

**ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW:
NATIONALISM, CIVIL LIBERTIES AND PARTISANSHIP¹**

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Inter arma silent leges [In the midst of arms laws are silent].³

In 1814, while the War of 1812 was in full rage, Louisiana Governor William C.C. Claiborne and others within the City of New Orleans implored General Andrew Jackson to “take military control of the unsettled and significantly foreign population [of New Orleans]” to save the city from the anticipated threat of invading British forces.⁴ General Jackson complied, and in so doing suspended the civil liberties of the citizenry of New Orleans and instituted martial law.⁵ Jackson repelled and virtually annihilated the attacking British.⁶ He also dealt harshly with those that ran afoul of his martial code, which included members of the judiciary, the press, foreign nationals, and ordinary citizens.⁷ Many would agree that Jackson’s decisive action contributed to the salvation of New Orleans, but most would undoubtedly be left to question the propriety of his imposition of martial law, as did many of his defenders and detractors throughout the nineteenth century.⁸

In *Andrew Jackson and the Politics of Martial Law: Nationalism, Civil Liberties and Partisanship*, author Matthew Warshauer provides a judicious analysis of Andrew Jackson’s role in the evolution of the concept of martial law in America and the politicization of civil liberties.⁹ Warshauer focuses painstakingly on the congressional refund

¹ MATTHEW WARSHAUER, *ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW: NATIONALISM, CIVIL LIBERTIES AND PARTISANSHIP* (2006).

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³ WARSHAUER, *supra* note 1, at 70–72 (quoting MAJOR HENRY LEE, *A VINDICATION OF THE CHARACTER AND PUBLIC SERVICES OF ANDREW JACKSON; IN REPLY TO THE RICHMOND ADDRESS, SIGNED BY CHAPMAN JOHNSON, AND TO OTHER ELECTIONEERING CALUMNIES* (1828)).

⁴ *Id.* at 20.

⁵ *Id.* at 24.

⁶ *Id.* at 27.

⁷ *Id.* at 29–38.

⁸ *See generally id.* (providing numerous examples of the loyalty and animosity engendered by Andrew Jackson and his imposition of martial law in New Orleans).

⁹ *Id.*

debates of 1842 to 1844, incited by Jackson's request for refund of a court-ordered fine arising from his enforcement of martial law in New Orleans, but expands his context to include insightful anecdotes, analogies, and political contradictions related to President Lincoln's later imposition of martial law during the Civil War.¹⁰ In the end, Warshauer produces a significant historical piece relevant to our times.

The timeliness of Warshauer's account cannot be overlooked. As debates abound in the United States concerning the radicalism of the Patriot Act¹¹ and the recent expansion of presidential powers related to the domestic use of the military outlined in the John Warner National Defense Act for Fiscal Year 2007,¹² Warshauer provides a germane historical perspective of the significant role of political partisanship and personal passion in the formation of our national policies.¹³

Warshauer focuses his discussion around a peculiar event arising from Jackson's governance of New Orleans during the winter of 1814 to 1815.¹⁴ Jackson's concept of martial law was absolute and severe.¹⁵ He stifled the press and suppressed public dissension.¹⁶ State Senator Louis Louaillier, writing under the pseudonym of "A Citizen of Louisiana of French Origin," was arrested and jailed for condemning Jackson's continued imposition of martial law after the battle for New Orleans had been decided.¹⁷ Jackson was well aware of the maturing distaste for military rule in the city and issued orders to the field that "should any person attempt serving a writ of Habeas Corpus to arrest the prisoner Louaillier from confinement immediately confine the person making such attempt."¹⁸ Federal district judge Dominick Hall issued such a writ for Louaillier's release.¹⁹ He was jailed and eventually ordered banished

¹⁰ See generally *id.* at 197–235.

¹¹ See Donald Gutierrez, *Universal Jurisdiction and the Bush Administration*, HUMANIST, Mar. 1, 2007, at 6.

¹² See Pub. L. No. 109-364, § 1076, 120 Stat. 2083 (2007) (amending § 333 of Title 10, United States Code, and, in part, granting authority to the President to employ the armed forces, including the National Guard, to any state or possession, in times of defined emergencies to restore public order and enforce the laws of the United States, including the constitutional rights of the citizens of such states or possessions).

¹³ WARSHAUER, *supra* at note 1, at 239.

¹⁴ See generally *id.* at 19–45.

¹⁵ *Id.* at 23–28.

¹⁶ *Id.*

¹⁷ *Id.* at 35.

¹⁸ *Id.*

¹⁹ *Id.* at 36.

from the city by Jackson.²⁰ Following Jackson's cessation of martial law, he was tried by Judge Hall for contempt, in part, for his "interference with judicial authority" in seizing and disregarding the writ, and for his detention of Hall.²¹ The sentence was a \$1000 fine which Jackson dutifully paid.²² In January 1842, motivated by what Warshauer ultimately concludes was Jackson's desire for vindication and removal of the taint on his legacy,²³ Jackson wrote to his former aide and Judge Advocate, Major Auguste Davezac, then a member of the New York legislature, requesting a refund of the fine.²⁴

Jackson's request and the conditions he attached to what he deemed adequate refund legislation sparked congressional debates that endured for the better part of two years and three congressional sessions.²⁵ Warshauer details the intense back and forth that ensued between Jackson's loyal Democrats and the antagonistic Whigs led in body and spirit by none other than John Quincy Adams, former President and Jackson's nemesis in the presidential election of 1824.²⁶ The result is a collection of congressional debates rich in substance, hyperbole, contradiction, and personal affection and animosity for Andrew Jackson.²⁷ Jackson received his vindication in February 1844 when Congress and the President approved refund of the fine with interest.²⁸ The significance of the refund extended beyond vindication for Jackson. Instead, as Warshauer contends, the refund ratified Jackson's imposition of martial law and symbolized a shocking disregard for civil liberties in the interest of political partisanship.²⁹

The strength of Warshauer's work is in the details.³⁰ He provides strong and ample support for his conclusion that the refund was not merely an attempt at vindication for Jackson's imposition of martial law, but rather a political referendum during the "Age of Party" where civil liberties were exploited as a partisan tool.³¹ The depth of Warshauer's

²⁰ *Id.*

²¹ *Id.* at 38–39.

²² *Id.*

²³ *Id.* at 78.

²⁴ *Id.* at 2–3, 241 n.1.

²⁵ *See generally id.* at 77–112.

²⁶ *Id.* at 56, 77–112.

²⁷ *See generally id.* at 77–175.

²⁸ *Id.* at 111.

²⁹ *See generally id.* at 77–175, 240.

³⁰ WARSHAUER, *supra* note 1.

³¹ *Id.* at 240.

research is impressive. He brings the debates to life by highlighting the various speeches and correspondence of many Democrats and Whigs in their fight over the propriety of the refund.³² By using Andrew Jackson's correspondence with those both loyal and opposed to his cause, the author vividly recounts Andrew Jackson's public affairs campaign to rescind the fine.³³ Warshauer also builds an impressive congressional record concerning the constitutionality of martial law, natural law and the concept of necessity as justification for martial law, and judicial autonomy and powers during periods of military rule, flushing out in the end an interesting, but somewhat questionable, concept of the evolution and legality of martial law in America.³⁴

Warshauer provides significant anecdotal support for his position that lawmakers on both sides were committed to partisanship rather than any heartfelt devotion to the law or precedent.³⁵ He reveals a striking example of the partisan nature of the debates and the hypocrisy of both parties in Congress by detailing their respective reactions to the Rhode Island legislature's declaration of martial law during the Dorr War scandal of 1842.³⁶ "[A]t the outset of the refund debates, in June 1842, the Whig-controlled government of Rhode Island . . . declared martial law in order to stop a revolt by Thomas Wilson Dorr."³⁷ Ironically, many Democrats in Congress who vehemently supported Andrew Jackson's unprecedented form of martial law chose to condemn Rhode Island. The Whigs proved equally committed to partisanship. Those who stood in opposition to Jackson's imposition of martial law chose to remain silent.³⁸

Warshauer underscores the depth and endurance of his theme by recounting the opposition of many Democrats, including surviving Democrats from the refund debates, to Abraham Lincoln's impositions of martial law during the Civil War, and the support of many former Whigs who rallied behind their former Whig President.³⁹ Two great illustrations play out in Warshauer's accounts of Robert Cumming Schenk and Chief Justice Roger Taney. Schenk, a former Whig congressman, made his

³² See generally *id.* at 77–175.

³³ *Id.*

³⁴ *Id.* at 195.

³⁵ *Id.* at 151.

³⁶ *Id.* at 145–48.

³⁷ *Id.* at 145.

³⁸ *Id.* at 46–48.

³⁹ *Id.* at 225–34.

maiden speech on the House floor in opposition to martial law during the 1844 refund debates. Later, while serving as a major general and commander of the Union's middle department during the Civil War, Schenk declared martial law in Maryland and managed it with the same ferocity as Andrew Jackson in New Orleans.⁴⁰ Taney was appointed Chief Justice by Jackson in 1836⁴¹ and was a documented, but private supporter of Jackson's imposition of martial law in New Orleans during the refund debates.⁴² In his writings to Jackson during the debates, "[h]e concluded that Whig opposition was nothing more than blatant partisanship, remarking, 'unfortunately the bitter feelings engendered by party conflicts too often render men blind to the principles of justice.'"⁴³ His contradictory ruling in *Ex Parte Merryman*, the Civil War era case dealing directly with President Lincoln's imposition of martial law, "discounted the authority of military rule upon any pretext or under any circumstances."⁴⁴ In the end, Warshauer brings the reader confidently to the "conclusion . . . that martial law was only beautiful, or at least justified, when in the eyes of the beholder."⁴⁵

One significant weakness of Warshauer's work is the lack of depth in his analysis of the root and cause of the political partisanship that guided the refund debates. Warshauer contends that the political partisanship was incited by the "Age of Party" and Andrew Jackson's return to the national consciousness in the 1840s.⁴⁶ However, he truncates his analysis of the formative period for this partisanship that began with the "corrupt bargain" struck during the presidential election of 1824 and endured throughout Jackson's later two terms as President.⁴⁷ By doing

⁴⁰ *Id.* at 211–13.

⁴¹ *Id.* at 210.

⁴² *Id.*

⁴³ *Id.* (quoting Letter from Roger Taney to Andrew Jackson (Apr. 28, 1943), in CORRESPONDENCE OF ANDREW JACKSON 6:217).

⁴⁴ *Id.* (internal quotes omitted); see also *Ex Parte Merryman*, 17 F. CAS. 144, 152 (1861).

⁴⁵ WARSHAUER, *supra* note 1, at 148.

⁴⁶ *Id.* at 240.

⁴⁷ See generally 2 ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM 83–115 (1981) (discussing the presidential election of 1824 and the allegation that Jackson lost the presidency due to Speaker of the House Henry Clay's bartering of the electoral vote to John Quincy Adams in exchange for appointment as Secretary of State, and detailing the formation of the Democratic Party by Jackson loyalists in the wake of the 1824 election for the "advancement of Jackson"). *Id.* at 10 (discussing generally the competing party views of Jackson that developed during the 1820s and 1830s). The Democrats viewed Jackson as a "hero and patriot," while the Whigs viewed Jackson as a "despot" and "the greatest threat to the nation." *Id.*

so, he forces the interested reader to look elsewhere to confidently conclude, as he does, that “[o]pposition to [Jackson] was the *raison d’être* of the Whig Party, the very reason they came into being.”⁴⁸ Warshauer’s superficial treatment of this period deprives the isolated reader of worthwhile context and the opportunity for a comprehensive understanding of the evolution of the partisanship that existed between Whigs and Democrats in the 1840s and the loyalty and animosity incited by the reemergence of Andrew Jackson to the political scene in 1842.

Another significant shortcoming of Warshauer’s analysis is his failure to reconcile the historical significance of early nineteenth century legal authority that dealt directly with emergency powers and the authority of military commanders to curtail civil liberties with his conclusion that Jackson’s experience in New Orleans and the refund debates defined America’s concept of martial law.⁴⁹ Interestingly, Andrew Jackson’s imposition of martial law in New Orleans was not the first attempt to place that city under military rule.⁵⁰ General James Wilkinson’s attempt to place the city under martial law and his defiance of the writ of habeas corpus in 1807 prompted the Supreme Court’s decision in *Ex parte Bollman and Swartwout*, “which declared that only the legislature could suspend the writ.”⁵¹ Unmentioned by Warshauer is the Insurrection Act of 1807, which vested power in the President to deploy troops within the United States and, in effect, impose military rule.⁵² Neither authority “define[d] or authorized the use of martial law as implemented by Jackson. Indeed, American law had no such precedent for such action.”⁵³ Logically, Jackson’s suspension of the writ and imposition of military rule without congressional or presidential oversight added a third layer to the historical and legal framework of martial law in America. However, in American legal and historical context, the significance of Jackson’s experience does not square with Warshauer’s conclusion regarding its precedential value in the formation of the concept of martial law.⁵⁴ Indeed, the historical and legal record of

⁴⁸ WARSHAUER, *supra* note 1, at 239.

⁴⁹ *Id.* at 21, 195.

⁵⁰ *Id.* at 21.

⁵¹ *Id.*; see also *Ex Parte Bollman and Swartwout*, 8 U.S. 75 (1807).

⁵² James Bovard, *Working for the Clampdown*, AM. CONSERVATIVE, Apr. 27, 2007, at 26.

⁵³ WARSHAUER, *supra* note 1, at 23.

⁵⁴ *Id.* at 200 (concerning suspension of the writ and imposition of martial law by the Union and Confederacy during the Civil War); 230 (discussing congressional approval of President Lincoln’s habeas corpus bill during the Civil War); see also *Ex Parte Merryman*, 17 F. CAS. 144, 149 (1861) (holding that Lincoln’s suspension of the writ was an improper assumption of legislative power).

America's experience with martial law during the Civil War leads the reader to conclude that the principles, if not substance, of *Bollman* and the Insurrection Act endured, while the Jackson precedent provided merely anecdotal support for later impositions of martial law.⁵⁵ It is certainly beyond arguable that a legal framework existed outlining the authority, means, and methods for imposing martial law long before Andrew Jackson impounded New Orleans. Considering this authority and America's experience with martial law after 1815, the reader is forced to question Warshauer's position regarding the value of Jackson's contribution to our common understanding of martial law.

Despite its shortcomings, Warshauer's work provides a worthwhile historical perspective on matters at the forefront of political and legal debate in this country. Commentators have railed against the actual and perceived curtailments of civil liberties embodied by the Patriot Act since its inception.⁵⁶ Likewise, recent amendments to the Insurrection Act that broaden presidential authority to deploy the military within the United States have prompted some critics to conclude that "[t]here is nothing more to prevent a president from declaring martial law"⁵⁷ Congress has broadened presidential powers, no doubt, but whether this power includes legal justification for the imposition of martial law is both debatable and yet to be seen. Warshauer's analysis of the concept and reality of martial law in America provides meaningful context for this debate and primes the interested reader with both a better historical understanding of the inherent clash between military rule and civil liberties and the partisanship, passion, and vitriol incited by the very idea of martial law and the assumption of unlimited power.

⁵⁵ WARSHAUER, *supra* note 1, at 15–16, 200 (highlighting Lincoln's citing of the Jackson precedent as justification for his own curtailment of civil liberties during the Civil War).

⁵⁶ See, e.g., Gutierrez, *supra* note 11, at 6.

⁵⁷ Bovard, *supra* note 52, at 26; see also Pub. L. No. 109-364, § 1076, 120 Stat. 2083 (2007).