NATIONAL INTELLIGENCER,

AND

WASHINGTON ADVERTISER.

Vol. II. WASHINGTON CITY, PRINTED BY SAMUEL HARRISON SMITH, PENNSYLVANIA AVENUE. *No. CCIV.*

Five Dolls. per ann. FRIDAY, FEBRUARY 26th, 1802. *Paid In Advance.*

National Intelligencer.

CONGRESS OF THE UNITED STATES,

House of Representatives.

Thursday, *February* 18, 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.

[continued]

[Mr. Stanley's Speech concluded from our last.]

In approaching the second question which I proposed to examine, the constitutionality of the measure, whether I reflect on the magnitude of the question on the one hand or my inability on the other, I am indeed humbled before the undertaking.

Without examining whether government hould be, according to the modern opinion, founded on the reason and sense of justice of man, it is certain our government is calculated to guard against his weakness and his wickedness. Our government has been particularly cautious on this subject, it has left nothing to the hazard of reason or sense of justice—it has carefully delegated powers to three distinct departments, & separated these departments by boundaries plainly marked, and formed each so as if not to control at least to check the other. The legislative powers though vested in men chosen frequently and by the people themselves in one branch, and by the immediate agents of the people in the other, is nevertheless the object of suspicion and caution. Their powers far from resting on their discretion, or sense of expediency are expressly and cautiously limited. The executive conditional veto forms one check on the legislature, the judiciary I shall contend are a check on both. Here permit me to say, that from the spirit and the words of our constitution, I infer that the judiciary are a co-ordinate department with the executive and legislative. The framers of our constitution satisfied that the powers of all well organized governments ought to be divided into three branches—legislative, executive and judicial, have no where expressly declared there shall be such departments, but after premising the objects of the government, proceed to ordain how the legislature shall be composed—And Art. 2. sec. 2. " The Executive power shall be vested in a President of the United States of America; he shall hold his office during the term of four years," and prescribes the mode of election—Art 3. sec. 1. " The judicial power of the U. States, shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish," and the judges of the supreme and inferior courts shall hold &c. during good behavior. By comparing these sections of the constitution, it appears the judiciary and the executive are expressly created by the constitution, nothing is left to the discretion of Congress, as to the existence of these departments; they are created by the same words; and if the legislature claim a right to put down the judiciary at pleasure, before the happening of that event 'til which the constitution secures their offices, their misbehavior; they may as well assume the right to remove the President before the happening of that event 'til which his office is secured, to wit: the expiration of four years. I shall attempt to establish as a first principle, That the judiciary are a check on the legislature, and thence to shew first, that by the spirit of our constitution the judiciary ought to be independent, beyond the controul or influence of either of the other departments of power, and secondly, that by the words of the constitution, they are so secured.

First then, that the judiciary are a check on the legislature.—In the constitution we find certain powers delegated to Congress, we also find they are prohibited from exercising certain powers. Among which are, that they shall pass no ex post facto law, no bill of attainder, no law respecting religion, &c. Should unhappily a legislature be found also from weakness or wickedness, or the union of both should transgress the bounds prescribed, what is the security of the citizen? After all the experience derived from the example of other governments, after all the deliberation and wisdom of our sages, who framed the constitution, are we left in this important instance as under the despotism of a monarch, to seek redress through the throes and convulsions of a revolution? No Sir. The judiciary are our security. The legislature may enact penalties and denounce punishments against those who do not yield obedience to their unconstitutional acts; their penalties cannot be exacted nor punishments inflicted without the judgment of a court. The judges are to expound the law and that fundamental, paramount law, the constitution. To this purpose they are sworn to support the constitution.—While the judiciary firmly, independently and uprightly, discharge their duty and declare the act of the legislature contrary to the constitution *to be void*, the legislature are checked, and the citizen shielded from oppression and persecution. But, ask gentlemen, whence do the courts derive this power. And the honorable gentleman from Virginia (Mr. Thompson) says we are contending for this *common law doctrine*, that the courts are a check on the legislature. If I misunderstood the gentleman, I trust he will correct me. Sir, that gentleman, I am willing to presume knows, what I assure him no gentleman with whom on this occasion I act, is ignorant of, that this is not a common law doctrine—that in England their courts have no check on the legislature—their Parliament are emphatically stiled omnipotent, and if they violate the few natural rights that remain to the citizens, they have no remedy but in a resort to revolutionary principles; it was the want of this check to the oppressions of their rulers which have produced civil wars, and driven one monarch from his kingdom, and sent another to the scaffold. This power exists in no other government, because under no other government does there exist a legislature with limited powers; under our government it is the very essence, the constitution of a court, a duty enjoined on them by the oath to support the constitution. The exercise and the admission of this right are not new in America; instances must be in the recollection of every gentleman. I will cite a few most prominent.—The honorable member (Mr. Thomson) has been pleased to call the attention of the committee to the examples drawn from his state; I beg leave to profit from the same source. In 1787, the legislature of that state passed an act, making new arrangements in the jurisdiction of their courts.—The judges, among whom was that venerable gentleman mentioned by the member from that state, whose merits and worth command the sincere homage of my respects, protested against this act, and refused to carry it into effect; the legislature acquiesced and the law was repealed.

Upon the imposition of the carriage tax by Congress, a citizen of Virginia refused to pay the tax, upon the ground that it was unconstitutionally laid. He was sued for the penalty in the circuit court of that state, from whence by writ of error the suit came before the supreme court; in this case the defendant relied solely on the unconstitutionality of the act of Congress, and on this ground was defended by the Attorney-General of the state of Virginia, and the Attorney-General of the state of Pennsylvania.—At this time then it appears that these learned gentlemen, the judges and the citizens, thought the court competent to relieve in case the law was judged to be unconstitutional. In 1792, Congress passed an act imposing certain duties respecting invalid pensioners, upon the judges of the circuit court.—The judges at the first court after this act, protested against it; their protests were transmitted to the President of the United States; that President who had presided in the general convention which framed the constitution, and therefore as likely to understand the powers of Congress on the judiciary, as any other man, so far sanctioned their opinions as to transmit them to the next Congress, where the act was reconsidered and repealed.—I beg leave also to allude to the authority before mentioned by my friend from Pennsylvania (Mr. Hemphill) which I should think of some weight here—It is the opinion of a gentleman venerable for his age, respectable for legal knowledge, and distinguished for what in the fashionable language of the day, are termed republican principles. I mean the executive of Pennsylvania; that gentleman in assigning to the legislature of his state, his reasons for not approving an act they had laid before him, after expressing his doubts of the constitutionality of the act, declares, " he cannot from a confidence in the legal knowledge, integrity and fortitude of his former brethren in the supreme court, risk his character in a judicial decision on this question, when he does not foresee any advantage to be derived to his country from a possibility of success." If any words can make more plain the opinion here conveyed, it is, that he considers the judges have the power and will exercise it, to declare the act unconstitutional.

To my mind these considerations are satisfactory that from the very constitution of our courts, from the practice and admission of our state courts and state legislatures, and federal courts, and federal legislature, that the judges of the United States, sitting in court, have the power, and by oath are bound to pronounce, that an act contrary to the constitution, *is void*. From the establishment of this proposition, that the judges are the expounders of the constitution, and the laws made under it, and that they are thereby a check on the legislature, I shall infer, that by the spirit of our constitution they ought to be independent of the other branches of government, but particularly so of the legislature. The concentrating the branches of power either executive and legislative, or legislative and judiciary in the same hands is the very essence of tyranny; in proportion as we advance towards the union of those powers, in the same proportion do we recede from liberty. Are these departments separate, unconnected—if the legislature by any means procure their *will* either directly or indirectly, to be substituted for, or to overrule *judicial judgment?* Whether the legislature expound and adjudge their acts themselves, or submit them to the exposition and judgment of a judiciary subservient to them, is essentially the same. If the legislature exercise the power of removal from office by the direct means of a vote of removal, or by the indirect means, the legislative legerdemain of a repealing act, is precisely the same thing, the judges are no longer independent, but dependent on the legislature for their offices, and subject to their control; a consequence entirely repugnant to the spirit of our constitution. I shall now attempt to shew, that by *the words* of our constitution the judges are placed beyond legislative control. Art. 3. sect. 1. " 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." Until the contemplation of the present measure, I incline to believe, it never entered the mind of any man acquainted with this clause of the constitution, that judges should be removed, otherwise than by impeachment for misdemeanor. The advocates for this legislative power contend that the tenure of " good behaviour" in this article of the constitution is intended to restrict executive and not legislative power. It does not appear probable that an express restriction should be introduced against a power which is no where expressly granted. For gentlemen know that the executive power of removal from office, is a power admitted from construction, and not founded on any thing drawn from the constitution. I say this the rather, because by the constitution the aid of the senate is necessary to *appoint*, and a fortiori should be necessary to remove. It is important to ascertain what was the intention in the framers of the constitution in introducing the words " good behaviour." The most correct source in our power from which this aid may be derived, is the writings and opinions at that day of those who aided in the great work. Among those publications which were written for the purpose of explaining and recommending this constitution, the most celebrated are those pieces under the signature " Publius," written by the pens of gentlemen of leading influence in the convention, and whose talents and patriotism are still honoured by the nation. In that part of this work which treats of the tenure of the office of judge during " good behaviour," I find this strong expression " the standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince. *In a republic it is a no less excellent barrier to the incroachments and oppressions of the representative body.*" This, Sir, to my mind is conclusive, that the convention intended this tenure as a restriction no less on legislative than on executive power, and that in this sense of the phrase the people of America received this part of the constitution. In ascertaining the import of the words " during good behaviour," it is certainly important to enquire the end to which they have been used in other similar cases. My colleague (Mr. Henderson) has, with much abler talents shewn that in most of the state constitutions which existed before our federal constitution, these words are used to fix the tenure of offices, where the executive have neither express nor constructive power of removal; consequently they are in those constitutions restrictive of the legislative power. If then the framers of our constitution borrowed this tenure from these state constitutions, it is fair and reasonable to conclude they used them in the sense in which they were previously received. But says my colleague on the other side the house (Mr. Robert Williams) the judges in England hold their offices by the tenure of " good behaviour," and yet are removable on an address from both houses of parliament, and he infers that the terms may have been taken from England. To this I will first observe, that no fair argument can be drawn from the existence of this legislative power there, for the exercise here. The mode of appointment there may render such control over the executive necessary, which from the provisions of our constitution are not wanted here. In England the king has the sole power of appointment.—the people have no previous check. In this country the executive appointment is checked by the requisite sanction of the senate. But is this legislative power in Great Britain usurped by construction? No, if the gentleman will read again the statute of 13 William III. he will find that this power of removal is expressly granted by the crown to the parliament. If then one convention had this statute before them, in adopting that part, which relates to the tenure of office, and omitting that part which gives the power of removal, it is not to be presumed they intended so important a power should depend on construction. The same gentleman (Mr. R. W.) also contended, that it could not be presumed the convention intended to restrict the power of the representatives of the people, the friends of the people. What will the gentleman say, of the correctness of his opinion, when I remind him, that our powers are all expressly restricted; that the same article which fixes the tenure of " good behaviour," expressly and undoubtedly guards against the power of the representatives of the people, the friends of the people, by securing the salaries of the judges undiminished during their continuance in office.

But, as strong an argument as can be used against this constructive legislative power, is the evils which may result from the exercise of it. Popular assemblies are as much under the dominance of passion as individuals; they feel as sensibly, and resent as malignantly. He who has not made this observation is a stranger to what has passed in all popular governments. I am sorry to add, a stranger to what has so lately passed in this country. By the exercise of this power, firm, upright judges, men of unbending virtue, are to be removed upon every change of administration, to make way for more pliant minions, the humble instruments of the legislature. That bulwark of our liberties against legislative encroachment, the independence and purity of our judiciary, is tumbled into ruins, and the rights of millions are crushed by its fall. The sacred altar of justice is polluted, the sword of justice becomes the rod of oppression. On the other hand, what danger is to be apprehended from that independence of the judges for which the friends of the constitution contend; not that bad and corrupt men will be fastened on us. No, the constitution provides for their removal by impeachment. Not that they will viciously oppose the constitutional acts of the legislature. No, the legislature are a check upon them by the mode of impeachment, in which this house is the accuser and the senate the judges. If the judge be corrupt, if he misdemean himself, he may be removed. If he continue pure and upright, he ought not to be removed; no earthly power, but the mighty hand of the people which formed the constitution and can destroy it, can legally remove him. Should this measure be adopted, and the independence of our judiciary destroyed; should the administration of our government unfortunately pass into the hands of men who feel power and forget right, our constitution becomes indeed " a Lilliputian tie;" and this measure will be the first link in that chain of measures which will add the name of America to the melancholy catalogue of fallen republics.

[To be continued.]

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Dec. 18. eptf

National Intelligencer.

[Among the most important subjects at present before the Legislature is the organisation of an efficient *Militia.*—Assured that they must be the strongest bulwark of our liberties, the subject merits the consideration of every patriotic mind. We trust, therefore, that the following intelligent and animated remarks of Mr. *Dickinson*, extracted from his Works, which have just appeared, will give an impulse to our public councils, which shall issue in the happiest result.]

A small standing army cannot defend an extensive country, and a large one is always injurious to the welfare, and dangerous to the liberty of the people. Those excellent counsellors, common sense and common honesty, induced our ancestors to adopt one plain maxim of inestimable worth, for securing national happiness. It was this, to *connect the civil and military powers, and direct them to the same end, retaining the latter in strict subordination to the former.*

In every country where this connection has been neglected, the military power has become a *dictator* to the civil power.

The voice of reason and the voice of historic experience address us, in the strongest and clearest notes of warning. Let us attentively listen to their solemn instruction.

An *armed people* with *unarmed magistrates*, is the best security for liberty.

There cannot be a plainer proof that magistrates entertain views unfavorable to the welfare of their country, than their aversion to *a national militia.*

While the measures of the magistrates are agreeable to the people, things proceed quietly & happily; but, when *they* are determined to pursue measures displeasing to the people, they, for carrying their own will into execution against the will of the people, *they look for some other support.*

If it should be asked, when does this opposition of wills take place, the answer suggested by truth is, when rulers resolve to gratify their ambition, avarice, pride or any base passion, *whatever expence of blood or treasure* it may cost the people. But do they frequently happen? To go no farther, let the history of modern *Europe* be consulted. There we shall find, that but a few centuries ago, the inhabitants of all its divisions were free. They were brave too; but unhappily they were heedless also. Many snares were laid for their unsuspecting simplicity, and before they discovered them, they were catched in the toils, and reduced to slavery.

An aversion to a national militia acts as the main spring that regulates all these snares.

Sometimes magistrates indulge this disposition, by craftily neglecting this *natural force.* Sometimes they insidiously manage so as to enervate it, for this purpose availing themselves particularly of the ignorance and indolence of those who know not its value, or who dislike any exertion unless it be immediately profitable and pleasant. Sometimes they cunningly *irritate and arm* one part of the people against their fellow-citizens. Sometimes, raw in policy or rash in passion, they by their mismanagement or insolence *create* disorder, and then, with the blundering boldness of fear, deny the utility of a militia. Alarmed at the discontents and evils *which their own follies and vices have produced*, they cry out, that nothing less than *the energy of a standing army*, and copious phlebotomy by the points of swords and bayonets can cure the diseases.

But, this direful process for changing freedom into servitude, must be conducted with due decorum; for the *usurpers* of power always moving in the view of the public, are the most decorous of all mortals. The *form* is to deceive, while they seize the *substance.* Every violence has its attendent vindication. Their massacres are humane, and their robberies equitable. Thus, the patriotic *Julius Cæsar*, to *defend the rights of the plebians*, justly enslaved *Rome.* Thus, the pious *Oliver Cromwell*, to *keep the peace of the nation*, mercifully enslaved *Britain.*

If a *law* or a *constitution* stands in the way of such ambitious commentators, not *the three brothers* so celebarted for their dexterity of interpretation could be more versute in extracting a meaning accommodated to their inclinations.

If *their* constitution cannot be found in so many *words*, they are far from being discouraged. They will next seek for it in so many *syllables.* If even *syllables* should be so stubborn as to deny their aid, they can at least find in different parts a sufficient number of *letters*, and then by joining these together, they