a political and not therefore open to Court opinion . . .

Did a majority of the Court believe the Reconstruction Acts unconstitutional?

Kutler argues against the traditinnal view that this was not the case. He notes David Davis position in the Milligan case. Regardles of what the opponents of Reconstruction attributed to the Justices,etc., the Milligan case was not the basis for overturning Reconsgruction . . .At least Davis did not believe so . . .Milligan applied only to courts sitting in the north. There was a word or opinion in the case about reconstruction and David noted that the power of military commissions and law was conceded in the insurrectionary states. Was the postwar south still in a state of insurrection? Congress thought so . . .and Davis acquiesced in Texas vs. White. .
He notes that years afterwards Justice Field writing in his Reminisences rejected that argument that the Court was unanimously opposed to the reconstruction acts,etc. . .Waiting for the right opportunity to delacare them unconstitutional. . . .He said this was not the case at all. Field while a Lincoln appointee to the Court, was opposed to Reconstruction and thought the act unconstitutional. . .But this was apparanrly not a view shared by all others or even a majority of the Court. . .

7. The Expansion of Power: Judicial Activism

Kutler adding to his thesis about the potency and persistency of the Court during the Reconstruction ear notes in this chpt. that the Court voided 10 cpngressional acts inthis period. They were cases that were unspectacular compared to the issues emerging from reconstruction,etc. . and have received little attention. But they are meaningful in terms of the activism of the Court when we consider the fact that judicial review power to overturn acts of congress had been successfully employed on only two occasions in the previos 76 years(Marbury vs, Madison and the Dred Scott decision). . .

The basis for the asertive court and judicial supremacy of the Gilded Age goes back to this period. .

So much for the insinuation that the red-eyed radicals were intent on stripping away the Court's power or judical review,etc. .