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CONGRESS OF THE UNITED STATES,

House of Representatives.

Tuesday, February 23,

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. Huger's Speech concluded.]

[*Extracts from Judge Tucker's Lectures continued.*

"And here we cannot but observe, that the judiciary power cannot of itself oppress the citizen. The executive must lend its aid in every case, where oppression can ensue from its decisions; but its decisions in favor of the citizen are carried into instantaneous effect, by delivering him from the coercion of the executive officer, the moment that judgment of acquital is pronounced, and herein consists the excellence of our constitution, that no individual can be oppressed whilst this branch of the government remains uncorrupted; it being a *necessary check* upon the encroachments of power by either of the other.—Thus, if the legislature should pass a law dangerous to the liberties of the people, the judiciary are to pronounce not only whether the party accused be guilty of a violation thereof, but whether such law be permitted by the constitution. If, for example, a law were passed prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people to assemble peaceably, or to keep and bear arms, it would be the province of the judiciary to decide that the power of the legislature did not extend to the making of such a law, and consequently to acquit the prisoner from any penalty, which might be annexed to the breach of such an unconstitutional law.

"Should he be persecuted by the executive, it is the province of the judiciary to decide, whether there be any law that authorizes the proceedings against him, and if there be none, to acquit him not only of the present but of all future prosecutions for the same cause. The power of pardon, which is vested in the executive, constitutes a proper check on the judiciary in its turn. On this circumstance, however, no great stress can be laid, since in criminal prosecutions the executive is in the eye of the law, always plaintiff, and where the prosecution is *actually* carried on by *its* direction, the purity of the judiciary is the only security for the citizen. The judiciary, therefore, are that department of the government, to whom the protection of the rights of the citizen is by the constitution especially confided, &c."

Such, sir, are the sentiments of this learned and enlightened judge; a gentleman, as I before observed, avowedly and well-known to be of the political party of the other side of the house.—And let me ask, whether it be possible to bring on any subject, an authority more to the point in dispute; or whether Mr. Tucker could have expressed, in terms more forcible and less equivocal, his opinion in favor of the doctrine we advocate, viz. that the judiciary is a distinct and separate branch of the government, and that it is equally and absolutely independent, as well of the legislature as the executive, or of both united.—Such, too, I contend and firmly believe, to have been heretofore the approved and generally received doctrine of the American world, and such appears to me to be the language which the people of America have spoken, as well in their state constitutions, as in our federal compact. Will you permit me, sir, to turn to these constitutions and see what is the plain language they hold on this subject.

In the bill of rights, prefixed to that of New-Hampshire, I find these words, to wit, "The three essential powers of government, viz. the executive, legislative and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit."—In another section, "It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore, not only the best policy, but for the security of the rights of the people, that the judges should hold their offices *so long* as they behave well."—These provisions were, I believe, borrowed from, and are to be found nearly verbatim in the constitution of Massachusetts. In New-York, Pennsylvania and Delaware, I find these three branches separated with the same care, and the judges declared to hold their offices during good behaviour.—The constitution of Maryland expressly provides "that the executive, legislative and judicial powers of the government ought to be forever separate and distinct from each other, and that the judges ought to hold their commissions during good behaviour." In the constitution of the state of the Virginia, I meet with the same sentiments, to wit, "the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other;" and I find it further provided, that the judges shall *continue* in office during good behaviour. But it would be superfluous to encroach longer on the patience of the committee, by other examples from the state constitutions. They all of them establish the complete separation of the three great branches of government; all of them inculcate, more or less strongly the independence of the judiciary on the other two branches, and with one or two exceptions, all adopt the tenure of good behaviour, as that, under which the judges are to hold their offices. In this place, therefore, it may not be amiss to say a few words with respect to this tenure, to examine how far it extends.

To an unprejudiced mind—to a man of plain, but sound understanding, making up his opinion from the usual meaning and common acceptation of words, it would I think appear, that a right or power, given to be held and exercised during good behaviour, would, and ought to be retained by the person, on whom it was bestowed, so long as he continues to behave well, nor could he forfeit it otherwise than by behaving ill, i. e. ceasing to behave well. It is now contended, however, that we are not to judge of the force and effect of these words, according to their plain meaning and common acceptation. We are told, that the words "holding during good behaviour" compose a technical phrase, and that in order to apply them correctly, we must cast our eyes across the Atlantic, and see what is their operation in England, the country from which we derive them.

Mr. Chairman, it has not been my good fortune to be initiated in the mysteries of the law. I am no professional man; nothing more or less than a plain farmer, or to use a more appropriate term of my native state, a plain and (I trust) honest planter. I cannot hope, therefore, to throw much light on a legal question; nor do I feel myself adequate to the discussion of legal terms & niceties. I will, nevertheless, claim the indulgence of the committee whilst I make a few observations on the subject, even in this point of view.

In the earlier stages of the English, as well as many other European governments, the King sat and administered justice in his own immediate person.—This state of things, however, neither could nor did last for any very considerable length of time. It was soon found expedient to dispense with the personal attendance of the prince, and the administration of justice devolved on certain substitutes, who were still supposed to represent his person, acted in his name, and held their offices at his pleasure.—As the darkness and ignorance of the middle ages were dispersed, and the inhabitants of Europe became more enlightened, the feudal chiefs in the first instance, and afterwards the people generally, increased in power, and procured to themselves certain rights and charters. By degrees they came also to participate in the legislation and government of the country. But the laws were still interpreted and justice administered by the creatures of the crown; and experience sufficiently proved, that whilst the judges were left at the mercy of the prince, they would invent modes and find evasions, by means of which the will of him on whom they depended, might be carried into execution. The necessity, therefore, of establishing the independence of the judges became evident, and the people of England, after a long struggle, succeeded in carrying this point. The judges, instead of holding their commissions durante bene placito, during pleasure, as heretofore, received them under a new tenure, quam diu bene se gesserint, during good behaviour; nor could the King any longer remove them, except on an address from both houses of parliament. This was all that was necessary; all that was required—all that could be done; for, as the two houses of parliament and the crown united, possess what has been styled political omnipotence, as they act not only in the confined sphere of agents, bound down by certain fixed rules and a written constitution, but are supposed also to represent the nation in its original capacity, there is nothing so sacred under this system of government, which they cannot and do not control and alter at their pleasure and discretion. The judiciary continues, nevertheless, in that country, to be a subordinate department; the judges continue still to hold of, and from the crown, to administer justice in its name, and are supposed to be an emanation from the regal power. The courts are still called the King's courts. The judges the King's judges. This being the case, as respects the King's power and prerogatives in England, Gentlemen now bring forward the monstrous doctrine, that the executive stands precisely in the place of the crown, and imply that the judiciary are placed in precisely the same relative situation with respect to him, as that of England is to the crown.

And is this really the case, Mr. Chairman? Is the judiciary of the United States really subordinate to the executive? Do the judges indeed hold, as the gentleman from Virginia [Mr. Giles] tells us, of and from the President; that very President, at whose trial, in case of impeachment, one of them is to preside; do they indeed administer justice in his name? Does their power emanate from him? Are the federal courts the courts of the President, the federal judges, his judges? No, Sir, the federal courts are the courts of the United States. Justice is administered in the name of the United States. The judges are only known, as judges of the United States. They hold their commissions of and from, and act under the authority of the United States. What is then the fair inference; against what power under our constitution was the tenure of good behaviour intended to operate? I say, sir, the fair and honest inference is, that this tenure was intended as a limitation and restraint against the United States in its corporate capacity; that is, against the government of the United States, which in fact and in truth, are placed in the same relative situation with respect to the judiciary, in which the crown stands in that country of which we have been speaking. The native citizens of America, Mr. Chairman, are a plain but shrewd people, of sound and distinguishing minds, and possessed of their full share of common sense. They are not apt to do things idly, to adopt measures, which mean nothing, and are of no avail. When therefore, they adopted this tenure, it is but paying them a poor compliment to suppose, that they intended it to operate only against that branch of the government, which did not possess the powers and prerogatives, against which the check was originally aimed and directed in the country from whence we are supposed to borrow it. They looked not, sir, to the sound, but the substance; they regarded not the name or the title, but the thing itself; they meant not to combat a shadow, a nonentity, but to limit and contract *the power itself*, in whatever branch it might appear to have been deposited under the constitution, and which possessing, or assuming the prerogative of the British court, might be disposed to make the judiciary a subordinate department of the government, or to affect the independence of the judges. Whatever branch therefore of the government assumes this power, from whatever quarter the attempt is made to render the judiciary subordinate to its will and pleasure, and to infringe the independence of the judges; this constitutional barrier stares them in the face; and upon a fair and honest construction of the tenure, under which the people have willed, that the federal judges should hold their commissions, they can only forfeit them, (whilst the constitution lasts, or until the people think proper to alter it) they can only forfeit them by ceasing to behave well; they can only be deprived of them by impeachment.

That this is the construction heretofore given to the tenure of good behaviour in the American world, may I think, also be proven by a further reference to the state constitutions. In those of New-Hampshire, and New-York, it is expressly declared, that the judges, who hold their offices during good behaviour, shall not continue in them after reaching a specified age; 60 or 70 years; and in that of Massachusetts, that the governor with the consent of council may remove the judges, holding under the same tenure upon the addresses of both houses. Here I say, in the first instance, the exception proves the rule. If the judges were not to hold their offices (but for this exception,) during their lives and good behaviour; to what end, with what possible view was the exception as to age introduced. In the latter case; if the other two branches have, (as is contended) in the nature of things, and of course, the right of deranging and the power of depriving the judges of their offices, why was the proviso adopted? What necessity could there have been to grant this power expressly to them in the constitution? Is it not fair and correct to imply from this proviso, this express grant; that in the opinion of the framers of that constitution, the legislature would not otherwise have possessed the power therein given? Again; in the constitutions of Pennsylvania, Delaware, &c. it is provided, that the judges shall hold their offices during good behaviour, (subject however to impeachment;) but for any reasonable cause, which shall not be a sufficient ground of impeachment, the governor at his discretion may remove any of them on the address of *two thirds* of each branch in Pennsylvania, and in Delaware on the address of *two thirds of all* the members of each branch of the legislature. Now, sir, does not the *major* include the *minor*. If then, it was contemplated by those, who framed these constitutions, that a simple majority of the two houses could pass a law, which would to all intents and purposes derange and remove the judges from office, why in the name of common sense require, as we have just shewn is done in the constitutions of Pennsylvania, and Delaware, an union of two thirds of all the members of both branches of the legislature to effect the same thing, viz. the removal of the judges.

Far however, as these examples go to shew the effect, which this tenure was supposed to have in restraining the power, as well of the legislature as the executive, the point is still more triumphantly and unanswerably proven in the case of those States, in whose constitutions no specific mode is provided of removing the judge, except by impeachment, and in which the executive neither exercises nor has the power of removing an incumbent from office. Such is for example, the case in North-Carolina, and in the State I have the honor immediately to represent. Here the judges are chosen by joint ballot of both houses, and hold their offices during good behaviour. The executive however, neither does nor can remove any civil officer from office, who holds a commission at pleasure. Did the judges, therefore, hold under this inferior tenure, they would be still out of his reach, beyond his authority and control, yet the constitution declares, 'they shall hold their commissions during good behaviour.' Why then is this particular tenure secured to them by the constitution? In whose hands is the power placed, against which it is intended to operate and secure them? Certainly not in the hands of the executive, for we have just seen, that he cannot remove from office even in cases, where the commissions run 'during pleasure.' If any thing therefore is meant by this provision in the constitutions of these States, the intention and object must have been thereby to limit and restrain the power of the legislature; and as I have never yet heard it contended, that a public officer, holding during good behaviour, could be turned out of office by a simple vote or resolution of the two houses, it follows, that this tenure was adopted to prevent them from doing the same thing by a side wind, by deranging the individual thus secured, and taking his office from him.

From this hasty review of the State constitutions, it would appear, that in the general received opinion of the American people, the tenure of good behaviour, where no express provisions to the contrary were introduced in their State constitutions, went to secure the independence of the judges and their *continuance* (the very term made use of in the constitution of Virginia) in office, equally against the attempts & encroachments of the legislature and executive.

The wise men, who framed our federal compact were perfectly aware of this. The state constitutions were all before them. They were well acquainted with the sentiments and opinions of the people in every part of the continent. They deemed it, however, most expedient to omit the various exceptions, contained in the several state constitutions; and in establishing the federal judiciary, they carefully provided, that the judges, both of the supreme and inferior courts, should hold their offices under the pure and simple tenure of good behaviour, subject to a possibility of removal from office in no other way under the constitution, save only by impeachment. So far were they, indeed, from intending, that a bare majority of the two branches of the legislature, uniting with the executive, should have the important and effectual power of deranging and getting rid of the judges, by putting down their offices; that they would not even trust them with the much inferior power of reducing their salaries; but expressly provide, that the salaries of the judges should not be diminished during their continuance in office. In the only instance, in which they grant the power of removal, viz. by impeachment, they avoid giving the executive any agency whatever in the business; they suspend all the legislative functions of the senate and house of representatives, and introduce them entirely in a new character, by making of the latter a body of accusers, and converting the senate into a court of justice. They go further, and from abundant caution provide at the same time in cases of impeachment, that no person shall be convicted without the concurrence of *two thirds* of the members of the senate, before whom he is impeached.

But granting for a moment, that the tenure of good behaviour was intended more immediately as a check against the executive; whence, I pray you, does the legislature obtain the right of disregarding this check, and removing the judges in spite of this express limitation of any and every such power? Will any one contend, that they can exercise a power not given them by the constitution? If not, I repeat the request of the member from Pennsylvania, (Mr. Hemphill) that gentleman will turn to the page and point their finger to the clause, which gives even the semblance of any such power to the legislature alone, or united with the executive. And if, as is the fact, no such power is given in the constitution, I ask with the same gentleman, how this committee can possibly get over the provisions contained in the 10th amendment to the constitution, viz. "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

In the face of all this, and contrary to the practice, which has heretofore invariably prevailed as well under the state governments, as that of the union at large, gentlemen now tell us, that the members of this separate, distinct and co-ordinate branch, are left at the mercy of every political gale that blows, and subject to the whim and caprice of every party, which may chance from day to day to predominate in the other two branches of the government.

The error of this novel doctrine seems to me, sir, to arise from an impression on the minds of gentlemen, which leads them to suppose, that as the executive and legislative branches are elected by and therefore presumed to be the more immediate representatives of the people, they are in fact one and the same with the people, and possess all the powers of the great body of the nation in its original capacity. They forget, in how narrow and limited a sphere they are delegated to act, assimilate themselves to the parliament of Great Britain, and would fain assume the political omnipotence, which is supposed to vest in that body: or to express my idea still more clearly, and in American language, they regard themselves, not merely as sitting here in a legislative capacity under a written constitution, but as possessed of the much higher and more important powers of a convention. But will any one at this time, whatever may be done hereafter, come boldly forward and openly avow this doctrine. No, sir, the fact is far otherwise. We are nothing more or less than the mere agents of the people, empowered to transact the current business of the day; honored it is true, by the confidence and trust they place in us, but bound down by written rules or instructions, and under an obligation to move within a confined sphere and within narrow and specified limits. The constitution is the power of attorney, under which we act, and I might as well be told, that an agent empowered to dispose of my personal, had of course a right to do the same with my real property; as that we are to judge of the expediency and propriety of the quantum of power vested in this or that branch of the government by the constitution, and to make its express provisions bend to what we deem right, and what comports best with our own immediate purposes and wishes. When, therefore, the constitution says, art. 3d, sec. 1, "The judicial power shall be vested in a supreme court, and in such other inferior courts, as the congress may from time to time ordain and establish

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