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THE PRESIDENT'S PROTEST.

[Concluded from our last.]

The Constitution makes the House of Representatives the exclusive judges, in the first instance, of the question whether the President has committed an impeachable offence. A majority of the Senate, whose interference with the preliminary question has, for the best of all reasons, been studiously excluded, anticipate the action of the House of Representatives, assume not only the function which belongs exclusively to that body, but convert themselves into accusers, witnesses, council, and judges, and prejudge the whole case. Thus presenting the appalling spectacle, in a free State, of judges going through a labored preparation for an impartial hearing and decision, by a previous *ex parte* investigation and sentence against the supposed offender.

There is no more settled axiom in that Government whence we derived the model of this part of our Constitution, than that "the Lords cannot impeach any to themselves, nor join in the accusation, *because they are judges.*" Independently of the general reasons on which this rule is founded, its propriety and importance are greatly increased by the nature of the impeaching power. The power of arraigning the high officers of Government before a tribunal whose sentence may expel them from their seats and brand them as infamous, is eminently a popular remedy—a remedy designed to be employed for the protection of private right and public liberty, against the abuses of injustice and the encroachments of arbitrary power. But the framers of the Constitution were also undoubtedly aware that this formidable instrument had been and might be abused; and that, from its very nature, an impeachment for high crimes and misdemeanors, whatever might be its result, would in most cases be accompanied by so much of dishonor and reproach, solicitude and suffering, as to make the power of preferring it one of the highest solemnity and importance.

It was due to both these considerations, that the impeaching power should be lodged in the hands of those who, from the mode of their election and the tenure of their offices, would most accurately express the popular will, and at the same time be most directly and speedily amenable to the People. The theory of these wise and benignant intentions is, in the present case, effectually defeated by the proceedings of the Senate. The members of that body represent, not the People, but the States; and though they are undoubtedly responsible to the States, yet, from their extended term of service, the effect of that responsibility, during the whole period of that term, must very much depend upon their own impressions of its obligatory force.—When a body thus constituted expresses, before hand, its opinion in a particular case, and thus indirectly invites a prosecution, it not only assumes a power intended, for wise reasons, to be confined to others, but it shields the latter from that exclusive and personal responsibility under which it was intended to be exercised, and reverses the whole scheme of this part of the Constitution.

Such would be some of the objections to this procedure, even if it were admitted that there is just ground for imputing to the President the offences charged in the resolution. But if, on the other hand, the House of Representatives shall be of opinion that there is no reason for charging them upon him, and shall therefore deem it improper to prefer an impeachment, then will the violation of privilege as it respects that House, of justice as it regards the President, and of the Constitution, as it relates to both, be only the more conspicuous and impressive.

The constitutional mode of procedure on an impeachment has not only been wholly disregarded, but some of the first principles of natural right and enlightened jurisprudence have been violated in the very form of the resolution. It carefully abstains from averring in which of "the late proceedings, in relation to the public revenue, the President has assumed upon himself authority and power not conferred by the Constitution and laws." It carefully abstains from specifying *what laws or what parts* of the Constitution have been violated. Why was not the certainty of the offence—"the nature and cause of the accusation"—set out in the manner required in the Constitution, before even the humblest individual, for the smallest crime, can be exposed to condemnation?

Such a specification was due to the accused, that he might direct his defence to the real points of attack; to the people, that they might clearly understand in what particulars their institutions have been violated; and to the truth and certainty of our public annals. As the record now stands, whilst the resolution plainly charges upon the President at least one act of usurpation in "the late executive proceedings in relation to the public revenue," and is so framed that those Senators who believed that one such act, and only one, had been committed, could assent to it; its language is yet broad enough to include several such acts; and so it may have been regarded by some of those who voted for it. But though the accusation is thus comprehensive in the censures it implies, there is no such certainty of time, place, or circumstance, as to exhibit the particular conclusion of fact or law which induced any one Senator to vote for it. And it may well have happened, that, whilst one Senator believed that some particular act embraced in the resolution was an arbitrary and unconstitutional assumption of power; others of the majority may have deemed that very act both constitutional and expedient—or, if not expedient, yet still within the pale of the Constitution.

And thus a majority of the Senators may have been enabled to concur in a vague and undefined accusation, that the President, in the course of "the late executive proceedings in relation to the public revenue," had violated the Constitution and laws; whilst, if a separate vote had been taken in respect to each particular act, included within the general terms, the accusers of the President might, on any such vote, have been found in the minority.

Still further to exemplify this feature of the proceeding, it is important to be remarked, that the resolution, as originally offered to the Senate, specified, with adequate precision, certain acts of the President, which it denounced as a violation of the Constitution and laws; and that it was not until the very close of the debate, and when, perhaps, it was apprehended that a majority might not sustain the specific accusation contained in it, that the resolution was so modified as to assume its present form. A more striking illustration of the soundness and necessity of the rules which forbid vague and indefinite generalities, and require a reasonable certainty in all judicial allegations, and a more glaring instance of the violation of those rules, has seldom been exhibited.

In this view of the resolution, it must certainly be regarded, not as a vindication of any particular provision of the law or the Constitution, but simply as an official rebuke or condemnatory sentence, too general and indefinite to be easily repelled, but yet sufficiently precise to bring into discredit the conduct and motives of the Executive. But whatever it may have been intended to accomplish, it is obvious that the vague, general, and abstract form of the resolution, is in perfect keeping with those other departures from first principles and settled improvements in jurisprudence, so properly the boast of free countries in modern times. And if is not too much to say, of the whole of these proceedings, that if they shall be approved and sustained by an intelligent people, then will that great contest with arbitrary power, which had established in statutes, in bills of rights, in sacred charters, and in constitutions of Government, the right of every citizen to a notice before trial, to a hearing before conviction, and to an impartial tribunal for deciding on the charge, have been waged in vain.

If the resolution had been left in its original form, it is not to be presumed that it could ever have received the assent of a majority of the Senate: for the acts therein specified as violations of the Constitution and laws were clearly within the limits of the Executive authority. They are the "dismissing the late Secretary of the Treasury because he would not, contrary to his sense of his own duty, remove the money of the U. States in deposite with the Bank of the U. States and its branches, in conformity with the President's opinion; and appointing his successor to effect such removal, which has been done." But as no other specification has been substituted, and as these were the "Executive proceedings in relation to the public revenue," principally referred to in the course of the discussion, they will doubtless be generally regarded as the acts intended to be denounced as "an assumption of authority and power not conferred by the Constitution or laws, but in derogation of both." It is therefore due to the occasion, that a condensed summary of the views of the Executive, in respect to them, should be here exhibited.

By the Constitution, "the Executive power is vested in a President of the U. States." Among the duties imposed upon him, and which he is sworn to perform, is that of "taking care that the laws be faithfully executed." Being thus made responsible for the entire action of the Executive Department, it was but reasonable that the power of appointing, overseeing, and controlling those who execute the laws—a power in its nature executive—should remain in his hands. It is, therefore, not only his right, but the Constitution makes it his duty, to "nominate, and by and with the advice and consent of the Senate, appoint," all "officers of the United States whose appointments are not in the Constitution otherwise provided for," with a proviso that the appointment of inferior officers may be vested in the President alone, in the Courts of Justice, or in the Heads of Departments.

The Executive power vested in the Senate, is neither that of "nominating" nor "appointing." It is merely a check upon the Executive power of appointment. If individuals proposed for appointment by the President, are by them deemed incompetent or unworthy, they may withhold their consent, and the appointment cannot be made.—They check the action of the Executive, but cannot, in relation to those very subjects, act themselves, nor direct him. Selections are still made by the President, and the negative given to the Senate, without diminishing his responsibility, furnishes an additional guarantee to the country that the subordinate executive, as well as the judicial offices, shall be filled with worthy and competent men.

The whole Executive power being vested in the President, who is responsible for its exercise, it is a necessary consequence, that he should have a right to employ agents of his own choice to aid him in the performance of his duties, and to discharge them when he is no longer willing to be responsible for their acts. In strict accordance with this principle, the power of removal, which, like that of appointment, is an original Executive power, is left unchecked by the Constitution in relation to all Executive officers, for whose conduct the President is responsible, while it is taken from him in relation to judicial officers, for whose acts he is not responsible. In the Government from which many of the fundamental principles of our system are derived, the Head of the Executive Department originally had power to appoint and remove at will all officers, Executive and Judicial. It was to take the Judges out of this general power of removal, and thus make them independent of the Executive, that the tenure of their offices was changed to good behaviour. Nor is it conceivable why they are placed, in our Constitution, upon a tenure different from that of all other officers appointed by the Executive, unless it be for the same purpose.

But if there were any just ground for doubt on the face of the Constitution, whether all Executive officers are removable at the will of the President, it is obviated by the cotemporaneous construction of the instrument, and the uniform practice under it.

The power of removal was a topic of solemn debate in the Congress of 1789, while organizing the administrative departments of the Government, and it was finally decided that the President derived from the Constitution the power of removal, so far as it regards that department for whose acts he is responsible. Although the debate covered the whole ground, embracing the Treasury as well as all the other Executive Departments, it arose on a motion to strike out of the bill to establish a Department of Foreign Affairs, since called the Department of State, a clause declaring the Secretary "to be removable from office by the President of the United States." After that motion had been decided in the negative, it was perceived that these words did not convey the sense of the House of Representatives in relation to the true source of the power of removal. With the avowed object of preventing any future inference that this power was exercised by the President in virtue of a grant from Congress, when in fact that body considered it as derived from the Constitution, the words which had been the subject of debate were struck out, and in lieu thereof a clause was inserted in a provision concerning the Chief Clerk of the Department, which declared that "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy," the Chief Clerk should, during such vacancy, have charge of the papers of the office. This change having been made for the express purpose of declaring the sense of Congress, that the President derived the power of removal from the Constitution, the Act as it passed has always been considered as a full expression of the sense of the Legislature on this important part of the American Constitution.

Here then we have the concurrent authority of President Washington, of the Senate, and the House of Representatives, numbers of whom had taken an active part in the Convention which framed the Constitution, and in the State conventions which adopted it, that the President derived an unqualified power of removal from that instrument itself, which is "beyond the reach of Legislative authority." Upon this principle the Government has now been steadily administered for about forty-five years, during which there have been numerous removals made by the President or by his direction, embracing every grade of Executive officers, from the Heads of Departments to the messengers of Bureaus.

The Treasury Department, in the discussions of 1789, was considered on the same footing as the other Executive Departments, and in the Act establishing it, the precise words were incorporated, indicative of the sense of Congress, that the President derives his power to remove the Secretary, from the Constitution, which appear in the Act establishing the Department of Foreign Affairs. An Assistant Secretary of the Treasury was created, and it was provided that he should take charge of the books and papers of the Department "whenever the Secretary shall be *removed* from office by the President of the United States." The Secretary of the Treasury being appointed by the President, and being considered as constitutionally removable by him, it appears never to have occurred to any one in the Congress of 1789, or since, until very recently, that he was other than an Executive officer, the mere instrument of the Chief Magistrate in the execution of the laws, subject, like all other Heads of Departments, to his supervision and control. No such idea as an officer of the Congress can be found in the Constitution, or appears to have suggested itself to those who organized the Government. There are officers of each House, the appointment of which is authorized by the Constitution, but all officers referred to in that instrument, as coming within the appointing power of the President, whether established thereby, or created by law, are "officers of the United States." No joint power of appointment is given to the two Houses of Congress, nor is there any accountability to them as one body: but as soon as any officer is created by law, of whatever name or character, the appointment of the person or persons to fill it, devolves, by the Constitution, upon the President with the advice and consent of the Senate, unless it be an inferior officer, and the appointment be vested by the law itself "in the President alone, in the courts of law, or in the Heads of Departments."

But at the time of the organization of the Treasury Department, an incident occurred which distinctly evinces the unanimous concurrence of the first Congress in the principle that the Treasury Department is wholly executive in its character and responsibilities. A motion was made to strike out the provision of the bill making it the duty of the Secretary "to digest and report plans for the improvement and management of the revenue, and for the support of public credit," on the ground that it would give the Executive Department of the Government too much influence and power in Congress. The motion was not opposed on the ground that the Secretary was the officer of Congress, and responsible to that body, which would have been conclusive, if admitted, but on other grounds, which conceded his Executive character throughout.

The whole discussion evinces an unanimous concurrence in the principle that the Secretary of the Treasury is wholly an Executive officer, and the struggle of the minority was to restrict his power as such. From that time down to the present, the Secretary of the Treasury, the Treasurer, Register, Comptrollers, Auditors, and Clerks, who fill the offices of that department, have, in the practice of the Government, been considered and treated as on the same footing with corresponding grades of officers in all the other Executive Departments.

The custody of the public property, under such regulations as may be prescribed by legislative authority, has always been considered an appropriate function of the Executive Department in this and all other Governments. In accordance with this principle, every species of property belonging to the United States, (excepting that which is in the use of the several co-ordinate departments of the Government, as means to aid them in performing their appropriate functions,) is in charge of officers appointed by the President, whether it be lands, or buildings, or merchandize, or provisions, or clothing, or arms and munitions of war. The superintendents and keepers of the whole are appointed by the President, and removable at his will.

Public money is but a species of public property. It cannot be raised by taxation or customs, nor brought into the treasury in any other way, except by law; but whenever or howsoever obtained, its custody always has been, and always must be, unless the Constitution be changed, intrusted to the Executive Department. No officer can be created by Congress for the purpose of taking charge of it, whose appointment would not, by the Constitution, at once devolve on the President, and who would not be responsible to him for the faithful performance of his duties. The legislative power may undoubtedly bind him and the President, by any laws they may think proper to enact; they may prescribe in what place particular portions of the public money shall be kept, and for what reason it shall be removed, as they may direct that supplies for the army or navy shall be kept in particular stores; and it will be the duty of the President to see that the law is faithfully executed—yet will the custody remain in the Executive Department of the Government. Were the Congress to assume, with or without a legislative act, the power of appointing officers, independently of the President, to take the charge and custody of the public property contained in the military and naval arsenals, magazines and store-houses, it is believed that such an act would be regarded by all as a palpable usurpation of executive power, subversive of the form as well as the fundamental principles of our Government. But where is the difference, in principle, whether public property be in the form of arms, munitions of war, and supplies, or in gold and silver, or Bank notes? None can be perceived—none is believed to exist. Congress cannot, therefore, take out of the hands of the Executive Department the custody of the public property or money, without an assumption of executive power, and a subversion of the first principles of the Constitution.

The Congress of the United States have never passed an act imperatively directing that the public moneys shall be kept in any particular place or places. From the origin of the Government to the year 1816, the statute book was wholly silent on the subject. In 1789, a Treasurer was created, subordinate to the Secretary of the Treasury, and through him to the President. He was required to give bond, safely to keep and faithfully to disburse the public moneys, without any direction as to the manner or places in which they should be kept. By reference to the pratice of the Government, it is found, that from its first organization, the Secretary of the Treasury, acting under the supervision of the President, designated the places in which the public moneys should be kept, and specially directed all transfers from place to place. This practice was continued, with the silent acquiescence of Congress, from 1789 down to 1816, and although many Banks were selected and discharged, and although a portion of the moneys were first placed in the State Banks, and then in the former Bank of the United States, and upon the dissolution of that, were again transferred to the State Banks, no legislation was thought necessary by Congress, and all the operations were originated and perfected by executive authority. The Secretary of the Treasury, responsible to the President, and with his approbation, made contracts and arrangements in relation to the whole subject matter, which was thus entirely committed to the direction of the President, under his responsibilities to the American people, and to those who were authorized to impeach and punish him for any breach of this important trust.

The act of 1816, establishing the Bank of the United States, directed the deposites of public money to be made in that Bank and its branches, in places in which the said Bank and branches thereof may be established, "unless the Secretary of the Treasury should otherwise order and direct," in which event, he was required to give his reasons to Congress. This was but a continuation of his pre-existing powers as the head of an Executive Department, to direct where the deposites should be made, with the superadded obligation of giving his reasons to Congress for making them elsewhere than in the Bank of the United States and its branches. It is not to be considered that this provision in any degree altered the relation between the Secretary of the Treasury and the President, as the responsible head of the Executive Department, or released the latter from his constitutional obligation to "take care that the laws be faithfully executed." On the contrary, it increased his responsibilities, by adding another to the long list of laws which it was his duty to carry into effect.

It would be an extraordinary result, if, because the person charged by law with a public duty, is one of the Secretaries, it were less the duty of the President to see that law faithfully executed, than other laws enjoining duties upon subordinate officers or private citizens. If there be any difference, it would seem that the obligation is the stronger in relation to the former, because the neglect is in his presence, and the remedy at hand.

It cannot be doubted that it was the legal duty of the Secretary of the Treasury to order and direct the deposites of the public money to be made elsewhere than in the Bank of the United States, *whenever sufficient reasons existed for making the change.* If, in such a case, he neglected or refused to act, he would neglect or refuse to execute the law. What would then be the sworn duty of the President? Could he say that the Constitution did not bind him to see the law faithfully executed, because it was one of his Secretaries, and not himself, upon whom the service was specially imposed? Might he not be asked whether there was any such limitation to his obligations prescribed in the Constitution?—whether he is not equally bound to take care that the laws be faithfully executed—whether they impose duties on the highest officer of the State, or the lowest subordinate in any of the departments? Might he not be told, that it was for the sole purpose of causing all executive officers, from the highest to the lowest, faithfully to perform the service required of them by law, that the people of the United States have made him their Chief Magistrate, and the Constitution has clothed him with the entire executive power of this Government? The principles implied in these questions appear too plain to need elucidation.

But here, also, we have a cotemporaneous construction of the Act, which shows that it was not understood as in any way changing the relations between the President and Secretary of the Treasury, or as placing the latter out of Executive control, even in relation to the deposites of the public money. Nor on this point are we left to any equivocal testimony. The documents of the Treasury Department show that the Secretary of the Treasury did apply to the President, and obtained his approbation and sanction to the original transfer of the public deposites to the present Bank of the United States, and did carry the measure into effect in obedience to his decision. They also show that transfers of the public deposites from the Branches of the Bank of the United States to State Banks, at Chillicothe, Cincinnati, and Louisville, in 1819, were made with the approbation of the President, and by his authority. They show, that upon all important questions appertaining to this department, whether they related to the public deposites or other matters, it was the constant practice of the Secretary of the Treasury to obtain for his acts the approval and sanction of the President.

These acts and the principles on which they were founded, were known to all the departments of the Government, to Congress, and the country; and, until very recently, appear never to have been called in question.

Thus was it settled by the Constitution, the laws, and the whole practice of the Government, that the entire executive power is vested in the President of the United States; that, as incident to that power, the right of appointing and removing those officers who are to aid him in the execution of the laws, with such restrictions only as the Constitution prescribes, is vested in the President; that the Secretary of the Treasury is one of those officers; that the custody of the public property and money is an Executive function, which, in relation to the money, has always been exercised through the Secretary of the Treasury and his subordinates; that, in the performance of those duties, he is subject to the supervision and control of the President, and in all important measures having relation to them, consults the Chief Magistrate, and obtains his approval and sanction; that the law establishing the Bank did not, as it could not, change the relation between the President and the Secretary, did not release the former [illegible] to see the law faithfully executed, nor the latter from the President's supervision and control; that afterwards, and before, the Secretary did in fact consult, and obtain the sanction of the President, to transfers and removals of the public deposites, and that all departments of the Government, and the nation itself, approved or acquiesced in these acts and principles, as in strict conformity with our Constitution and laws.

During the last year, the approaching termination, according to the provisions of its charter, and the solemn decision of the American people, of the Bank of the United States, made it expedient, and its exposed abuses and corruptions made it, in my opinion, the duty of the Secretary of the Treasury, to place the moneys of the United States in other depositories. The Secretary did not concur in that opinion, and declined giving the necessary order and direction. So glaring were the abuses and corruptions of the Bank, so evident its fixed purpose to perseverance in them, and so palpable its design, by its money and power, to control the Government and change its character, that I deemed it the imperative duty of the Executive authority, by the exertion of every power confided to it by the Constitution and laws, to check its career, and lessen its ability to do mischief, even in the painful alternative of dismissing the Head of one of the Departments. At the time the removal was made, other causes sufficient to justify it existed, but if they had not, the Secretary would have been dismissed for this cause only.

His place I supplied by one whose opinions were well known to me, and whose frank expression of them, in another situation, and whose sacrifices of interest and feeling, when unexpectedly called to the station he now occupies, ought forever to have shielded his motives from suspicion, and his character from reproach. In accordance with the opinions long before expressed by him, he proceeded, with my sanction, to make arrangements for depositing the monies of the United States in other safe institutions.

The resolution of the Senate, as originally framed, and as passed, if it refers to these acts, presupposes a right in that body to interfere with this exercise of Executive power. If the principle be once admitted, it is not difficult to see where it may end. If, by a mere denunciation like this resolution, the President should ever be induced to act, in a matter of official duty, contrary to the honest convictions of his own mind, in compliance with the wishes of the Senate, the constitutional independence of the Executive Department would be as effectually destroyed, and its power as effectually transferred to the Senate, as if that end had been accomplished by an amendment of the Constitution. But if the Senate have a right to interfere with the Executive powers, they have also the right to make that interference effective; and if the assertion of the power implied in the resolution, be silently acquiesced in, we may reasonably apprehend that it will be followed, at some future day, by an attempt at actual enforcement. The Senate may refuse, except on the condition that he will surrender his opinions to theirs and obey their will, to perform their own constitutional functions; to pass the necessary laws; to sanction appropriations proposed by the House of Representatives,