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JUDGE BASSETT'S PROTEST
(Concluded.)

The people, indeed, by a conſtitutional act, may, if the occaſion demands it, correct an error even here. But until then, every department, every officer, every citizen of the United States, is bound to yield to the ſentence of the judicial department, judicially declaring what is the law.

If we look only into the conſtitution for one moment, and ſee the various checks and limitations upon legiſlative power, and in favor of the ſtates and citizens, all declared to be the ſupreme law of the land, and conſider, for a moment, the nature of the judicial power, to which is expreſsly delegated the right of deciding all queſtions ariſing under the conſtitution and laws of the United States: and that without this power in the judiciary to extend to the ſtates and citizens, the benefits of the conſtitution as a ſupreme law, they can only be obtained through force and blood; no rational doubt can be entertained, that it is the right and indeed the higheſt duty of the judges, if convinced that a law of congreſs is oppoſed to the laws of the people, as enacted in the conſtitution, to pronounce it, for that reaſon a nullity and void.

Theſe are my views of the judicial power. I never entertained the leaſt ſcruple upon this point; conſidering it as clear as the conſtitution itſelf. Judicial determinations, too, of the higheſt authority, have placed this queſtion, or ought to have placed it, at reſt. On the penſion law, the judges of the ſupreme court agreed, that it was unconſtitutional, and congreſs, acquieſcing in the determination, repealed ſo much as was by them held void.

On the carriage tax, the queſtion was brought, by a citizen of Virginia, before the ſupreme court, on the very point, that the law was unconſtitutional. The judges determined it was not contrary to the conſtitution; but their power and right to determine otherwiſe was never queſtioned; and they affirmed the law, not on the ground that they were obliged to execute a law of congreſs, but on the principal of its conformity and being purſuant to the conſtitution.

Theſe are the general grounds and reaſonings upon which my judgment is founded, that the acts of congreſs of the 8th of March, and 29th of April 1802, do not aboliſh the office of the judges, under the law of the 13th of February 1801. I hold thoſe acts, ſo far as they are deſigned to aboliſh the offices of thoſe judges, void, becauſe directly contrary to the conſtitution of the United States, which eſtabliſhed them in the judges when once created and veſted, during their good behaviour.

I feel myſelf called upon, in this place, to notice an opinion, which ſome entertain, who hold, that congreſs, by no act, can deprive a judge of his judicial capacity, and the ſalary annexed to his original office; but that congreſs may aboliſh the particular court, of which he is the judge, and tranſfer the judicial powers, which are exerciſed in that court, to any other exiſting courts and judges of the United States: or may create other courts of the ſame or different name and territorial limits, and veſt the ſame powers in thoſe courts, to be compoſed of newly created judges, or judges already appointed, belonging to any other court of the U. States.

That congreſs can, by no lawful means, deprive a judge of his judicial capacity, or commiſſion, and if by their act, and not by his own neglect refuſal, or miſbehavior, he is left without any judicial ſervices to perform, they are bound to pay him the ſtipulated compenſation, unleſs he voluntarily relinquiſhes it, can not well be doubted by any, who take the conſtitution as a law, or moral obligation for a principle of human action. And ſo far I agree in the foregoing opinion, that the commiſſion to hold ſuch a court remains, and the ſalary annexed to it. But the conſtitution of the United States, by that clauſe which ſecures to judges their office during good behaviour, was ſurely deſigned to anſwer much higher purpoſes than merely to entitle him to the name and technical qualities and capacities of a judge, and to the compenſation ſtipulated between him and the public.

It was plainly and *principally* deſigned to ſecure to him the ſubſtantial exerciſe of the judicial powers and rights annexed to the office, at its creation: but beyond that, the great and important end of the proviſion was to render the judge *independent* of legiſlative & executive power, for the benefit of the people and the ſtates, in the adminiſtration of the laws.

Once abandon this ground, and allow that congreſs may ſtrip the judges of the courts of the United States of all their judicial powers, by aboliſhing the courts which they are commiſſioned to fill, and by giving the whole of their juriſdiction to other courts and judges, (provided only the capacity of judge and the ſalary in virtue of that, and the contract is continued) I ſay, once eſtabliſh this, and the moſt important moſt obvious intent of the conſtitution is defeated.

The judiciary is completely, and if the foregoing opinion be true, conſtitutionally dependent on the will of the legiſlative department. If a judge or any ſet of judges, become obnoxious, becauſe they will not bend to the dominant party, or execute acts however oppoſed to the conſtitution, and they may be removed from the exerciſe of their offices, and their powers be lawfully transferred to others, it is in vain to talk of an independent judiciary. Succeſſive legiſlatures will find or make judges to anſwer their views; and thoſe who are diſmiſſed (as in the caſe that has happened) may not only be left without any judicial powers of office, but even without ſubſiſtence itſelf!

It is ſaid, in the conſtitution "that courts ſhall be eſtabliſhed, and that the judges both of the ſupreme and inferior courts ſhould hold their offices during good behavior."

What is meant, what can be meant by this, but that when courts are eſtabliſhed, and judges are appointed for thoſe courts, thoſe judges ſhall have a right, and are veſted with an indefeaſible power, during their good behaviour, to hold courts and to exercite in them ſome judicial powers.

Can it be ſeriouſly contended, that the judges, under the act of 13th of February, 1801, do 'hold the offices thereby created and expreſsly granted to them in their commiſſions, within the meaning of thoſe words in the conſtitution? when at the ſame time, it is maintained, that all their courts are rightly aboliſhed, and all the judicial powers annexed to thoſe courts, in their creation, and every action and proceeding in thoſe courts, rightfully tranſferred to other courts of the ſame name and nature, and compoſed of judges who are to execute thoſe identical powers.

'Holding their offices' according to the manifeſt intent of the conſtitution, in my apprehenſion, means nothing ſhort of the full right of continuing in, and exerciſing, the judicial powers attached to the court they compoſe.

If we execute thoſe powers, we hold the office. If others execute them, they hold the office.—The only queſtion is to whom, of conſtitutional right, does it belong to execute them?

Thoſe who maintain the great and ſalutary principle of an independent judiciary, reſulting from the conſtitutional tenure of office during good behaviour, and who are not prepared to reſign it for an empty name, muſt, I apprehend, be brought to this, as the only ſound and ſatisfactory concluſion: 'That the judges of a court once ordained and eſtabliſhed by congreſs, have, in virtue of their office, and as eſſentially conſtituting the office itſelf, a veſted title, under the conſtitution, to hold the court and exerciſe the judicial powers attached to it.

I deem it ſuperfluous to conſider what congreſs may or may not do lawfully in modifications and amendments, by altering the ſeſſions, varying territorial limits of juriſdiction, changing the ſtyle of courts and judges, adding to and diminiſhing the ſtock of judicial powers and duties in the ſame court.

If it is ſaid, that ſhould it be conſtrued, that the office of a judge 'conſiſts in an excluſive right to exerciſe 'all the judicial powers' attached to it, in its creation and no others, this might produce inconvenience; I anſwer, that if this is the ſound conſtruction, or the one attended with the leaſt bad conſequences, inaſmuch as it complies with the words of the conſtitution, and maintains the independence of the judges (its favorite object) it ought to prevail, leaving the inconvenience, if they exiſt, to conſtitutional and not to legiſlative amendment.

In practice it has not been found neceſſary to make any eſſential changes or alterations of juriſdiction in civil or criminal caſes in the courts of juſtice hitherto eſtabliſhed.

But it need not be contended, that the legiſlature are prevented under the conſtruction which I give to the conſtitution in this particular, from adding to, diminiſhing, or altering the judicial powers, and duties of the eſtabliſhed courts. The officers of the judges will not be deſtroyed; they will ſtill 'hold their offices, provided they hold courts and exerciſe judicial powers. If it be ſaid, that this being admitted, congreſs may, if ſo diſpoſed, as effectually reduce the offices of the judges and their independence, by circumſcribing their limits of territory and ſubjects of juriſdiction, to a mere ſound; or by impoſing impracticable duties, drive them from office; I anſwer, that ſuch open abuſes are not to be preſumed, and when they happen, the act of producing them would be void. It would be a fraud on the office of the judge; and on the conſtitution, and would be held up ſo by all judges bound to ſupport the conſtitution of the ſupreme law.

The line which divides rightful authority from abuſe of it, ſo as to become unconſtitutional, cannot and need not be defined or conjectured. When the occaſion furniſhes ground for the queſtion, the judges will exerciſe a judicial diſcretion upon it. There can be no other or ſafer criterion.

But, to whatever length or extreme of abuſe an act of congreſs might lawfully go in this particular, ſtill, however, leaving to the judges, courts and the exerciſe of judicial powers, what I contend for is, that a law which aboliſhes the courts and all the judicial powers of one ſet of judges lawfully appointed, and tranſfers to new courts, leaving the firſt without any official rights, or proviſion for their ſalaries, is unconſtitutional and void. Such a law or laws carry on the face of them indubitable ſigns and evidence of a deſign in the legiſlature to take away from the firſt judges their offices, and are therefore manifeſtly contrary to the letter and ſpirit of the conſtitution.

Such an act made and operating againſt the words, the true intent, and obvious policy of the conſtitution, is not to prevail.

The judges, to whom the ſame office, in effect, is tranſferred will not except the legiſlative commiſſion nor, by executing the act, participate in the overthrow of the conſtitution, Taking that as the ſupreme law of the people they are bound to reject, as void every meaſure which if carried into effect by them would directly or indirectly defeat any of its proviſions.

The abolition of the courts and the exerciſe of all the judicial powers of the judges, and the deprivation of their ſalaries, unniſhes a caſe, which ſeems to involve no queſtion of "degree," to which the legiſlative body may rightfully invade the offices of the judges.—It attempts to aboliſh both office and judge entire—The true queſtion is, whether ſuch an act, with ſuch intent and operation, is not unconſtitutional?

The judges who are called in to execute ſuch an act in any way, are bound to conſider, whether it was conſtitutional. If they are of opinion it was not, then they are to refuſe any co-operation, which would effectuate or tend to effectuate, the conſequences and deſigns propoſed by the prohibited act of the legiſlature.

The repealing act of the 3d of March, 1802, of itſelf, deſigning to aboliſh the courts and judges created by that of February, 1801, was prohibited by the conſtitution; it was void, and the judges ſtill retain their rights of office.

The judges deſignated to execute the repealing act of the 8th of March 1802, and the amending act of 29th of April, 1802, or, in other terms, the judges called upon to aſſiſt and ſanction of uſurpation and illegality, if ſuch is the opinion they entertain of thoſe acts, muſt neceſſarily refuſe to participate or aid in their deſign and conſequences

It has been ſaid, that the act of February 1801, inaſmuch as it aboliſhed the circuit courts under the act of the 24th of September, 1789, juſtifies the opinion, that Congreſs may aboliſh courts and tranſfer all the judicial powers and juriſdiction of thoſe courts, to newly erected courts of the ſame name and nature, to be compoſed of newly appointed judges.

A ſhort and deciſive anſwer preſents itſelf. The caſes are diſſimilar.

No judges were ever appointed and commiſſioned to exerciſe the judicial powers and duties attached to the firſt circuit courts.

Theſe were performed by the judges of the ſupreme and diſtrict courts, who were directed to hold them by law, having no executive commiſſions as judges of thoſe courts.

Congreſs, in aboliſhing thoſe courts aboliſhed no judges or offices. No judicial tenure of office was the leaſt affected. The judges of the ſupreme and diſtrict courts ſtill continued in poſſeſſion of their proper reſpective courts and ſalaries. They merely aſſociated in the circuit courts under a kind of legiſlative commiſſion, which attached thoſe duties to their proper and diſtinct judicial offices. Congreſs might, of courſe, lawfully diſcharge them from thoſe duties, leaving them in full poſſeſſion of their original and appropriate juriſdictions.—Should all the judges of a court die or reſign, congreſs, by aboliſhing ſuch court,