THE NORTH-CAROLINA MINERVA.

RALEIGH:—PUBLISHED EVERY TUESDAY BY HODGE & BOYLAN.

Twenty-five Shillings per Year.] TUESDAY, MARCH 9, 1802. VOL. VI. NUMB. 309

CONGRESS,

House of Representatives,

TUESDAY, February 16.

Debate on the bill received from the Senate, entitled "An Act to repeal certain acts respecting the organization of the courts of the U. States."

Mr. HENDERSON of N. CAROLINA.

I should not rise to offer my opinion on the great question now before the committee, were I not placed in a situation different from that in which I have been since I have had the honor of a seat in this house. The legislature of the state of North Carolina, one of whose representatives I am on this floor, have seen proper to instruct their senators, and to recommend to their representatives in congress, to use their exertions to procure a repeal of the law passed the last session of congress for the more convenient organization of the courts of the United States: and as the bill on your table has for its object the repeal of this law, and as I shall probably vote against its passage, a decent respect for the opinions of those who have framed and sent forward those resolutions, demand that I should give the reasons which influence my conduct.

And here, Sir, I cannot forbear lamenting extremely that I should unfortunately be placed in a situation where the highest obligations of duty compel me to act in opposition to the wishes of that community to which I immediately belong. It is certainly of great importance that as public functionaries we should not only discharge the trusts committed to us with fidelity, and for the general good, but in such a manner as to give satisfaction to those for whom we are acting.

And if I know the feelings of my own heart, I declare, that next to the consciousness of having performed my duty with uprightness, is the knowledge that in the discharge of this duty I meet the approbation of my fellow-men. But, Sir, if this approbation is only to be obtained by the unconditional surrender of my understanding, and the violation of my oath, I hope I shall be excused if I do not make this sacrifice at the altar of public opinion. Indeed, Sir, were I disposed to forego my own opinion and adopt that of the legislature of my state—were I inclined to say thy will be done and not mine, I should first demand of them an absolution from the oath which I have lately taken to support the constitution of the United States. As long as that oath is binding on me, I see an insuperable objection to my acting in conformity to their wishes.

I will further remark, Sir, that I am not a little surprised that, that august body should have undertaken to decide on a question not necessarily before them without having an opportunity of hearing the arguments which may be used here either on one side or the other. I will not permit myself for a moment to believe the measure originated in a want of confidence in those who represent the state and the people in this assembly. And yet, if that confidence exists; the reasons for this procedure do not immediately present themselves to the mind.

I hope, Sir, it will not be understood that I mean to cast the most distant shade of disrespect on that body. I feel too great a respect for the legislature of my native state to be guilty of such an attempt. No doubt but they were influenced by the purest and the most correct understanding. It does not follow by any means, that because my weak and feeble mind cannot discover perfect propriety in the conduct of men, that therefore it does not exist. Having premised thus much Mr. Chairman, I will proceed to an examination of the question under consideration. It has been usual to divide it into two parts: first, the expediency; and secondly, the authority of congress to pass the bill on the table. This is a natural and correct division; but I shall invert the order of considering the question, and first examine our power to act, before we consider the expediency of action. And if after a calm and candid review of the constitution, it should be found that we are prohibited from passing the bill, there will be no necessity for inquiring into the expediency of repealing the law passed last session of congress for organizing our courts of justice. The relative merits of the old and new judiciary system will be entirely out of view. For I am confident that there is not a member of this body who would wish to pass the bill on your table, if in doing it we must violate the sacred charter under which we are now assembled.

The people of America have ordained and established that the powers of government shall be vested in three great departments—the Legislative, the Executive, and the Judicial. They have said that there shall be an house of representatives, the members of which shall be chosen by the people of the several states, every second year. Though this house is composed of members chosen by the people immediately; though they can have no other interest than the great community from which they were sent; though they must return to the common mass in the short period of two years, yet enlightened America did not see proper to entrust the power of making laws to this body alone; they knew that the history of man and the experience of ages bore testimony against the safety of committing this high power to any one assembly not checked by some other body.

They have therefore erected another branch of the legislature, called the senate, the members of which are not to be elected by the people immediately, but by the sovereignties of the several States: they are to be chosen for six years and not for two, and the qualification requisite to intitle those to a seat is different from that of a member of this House. To these bodies are given the power of initiating all laws, but after a bill has passed both of these Houses, before it becomes of binding obligation on the nation, it must be approved of by the President; it is a dead letter until life is given by the executive. The President is elected not by the people, not by the legislatures of the several States, not by either House of congress, but by electors chosen by the people. He is to hold his office during four years; this is the second great department of the government. It will be easily discovered from this cursory view of our constitution, the caution and jealousy with which the people have conferred the power of making laws, of commanding what is right, and prohibiting what is wrong. But, sir, after this law was made, after its authoritative mandate was acknowledged by the nation, it became necessary to establish some tribunal to judge of the extent and obligation of this law. The people did not see proper to entrust this power of judging of the meaning of their laws either to the legislature or to the executive, because, they all participated in the making of these laws; and experience had shown, that it is essential for the preservation of liberty, that the judicial and legislative authorities should be kept separate and distinct. They therefore, erected a third department, called the judicial, and said that "the judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as congress may from time to time ordain and establish. The *judges both* of the *supreme* and *inferior* courts, shall hold their *offices during good behaviour*, and shall at stated times receive for their services, a compensation which shall not be diminished during their continuance in office." It is admitted, I understand by all parties, by every description of persons, that these words, *shall hold their offices during good behaviour*, are intended as a limitation of power. The question is; what power is thus to be limited and checked? I answer, that all and every power which would have had the authority of impairing the tenure by which the judges hold their offices, (if these words were not inserted) is checked and limited by these words; whether that power should be found to reside in congress, or in the executive. The words are broad and extensive in their signification, and can only be satisfied by being construed to control the legislative as well as the executive power. But gentlemen contend, that they must be confined to limiting the power of the President. I ask gentlemen, what is there in the constitution to point their signification to this end alone? When you erect a court and fill it with a judge, and tell him in plain simple language, that he shall hold his office during good behaviour, or as long as he shall behave well; what I beseech you, sir, will any man whose mind is not bewildered in the mazes of modern metaphysics infer from the declaration? Certainly that the office will not be taken from him until he misbehaves; nor that he will be taken from the office during his good behaviour. Under this impression he enters upon his duty, performing it with the most perfect satisfaction to all persons who have business before him; and the legislature without whispering a complaint, abolishes the office and thereby turns out the judge. The judge is told this is no violation of the compact, although you have behaved well, although we have promised, that as long as you did behave well, you should continue in office; yet, there is now no further necessity for your services, and you may retire. These words, 'during good behaviour,' are intended to prevent the President from dismissing you from office, and not the legislature from destroying your office. Do you suppose, sir, that there is a man of common understanding in the nation whose mind is not alive to the influence of party spirit, that would yield his assent to this reasoning? I hope and believe, there is not. But, sir, how is it proved that the President would have had the power of removing the judges from their office, if these words 'during good behaviour had not been inserted in the constitution? Is there any words in that instrument which give the President expresly the power of removing any officer at pleasure? If there are—I call upon gentlemen to point them out—It does not result from the fashionable axiom, that the power which can create can destroy. The President can nominate, but he can appoint to office only by the advice and consent of the senate. Therefore, it would follow if the power of displacing results from that of creating; that the senate should participate in displacing as well as creating officers. But however this may be, it is certainly a mere constructive power which he has exercised, because the legislature have from motives of expedience acknowledged, that he had it. If the constitution does not necessarily give the President the right of removing officers at pleasure, and if that right depend upon legislative act or constructions, where would have been the necessity for inserting these emphatic words as a check and limitation of executive power, where without them the President has no such power. You are taking great pains to control a power which does not exist. The persons who framed our constitution, knew that a power of removal in ordinary cases must exist somewhere. They took care therefore, that in whatever hands it might fall, the language of the constitution respecting the tenure of the office of a judge should be co extensive with the whole power of removal, whether it should reside in one or in more hands.

But, sir these words, during good behaviour, are familiar to the American people; when the political bands which united us with Great Britain were burst asunder, and we assumed among the nations of the earth an independent station, most, if not all the states introduced these words into their constitutions. They were deemed essential, and a meaning has been stamped upon them which it is not in the power of this house to change. Let us for a moment examine some of the state constitutions and see what signification must of necessity be given to these words. I will first advert to the constitution of North Carolina, as being one with which I am best acquainted. In that instrument it is said "that the General Assembly shall, by joint ballot, of both houses, appoint judges of the supreme court of law and equity, judges of admiralty and an attorney-general, who shall be commissioned by the Governor, and hold their offices during good behaviour." I ask gentlemen what power is intended here to be limited and checked by the words "shall hold their offices during good behaviour?" Not the executive, for it is well known that the Governor of that state cannot appoint even a constable. It could not be the meaning of that constitution to check his power of removal, for that of appointment is not any where given to him.—Then these words must mean that the legislature should not have the power of removing the judges from office as long as they behaved well. If you do not give this signification to the words they are of no importance, and might as well have been left out of the instrument. I hope the feelings of the people of North-Carolina will not be hurt, and their understandings insulted by telling us that the meaning of the words may be satisfied by construing them to extend to a prohibition of the legislature displacing the judges and proceeding to the election of others without those displaced being guilty of *misbehaviour*. If this is correct, what security, sir, have the people then for the independence of their judges? The constitution has told them that they should be judged by men who, during the time they behaved well should continue in office, or what is the same thing, should hold them during good behaviour. But they are now informed that this was intended to operate as a check upon the legislature's displacing them by selecting others to fill their offices when they had not misbehaved, but not to prevent their passing a law repealing that act by which the appointment to office was made; or in other words, our assembly are expresly forbidden to impair the tenure by which our judges hold their offices, as long as they behave well; but they can repeal the law, and the judges are out of office, though they may be the most virtuous, upright and able men in the country, and have discharged their duties faithfully. Are the gentlemen on this floor from N. Carolina prepared to give this construction to that constitution? Are they prepared to tell their constituents that the provisions of their constitution may be thus evaded, and the whole power of government, legislative, executive and judicial be concentrated in the general assembly, and absolute despotism imposed upon them? If they are not I conjure them to pause before they give their vote for the passage of the bill on the table. I will further observe, Mr. chairman, that words of the same import with those I have quoted from the constitution of North-Carolina, are to be found in the Virginia and South-Carolina constitutions, in neither of which states hath the Governor the right of appointing judges. In Virginia, sir, the judges of the supreme court, in 1792, declared that the assembly of that state had not the power of imposing chancery duties on the district judge, and in delivering their opinions, descanted at large on the independence of the judiciary, and said that the assembly could not annihilate the office of a judge, which was secured to him by the constitution. If this is a true exposition of the constitution of these states I ask gentlemen by what authority they now attempt to impose a different meaning on the same words, when found in the constitution of the United States? Are we to suppose that the whole people of America were less regardful of their rights, less solicitous for independent judges than the people of particular states? And unless this is conceded the doctrine of gentlemen who advocate the passage of this bill must be incorrect.

But it has been said that the powers of each congress are equal, and that a subsequent legislature can repeal the acts of a former. And as this law was passed by the last congress, we have the same power to repeal it which they had to enact it. This objection is more plausible than solid. It is not contended by us that legislatures who are not limited in their powers, have not the same authority. The question is not what omnipotent assemblies can do, but what *we* can do under a constitution defining & limiting with accuracy, the extent & boundaries of our authority. The very section in the constitution, art. 3, section 1, which I have read, is a proof against the power of every congress to repeal the acts of their predecessors. In the latter part of the same section it is provided that the judges shall receive for their services a compensation which shall not be diminished during their continuance in office. I suppose that it will not be contended that we can diminish this compensation during the continuance of the office, and yet the salary was fixed and ascertained by a former congress; the same observations may be made with respect to compensation to the President, which can neither be encreased nor diminished during the period for which he shall have been elected. It is not competent for this congress to vary the compensation to him which has been fixed by a prior legislature. It is clearly seen upon a little investigation that the position which gentlemen take is too extensive, and leads immediately to a destruction of the constitution. It does away all check and makes the legislature omnipotent. It has been asked that if a corrupt and unprincipled congress should make an army of judges, have not a subsequed congress the right of repealing the law establishing this monstrous judicial system. I answer, that they have

(See last page.)