NATIONAL INTELLIGENCER,

AND

WASHINGTON ADVERTISER.

Vol. II | WASHINGTON CITY, PRINTED BY SAMUEL HARRISON SMITH, PENNSYLVANIA AVENUE. | No CCXIV.

Five Dolls. per ann. | WEDNESDAY, JUNE 2d, 1802. | Paid In Advance.

Thursday, April 22, 1802.

Debate *on the act to amend the judicial system of the United States.*

The amendment of the select committee, reported yesterday by Mr. Bayard, under consideration.

[Mr. Giles's Speech, continued.]

Four or five hundred old officers have been dismissed, no new ones have been created, and yet we are told that we are in favor of swelling executive patronage. Again I find several foreign ministers dismissed, and still we are told that we are favourers of executive patronage. I deny the point. I deny that we have ever voted for an office that was not necessary. I say, on the other hand, that the number of officers we found in existence has been much lessened, and may be lessened still more.

I must observe that the gentleman from Delaware has come nearer the true point than the gentleman from Maryland (Mr. Dennis) who said if the clerks are the creatures of the court, there would be some force in objecting to their having the selection of jurors. The gentleman from Delaware says the court itself has this right. But how long have we heard this doctrine? For my part when I heard the gentleman make the declaration that the courts had this power, I thought it most singular. But grant that the courts have this power, what does it amount to? If chosen by the courts, will jurors be independent? In the existence of political divisions, are courts impartial? I say, that it is within my own knowledge that jurors have been selected with a view to particular ends.

It is true that they are not now so selected. No! Sir. For if the marshal is on one side, the court is on the other, and is a check on his partiality? The court has the power of directing the jury, and, if they do so, of granting a new trial; and permit me to say, nothing can be so dangerous as to unite the power of selecting jurors, and of deciding the cause.

We are told there may be commercial cases, which require a select jury. In such cases why may not the marshal make the selection?

But suppose a political case should occur. This is the most likely, when it does occur, to be productive of mischief; and I believe, if we have had mechanical and commercial, we have also had political juries.

The gentleman from Delaware (Mr. Bayard) says he is not at a loss to understand this question. No doubt he is not at a loss. He understands all questions. And I wish that that gentleman, as well as every other gentleman, should understand it. I say it is improper that judges should empannel the jury. If there are such marked political divisions, as I fear there are, it is most dangerous to unite the power of empannelling with that of deciding. If you do this, you give the principle, so long contended for, not that of the independence, but the supremacy of the judges. For during the whole of this session gentlemen have been using improper names. No man values more highly than I do the independence of the judges—but the question is a question of supremacy—they are to be made supreme! They are to control all your laws! You have given them a great variety of powers, and now they are to have the power of empannelling juries.

I beg leave to observe that this amendment will not have the smallest operation on Virginia where the marshal summons all juries; but if there be a part of the United States where this evil exists, it ought to be remedied. Not that I am in favor of any bias whatever in the designation of jurors. I wish there was none; I am sorry that our judges are politicians; but so long as the courts are political it seems to me necessary, in order to meet them, that there should be political juries. The courts can almost do any thing—they decide the evidence received, they charge the jury, and may grant new trials. It is, therefore, improper that the clerk should empannel the jury.

The gentleman from Delaware says there may be a change of men hereafter. That to me is altogether immaterial, as I am for acting on general principles, which shall equally apply to all men.

Mr. Bayard said he should have no objection to vote for the amendment, if he did not consider it not only harmless but absurd. He did not see how political questions had any thing to do with struck juries. Such questions arise only on criminal prosecutions, and in those, struck juries are never used: they are summoned in civil actions only. But he considered the amendment as a mere *bagatelle*, it was only a grasp at all power to be placed in the hands of the executive. As to executive patronage, if the repeal of the internal taxes proved that those who voted for the repeal were for reducing executive patronage, it proves also, that those who voted against it were not unwilling to give to the executive a legitimate exercise of patronage where it was necessary for the public good. But he had seen instances, in cases not calculated to alarm the public mind, where a strong disposition had been shewn to extend executive patronage.

The question was then taken on Mr. Leib's motion, and carried—Ayes 41—Noes 32.

Mr. *Dennis* moved to strike out the 15th section, which is in the following words:

"*And be it further enacted,* That there shall be appointed by the President of the United States, from time to time, as many general commissioners of bankruptcy in each district of the United States, as he may deem necessary; and upon petition to the judge of a district court, for a commission of bankruptcy, he shall proceed as is provided in, and by an act, intituled "An act to establish an uniform system of bankruptcy throughout the United States," and appoint, not exceeding three of the said general commissioners, as commissioners of the particular bankrupt petitioned against; and the said commissioners, together with the clerk, shall each be allowed, as a full compensation for their services, when sitting and acting under their commissions, at the rate of six dollars per day, for every day which they may be employed in the same business, to be apportioned among the several cases on which they may act on the same day, and to be paid out of the respective bankrupts estates: *Provided,* That the commissioners, who may have been, or may be appointed in any district, before notice shall be given of the appointment of commissioners for such district, by the President, in pursuance of this act, and who shall not then have contemplated their business, shall be authorised to proceed and finish the same, upon the terms of their original appointment."

Mr. *Dennis* called for the yeas and nays. This section says nothing less than that the courts are not to be trusted; and if this power be vested in the President, I can see no reason why the appointment of commission's on a petition in chancery may not also be vested in him. Gentlemen have said much about abridging executive patronage. Permit me to say that this section vests in the President the power of appointing every man, woman and child in the United States a commissioner of bankruptcy. But my great objection is the inconvenience that will attend this mode of appointment. The President must either appoint a vast number of commissioners, or the inconvenience will be very great. In my opinion, it is improper to appoint general commissioners; they ought to be appointed in each special case.

Mr. S. Smith. The house well know that I have always been an advocate for the bankrupt system. I am still an advocate of it. I am a friend to it, and it is because I am a friend to it that I shall vote against striking out this section. I believe the mode pointed out in this section will be most agreeable to merchants, who are most interested in it. It will be recollected that at present the commissioners are appointed by the district judge, to whom appeals are to be had, when the commissioners shall be considered as acting wrong. The commissioners, therefore, will be extremely cautious how they offend the district judge, and be apt to be too much biassed by him. At present the commission is not general, but formed for every special case. With respect to the commissioners of Maryland I have never heard any complaints. They are men of respectability. But I wish this commission to be perfectly independent. This new course will make them more independent. The President will first name the commissioners, from whom the judge will have an opportunity of selecting his characters for each case; and I am convinced that this will be the most satisfactory. As to executive patronage, I can say with the gentleman from Delaware, I can see no patronage created in this measure. With regard to appointments they are constitutionally vested in the President, who will in general discharge the duty well, though he may be sometimes mistaken.

Mr. Giles said, though in favor of the section, he was not very tenacious of it; but he believed the appointment to office ought to be where the constitution had placed it, in the hands of the President. The judges have proper subjects on which to exercise their powers; and a preclusion from all other unnecessary objects will best insure their independence. These officers are considered as important and responsible. He did not see any part of the constitution that gave the judge the power of appointing them.

Mr. Giles said his indifference to this subject arose from another reason. He believed the bankrupt law the worst act that Congress had ever passed. He was, however, perfectly willing that experience should test it. He had, since its passage, heard of no new proselytes to it, while he had heard of many complaints against it. He believed that at the next session the force of public opinion would repeal it; and that this effect would be principally produced by the very persons for whose benefit it was formed.

Mr. Bayard said he had not the smallest doubt of the sincerity of the gentleman from Virginia, when he tells us the courts of law are the worst possible deposits of appointments. Nor was he at any loss to know to what to ascribe this opinion. He says the President is the natural officer to make appointments.—He had no doubt that gentleman now thinks so, as well as other gentlemen who until lately thought very differently.

Mr. Bayard said he could convince the gentleman there was no repugnance to the constitution in vesting this power in the judges. Mr. B. here read the second section of article second of the constitution. "Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, *in the courts of law,* or in the heads of departments." After hearing this section of the constitution the gentleman will not say it is more natural to give this power to the President than to the judges. 'Tis a paltry affair. The power to appoint in these cases cannot create a patronage very useful to the President. From all experience under a system of bankrupt laws, the power now to be given to the President ought to belong to the judges. In England the King cannot appoint a commissioner. The power is appurtenant to the court; and the experience of this country has shewn no inconvenience from the power vesting in the chancellor. But why, sir, on a bill professing to amend the judiciary system, are we led into a discussion of the bankrupt act? Why are we told the law is to be repealed? And why is this section not relating to the subject of the bill introduced into it? It is the expectation of taking a miserable power from the courts to vest in your President. Have there been any complaints, remonstrances or petitions against abuses of the power in the judges? I have heard of none.—Why then transfer the power from a department possessing no power, to one already possessing exorbitant powers. Gentlemen will find themselves infinitely mistaken in giving this power to the President; it will not extend his influence so far as his disappointment. When gentlemen recollect seriously the duties of the commissioners, they must be convinced of the difficulty of the President's filling these appointments. The ordinary characters fit to fill these offices, and willing to fill them, are infinitely below the knowledge of the President. He must rely on the advice of others. By what light will he be instructed as to the number necessary. In Delaware, there has not been occasion for a single commissioner of bankruptcy; in Pennsylvania, only in Philadelphia; but they may be wanted in other parts of the state, and the nomination must be dispersed over the country. If you are jealous of the judges, how do you operate on them? You take not their power—for after all, the President does not make them commissioners, but only qualifies them to serve when selected by the judge; the men thus preferred to the others are so far obliged by the preference, and if the influence of the judge is feared, here is still a field to exercise it. Your President's may fall on men the first victims of the law. The intimate connection of merchants is so intricate, that no previous appointment can be made without the hazard of making men judges in their own cause. Upon the whole, I perceive much injury which may result from this innovation without any benefit. The compensation by the present section, of 24 dollars per day for three commissioners and clerk, will eat up every fragment of the bankrupt's estate, for whom nothing will escape, but a miserable remnant.

Mr. Bacon. I am apprehensive that the determining who are to perform these duties does not depend on a long chain of reasoning. It appears to me that there is a strong impropriety in vesting the same men with the power of appointing and ascertaining the compensation of the person appointed. This is nearly the same as fixing his own compensation; for he has only to appoint his own friend, and then determine his compensation. This is too great a temptation for human nature; and with me weighs more than the long train of logical reasoning which we have just heard. I am, therefore, against striking out the section.

Mr. *Goddard* said that if he was fully satisfied that the gentleman from Virginia (Mr. Giles) was correct in his opinion of the bankrupt law (and he was not perfectly satisfied, that he might not be correct) he should not feel so strong objections to the provisions of the section. But being willing to give the system a fair experiment, he could not consent to adopt the section; because he believed it calculated to render the law much more inconvenient to the citizens, and to render it odious. The President by this section is authorised to appoint in each state, as many commissioners of bankruptcy as he might think proper. This provision might not be productive of any considerable inconveniences to the few large cities, and if bankruptcies could be confined to those cities, he should feel indifferent about this provision. But in the state which he had the honor to represent, there were no very large trading towns, but many smaller ones, and persons who might be liable to bankruptcy, were scattered over all parts of the state. The consequence of this provision would be, that the President must either appoint a host of commissions in all parts of the state, or rather capacitate a vast number of persons by commission under him, *to be appointed* commissioners by the judges, or the citizens from the extreme parts of the state, in case no greater number than was originally contemplated (not less than 3 nor more than 12) must travel to one central spot to have this business done, in case of bankruptcies, either of which would be very inconvenient and oppressive. Besides, those named commissioners by the President, in the state of Connecticut, will be thereby incapacitated, under the laws of that state, from being members of the state legislature.

Mr. *Elmendorf.* From representations made to me I confess I am extremely tenacious of this section. It has been shewn by the gentleman from Delaware, that there are but three modes of appointment, first by the President, secondly by the courts, third by the heads of departments. When these offices are created, they become the subjects of legislative discretion. The practice has been, not as stated by gentlemen for the court to appoint for each particular case, but to appoint a general board. From this practice inconveniences have arisen too intolerable to be borne. Improper persons have been appointed, and enormous emoluments allowed; and the whole fragments of the bankrupt's estate have been destroyed. The provisions of the law have been so tortured, that the commissioners have received, under the sanction of the court, six dollars a day for every case of bankruptcy before them. It will be found that the son of a judge has even been appointed. Shall we then continue this power in the hands of the courts? No—We have tried them abundantly. We ought not, therefore, to shrink from imposing this duty upon the President, which the good of the country requires to be vested in him.

I am not a friend to the Bankrupt act, not because I am inimical to a proper system of bankruptcy, but because the sums under the present system exceed the benefit which it confers. Under this system from the practice in New-York, it would seem that it was not so much for the benefit of the real bankrupt, as for those who can afford to pay well, or can give security for those who wish to become bankrupts.

I will ask if the provision of this bill will not be a check on the present abuses, by limiting the total daily compensation to six dollars. I would rather limit the allowance to 4 dollars a day; but I believe 10 times 6 much greater than 6.

I believe that appointments in the state of New-York, are considered as more beneficial than any that can be conferred; and if they are so emolumentary, I fully agree with the gentleman from Virginia that they ought not to be made the instruments of court patronage. Not that I am for giving improper appointments to the President; on the contrary I wish less power of this kind had been reposed in him; but in this respect I am constrained to obey the constitution.

Mr. Mott spoke against the section. When the question was taken by yeas and nays on striking out the 15th section, and lost—Yeas 35—Nays 36—as follows:

Yeas.—Messrs. Archer, Bayard, Bowie, Campbell, Condit, Cutler, Davenport, Davis, Dennis, Dickson, Foster, Goddard, Grey, Griswold, Hastings, Henderson, Huger, Lowndes, L. R. Morris, T. Morris, Mott, Nicholson, Plater, Read, Shepard, Smilie, Stanley, Stanton, Tallmage, Tenney, Tillinghast, Upham, Wadsworth, Williams, and Woods.—35.

Nays.—Messrs. Alston, Bacon, Bailey, Bishop, Brent, Brown, Butler, Claiborne, Clay, Clopton, Cutts, Dawson, Elmendorf, Elmer, Fowler, Giles, Hanna, Heister, Helms, Holland, Holmes, Leib, Milledge, Mitchill, New, I. Smith, J. Smith (of Virg.) J. Smith, S. Smith, Stanford, Stanton, jun. Stewart, Thomas, Thompson, A. Trigg, and I. Van Horn.—36.

Mr. Bayard offered a new section to this effect: "that this act shall not go into operation, or take effect until the first day of July next," and required the yeas and nays.

Mr. Bayard. The system lately repealed will not go out of operation until the 1st of July; otherwise there will be two contrarious systems in force at the same time. It is difficult to say what would be the effect of a collision of the two systems. I would wish gentlemen to say whether the present circuit courts are, or are not to have a spring session. This bill creates new circuit courts to take effect immediately. I am not prepared to say whether the old circuit courts will remain in force after the passing of this act. I am very much inclined to think that the effect of this law may be to suspend the circuit courts now sitting, and the effect may be to annihilate judgments now given. I would therefore wish gentlemen to be explicit.

Mr. Nicholson. The objection, taken by the gentleman, is fully provided against by the 4th section, wherein it is declared, that none of the circuit courts created by this bill shall be held till after the 1st day of July next. There can, therefore, be no kind of contradiction between this, and the repealing law. But I believe, the effect of the amendment will be to give the supreme court a June session, which is not intended by the bill.

Mr. Bayard. The gentleman from Maryland has not answered my objection. His defence is, that the present circuit courts shall hold a spring session. But this will not be the effect of the bill. The basis of the power of the old judges is derived from the old division of the United States into circuits; now if this basis is changed, by a new division, how can the same judges be circuit judges. The effect will be to have two circuit courts. As legislators, ought we suffer any doubt to remain on a subject, when we can remove it by a single section? Is it not a matter of serious consideration to the judges and suitors, whether the judgments rendered in these courts are nullities? And what objection is there to the section now offered? Why, that it gives a session to the supreme court in June. But is this a source of alarm? Are the justices of the supreme court objects of terror to gentlemen? Was not this session contemplated and expected. The effect of the present bill will be to have no court for 14 months. Is this constitutional? Are the judges to consume their salaries without having any thing to do. I call upon gentlemen to consider the alarming principle contained in this bill. They are about to pronounce that the supreme court (a court formed under the constitution) shall not sit for fourteen months instead of sitting in six months. Are gentlemen afraid of the judges? Are they afraid that they will pronounce the repealing law void? If gentlemen think they have no such power, they will conclude that any interposition of the judges will be rejected by the good sense of the people; and if they have such a power, are they prepared, on a mere political pretence, to deprive them of it? Sir, as far as regards myself, I have not the smallest knowledge that any such interposition will take place. It is not probable that at present any one judge knows the opinion of another. My own opinion is, that it is scarcely probable they will interpose. I do not see how that question can come before them. It is ten to one that they will not act upon it.

Mr. Nicholson. I have no hesitation to declare, that I am not afraid of the exercise of any constitutional authority of the judges. Such authority can be exercised as well in February as in June. They will have the same opportu-