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CONGRESS OF THE UNITED STATES,

House of Representatives.

Wednesday, Feb. 17, 1802.

DEBATE

On the bill received from the Senate, entitled "An Act to repeal certain acts respecting the organisation of the courts of the United States.

Mr. Thompson—I find the opinions I entertain, so extremely adverse to the sentiments yesterday expressed on this subject by the honourable gentleman from North-Carolina (Mr. Henderson) who opened this debate, and the honourable gentleman from Pennsylvania (Mr. Hemphell) whose great ingenuity I feel pleasure in acknowledging, that I feel myself impelled to offer to the consideration of the committee a few observations in reply to the arguments used by those gentlemen. But, Mr. Chairman, whilst I pay the tribute of my respect to the eloquence and ability which the gentleman from North-Carolina has displayed in the discussion of this subject, I must pray that honourable gentleman to pardon me when I declare myself unable to follow him, when soaring on fancy's airy pinion he transported us across the Atlantic, and presented to our view, in the most vivid colours which language can pourtray, the spirit of innovation sweeping morality and good order from the earth. Nor will I pretend, Sir, that my humble genius will enable me to pursue him, when he forced this same spirit of innovation to mount the whirlwind and lash on the storm. But, Sir, with such talents as I am endowed with, I have no objection to going into the consideration of the question before the committee, and pursuing the order which the gentleman has had the goodness to suggest, as the most natural into which the subject can be divided—that is 1st—The power of the legislature to pass, and 2dly, The expediency under the existing state of things of passing the bill now upon your table.

Under these two heads I will endeavor to meet, as far as I shall be able to recollect them, the most impressive arguments which have been used by the gentlemen, and I will beg leave in the first place to call the attention of the committee to the 8th section of the 1st article of the constitution, which has been very slightly touched on by the gentleman from North-Carolina, and which has been attended to, with much ingenuity by the gentleman from Pennsylvania. By this section the legislative powers of congress are defined. Congress shall have power, says the constitution, to levy taxes, to borrow money, to coin money, and, among a variety of other powers, "To constitute tribunals inferior to the supreme court." It is an axiom in politics that an ordaining power always embraces a repealing power; if congress have a right to constitute courts, they have the right to modify and to annul the courts so constituted, this, like various others, is merely a discretionary power to be exercised, or not exercised, as congress shall find conducive to the public welfare; the granting a power does not oblige the exercise of that power: neither does the exercise of power make the laws resulting from that constitutional exercise of power, unchangeable and irrepealable. The same constitution, giving this power, gives various other powers as I have already shewn; yet it has never been contended that the laws passed under these conceded powers are irrepealable. Still, by a parity of reason, and with a referrence to this particular section of the constitution, if the laws relating to the judiciary establishment of the United States are irrepealable, so must the various laws passed under these granted powers, relating to your revenue, to your army, to your navy, to your mint, be irrepealable. But every gentleman knows that laws resulting from these powers have been passed, have been modified, and have been repealed; and so likewise has the law establishing the judiciary system. Without carrying you through the tedious detail of the 26 or 27 laws, which have been passed upon this subject, it will be quite sufficient for my purpose to notice the law of the last session of congress; the 27th section of which begins with these words: "And be it further enacted, that the circuit court of the United States heretofore established shall cease and be abolished." We travel not then in a wilderness, Mr. Chairman, untrodden by human footsteps; our immediate predecessors, it appears to me, are the pioneers who point out to us the path we should pursue for the benefit of our constituents: They have not only abolished the circuit courts, but reorganized the whole system—they have constituted new courts and new judges, and they have lessened the duties of the judges of the supreme courts. To say that a subsequent legislature have not a right to repeal a law of a precedent legislature is to proclaim such precedent legislature infallible. That they are more just, more wise, more competent to the exercise of their functions, than any legislature which shall follow them. It is a contradiction of the progress of knowledge, and of the improvements which may result from experience—it is a denial of the utility of frequent elections; because that legislature which had attained the acme of perfection ought to be permanent and unchangeable. The law however of the last session, which I have just now cited, having modified the courts of the United States, concedes the power of modification to be in the legislature. But, Sir, even this concession, such as it is, is now by the arguments of gentlemen, so clogged with appendages, so qualified by expositions, that whilst with one breath the power of modification is admitted, with the very next that power is unnerved, is rendered useless; for, says the gentleman from North-Carolina, a department of the government has been erected, called the judiciary, not holding their offices during pleasure, but during good behaviour, and whatever power attempts to deprive them of their offices violates the constitution. It is admitted then that congress have power to modify the law; but it is denied that they have power to abolish the offices of the judges.

Let us then enquire, Mr. Chairman, by what tenure the judges hold their offices—"The judges both of the supreme and inferior court, shall hold their offices during good behaviour." Const. Art. 3, Sec. 1. The gentleman from North-Carolina enquires, if they have been guilty of any misdemeanor. How then are we to break down this constitutional rampart, with which they are entrenched? How, (to use the gentleman's own expression) are the judges to be *hurled* from their offices? There is no gentleman, Mr. Chairman, within these walls, who would more sincerely wish the judiciary to possess a due and proper independence than myself; but although I do not admit the right of the legislature to hurl these judges from their offices, yet, I must contend and shall ever contend for the right which congress possess to abolish an office, or in other words to repeal a law creating an office, whenever it shall be plainly proved to them that such an office is unnecessary and oppressive. They may hold their offices during good behaviour, if their offices exist; but most certainly the moment the office is legally destroyed, that is, the moment the law establishing the office is repealed, there must be an end of the tenure. Those sages, who formed the constitution, Mr. Chairman, never contemplated a privileged order of men in that society for whose happiness they formed that instrument. The exposition, which is now given to it, is very different indeed from that which was intended by them. I have read and have heard, sir, that this is a government of experiment. That in the annals of nations it has no likeness—No prototype—The effects of this particular department of the government were not better understood than the effects of the other departments of the government—it was to be tested by experience, the touchstone of truth; if one system in its operation did not answer the expectation of the legislature, ample room was allowed for the introduction of some other, and for the abolition of the former; hence come the expressions "from *time to time* ordain and establish"—What says the constitution? "The judicial power of the United States shall be vested in one supreme court, and such inferior courts, as congress shall from time to time ordain and establish." Congress *may* then or congress *may not* from time to time ordain and establish courts. But if they establish courts, so likewise may they abolish courts. Into what a variety of absurdities shall we be plunged, if we reject this reasonable interpretation? The right to modify the law being conceded, but not the right to deprive the judges of their offices, our country would exhibit a spectacle which it never has yet and I hope never will exhibit—officers without offices—judges without courts—A privileged order out of the reach of the constitution, (for being deprived of their offices they can not be impeached) drawing money from the treasury and rendering no services for their salaries. Is this the meaning of that constitution which declares, that "the judges during their continuance in office shall receive a compensation for their *services*—a *compensation*?" But suppose, Mr. Chairman, they perform no service—Suppose there be no service for them to perform, what then is to be their compensation? Will the judge say to the legislature, encreace my duties, make them proportionate to my salary, and I will perform them? Not so Mr. Chairman—an increase of salary is never objected to; a diminution of duty is never objected to; but if duties are encreased, salaries must also be encreased. If I understand the word compensation, it signifies a something given for a something performed. But if there be no duty performed (and if there be no office there can be no duty) then there ought to be no compensation. In the English language there is such a word as sinecure. This is a word, Mr. Chairman, which as yet we do not practically understand. This is a word abhorrent to the spirit of our constitution. Yet, sir, if the construction of the constitution, which is now contended for, be admitted, this will be a word which we shall soon practically feel, and practically understand. We shall have a set of men receiving the public treasures not in consideration of public services, but without any services whatever being performed; or in other words, we shall lay the foundation of a sinecure system, the consequences of which will be incalculable, and the effects of which will be indescribably destructive.

But, Mr. Chairman, I will shew you a precedent and a recent one too, where the legislature put a different construction upon the constitution; I will shew you a precedent where a federal congress, our immediate predecessors, did not hesitate to exercise the powers we contend for; by the 27th Sec. of the law of the last session, which I have had occasion before to advert to, the circuit courts are abolished. Then that congress not only thought themselves justifiable in touching the judges of the inferior courts, but of the supreme court likewise; for you will find that the same law which constituted the supreme court, allotted to the judges of that court, particular and express duties or offices, that is, to perform the duties of a judge of the supreme court, as is in that law defined, and to perform the duties of judges of the circuit court as is likewise defined in that law; and in abolishing the circuit courts, half the office of the judges of the supreme court were abolished.

Perhaps, Mr. Chairman, that congress had as great a right to abolish the whole office as half the office; but whether that was an infraction of the constitution, or whether it would be an infraction of the constitution to abolish the office of a judge of the supreme court, I will not now detain you to enquire, because it appears to bear but little upon the immediate subject before us, it not being the intention of the bill, as I understand it, to interfere with the offices of the judges of the supreme court, further than to restore them to that firm, that rightful, that constitutional ground, on which they stood previously to the passage of the law of the last session, and to all the duties and immunities of which I most sincerely wish to see them restored.

But, Mr. Chairman, the gentleman from Pennsylvania has informed us, it is acknowledged that the law of the last session is constitutional; in this I can by no means agree with that gentleman. There is one section in that law, Sir, which in my humble opinion is a flagrant violation of the constitution. By the 24th section of that law the district courts of Kentucky and Tennessee are abolished. Had our predecessors stopped at this point, we should have no cause on this day to charge them with a violation of their charter, they would have done no more in principle than we now contend we have a right to do. But they went further—they usurped a power in my opinion, not given them by the constitution, they usurped a power exclusively vested in the president and senate. By the 7th section of the same law, the judges of the district courts of Kentucky and Tennessee, are appointed circuit judges in fact, not indeed in name, but in reality the duties of circuit judges of the sixth circuit are assigned them. The district courts of Kentucky and Tennessee are abolished, and I wish to be informed if they are not circuit judges to all intents and purposes, and I wish further to be informed, if they are not circuit judges appointed by the legislature, and in direct violation of that article of the constitution, which has, in the most express terms, vested this power in the president and senate. Sir, did I apprehend the gentleman from Pennsylvania aright, when I understood him to say, the name of a judge does not define or constitute the duty of a judge?

This is indeed a melancholy exemplification. Shall I be told that by the law they are stiled district judges? How long, Mr. Chairman, are we to be imposed on by sound, how long are we to be entangled with the cobwebs of sophistry. But, Sir, the gentleman from North Carolina, has warned us, solemnly warned us, against a violation of the constitution. Was that gentleman a member of this house, when the law which I have just been speaking of, passed? I perceive by your journals that he was—why then, Sir, were not these sensations, which he now experiences with such exquisite sensibility, awakened? Why were they not awakened a year ago, when he might perhaps have prevented an actual violation of the constitution? I ask the honorable gentleman, Sir, when with a sacrilegious hand this vital wound was inflicted on the constitution, if he raised no plaintive cry of spare, oh! spare the constitution of my country? Yesterday, Sir, the gentleman informed us if the bill on your table should pass he would heave no sigh, he would drop no tear over the expiring constitution. When that law passed, did he heave no sigh, did he drop no tear? Oh, no Sir, very different was the course which was then pursued. With cool, with cruel deliberation, the devoted victim was immolated, and the blood which issued from the gaping wound will forever stain the pages of your statute book.

Mr. Chairmain, the expediency of the law now under consideration, and the propriety of adopting a measure of this nature, at the present time, have been so fully and so satisfactorily discussed in the senate, not many days ago, that to this point I shall apply but few observations. Coming from a state where justice is administered with promptness and frugality, I confess that the stupendous fabric of the federal judiciary excites my astonishment. I had, Sir, supposed, that the document, which has been furnished by the executive, would be a full and compleat answer to any thing that could be said on this division of the subject; but, Sir, the gentleman from Pennsylvania, has informed us that if the undecided causes of the state of Maryland were added, the aggregate number of depending causes in the courts of the United States would probably amount to sixteen hundred, and he enquires if it is practicable for the courts, after the repeal of the law of the last session, to determine this number of causes, scattered over the United States. Sir, when I cast my eyes across the Potomack, and call to my recollection the system of jurisprudence established in *my* country, I cannot hesitate a moment in giving him an affirmative answer.

I have not, Mr. Chairman, nor was it possible for me to procure, documents from the district courts of my state to shew to the committee the number of suits which are depending in them. But, Sir, when I reflect how often I have seen a venerable citizen of that state, respectable for his great learning, respectable for his irreproachable life, and respectable for his years, (being aged I believe full seventy) who is judge of the high court of chancery there, devoting his days and his nights to the avocations of his office, in the plain garb of a common citizen, dispensing justice and satisfaction to the multitude of citizens whose causes are tried before his tribunal; when I reflect on the number of decisions which are made in his court in the course of a year; and when I overlook a document which I have now in my possession from the clerk of that court, and which I shall presently offer to the view of this committee, I can have no difficulty in pronouncing the sincere opinion which I entertain that he performs more duty, and perhaps with greater ability, than the whole judicial corps of the United States. [Read the document from the clerk of the high court of chancery of Virginia.]

And what, Mr. Chairman, is the compensation which this venerable citizen receives? Fifteen hundred dollars—no more—compare this with the sum which supports and decorates the fair composite column, which we are informed is one of the strong pillars of our government; and to touch which we are told will occasion the beautiful fabric to tumble in the dust. Have we not state courts diffused in abundance over every commonwealth composing this union? are they not competent to the decision of all cases of controversy between citizen and citizen? Is not the jurisdiction of the federal court extremely limited from the true and genuine construction of the constitution? Where then was the necessity of the law of the last session which ramified and encreased these courts? But, sir, the honorable gentleman from North-Carolina has found another use for them; he has told us "the people, when they established this constitution did not delegate the power of legislation to the house of representatives alone.---They established the senate as a check upon the house of representatives, knowing the violent impulses which often actuate popular assemblies, they gave the President too the power to negative laws.—When a law had passed these various branches of the government, it became necessary to erect a third department, called the judiciary, not holding their offices during pleasure but during "good behaviour."—Did I comprehend the argument of gentlemen when I supposed it went to the establishment of this department, as a check upon the legislature, & did I comprehend the argument of the gentleman from Pennsylvania when he cited judge Paterson's charge, which I have not seen, but from which, as he read, I noted these words "I hold it to be the duty of the court in such case, to declare the law null & void." If I have not misunderstood the gentleman, I confess my eyes are now opened. I begin to feel some of those apprehensions which have been so strongly talked about, and which heretofore I have not been accustomed to experience. Not, sir, from a fear of usurpation of power on the part of the legislature—for they are biennially responsible to their constituents for the sacred observance of the charter of their rights; not, sir, from a fear of usurpation of power on the part of the executive, for the term of his service is limited to four years, and therefore he is liable to lose his office in case of an infraction of the constitution on his part; but from a desire which I fear this check-department of the government has to grasp at all power. Give the judiciary this check upon the legislature, allow them the power to declare your laws null and void, allow the common law, a system extending to all persons and to all things, to be attached to the constitution, as I understand it is contended; and in vain have the people placed you upon this floor to legislate; your laws will be nullified, your proceedings will be checked. As long as the office exists the judge holds it during good behaviour; he is then independent. Being independent, and not having that degree of responsibility attached to his office which is attached to the legislature or to the executive, the powers granted by the constitution are to be strictly construed; nothing is to be left to implication; nothing to construction; the letter is to determine the extent of their power, and I conceive it never was intended they should transcend it.—I have, sir, looked into the constitution with a scrutinizing eye, to discern, if possible, whence these pretensions are derived. There are but two clauses of the constitution, which can even give a pretence for the power which is contended for. The first is as follows, "The judicial power of the United States shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."—To declare a law null and void is certainly not such a case, either in law or equity, arising under the constitution, as was contemplated to be embraced by the paragraph I have cited. It will be in vain to say, that without such a construction the constitution cannot be satisfied. I am not now to learn that there are two descriptions of cases which will be fully sufficient to satisfy the terms there expressed, in their utmost extent, as where cases shall arise between citizens of different states, or between citizens and foreigners which are to be decided either by state laws or by foreign laws; or where cases shall arise between citizens of the same state in consequence of an unconstitutional exercise of power on the part of the state, in emitting and making bills of credit a lawful tender. The other clause of the constitution is as follows: "This constitution and the laws of the United States which shall be made in pursuance thereof, &c. shall be the supreme law of the land and the judges in every state shall be bound thereby."—This, certainly, from the words with which it concludes was intended as an instruction or direction to the judges of the state courts; and if they were transposed perhaps would more fully communicate the intention of their framers, reading in this form, "the judges in any state shall be bound by this constitution, &c." Is there any reasonable person, sir, after this explanation, will say that by

(Continued on last page.)