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CONGRESS
OF THE UNITED STATES.
HOUSE OF REPRESENTATIVES,
Tuesday, Feb. 19.

DEBATE
On the Judiciary Bill.

(Mr. Bayard's speech concluded.)

I return again to the subject before the committee, from the unpleasant digression to which I was forced to submit, in order to repel insinuations which were calculated to have the worst effect, as well abroad as within the Walls of this house. I shall now cursorily advert to some arguments of minor importance, which are supposed to have some weight by gentlemen on the other side. It is said, that if the courts are sanctuaries and the judge cannot be removed by law, it would be in the power of a party to create a host of them to live as pensioners on the country.—This argument is predicated upon an extreme abuse of power, which can never fairly be urged to restrain the legitimate exercise of it; as well might it be urged, that a subsequent congress had a right to reduce the salary of a judge, or of a President, fixed by a former congress, because if the right did not exist, one congress might confer a salary of 500,000 or 1,000,000 dollars to the embarrassment of the country. It will be time enough to decide upon those extreme cases when they occur. We are told, that the doctrine we contend for, enables one legislature to derogate from the power of another. That it attributes to a former a power which it denies to a subsequent legislature.

This is not correct. We admit, that this congress possesses all the power possessed by last congress. That congress had a power to establish courts, so has the present. That congress had not, nor did it claim the power to abolish the office of a judge while it was filled. Though they thought five judges under the new system, sufficient to constitute the supreme court, they did not attempt to touch the office of either of the six judges. Though they considered it more convenient to have circuit judges in Kentuckey, and Tennessee, than district judges, they did not lay their hands upon the offices of the district judges. We therefore deny no power to this congress which was not denied to the last. An honorable member from Virginia (Mr. Thompson) seriously expresses his alarm, lest the principles we contended for should introduce into the country a priviledged order of men. The idea of the gentleman supposes that every office not at will establishes a priviledged order. The judges have their offices for one term, the President, the senators and the members of this house for different terms. While these terms endure there is a priviledge to hold the places, and no power exists to remove. If this be what the gentleman means by a priviledged order, and he agrees, that the President, the Senators and the members of this house belong to priviledged orders, I shall give myself no trouble to deny, that the judges fall under the same description; and I believe that the gentleman will find it difficult to shew, that in any other manner they are priviledged. I did not suppose that this argument was so much addressed to the understandings of gentlemen upon this floor, as to the prejudices and passions of people out of doors.

It was urged with some impression by the honorable member from Virginia, to whom I last referred, that the position that the office of a judge might be taken from him by law, was not a new doctrine.—That it was established by the very act now designed to be repealed, which was described in glowing language to have inflicted a gaping wound on the constitution, and to have stained with its blood the pages of our Statute books. It shall be my task, sir, to close this gaping wound, and to wash from the pages of our Statute book, the blood with which they were stained. It will be an easy task to shew to you the constitution without a wound and the Statute-book without a stain.

It is sir, the 29th sec. of the bill of the last session, which the honorable member considers as having inflicted the ghastly wound on the constitution, of which he has so feelingly spoken. That section abolishes the ancient circuit courts. But, sir, have we contended, or has the gentleman shewn, that the constitution prohibits the abolition of a court when you do not materially affect or in any degree impair the independence of a judge. A court is nothing more than a place where a judge is directed to discharge certain duties. There is no doubt you may erect a new court and direct it to be holden by the judges of the supreme court or of the district courts.—And if it should afterwards be your pleasure to abolish that court, it cannot be said that you destroy the offices of the judges by whom it was appointed that the court should be holden.

Thus it was directed by the original judicial law, that a circuit should be holden at York-town in the district of Pennsylvania. This court was afterwards abolished, but it was never imagined, that the office of any judge was affected. Let me suppose that a state is divided into two districts, and district courts established in each, but that one judge is appointed by law to discharge the judicial duties in both courts. The arrangement is afterwards found inconvenient, and one of the courts is abolished. In this case will it be said that the office of the judge is destroyed, or his independence affected? The error into which gentlemen have fallen on this subject, has arisen from their taking for granted, what they have not attempted to prove and what cannot be supported. That the office of a judge and any court in which he officiates are the same thing. It is most clear that a judge may be authorised and directed to perform duties in several courts, and that the discharging him from the performance of duty in one of those courts, cannot be deemed an infringement of his office.—The case of the late circuit courts as plainly illustrates my argument, and as conclusively demonstrates its correctness, as any case which can be put. There were not nominally any judges of the circuit court.—The court was directed to be holden by the judges of the supreme and of the circuit courts. The judges of these two courts were associated and directed to perform certain duties; when associated and in the performance of those duties, they were denominated the circuit court. This court is abolished; the only consequence is, that the judges of the supreme and district courts are discharged from the performance of the joint duties which were previously imposed upon them. But is the office of one judge of the supreme or of the district courts infringed? Can any judge say, in consequence of the abolition of the circuit courts, I no longer hold my office during good behaviour? On this point it was further alledged by the same honorable member, that the law of the last session, inflicted another wound on the constitution, by abolishing the district courts of Kentuckey and Tennessee. The gentleman was here deceived by the same fallacy, which misled him on the subject of the circuit courts. If he will give himself the trouble of carefully reviewing the provisions of the law, he will discern the insidious attention of the legislature to avoid the infringement of the offices of those judges. I believe the gentleman went so far as to charge us with appointing by law those judges to new offices.

The law referred to establishes a circuit, comprehending Kentuckey, Tennessee and the district of Ohio. The duties of the court of this circuit is directed to be performed by a circuit judge and the two district judges of Kentuckey and Tennessee.—Surely it is competent for the legislature to create a court, and direct that it shall be holden by any of the existing judges. If the legislature had done with respect to all the district judges, what they have done with respect to those of Kentuckey and Tennessee, I am quite certain that the present objection would have appeared entirely groundless. Had they directed, that all the circuit courts should be held by the respective judges within the circuits, gentlemen would have clearly seen, that this was only an imposition of a new duty and not an appointment to a new office.

It will be recollected, that under the old establishment, the district judges of Kentuckey and Tennessee, were invested generally with the powers of the circuit judges. The ancient powers of those judges are scarcely varied by the late law, and the amount of the charge is, that they are directed to exercise those powers in a court formerly called a district, but now a circuit court, and at other places than those to which they were formerly confined.—but the district judge nominally remains, his office both nominally and substantially exists, and he holds it now as he did before, during good behaviour.—I will refer gentlemen to different provisions in the late law, which will shew beyond denial, that the legislature carefully and pointedly avoided the act of abolishing the offices of those judges.

The 7th sec. of the law provides that the court of the 6th circuit shall be composed of a circuit judge "and the judges of the district courts of Kentuckey and Tennessee." It is afterwards declared in the same section, "that there shall be appointed in the 6th circuit, a judge of the United States, to be called a circuit judge, who together with the district judge of Tennessee and Kentuckey shall hold the circuit courts hereby directed to be holden within the same circuit." And finally in the same section it is provided, "That whenever the office of district judge in the districts of Kentuckey and Tennessee respectively, become vacant, such vacancies shall respectively be supplied by the appointment of two additional circuit judges in the said circuit, who together with the circuit court aforesaid, shall compose the circuit court of the said circuit." When the express language of the law affirms the existence of the office and of the officer, by providing for the contingency of the officer ceasing to fill the office, with what face can gentlemen contend that the office is abolished? They who are not satisfied upon this point, I despair of convincing upon any other.

Upon the main question whether the judges hold their offices at the will of the legislature, an argument of great weight and according to my humble judgment, of irresistable force, still remains.

The legislative power of the government is not absolute but limitted. If it be doubtful whether the legislature can do what the constitution does not explicitly authorize; yet there can be no question, that they cannot do what the constitution expresly prohibits. To maintain therefore the constitution, the judges are a check upon the legislature. This doctrine I know is denied, and it is therefore incumbent upon me to shew that it is found.

It was once thought by gentlemen who now deny the principle, that the safety of the citizens and of the states relied upon the power of the judges to declare an unconstitutional law void. How vain is a paper restriction if it confers neither power nor right. Of what importance is it to say, Congress are prohibited from doing certain acts, if no legitimate authority exists in the country to decide whether an act done is a prohibited act? Do gentlemen perceive the consequences which would follow from establishing the principle, that Congress have the exclusive right to decide upon their own powers? This principle admitted, does any constitution remain? Does not the power of the legislature become absolute and omnipotent? Can you talk to them of transgressing their powers, when no one has a right to judge of those powers but themselves? They do what is not authorized, they do what is inhibited, nay, at every step they trample the constitution under foot; yet their acts are lawful and binding, and it is treason to resist them. How is it, sir, do the doctrines and protestions of these gentlemen agree. They tell us they are friendly to the existence of the states; that they are the friends of federative, but the enemies of a consolidated general government, and yet, sir, to accomplish a paltry object, they are willing to settle a principle which, beyond all doubt, would eventually plant a consolidated government with unlimitted power upon the ruins of the state governments.

Nothing can be more absurd than to contend that there is a political restraint, upon a political body who are answerable to none but themselves for the violation of the restraint, and who can derive from the very act of violation, undeniable justification of their conduct.

If Mr. Chairman, you mean to have a constitution you must discover a power to which the acknowledged right is attached of pronouncing the invalidity of the acts of the legislature which contravene the instrument.

Does the power reside in the states? Has the legislature of a state a right to declare an act of Congress void? This would be erring upon the opposite extreme. It would be placing the general government at the foot of the state governments. It would be allowing one member of the union to control all the rest. It would inevitably lead to civil dissention and a dissolution of the general government. Will it be pretended that the state courts have the exclusive right of deciding upon the validity of our laws?

I admit they have a right to declare an act of congress void. But this right they enjoy [illegible] and it ever effectually must exist [illegible] sion and control of the courts of [illegible]. If the state courts definitively possessed the right of declaring the invalidity of the laws of this government it would bring us in subjection to the states!—The judges of those courts being bound by the laws of the states. If a state declared an act of congress unconstitutional, the law of the state would oblige its courts to determine the law invalid. This principle would also destroy the uniformity of obligation upon all the states which should attend every law of this government. If a law were declared void in one state, it would exempt the citizens of that state from its operation, whilst obedience was yielded to it in the other states. I go further and say, if the state or state courts had a final power of annulling the acts of this government, its miserable and precarious existence would not be worth the trouble of a moment to preserve.

It would endure but a short time, as a subject of division, and wasting into an empty shadow, would quickly vanish from our sight. Let us now ask if the power to decide upon the validity of our laws resides with the people? Gentlemen cannot deny this right to the sovereign people. I admit they possess it. But if at the same time it does not belong to the courts of the United States, where does it lead the people? It leads them to the gallows. Let us suppose that congress, forgetful of the limits of the authority, pass an unconstitutional law. They lay a direct tax, upon one state, and impose none upon the others. The people of the state taxed, contest the validity of the law. They forcibly resist its execution. They are brought by the executive authority before the courts upon charges of treason. The law is unconstitutional, the people have done right, but the court are bound by a law and obliged to pronounce upon them the sentence which it inflicts. Deny to the courts of the United States, the power of judging upon the constitutionality of our laws, and it is vain to talk of its existing elsewhere. The infractors of the laws are brought before the courts, and if the courts are implicitly bound, the invalidity of the laws can be no offence. There is however, Mr. Chairman, still a stronger ground of argument upon this subject, I shall collect one or two cases to illustrate it.—Congress are prohibited from passing a bill of attainder; it is also declared in the constitution "that no attainder of treason shall work corruption of blood or forfeiture except during the life of the party attained."—Let us suppose that congress pass a bill of attainder, or they enact that any one attained of treason shall forfeit to the use of the United States all the estate which he held in any land or tenements.

The party attained is seized and brought before a federal court, and an award of execution passed against him. He opens the constitution and points to this line—"no bill of attainder, or expost facto law shall be passed." The attorney for the U. States reads the bill of attainder.

The court are bound to decide, but they have only the alternative of pronouncing the law or the constitution invalid. It is left to them only to say, that the law vitiates the constitution, or the constitution avoids the law. So in the other case stated, the heir after the death of his ancestor, brings his ejectment in one of the courts of the United States, to recover his inheritance. The law by which it is confiscated is shewn. The constitution gave no power to pass such a law. On the contrary it expresly denied it, to the government. The title of the heir is rested on the constitution, the title of the government on the law. The effect of one destroys the effect of the other; the court must determine which is effectual.

There are many other cases, Mr. Chairman, of a similar nature, to which I might allude. There is the case of the privilege of Habeas Corpus, which cannot be suspended but in times of rebellion or of invasion. Suppose a law prohibiting the issuing of a writ, at a moment of profound peace. If in such case the writ were demanded of a court, could they say it is true the legislature were restrained from passing the law, suspending the privilege of its writ, at such a time as that which now exists, but their mighty power has broken the bounds of the constitution, and festered the authority of the court. I am not, sir, disposed to vaunt, but standing on this ground, I throw the gauntlet to any champion upon the other side. I call upon them to maintain, that in a collision between a law, and the constitution, the judges are bound to support the laws and annul the constitution. Can the gentlemen relieve themselves from this dilemma? Will they say, though a judge has no power to pronounce a law void, he has a power to declare the constitution invalid.

The doctrine for which I am contending is not only clearly inferable from the plain language of the constitution, but by law has been expresly declared and established in practice since the existence of the government.

The 2d sec of the 3d art. of the constitution expresly extends the judicial power to all cases arising under the constitution, the laws, &c. the provision of the 2d clause of the 6th article leaves nothing to doubt. "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." The constitution is absolutely the supreme law. Not so of the acts of the legislature. Such only are the laws of the land as are made in pursuance of the constitution.

I beg the indulgence of the committee, one moment, while I read the following provision from the 25th sec. of the judicial act of the year 1789: "A final judgment or decree in any suit in the highest court of law or equity of a state in which a decision of the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity, &c. may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error." Thus as early as the year 1789, among the first acts of the government, the legislature explicitly recognized the right of a state court to declare a treaty, a statute and an authority exercised under the United States void, [illegible] to the revision of the supreme court of the United States; and it has expresly given the final power to the supreme court to affirm a judgment which [illegible] the validity either of a treaty, statute [illegible] authority of the government.

[illegible], Mr. Chairman, that I have given abundant proofs from the nature of our governments from the language of the constitution, and from legislative acknowledgment, that the judges of our courts have the power to judge and determine upon the constitutionality of our laws.

Let me now suppose that in our frame of government the judges are a check upon the legislature that the constitution is deposited in their keeping.—will you say afterwards that their existence depends upon the legislature? That the body to whom they are a check has the power to destroy them? Will you say that the constitution may be taken out of their hands, by a power the most to be distrusted, because the only power which could violate it with impunity? Can any thing be more absurd than to admit, that the judges are a check upon the legislature, and yet, to contend that they exist at the will of the legislature? A check must necessarily imply a power commensurate to its end. The political body designed to check another must be independent of it, otherwise there can be no check. What check can there be when the power designed to be checked can annihilate the body which is to restrain it?

I go further, Mr. Chairman, and take a stronger ground. I say in the nature of things, the dependence of the judges upon the legislature, and their right to declare the acts of the legislature void, are repugnant, and cannot exist together. The doctrine, sir, supposes two rights—first the right of the legislature to destroy the office of the judge, and the right of the judge to vacate the act of the legislature.—You have a right to abolish by a law, the office of the judges of the circuit courts. They have a right to declare your law void. It unavoidably follows in the exercise of these rights, either that you destroy their rights, or that they destroy yours. This doctrine is not an harmless absurdity, it is a most harmless heresy. It is a doctrine which cannot be practised without producing not discord only, but bloodshed. If you pass the bill upon your table the judges have a constitutional right to declare it void.—I hope they will have the courage to execute that right; and if, sir, I am called upon to take my side, standing acquitted in my conscience and before my God, of all motives but the support of the constitution of my country, I shall not tremble at the consequences.

The constitution may have its enemies, but I know that it has also its friends. I beg gentlemen to pause before they take this rash step. There are many, very many who believe if you strike this blow, you inflict a mortal wound on the constitution. There are many now willing to spill their blood to defend their constitution. Are gentlemen disposed to risk the consequences? Sir, I mean no threat—I have no expectation of appalling the stout hearts of my adversaries; but if gentlemen are regardless of themselves, let them consider their wives and children, their neighbours and their friends. Will they risk civil dissention; will they hazard the welfare, will they jeopardize the peace of the country, to save a paltry sum of money, less than thirty thousand dollars.

Mr. Chairman, I am confident that the friends of this measure are not appraized of the nature of its operation, nor fruitful of the mischievous consequences which are likely to attend it. Sir, the morals of your people, the peace of your country, the stability of your government, rests upon the maintenance of the independence of the judiciary. It is not of half the importance in England, that the judges should be independent of the crown, as it is with us, that they should be independent of the legislature. And I am asked, would you render the judges superior to the legislature? I answer no, but co-ordinate. Would you render them independent of the legislature? I answer, yes, independent of every power on earth, while they behaved themselves well. The essential interest, the permanent welfare of society, require this independence.—Not, sir, on account of the judges; that is a small consideration, but on account of those between whom he is to decide.—You calculate on the weakness of human nature, and you suffer the judge to be dependent on no one, lest he should be partial to those on whom he depends. Justice does not exist where partiality prevails. A dependent judge cannot be impartial. Independence is therefore essential to the purity of your judicial tribunals.

Let it be remembered that no power is so sensibly felt by society as that of the judiciary. The life and property of every man, is liable to be in the hands of the judges. Is it not our great interest, to place our judges upon such high ground, that no fear can intimidate, no hope can seduce them? The present measures humbles them in the dust, it prostrates them at the feet of faction, it renders them the tools of every dominant party. It is this effect which I deprecate, it is this consequence which I deeply deplore. What does reason, what does argument avail, when party spirit presides? Subject your bench to the influence of this spirit, and justice bids a final adieu to your tribunals. We are asked, sir, if the judges are to be independent of the people? The question presents a false and delusive view. We are, and as long as we enjoy our freedom, we shall be divided into parties. The true question is, shall the judiciary be permanent, or fluctuative with the tide of public opinion? I beg, I implore gentlemen, to consider the magnitude and value of the principle which they are about to annihilate. If your judges are independent of political changes, they may have their preferences, but they will not enter into the spirit of party. But let their existence depend upon the support of the power of a certain set of men, and they cannot be