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CONGRESS
OF THE UNITED STATES,

House of Representatives.

Saturday, *February* 20, 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. Bayard, concluded.]

I owe to the committee the expreſſion of my thanks for the patience with which they attended to the laborious diſcuſſion of yeſterday.

It will be my endeavour in the remarks which I have to offer upon the remaining point of the debate, to conſume no time which the importance of the ſubject does not juſtify. I have never departed from the queſtion before the committee, but with great reluctance. Before I heard the gentleman from Virginia, I had not an obſervation to make unconnected with the bill on the table. It was he who forced me to wander on foreign ground, and be aſſured, ſir, I ſhall be guilty of no new digreſſions where I am not covered by the ſame juſtification.

I did think that this was an occaſion when the houſe ought to have been liberated from the dominion of party ſpirit, and allowed to decide upon the unbiaſſed dictates of their underſtanding. The vain hope which I indulged that this courſe would be purſued was ſoon diſſipated by the inflammatory appeal made by the gentleman from Virginia, to the paſſions of his party. This appeal, which treated with no reſpect the feelings of one ſide of the houſe, will excite recriminations which have been made, or which ſhall be retorted. We were diſpoſed to conciliate, but gentlemen are deceived if they think that we will ſubmit to be trampled on.

I ſhall now, ſir, proceed to the conſideration of the ſecond point which the ſubject preſents. However this point may be diſguiſed by ſubtilities, I conceive the true queſtion to be—has the legiſlature a right by a law to remove a judge? Gentlemen may ſtate their queſtion to be, has the legiſlature a right by law to vacate the office of a judge? But, as in fact they remove the judges, they are bound to anſwer our queſtion.

The queſtion which I ſtate they will not meet. Nay, I have conſidered it as conceded upon all hands, that the legiſlature have not the power of removing a judge from his office; but it is contended only that the office may be taken from the judge. Sir, it is a principle in law, which ought, and I apprehend does, hold more ſtrongly in politics; that what is prohibited from being done directly is reſtrained from being done indirectly.' Is there any difference but in words between taking the office from a judge and removing the judge from the office? Do you not indirectly accompliſh the end, which you admit is prohibited. I will not ſay that it is the ſole intention of the ſupporters of the bill before us, to remove the circuit judges from their offices; but I will ſay that they eſtabliſh a precedent, which will enable worſe men than themſelves to make uſe of the legiſlative power for that purpoſe upon any occaſion. If it be conſtitutional to vacate the office, and in that way to diſmiſs the judge, can there be a queſtion as to the power to re-create the office and to fill it with another man? Repeal to-day the bill of the laſt ſeſſion, and the circuit judges are no longer in office. To-morrow reſcind this repealing act (and no one will doubt the right to do it) and no effect is produced but the removal of the judges. To ſuppoſe that ſuch a caſe may occur is no vagary of imagination. The thing has been done, ſhameleſsly done in a neighbouring ſtate. The judges there held their offices upon the ſame tenure with the judges of the United States. Three of them were obnoxious to the men in power. The judicial law of the ſtate was repealed, and immediately re-enacted without a veil being thrown over the tranſaction. The obnoxious men were removed, their places ſupplied with new characters, and the other judges were re-appointed. Whatever ſophiſtry may be able to ſhew in theory, in practice there never will be found a difference in the exerciſe of the powers of removing a judge and of vacating his office.

The queſtion, which we are now conſidering, depends upon the proviſions contained in the conſtitution. It is an error of the committee, upon plain ſubjects to ſearch for reaſons very profound. Upon the preſent ſubject the ſtrong proviſions of the conſtitution are ſo obvious, that no eye can overlook them. They have been repeatedly cited, and as long as the queſtion ſtated is under diſcuſſion, they muſt be reiterated. There are two prominent proviſions to which I now particularly allude. 1ſt. The judges ſhall hold their offices during good behaviour. 2d. Their compenſation ſhall not be diminiſhed during their continuance in office. Theſe are proviſions ſo clearly underſtood upon the firſt impreſſion, that their meaning is rather obſcured than illuſtrated by argument. What is meant, and what has been univerſally underſtood by the tenure of "good behaviour?" *A tenure for life* if the judges commit no miſdemeanor. It is ſo underſtood and expreſſed in England, and ſo it has always been received and admitted in this country. The *express* proviſion then of the conſtitution defines the tenure of a judge's office; a tenure during life.—How is that tenure *expressly* qualified? By the good behaviour of the judge.—Is the the tenure qualified by any other *express* condition or limitation? No other. As the tenure is *express*, as but one *express* limitation is impoſed upon it, can it be ſubject to any other limitation not derived from neceſſary implication. If any material proviſion in the conſtitution can in no other manner be ſatisfied, than by ſubjecting the tenure of this office to ſome new condition, I will then admit that the tenure is ſubject to the condition.

Gentlemen have ventured to point out a proviſion which they conceived furniſhed this neceſſary implication. They refer to the power given to Congreſs from time to time to eſtabliſh courts inferior to the ſupreme court. If this power cannot be exerciſed without vacating the offices of exiſting judges, I will concede that thoſe offices may be vacated. But on this head there can be no controverſy. The power has been, & at all times may, be exerciſed without vacating the office of any judge. It was ſo exerciſed at the laſt ſeſſion of Congreſs; and I ſurely do not now diſpute the right of gentlemen to eſtabliſh as many new courts as they may deem expedient. The power to eſtabliſh new courts does not therefore neceſſarily imply a power to aboliſh the offices of exiſting judges, becauſe the exiſtence of thoſe offices does not prevent an execution of the power.

The clauſe in the conſtitution to which I have juſt alluded has furniſhed to gentlemen their famous poſition, that though you cannot remove a judge from his office, you may take the office from the judge. Though I ſhould be in order, I will not call this a quibble, but I ſhall attempt, in the courſe of the argument, yet more clearly to prove that it is one. I do not contend that you cannot aboliſh an empty office, but the point on which I rely is, that you can do no act which impairs the independence of a judge.—When gentlemen aſſert that the office may be vacated notwithſtanding the incumbency of the judge, do they conſider that they beg the very point which is in controverſy. The office cannot be vacated without violating the expreſs proviſion of the conſtitution in relation to the tenure.

The judge is to hold the office during good behaviour. Does he hold it when it is taken from him? Has the conſtitution ſaid, that he ſhall hold the office during good behaviour, unleſs Congreſs ſhall deem it expedient to aboliſh the office? If this limitation has been omitted, what authority have we to make it a part of the conſtitution?

The ſecond plain, unequivocal proviſion, on this ſubject is, that the compenſation of the judge ſhall not be diminiſhed during the time he continues in office. This proviſion is directly levelled at the power of the legiſlature. They alone could reduce the ſalary. Could this proviſion have any other deſign than to place the judge out of the power of Congreſs; and yet how imperfect and how abſurd the plan. You cannot reduce a part of the compenſation, but you may extinguiſh the whole. What is the ſum of this notable reaſoning? You cannot remove the judge from the office, but you may take the office from the judge. You cannot take the compenſation from the judge, but you may ſeparate the judge from the compenſation.

If your conſtitution cannot reſiſt reaſoning like this, then indeed is it waſte paper.

I will here turn aſide, in order to conſider a variety of arguments drawn from different ſources, on which gentlemen on the other ſide have placed a reliance. I know of no order in which they can be claſſed, and I ſhall therefore take them up as I meet with them on my notes. It was urged by the honourable member from Virginia, to whom I have ſo frequently referred, that what was created by law, might by law be annihilated. In the application of his principle, he diſcloſed views which I believe, have not yet been contemplated by gentlemen of his party. He was induſtrious to ſhew that not only the inferior courts, but the ſupreme court derives its exiſtence from law. The preſident and legiſlature exiſt under the conſtitution. They came into being without the aid of a law. But though the conſtitution ſaid, there ſhould be a ſupreme court, no judges could exiſt till the court was organized by a law. This argument, I preſume, was puſhed to this extent in order to give notice to the judges of the ſupreme court of their fate & to bid them prepare for their end.

I ſhall not attempt to diſcriminate between the tenure of the offices of the judges of the ſupreme & inferior courts. Congreſs has power to organize both deſcriptions of courts, and to limit the number of judges, *but they have no power to limit or define the tenure of office.* Congreſs creates the office; the Preſident appoints the officer, but it is neither under Congreſs or the Preſident, but under the conſtitution, that the judge claims to hold the office during good behaviour. The principle aſſerted does not in this caſe apply; the tenure of office is not created by law, and if the truth of the principle were admitted, it would not follow, that the tenure of the office might be vacated by law. But the principle is not ſound. I will ſhew a variety of caſes which will prove its fallacy. Among the obnoxious meaſures of the late adminiſtration, was the loan of five millions, which was funded at 8 per cent. The loan was created by a law and funded by law. Is the gentleman prepared to ſay, that this debt, which was funded by a law of the former legiſlature, may be extinguiſhed by a law of the preſent. Can you, by calling the intereſt of this debt, exorbitant and uſurious, juſtify the reduction of it? Gentlemen admit that the ſalary of a judge, though eſtabliſhed by a law, cannot be diminiſhed by a law. The ſame thing muſt be allowed with reſpect to the ſalary of the Preſident. Sir, the true principle is, that one legiſlature may repeal the act of a former, in caſes not prohibited by the conſtitution. The correct queſtion therefore is, whether the legiſlature are not forbidden by the conſtitution to abridge the tenure of a judicial office?

In order to avoid caſes of a nature ſimilar to thoſe which I have put, the gentleman from Kentucky, (Mr. Davis,) and after him the gentleman from Virginia, endeavoured to draw a diſtinction between laws executed, and laws executory.

The diſtinction was illuſtrated by reference to the caſe of a ſtate admitted by a law into the union. Here it is ſaid the law is executed, and *functus officio*, and if you repeal it, ſtill the ſtate remains a member of the union. But it was aſked by the gentleman from Kentucky, ſuppoſing a law made to admit a ſtate into the union, at a future time, before the time of admiſſion arrived, could not the law be repealed. I will anſwer the queſtion to the ſatisfaction of the gentleman, by ſtating a caſe which exiſts. By an ordinance of congreſs, in the year 1787, Congreſs ordained, that when the population within the limits of a ſtate within the North Weſtern Territory, ſhould amount to 60,000 ſouls—the diſtrict ſhould be admitted as a member of the union. Will the gentleman venture to doubt as to this caſe? Would he dare to tell the people of this country, that Congreſs had the power to disfranchiſe them.

The law, in the caſe I refer to, is executory, though the event upon which it is to take effect is limited by population and not by time?

But, ſir, if there were any thing in the principle, it has no influence upon the caſe to which it has been applied. A law has created the office of a judge, the judge has been appointed and the office filled. The law is therefore executed, and upon the very diſtinction of the gentleman, cannot be repealed. The law fixing the compenſation is executory, and ſo is that which eſtabliſhes the ſalary of the Preſident, but tho' executory, they cannot be repealed. The diſtinction therefore is idle, and leaves the queſtion upon the ground of the repeal, being permitted or prohibited by the conſtitution. I ſhall now advert, ſir, to an argument urged with great force and not a little triumph, by the honorable member from Virginia. This argument is derived from the word, 'hold' in the expreſſion, the judge ſhall *hold* his office during good behaviour. It is conſidered as correlative to tenure. The gentleman remarks, that the conſtitution provides, that the Preſident ſhall nominate the judge to his office, and when approved by the ſenate, ſhall commiſſion him. It is hence inferred, that as the Preſident nominates and commiſſions the judge, the judge *holds* the office of the Preſident; and that when the conſtitution provides, that the tenure of the office ſhall be during good behaviour, the proviſion applies to the Preſident, and reſtrains the power which otherwiſe would reſult in conſequence of the offices being *holden* of him, to remove the judges at will. This is an argument, ſir, which I ſhould have thought, that honorable member would have been the laſt perſon upon this floor to have adopted. It not only imputes to the Preſident royal attributes, but prerogatives, derived from the rude doctrines of the feudal law. Does the gentleman mean to contend, that the Preſident of theſe ſtates, like the monarch of England, is the fountain of honor, of juſtice and of office? Does he mean to contend, that the courts are the Preſident's courts, and the judges, the Preſident's judges? Does he mean to ſay, ſir, that the chief magiſtrate is always ſuppoſed to be preſent in theſe courts, and that the judges are but the images of his juſtice? To ſerve the paltry purpoſes of this argument, would the gentleman be willing, to infuſe into our conſtitution, the vital ſpirit of the feudal doctrines? He does not believe, he cannot believe, that when the word 'hold' was employed, any reference was had to its feudal import. The language of the conſtitution furniſhes no ſupport to this feudal argument. Theſe officers are not called the judges of the Preſident, but the judges of the United States. They are a branch of the government equally important, and deſigned to be co-ordinate with the Preſident. If, ſir, becauſe the Preſident nominates to office and commiſſions, the office is held of him, for a ſtronger reaſon where by patent he grants lands of the United States, the lands are held of him. And upon the grantee's dying without heirs, the lands would eſcheat not to the United States, but to the Preſident. In England, the tenure of lands and offices is derived from the ſame principle. All lands are held mediately, or immediately of the crown, becauſe they are ſuppoſed to have been originally acquired from the perſonal grant of the monarch. It is the ſame of office, as the king is ſuppoſe to be the ſource of all offices. Having the power to grant, he has a right to define the terms of the grant. Theſe terms conſtitute the tenure. When the terms fail, the tenure ceaſes, and the object of the grant reverts to the grantor. This gentleman has charged others with monarchical tendencies, but never have I before witneſſed an attempt ſo bold and ſtrong to incorporate in our conſtitution, a rank monarchical principle. If, ſir, the principle of our conſtitution on this ſubject be republican and not monarchical, and the judges hold their offices of the United States, and not of the Preſident, then the application of his argument has all the force againſt the gentleman, which he deſigned it ſhould have againſt his adverſaries. For if the office be held of the United States, and the tenure of good behaviour was deſigned to reſtrain the power of thoſe of whom the office was holden, it will follow, that it was the intention to reſtrain the power of the United States.

We were told by an honorable gentleman from Virginia, who roſe early in the debate, (Mr. Thompſon) that the principles we advocated tended to eſtabliſh a ſinecure ſyſtem in the country. Sir, I am as little diſpoſed to be acceſſary to the eſtabliſhment of ſuch a ſyſtem, as any gentleman on this floor. But let me aſk how this ſyſtem is to be produced? We eſtabliſhed judicial offices, to which numerous and important duties were aſſigned. A compenſation has been allowed to the judges, which no one will ſay, is immoderate, or diſproportioned to the ſervice to be rendered. Theſe gentlemen firſt aboliſh the duties of the offices, then call the judges penſioners, and afterwards accuſe us of eſtabliſhing ſinecures. There are no penſioners at preſent, if there ſhould be any, they will be the creatures of this law. I have ever conſidered it as a ſound and moral maxim, that no one ſhould avail himſelf of his own wrong. It is a maxim, which ought to be equally obligatory upon the public as upon the private man. In the preſent caſe, the judge offers you his ſervice. You cannot ſay, it is not worth the money you pay for it. You refuſe to accept the ſervice; and after engaging to pay him while he continued to perform the ſervice, you deny him his compenſation, becauſe he neglects to render ſervices which you have prevented him from performing. Was injuſtice ever more flagrant? Surely, ſir, the judges are innocent. If we did wrong, why ſhould they be puniſhed and diſgraced? They did not paſs the obnoxious law, they did not create the offices, they had no participation in the guilty buſineſs; but they were invited upon the faith of government, to renounce their private profeſſions, to relinquiſh the emolument of other employments, and to enter into the ſervice of the United States, who engaged to retain them during their lives, if they were guilty of no miſconduct. They have behaved themſelves well, unexceptionably well, when they find the government reſcinding the contract made with them, refuſing the ſtipulated price of their labour, diſmiſſing them from ſervice, and in order to cover the ſcandalous breach of faith, ſtigmatizing them with names which may render them odious to their countrymen. Is there a gentleman on the floor of this Houſe, who would not revolt at ſuch conduct in private life? Is there one who would feel himſelf juſtified, after employing a perſon for a certain time, and agreeing to pay a certain compenſation, to diſmiſs the party from the ſervice upon any caprice which altered, his views, deny him the ſtipulated compenſation, and to abuſe him with opprobrious names, for expecting the benefit of the engagement?

A bold attempt was made by one of the gentlemen from Virginia, (Mr. Giles) to force to his aid the Statute of 13th Wm. 3d. I call it a bold attempt, becauſe the gentleman was obliged to rely upon his own aſſertion to ſupport the ground of his argument. He ſtated, that the clauſe in the conſtitution was borrowed from a ſimilar proviſion in the Statute. I know nothing about the fact, but I will allow the gentleman its full benefit. In England at an earlier period, the judges held their commiſſions during the good pleaſure of the monarch. The parliament deſired, and the king conſented, that the royal prerogative ſhould be reſtrained. That the offices of the judges ſhould not depend on the will of the crown alone, but upon the joint pleaſure of the crown and of parliament. The king conſented to part with a portion of his prerogative by relinquiſhing his power to remove the judges without the advice of his parliament. *But by an express clause in the statute, he* retained the authority to remove them with the advice of his parliament. Suppoſe the clauſe had been omitted, which reſerved the right to remove upon the addreſs of the two Houſes of parliament, and the Statute had been worded in the unqualified language of our conſtitution, that the judges ſhould hold their offices during good behaviour, would not the prerogative of removal have been aboliſhed altogether? I will not ſay that the honorable member has been peculiarly unfortunate in the employment of this argument, becauſe, ſir, it appears to me, that moſt to which he has had recourſe, when juſtly conſidered, have operated againſt the cauſe they were deſigned to ſupport.

The gentleman tells us that the conſtitutional proviſion on this ſubject was taken from the ſtatute of William.—Will he anſwer me this plain queſtion? Why do we find omitted in the conſtitution, that part of the ſtatutory proviſion, which allowed the judges to be removed upon the addreſs of the two branches of the legiſlature? Does he ſuppoſe that the clauſe was not obſerved? Does he imagine that the proviſion was dropt through inadvertency? Will he impute ſo groſs a neglect to an inſtrument every ſentence and word, and comma, of which, he has told us was ſo maturely conſidered, and ſo warily ſettled. No, ſir, it is impoſſible; and give me leave to ſay, that if this part of the conſtitution were taken from the ſtatute (and the gentleman from Virginia muſt have better information on the ſubject than I have) that a ſtronger argument could not be adduced, to ſhew that it was the intention of thoſe who framed the conſtitution, by omitting that clauſe in the ſtatute which made the judges tenants of their offices at the will of Parliament; to improve in this country the Engliſh plan of judicature, by rendering the judges independent of the legiſlature. And I ſhall have occaſion in the courſe of my obſervations to ſhew, that the ſtrongeſt reaſons derived from the nature of our government, and which do not apply to the Engliſh form, require the improvement to be made.

Upon this point, ſir, we may borrow a few additional rays of light from the conſtitutions of Pennſylvania, of Delaware, and of ſome other ſtates. In thoſe ſtates it has been thought, that there might be miſconduct on the part