tion if it could be repealed, unless words mean any thing, and then congress can do any thing.

To come to a right understanding of the constitution, it will be necessary to enquire what was the generally received opinion about the time the constitution was adopted—I have ever understood, that there was no difference of opinion on this point; that the general opinion was, that the words in the constitution rendered the judges independent of both the other branches of government. This appears from the debates in the convention in Virginia to have been their opinion—it appears also from the strongest implication to have been the opinion of the Author of the Notes on Virginia. If we can receive no aid from any of these sources, we must take up the constitution, and apply to it the general rules for the interpretation of solemn instruments of writing. If in this instrument we find one express and positive provision, it must have its full force, unless we find another provision equally positive, and so inconsistent that one or the other must give way. In the constitution we find these words, "the judges both of the supreme and inferior courts shall hold their offices during good behaviour," without any other condition or qualification; take these words detached from any other part of the constitution, and I ask do they not contain an express and positive provision? If so, what part of the constitution is so inconsistent as to change the nature of this provision from a positive into a conditional one, and in substance to add these words, viz. "on this condition that congress permit the office so long to remain." It it is said in the 8th Sec. of the 1. Art. that "congress shall have power to constitute tribunals inferior to the supreme court." This power was necessary to be given, otherwise the tribunals could not have been constituted, and when constituted the duration of the office is limited in another part of the constitution; and any implied power therein contained cannot be inconsistent with an express provision; for a mere implication is never to take preference of a positive provision. The other words, relied upon, are contained in the 1st. Sec. of the 3d Art. What is the meaning of the words *from time to time*? They are used but in three other parts of the constitution, and when used they do not convey the idea of undoing what may be done. Indeed they are used in cases where it is impracticable to undo what shall have been done. [Mr. Hemphill here read 5th Sec. 1st. Art. No. 3, 9th Sec. 1st. Art. No. 6, and 3d Sec. 2d Art.] What do these words mean in that part of the constitution under discussion? The supreme court had been mentioned in 2d and 3d Art; *the* supreme court, which implies that there should be but one. They were not used to give congress power to constitute inferior courts, for that power had been previously given, and if the inferior courts, together with the offices of the judges, are as is contended, subjects of ordinary legislation, these words were unnecessary to enlarge the powers of congress on them, for on all subjects of ordinary legislation congress have an unquestionable right to enact and repeal at pleasure. It is not said in the 8th Sec. 1st Art. that Congress shall have power to borrow money from time to time, to regulate commerce from time to time; or to establish post-offices and post-roads, from time to time; yet no body doubts that Congress have a right to make and repeal laws on these subjects, when it may appear expedient; and the same power would have extended to the clause giving power to constitute inferior tribunals, if there had been no restriction in any other part of the constitution. As these words are unnecessary to give the power contended for, they must have some other meaning.—The plain meaning is this, that these words, together with the first part of the section, were not used to give a power to constitute courts, for that power had been previously given; they were merely introduced to dispose of the judiciary power, and to declare where it should reside; "the judiciary 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," meaning the power before given, which was discretionary as to number; the clause in the 8th sect. of the 1st article is brought here into view, and in the very next sentence the offices are positively fixed and limited. Here then is an express and positive provision, uncontradicted by any express declaration or by any violent implication. It is said, that there are words of negation used as to the compensation of the judges, and why not to the offices? If the words had been—and shall at stated times receive for their services a compensation during their continuance in office—will any man in his senses say that the compensation could be taken away during that continuance? yet although the compensation could not be taken away, it might be lessened, and the words of negation were to prevent that diminution; but as the legal signification of an office could not be lessened, the words there would have been surplusage.

But, Mr. Chairman, is it probable that the framers of the constitution ever intended to invest Congress with a power to destroy the office of a judge in a rising country like this, where all the various sources of litigation are daily encreasing? They foresaw that new judges would be wanted from time to time, but they never could have pictured to themselves a necessity of dispensing with the old judges.—If we were framing a constitution this moment, if we had any regard for the independency of the judges, would we invest Congress with a power to remove them, or take away the offices? We could calculate with a reasonable certainty, that if there should at any time be a necessity for their appointment, there would always in this country be a necessity for their continuance; and we could trust this power to one legislature as confidentially as to another. If the framers of the constitution could have entertained any suspicion that a legislature in 1801 would create useless judges for party purposes, with equal propriety they might have supposed that a legislature in 1802 would destroy useful judges for party purposes.—But the independency of the judicial department was the object.—This was an invaluable principle, and not more liable to abuse than any other principle fixed by the constitution, and there was no principle so necessary to be settled as the independency of the judges. If we are to argue from the abuse of power, what is there to prevent Congress from admitting into the union more new states than would be for the advantage of the nation; the late administration, with the consent of the legislature of Massachusetts, might have erected the province of Maine into 15 or 20 states; the fact is, if there is a necessity for a new state at the time of its admission into the union, the probability is, that there will always be a necessity.—So if there is a necessity for a judge at the time of his appointment, the probability is that there will always be a necessity, and the legislature giving birth to the one or the other, are the constitutional judges of that necessity, and no other legislature has a right to interfere. My opinion is that the framers of the constitution intended that the judges should be independent of both the other branches of government; that they have spoken plainly and unequivocally; and that the moment the judge is appointed the office is ingrafted in, and becomes a part of the constitution, and cannot be taken away without impairing the constitution itself. With regard, Mr. Chairman, to the distinction that is taken between the supreme and inferior courts, for my own part I cannot see any force in the argument. Any person of common candour must acknowledge, when he reads the first section and second section of the 3d art. that there is as imperative an injunction to establish some inferior courts as there is to establish one Supreme Court. It is said that the Supreme Court shall have *appellate* jurisdiction, and of course there must be inferior courts from which the appeals are to be made, and the duration of office in both courts is contained in the same sentence and words; and it is absurd to suppose that the framers of the constitution affixed a double meaning to these words——the reasons urged against our construction, apply as well to the supreme court as to the inferior courts—a dying administration could provide for its friends by increasing the number of judges in the supreme court with as much facility as by creating inferior tribunals. But, Sir, if congress have the power contended for, there is not a judge on the supreme bench who is not completely in their power. The constitution does not say how many judges there shall be, so that you may remove all but one, or you may pass a law placing six new judges on the bench by the side of the present judges, and then for the good of the people, conclude that twelve judges are unnecessary, and repeal the law which created the first six judges, and the imperative words in the constitution will be complied with; the supreme court being always in existence. I see nothing in the constitution which prohibits congress from changing the name of an inferior court, if by the same act the office with all that appertains to it is some where preserved. And that congress have a right to transfer some of the duties of the judges from one tribunal to another is clear and evident; it is incident to the power of constituting new tribunals; for when a new court is created, some of the business which would have been cognizable in the old court, must be transferred to the new tribunal. It was this kind of power that congress exercised in passing the law last session; but they did not touch the office, which consists in certain powers, jurisdiction, and authority, conferred on a particular person, requiring of him certain duties, which may be exercised in a court bearing a different name from that of the judge. Under the old system the district judges sat in the circuit courts, the supreme judges sat in the circuit courts—and under the old system the district judges of Kentucky and Tennessee had the powers cognizable in a circuit court, with some exception as to appeals, and writ of error—and the 24th section of the law of 13th February, 1801, which abolished the two district courts, transferred the constituent parts of the offices, to wit, all the power, authority and jurisdiction of the said courts into the circuit courts, and by the 7th section of the same law, the district judges of Tennessee and Kentucky, with a circuit judge, are to hold the circuit courts, and in the same section it is expressly declared, that when the *offices* of the district judge, in the districts of Kentucky and Tennessee respectively, shall become *vacant, such vacancies* shall be supplied by the appointment of two additional circuit judges, which appointment of course must be made in the usual way. And in the 3d section of the same law, congress have virtually acknowledged their want of power to take away the office of a judge, have provided that after the next vacancy in the supreme court, it shall consist of five justices only. And as to the additional salaries of the district judges, they will be presumed to be equal to the additional duties, until a complaint is made, and then the fact must be ascertained.

This law then, Mr. Chairman, which expressly recognizes the judge, which expressly continues his duties, and which expressly continues his salary, is likened to a law which destroys the office of a judge, takes away his duty, takes away his salary, and leaves his commission on a blank piece of paper; and this is the rock on which gentlemen stand, when they triumphantly ask were we the guardians of the constitution when the first law was passed?

Mr. Chairman, ingenuity has been exhausted in contriving cases wherein it is said our construction will not hold good. It is asked if in the case of a war a whole state should be ceded, if the offices of judges would remain? Certainly not; but here the provision in the constitution would not be complied with, the whole strength of the nation would not be sufficient to protect it, yet it would be a case of necessity, calamity or war, which no constitution can provide against—and in the case put, the most important part of the constitution would not be complied with, which garrantees to each state in the union a republican form of government; yet in that event the people of the ceded state might become the slaves of a tyrant.

But, Mr. Chairman, a doctrine new and dangerous has began to unfold itself. It is said that the judiciary is a subordinate and not a co-ordinate branch, of the government, that the judges have no right to declare a law to be unconstitutional: that no such power is given to that branch in the constitution. Why, Sir, it is no where declared that congress have a right to exercise their judgment, or to consider the expediency of a measure; the judiciary from the nature of their institution are to judge of the law and what is the law: the constitution is paramount and supreme: the judge is bound by his oath to support it; the legislature have a right to exercise their judgment as to the constitutionality of a law on its passage: but the judiciary decide at last, and their decision is final. This doctrine is admitted in the debates of the convention of Virginia—in the case of *Vanhorne, lessee vs. Dorrance*, judge Paterson has expressed the same opinion when he could have had no view to this question. "I hold it to be a position equally clear "and sound, that in such a case, it will "be the duty of the court to adhere to "the constitution and to declare the act "null and void. It is an important "principle, which in the discussion of "questions of this kind, ought never to "be lost sight of, that the judiciary in "this country is not a subordinate, but "co-ordinate branch of the govern"ment." The chief magistrate of Pensylvania has recently expressed the same sentiments, and the correctness of his legal opinions will not be called in question by any party, in assigning his reasons for not approving a law: He says, "And I cannot from a confidence in the "legal knowledge, integrity, and for"titude of my former brethren in the "supreme court, risk my character in a "judicial decision on this question, when "I do not foresee any advantage to be "derived to my country from a possibil"ity of success."

But, Sir, if it is once established that the judiciary is a subordinate and dependent branch of the government, I acknowledge that they have no right to judge of the constitutionality of a law, or, if they have the power, they will be afraid to exercise it. Upon this principle where will an influential partizan and an insignificant individual meet to adjust their claims; in this house or in a tribunal under the influence of this house? Where will the powerful state of Virginia and the state of Delaware meet upon terms of equality, in this house, or in a tribunal under the immediate controul of this house? Where could the federal administration of justice in this country be deposited with more safety than where it is? Entrenched as our judges are, they can do but little harm, but much good; from their situation they can have no temptation to make inroads upon the rights of the people; there is no such thing as judicial patronage; they can appoint no officers, collect no money, raise no armies, raise no fleets. They have nothing but their virtue and talents to recommend them to the people. If it is within the power of human contrivance to select a spot, where the stream of justice will flow pure and uncontaminated, it is in a tribunal of independent judges.

The three grand branches of our government are well arranged. The President has his proportionate weight in the judiciary, by appointing the judges, when they are appointed they are independent; and in this situation are to guard the legislature from making encroachments on the liberties of the people. The legislature in turn have a check on them by bringing them to trial and punishment, if they should become corrupted; this trial is to commence in this house, which will always be a repository of a sufficiency of passion and spirit to commence the impeachment if there is a reasonable cause—the trial is to be ended in the Senate, where the members, from their permanency, will be likely to be cool, and not convict, unless they are guilty. Thus the parts are interwoven operating as checks and controuls on each other; but once cut the ligament, and perhaps the dreadful consequences have not been too highly coloured. The effect may not be immediate, but let the principle be practised upon by two or three changes of administration, and it will become as much a matter of course to remove the judges, as the heads of department, and in bad times, the judges would be no better than a sword in the hands of a party to put out of the way great and obnoxious characters for pretended treasons.

The independency of the judges was a great point gained by the people of England. While the tenures of office depended on the nod of the crown, they supported the arbitrary measures of the king; in one instance they decided that the king had a right to levy ship money, without the consent of Parliament or people; and many an instance might be brought to the recollection of this honourable committee, where they determined through fear and not from judgment. It is said they are not independent of Parliament. Why, Sir, nothing is independent of Parliament; and there is not the same necessity there. There being no written constitution in England, the judiciary forms no check upon Parliament—and besides, our government is not a copy of the British government; and this is not the only solitary instance, where we have outstripped, as it is called, our too favorite prototype. There is not a leading feature in the constitution that bears testimony of any servile imitation; it is our opponents who wish to tell our constitution by the principles of the British government; it is they who wish that a construction be put upon the constitution by congress, which shall be considered as the constitution itself; and are unwilling that there should be any check to oppose it; and of course every construction put on it by the different legislatures will exhibit the appearance of a new constitution, a constitution to be tossed and blown about by every political breeze. The powers of congress will be equal to the powers of the English Parliament, transcendant, splendid and without controul. I little expected that such lordly power would be grasped at by our plain Republicans, who have no ambitious desires, and who wish rulers to be contented with humble prerogatives.

Mr. Chairman, when I reflect upon the intrinsic nature of the question, I am confounded and amazed—it is vast indeed—from a dread of its terrible consequences. Yet in its nature it consists in the open denial of the obvious meaning of a few words in the constitution—we repeat the words, gentlemen deny their plain sense—We read "That the judges both of the supreme and inferior court shall hold their offices during good behaviour."—Our opponents say that these words do not mean "that the judges of both the supreme and inferior courts shall hold their offices during good behaviour." the meaning of these word is entirely different; it is in fact the reverse; they do not infringe our power; they refer to the executive; although the office to be holden is not of executive creation, and he can neither make it or destroy it; the thing to be holden during good behavior is an object of legislative creation. Certainly our opponents cannot drive us off the firm ground on which we stand, and tell us that these words are not in the constitution. They are, and how are they to be gotten rid of? No other way under heaven, Mr. Chairman, than by a bold and arbitrary assertion that they do not bear their natural meaning; that they do not bear the same meaning which they bear in another part of the constitution. The people have said that a judge shall *hold* his office until a certain event shall happen—the rulers say no, we will shorten the period, and this is not breaking the constitution; or, in other words, the people have said that a judge shall hold his *office* during good behavior; the rulers say, the meaning of that is, that the office can be taken away at any moment. Why, sir, what part of the constitution will hold gentlemen, what words are in it that are strong enough, and what meaning cannot be as easily distorted and perverted? We have a right to our seats here for two years if we do not behave disorderly; yet it might as well be said that the meaning of that is, that two thirds can expel the other third at any moment notwithstanding their good behavior. Our opponents complain of the want of power—that their power would be too much cramped and restrained from its natural freedom by our construction. Why, sir, that is the object of a written constitution, to place objects out of the reach of legislative power. It is its great and grand design.

I ask pardon of the committee for detaining them so long. I ascribe no wicked motives to our opponents. I have the charity to believe that their motives are good and virtuous; yet I am confident that through a mistaken zeal for the good of the people, they are going too far, and are destroying the constitution of our country.

[To be continued.]

WASHINGTON CITY.

MONDAY, FEBRUARY 22, 1802

DE WITT CLINTON, is chosen Senator of the U. States, in the room of general Armstrong, resigned. He had 82 votes; and Mr. Clarkson 45. Mr. Clinton is, and ever has been, an unequivocal republican.

DIED—*Samuel Philips*, Lt. Governor of Massachusetts.

As no business of importance was transacted in Congress on Friday and Saturday, other than the discussion on the judiciary bill from the Senate, we omit, for the present the minutes of those days, to give way for the commencement of this important debate, the whole of which will be presented with the greatest attainable correctness and promptness.

On *Friday* Mr. Bayard occupied the whole of the day, without concluding his remarks, which he closed on *Saturday* about 3 o'clock; when *Mr. Randolph* spoke till nearly 5 o'clock; when the House adjourned to Tuesday, on the intimation of the Speaker, that a day would be required to have a ventilator put up.

To induce the House to adjourn to that day, Mr. Bayard stated that Monday was the birth day of Washington.

[By Authority.]

AN ACT

Extending the privilege of franking and receiving letters, free of postage, to any person admitted, or to be admitted to take a seat in Congress, as a delegate; and providing compensation for such delegate.

BE *it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That any person admitted, or who may hereafter be admitted to take a seat in Congress, as a delegate, shall enjoy the privilege of sending and receiving letters, free of postage, on the same terms, and under the same restrictions, as are provided for the members of the Senate and of the House of Representatives of the United States, by the act, entitled "An Act to establish the post-office of the United States;" and that every such delegate so admitted to a seat, be, and he is hereby authorised to receive, free of postage, under the said restrictions, any letters directed to him, and which shall have arrived at the seat of government prior to the passage of this act: And that every such delegate shall receive for his travelling expences and attendance in Congress, the same compensation as is or may be allowed, by law, to the members of the Senate and House of Representatives of the United States, to be certified and paid in the same manner.

NATHL. MACON,
Speaker of the House of Representatives.
A. BURR,
Vice-President of the United States, and President of the Senate.

APPROVED, Feb. 18. 1802.
TH: JEFFERSON,
President of the United States.

NOTICE.

THE Creditors of Mr. William Baily are requested to meet at Mr. Semmes's Tavern George Town on Thursday the 18th March next at 5 o'clock, in the afternoon—They are particularly requested to make known, at that time, the amount of their claims.

WALTER MACKALL, Trustee.

Feb. 22. eo3t

Public Auction.

Will positively be sold at the ferry on the premises, on Monday the 15th of March next, on terms that will then be made known.

ALL that tract of land, known by the name of Blue Plains, containing near 500 acres, on which Mr. William Bayly now lives. This property has been so frequently advertised and described, that it is supposed useless particularly to describe it; suffice it to say, it combines more advantages than any tract of its size in the United States. A good and indisputable title will be made upon receipt of the purchase money.

WALTER MACKALL,
Trustee

Feb 22, 1802. 2aw3w