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SENATE
OF THE UNITED STATES.

TUESDAY, Jan. 12, 1802.

DEBATE

On motion of Mr. Breckenridge to repeal the act passed last session for new organizing the courts of the United States.

JUDICIARY ESTABLISHMENT.

[CONTINUED]

Mr. TRACY of Connecticut. Feeble as I am, I have thought it my duty to offer my sentiments, on this subject. Owing to severity of indisposition, I have not been in my place, nor have I heard any of the discussion. This circumstance will be my apology, if in the remarks I shall make, repetitions shall occur on the one hand, and apparent inattention to arguments on the other.

Having been a member of this government during several years, and being impressed with the difficulties attending the formation of a judiciary system, I have thought proper to give a concise history of legislative proceedings on this important subject. Permit me to say, sir, that the first institution of such a system, must be an experiment. It is impossible to ascertain until tried, the effects of a system co-extensive with the vast territory of the United States, and which ought to be adapted to the different laws and habits of the different States.

Soon after the first law was enacted, as early as the year 1793, and I believe sooner, complaints were made of the system of circuit courts. The Union then being divided into three circuit, and two of the six judges, were obliged to attend each court, if one judge failed, all the business of course was continued to the next term. Judges complained of the distance they had to travel, and suitors and lawyers complained of delays. In 1793, if my memory is correct, the law passed allowing one judge to attend with the district judge in each district, with some other modifications not important in the present view of the subject. If by reason of distance, badness of roads, sickness or any other accident, this one judge failed of attendance, or if he and the district judge differed on any point, a delay was occasioned.

If the same judge attended the same circuit at the next term another delay, and so on, till experiment taught us, that some alteration in the system was requisite. It will be recollected, that the judges had to travel over this extensive country twice in each year, and to encounter the extremes of both heat and cold. Of this they complained; but this was not all; the business was not done.

At several Sessions of Congress, the subject of the circuit courts was before them; committees were appointed in both Houses, and in more than one communication of the executive at the commencement of sessions, a revision of the system was recommended. I cannot on memory detail the exact particulars, or order of time; but in the speech made by the President at the opening of the session 1799, the subject is stated as follows. "To give due effect to the civil administration of government, and to ensure a just execution of the laws, a revision and amendment of the judiciary system is indispensibly necessary. In this extensive country, it cannot but happen, that numerous questions respecting the interpretation of the laws, and the rights and duties of officers and citizens must arise. On the one hand, the laws should be executed, on the other, individuals should be guarded from oppression; neither of these objects is sufficiently assured, under the present organization of the judicial department; I therefore earnestly recommend the subject to your serious consideration." Although this subject had been recommended before, and committees had contemplated a revision and alteration of the system, I do not remember, that a bill had ever been presented to either House of Congress until 1799. In that session, a bill was reported similar in its features to the act which passed last session. It might have been acted upon in the House of representatives; of this however, I am not confident; but I recollect it was printed, and the members of both Houses had it before them; and at the last session with some alterations and amendments, it was enacted into a law. I believe all parties wished for a revision and amendment of the system, in respect to circuit courts; the difference of opinion was principally this; some supposed an increase of the judges of the supreme court to such a number, as would render the duties of the circuit practicable for them, and provided for the completition of business, would be the best amendment; and others thought the law, as it passed, was preferable.

I acknowledge, that in deliberating upon this subject, we always assumed the principle, that the establishment of courts was important to protect the rights of the people; we did not fear an army of judges, as has been hinted by the gentleman who was last up. (Mr. Jackson.) In this opinion we might be mistaken, but we were honest in our professions; although some believed, that more of the business of the United States, might be confided to the State courts; yet it is not within my recollection, that the question was considered in any measure a party question. I am confident, that at the session of 1799, and for a long time before that, the friends of this law, which eventually passed last winter, could not, nor did not, contemplate any change of administration. A revision of the system was long a subject of deliberation; we believed an increase of circuit judges, to the number requisite to perform the duties, would be an inconvenient increase of the Supreme court; and though it was desirable for the judges of the supreme court to see the people and be seen of them, yet, the preference was given to the system now proposed to be repealed. We supposed it would be an evil to encrease the number of judges of the supreme court to 13, 15 or 17. A court which is to act together, should not be numerous; on this subject, all men have agreed; here may be danger of an "*army of judges,*" as the gentleman says; for although in Great Britain the twelve judges are sometimes called to give an opinion; yet no man will feel equal confidence in a tribunal of judges for the business of a court, consisting of many, as of few; from 3 to 5, the good sense and experience of all nations has declared to be about the proper number; & we thought it conducive to the general good, to establish tribunals in such manner, as to carry justice to the door of every man.

In this modification of the system, the jurisdiction of the circuit court has been extended, as it respects the sum in demand of which they are to take cognizance, and as it respects the disputes which arise concerning the title of lands, and exclusive jurisdiction is given of all crimes committed within 50 miles of their place of session. The intention was to insure a prompt execution of justice, and experiment alone can test the wisdom of the plan.

I take it to be a sound rule, adopted by all wise and deliberative bodies, not to repeal an existing law, until experiment shall have discovered errors, or unless there is a vice so apparent on the face of the law, as that justice shall require an immediate destruction of it. Has there been time to gain information by experiment? No man will pretend this as a justification of the repeal; for the little time the law has been in force, so far as I have obtained any knowledge upon the subject, it has gained credit.

Another maxim in legislation I think is correct, not to give up a law in existence, which is conversant about extensive and important concerns of the community, and about which there is a necessity of enacting some law; without seeing clearly what can be substituted for it, and that the substituted has manifest advantages. This resolution leads to no result but a repeal. I have stated the errors of the former system of circuit courts, and if *expence* is an objection to the present system, as I have heard urged out of doors, the same or nearly as much must be incurred, if we increase the number of judges of the supreme court, to effect a reform in the circuit court. Why repeal this law then and leave us without any, or without any adequate to its purpose?

Is this system so very vicious, that it deserves nothing but abhorrence and destruction? It costs us a little more than thirty thousand dollars, and by it the number of circuit judges is increased to sixteen; and by it likewise is contemplated reducing the number of supreme judges to five, when it can constitutionally be done. Is the expence an object, when by that expence we extend the jurisdiction of a court over this vastly extensive growing country, and carry law and protection to every man? This country is in a singular condition, a great tract of unsettled lands is peopling with rapidity, and numerous immigrations increase our population far beyond its natural increase; is it not of importance, that courts should be located among them, early to correct the restless spirit, which is frequent in new and scattered settlements? And are not the immigrations composed of such as require the prompt assistance of the law, to preserve among them regularity? Punishment, to us, and to all good men should be a strange work, but to prevent crimes, is the work of a God. I speak to gentlemen, who have many of them graced the judges bench, and adorned the professional robe they have worn, and am therefore not obliged to be particular; that I may be understood; a word to the wise will be sufficient.—A judiciary in a national point of view is absolutely necessary, and an extension of it to every national purpose is equally necessary. To depend upon State courts, not under obligations, nor amenable to you, besides having as much business alotted to them by the respective State as they can accomplish, and depending upon them and not on us for existence; will require only to be mentioned, to be exploded. Locating your judges in various parts of the country, by them promulgating the national laws, which it is well known has been a subject of great difficulty, and giving them daily opportunity of mixing with people, not well disposed to order and law; may prevent disorders, and insurrections, and save millions of expence, which pecuniary saving will be the least of the important events arising from such a system.

But it will probably be said, the courts have not business to employ them; and the documents received from the executive will be produced in evidence. And it may further be said, the President has in his message, recommended a repeal of this law. The words of the message are, "the judiciary system of the United States, and especially that portion of it lately erected, will of course present itself to the contemplation of Congress; and that they may be able to judge of the proportion which the institution bears to the business it has to perform, I have caused to be procured from the several States, and now lay before Congress, an exact statement of all the causes decided since the first establishment of the courts, and of those that were depending when additional courts and judges were brought into their aid."

Is this a recommendation to repeal? Suppose for argument sake it is. Let us look at this "exact" statement. In the recapitulation, 19th page of document 8, there appears to have been instituted 8276 suits, and pending when this court went into operation, F539.—But on further inspection, it will be found that Maryland is entirely omitted, this omission is unaccountable, since the means of knowledge were so near at hand. 119 causes undecided in Tennessee; 134 in North-Carolina, and 331 in Virginia, are omitted; making in the whole an error of 5 or 600 causes. In addition to this the number of suits in New-York are not stated correctly by the statement of the attorney when he made the return, and not one is carried out as pending in the recapitulation; and the return of Massachusetts is incorrect on its face; so that nothing more than conjecture can be derived from this "exact" statement. The President is usually more correct, and how this peremptory language in the message comports with the document, every man can see for himself.—I am not disposed to attribute intentional error to any man, much less to the executive; but in point of use the statement amounts to nothing, we may just as well imagine without it as with it, how many suits were pending, at the institution of the new courts.

But I acknowledge that the number of suits pending is not in my mind any criterion upon which a correct judgment may be formed of the utility or necessity of courts, or to say the most of it, it forms but one ground of judging, and that not a very conclusive one. In a country thinly settled it is frequently as important to establish courts, as in a more populous country; and as this government is situated, it may be more so; and yet the number of suits will bear no proportion. Why did we establish courts in our territorial government but on this principle?

A number of courts properly located will keep the business of any country in such condition as but few suits will be instituted; and courts badly organized will discourage suitors and there will be but few actions returned.—From the number of suits alone, there can no sound judgment be formed.

But there is another objection to the repeal of the judiciary law, which in my mind is conclusive; I mean the letter and spirit of the constitution.

In the formation of every government in which the people have a share in its administration, some established and indisputable principles must be adopted.—In our government, the formation of a legislative, executive and judiciary power, is one of the incontrovertible principles, and that each should be independent of the other so far as human frailty will permit, is equally incontrovertible. Will it be expected, that I should quote Sidney, De Lolme, Montesquieu, and a host of elementary writers to prove this assertion? There is probably no conflict of opinion upon this subject. When we look into our constitution of government, we shall find in every part of it, a close and undeviating attention to this principle.—Our particular form is singular in its requirements, that full force and operation be given to this all important principle. Our powers are limited, many acts of sovereignty are prohibited to the national government, and retained by the states, and many restraints are imposed upon state sovereignty. If either, by accident or design, should exceed its powers, there is the utmost necessity that some timely checks equal to every exigency should be interposed. The judiciary is established by the constitution for that valuable purpose.

In the British government the legislature is omnipotent to every legislative effect, and is a perpetual convention for almost every constitutional purpose. Hence it is easy to discern the different part which must be assigned to the judiciary in the two kinds of government.—In England the executive has the most extensive powers; the sword or the military force; the right of making war, and in effect the command of all the wealth of the nation, with an unqualified veto to every legislative act. It is therefore rational for that nation to preserve their judiciary completely independent of their sovereign. In the United States the caution must be applied to the existing danger; the judiciary are to be a check on the executive, but most emphatically to the legislature of the union, and those of the several states. What security is there to an individual, if the legislature of the union or any particular state, should pass a law making any of his transactions criminal which took place anterior to the date of the law? None in this world but by an appeal to the judiciary of the United States, where he will obtain a decision that the law itself is unconstitutional and void, or by a resort to revolutionary principles, and exciting a civil war.—With a view to those principles, and knowing that the framers of our constitution were fully possessed of them, let us examine the instrument itself.—Article 3d, sect. 1st. "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish.—The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour; and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."—Are there words in the English language more explicit? Is there any condition annexed to the judge's tenure of office, other than good behaviour? Of whom shall your judges be independent? We are led to an erroneous decision on this, as well as many other governmental subjects, by constantly recurring to Great-Britain.—That their courts should be independent of their sovereign is an important object; he is the fountain of honor and power, and can do no wrong; our President, at least for several years past, has been considered the fountain of dishonor and weakness, and if there was any maxim upon the subject, it was, that he could do no right. Of course the great object of the independence of the judiciary must here have reference not only to our executive, but our legislature.—The legislature with us is the fountain of power. No person will say that the judges of the supreme court can be removed, unless by impeachment and conviction of misbehaviour; but the judges of the inferior courts as soon as ordained and established, are placed upon precisely the same grounds of independence with the judges of the supreme court. Congress may take their own time to ordain and establish, but the instant that is done, all the rights of independence attach to them.

If this reasoning is correct, can you repeal a law establishing an inferior court, under the constitution? Will it be said, that although you cannot remove the judge from office, yet you can remove his office from him? Is murder prohibited, and may you shut a man up, and deprive him of sustenance, till he dies, and this not be denominated murder? The danger in our government is, and always will be, that the legislative body will become restive, and perhaps unintentionally break down the barriers of our constitution. It is incidental to man, and a part of our imperfections, to believe that power may be safely lodged in our hands. We have the wealth of the nation at command, and are invested with almost irresistible strength; the judiciary has neither force nor wealth to protect itself. That we can with propriety modify our judiciary system, so that we always leave the judges independent, is a correct and reasonable position; but if we can, by repealing a law, remove them, they are in the worst state of dependence.

I have exhausted myself, and I fear, the patience of the Senate, and regret exceedingly that my indisposition prevented me from a better preparation upon this important question. I have attempted to show, that the establishment of a judiciary system for this country is, and must be attended with difficulties, and that the legislature have taken such measures as to a majority of them appeared most reasonable, after much attention to the subject, to cure the evils of the old system, by the substitution of a new system.

And let it be remarked that the law now under consideration, although it modified our courts, is strictly guarded against a violation of the principles I have here contended for. The Supreme Court is to consist of but five judges after the next vacancy shall happen; and the district judges of Tennessee and Kentucky are associated with a circuit judge, to perform the duties of circuit judges which duties it is well known they performed ever since the district courts were established; and in the clause which increases their salaries they are styled the District Judges; and all the alterations made in their circumstances, is, an increase of duty, and of salary. I have attempted to shew the primary necessity of rendering the judiciary of this confederated government, completely independent, not only of the executive, but especially so of the legislature.

And by adverting to the words of the instrument itself, I have attempted to show, that the judiciary are secured, so far as words can do it, as well from a circuitous removal, by repealing the law constituting the court of which they are judges, as by any direct removal.

I am strongly impressed with the magnitude of this subject; perhaps the whims of a sick man's fancy have too much possessed me, to view it correctly; but Sir, I apprehend the repeal of this law will involve in it the total destruction of our Constitution. It is supported by three independent pillars; the legislative, executive and judiciary; and if any rude hand should pluck either of them away, the beautiful fabric must tumble into ruins.

The judiciary is the centre pillar, and a support to each by checking both; on the one side is the sword, and on the other the wealth of the nation; and it has no inherent capacity to defend itself. These very circumstances united, may provoke an attack, and whichever power prevails so far as to vest in itself directly or indirectly the power of the judiciary by rendering it dependent; it is the precise definition of tyranny, and must produce its effects. The Goths and Vandals destroyed not only the government of Rome, but the city itself; they were savages, and felt the loss of neither; but if it be possible there can be an intention, like the son of Manoah, with his strength, without his godliness, to tumble the fabric into ruins, let it be remembered it will crush in one undistinguished ruin, its perpetrators, with those whom they may call their political enemies.

I most earnestly entreat gentlemen to pause and consider; I apprehend the repeal of this act will be the hand writing on the wall, stamping *Mene Tekel* upon all we hold dear and valuable in our constitution. Let not the imputation of instability, which is cast upon all popular bodies, be verified by us; in adopting laws to day, and repealing them to-morrow, for no reason, but that we have the power, and will exercise it.

This constitution is an invaluable inheritance? if we make inroads upon it and destroy it, no matter with what intentions, it cannot be replaced, we shall never have another.

WEDNESDAY, January 13, 1802.

Mr. MASON, of Virginia.—I feel some degree of embarrassment in offering my sentiments on a subject so fully and so ably discussed. I believe that the ground taken by my friend from Kentucky has not been shaken by any arguments urged in opposition to the resolu-