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CONGRESS OF THE UNITED STATES,

House of Representatives,

Tuesday, February 16, 1808.

Debate on the Bill received from the Senate, entitled "An Act to repeal certain acts respecting the organization and the carrying the Militia."

Mr. Hemphill—

I should not rise to offer my opinion on the great question now before the committee, were I not placed in a situation different from that in which I have been since I have had the honor of a seat in this house. The legislature of the state of North Carolina, one of whose representatives I am on this occasion, have seen proper to instruct their Senators, and to recommend to their representatives in congress, to use their exertions to procure a repeal of the law passed last session of congress for the more convenient organization of the militia of the United States; and as the bill on your table has for its object the repeal of this law, and as I fully probably vote against its passage, I deem it proper for the opinions of those who have framed and recommended these resolutions, to submit that I should give the reasons which influence my conduct.

And here, Sir, I cannot forbear lamenting extremely that I should unfortunately be placed in a situation, where the highest obligations of duty compel me to act in opposition to the wishes of that community to which I immediately belong. It is certainly of great importance that in public functionaries it should not only discharge their trusts committed to us with fidelity, and with the great good, but in such a manner as to give satisfaction to those for whom we are acting.

And if I know the feelings of my own breast, I declare, that next to the consciousness of having performed my duty with uprightness, is the knowledge that in the exchange of this duty for ease, the approbation of my fellow men. But, Sir, if this approbation is only to be obtained by the unconditional surrender of my understanding, and the violation of my oath, I feel it would be criminal in me to make this incident at the shrine of public opinion. Indeed, Sir, were I disposed to forego my own opinions, I doubt that of the legislature of my state—were I inclined to do the will be done and not mine, I should fall short of them an abolition from the oath which I have lately taken to support the constitution of the United States. As long as that oath is binding on me, I for an independent opinion to be influenced by conformity to their wishes.

I will further remark, Sir, that I am not a little surprised that this august body should have undertaken to decide on questions not *accidentally* brought before them, without having an opportunity of hearing the arguments which may be urged against either on one side or the other. I will not permit myself for a moment to believe the assertions contained in a certain resolution in those who represent the State and the people in this Assembly. And yet, if that resolution be adopted, reason for the procedure do not immediately present themselves to me.

I hope, Sir, it will not be understood that I seem to call the well illiant state of deliberation which this body, I feel not great a reflect for the legislature of my native State to be guilty of, (which is impossible.) No doubt but they were influenced by the purest and the most correct understandings. I believe that they, in any means, that because my weak and feeble mind cannot discover perfect propriety in the conduct of men, that therefore it does not exist. Having premised thus much Mr. Chairman, I will proceed to an examination of the question under consideration. It has been stated to divide into two parts, Sir, the expediency and propriety of repealing the whole of the acts, which, I believe, is the natural and correct division; but I shall invert the order of considering the question, and first examine the power to act, before we consider the expediency of action. And if after a calm and impartial review of the constitution, I should be found that we are prohibited from passing the bill, there will be no occasion for inquiring into the expediency of repealing the law passed last session of congress respecting our corps of militia. The relative merits of the old and new judiciary system will be entirely over. For I am confident that no member of this body who would wish to pass the bill on your table, if in doing it we shall violate the sacred charter under which we are now assembled.

The people of America have ordained and established that the powers of government shall be veiled in three great departments—the Legislative, the Executive, and the Judicial. They have said that there shall be an house of representatives, the members of which shall be chosen by the people of the several states, every second year. Though this house is composed of members chosen by the people, yet, nevertheless, I though they can have no other interest than the great mass of the people, yet I fear, Sir, that though they must return to the common mass in the short period of two years, yet enlightened America did not for proper to entrust the power of making laws to that body, lest they know the history of man and the experience of ages have testimony against the fallacy of continuing this high power in any one assembly not checked by some other power.

They have therefore erected another branch of the legislature, called the Senate, consisting of members who are to be elected by the people immediately, but by the forenoontire of the several states, who are to be chosen for six years and not for two, and the qualifications required by the state in the first is different from that of a member of this House. To these bodies are the power of making laws, and have, but after a bill has passed both of them, it cannot become a law, or obligation on the nation, it must be approved of by the President; it is based on the idea that he is the guardian of the executive. The President is elected not by the people, but by the representatives of the several States, not by other House of congress, but by electors chosen by the people. He is to hold his office during four years; tho is the second great department of the government, which is entirely different from this curbing view of our constitution, for, notwithstanding the power which the people have conferred the power of making laws, of commanding what is right, and forbidding what is wrong, But, Sir, after this law was made, after it had received the sanction of the legislature, after it became necessary to establish some tribunal to judge of the extent and obligation of this law. The people did not see proper to entrust this power of judging of the constitutionality of laws either to the legislature, or to the executive, because they all concurred in the making of these laws; and experience had shown, that it is effectual for the preservation of liberty, that the judicial and legislative authorities should be kept separate and distinct. Hence, Sir, the rise of a third department, called the judicial, and said that "the judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as 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." It is admitted, that all the duties of this office, from the description of persons, that their words, *shall hold their offices during good behaviour*, are intended as a sinecure of power. The question is, what power they were to exercise? It is admitted, however, that all and every power which would have had the authority of impaling, or of ascertaining what laws they should their offices, (if their words were not inferred) is checked and limited by the words, whether that power should be found to reside in congress, in the executive, or in the senate, that was bound and constrained in their signification, and can only be satisfied by being applied to control the legislature as well as the executive power. But gentlemen contend that this power is confined to limiting the power of the President. I ask gentlemen, what is there in the constitution to limit the power of action to this end alone? When you read at the end of the 3d article, to judge, & tell him in plain English language, that he shall hold his office during good behaviour, is it not as much a limitation of power, as if it had been said, that he should be impaled, or ascertain what laws he should be in the constitution? Under the impression he entertains on this point, performing it with the most perfect satisfaction to all persons who have been before him; and the legislature without whispering a complaint, abolished the office and thereby turn out the judge. The judge is told this is no violation of the constitution, although you have behaved well, although we have promised, that as long as you did behave well, you should continue in office; yet, because now no further necessity for your services, and you may retire, that these words, "during good behaviour," are intended to prevent the President from dismissing you from your office. Do you suppose, Sir, that there is a man of common understanding in the union whose mind is not alive to the influence of power? Can, Sir, this be the idea annexed to this reasoning? I hope and believe, there is not. But, Sir, how is it possible that the President would have had the power of removing the judges from their office, if their words "during good behaviour" had not been inserted in the constitution? Is there any words in the constitution which give him the power expressly the power of removing any officer at pleasure? Is there any such call upon gentlemen to point them out? It does not result from the fathomable constitution, that the power which exists, can destroy. The President can remove, but he can appoint, and that only, by the advice and consent of the Senate. Therefore, it would follow, if the power of judging, is not limited but constrained; that the finance should purchase in diplomacy as well as creating the power of removing officers, is certainly a more constructive power than any has appeared in the legislature have from motives of expediency, or acknowledged, that he had it. If the constitution, Mr. Chairman, gives the President the right of removing officers at pleasure, and that right dropped upon legislative act or constitution, where would have been the necessity for inserting these words, "shall work or check and limitation of executive power." Are we to suppose that the framers too much fools power. You are taking great pains to control a power which never existed. And with the authority of our constitution, knew that a power of removal as ordinary cases must exist somewhere, and that it was necessary, that in whatever hands it might fall, the legislature, in the constitution specifying the tenure of the office of a judge should be constrative with the power of removing, that the judge should reside in one or in more hands. Thus falls, Sir, in a manner good behaviour, are familiar to the American people; when the political hands which formed us made the constitution, the founder, and we allowed among the nations of the earth an independent nation, which I as well as the framers attached words into their constitutions. The power of removal from office, which they have stamped upon them which it is not to the power of this House to change. Let us for a moment suppose that the state constitutions and for what legislature, that authority be vested in the words. I will definitely to the constitution of North-Carolina, as being one in which I have the pleasure of knowing that infirment it is said "that the General Assembly shall, by joint ballot of both houses, appoint judges of the supreme court of law and equity, judges of admiralty, and attorney generals, who shall be commissioned by the Governor, and hold their offices during good behaviour, are intended as a sinecure of power. 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