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HOUSE OF REPRESENTATIVES.

MONDAY, DECEMBER 10.

Debate on the bill for establishing a Court for the adjudication of prize causes in certain cases.

Mr. R. Griswold said there was some difficulty occurred to his mind in the very outset of the bill. The constitution of the United States declares that all their judges shall hold their offices during good behaviour. Yet the first section of the bill declares that the judge of this court shall hold his office during the existence of the war between the United States and any of the predatory powers of the states of Barbary, and the 9th section goes still further, in abridging the duration of the office, by giving power to the President to abolish the Court when he may think proper. By the constitution the President is empowered to nominate, and by and with the advice of the Senate to appoint judges; but no where by that instrument, is he authorised to abolish a court or annihilate the office of a judge of the admiralty, as this section attempted to authorise him to do. He asked the gentleman who reported the bill to justify this arrangement of a judge of admiralty holding his office either during a war, or at the discretion of the President. In order to try the principle he moved to strike out the first section of the bill.

Mr. Rodney did not know that he had it in his power to satisfy the scruples of the gentleman from Connecticut, but if he had, he would endeavour to remove them. He considered this case as one *sui generis*, dependant upon its own peculiar circumstances; and he should not bring into view the question extremely analogous, which had been so much controverted a few years back, but had been then set at rest, namely, that judges, appointed under the law of the United States when once the courts were abolished, and their jurisdiction taken from them, shall not still continue judges of the land, and receive a salary for being idle, or worse than idle.

The case of last session, in forming a temporary government for the Louisiana territory, was precisely on the principle of the bill, and the gentleman will find upon inspecting the law that the judges in that territory only hold their offices for four years. The tenure in that case is a term of years, and is surely as strong a case as the one to be provided for by the bill, both courts being erected, or to be erected, out of the original limits of the United States at the time of adopting the constitution; and he believed the constitution when it declared that the judges of the supreme court and inferior courts should hold their offices during good behavior, confined itself to the then territory of the union, & not to judges out of the United States. There is another section of the constitution which gives to Congress the power to make all laws necessary for carrying into execution the other powers granted by that instrument, and under this power it becomes Congress to make provisionary regulations for temporary contingencies, and we are authorised to establish a temporary judiciary out of the United States, because the exigency occasioned by the exercise of the constitutional power of declaring war imperiously calls for it. Without such a provision as that contemplated in the bill, our gallant tars would be fighting to little effect, if there was no judicial authority for the condemnation of Tripolitan vessels after capture. The terms of the constitution do not apply to cases of this kind. This question was talked over in the select committee and the committee were unanimous, that we were as much at liberty to fix the duration of the judge's office in this case, as we were to fix the term of four years as the period of the establishment of the courts in Louisiana.

Mr. R. Griswold said the case did not compare. The judiciary power vested in the judges of the territory of Louisiana, was not that judiciary power of the United States mentioned in the constitution, and therefore the variation of the tenure might be justified; but in the present case they were about to vest a judge with the proper constitutional power of an United States judge, exercising admiralty jurisdiction, which is a regular judiciary power of the United States; and although it was to be exercised out of the territory of the United States, it was nevertheless the power alluded to in the constitution, and an inferior court to be established by Congress, the judge of which is to hold his office during good behaviour: and no gentleman on that floor could deny that this judge was bound in his decisions by the laws of the United States binding on the district, and other judges of the Union. He did not see that the point he had made out on the present question was the same as that alluded to in the repeal of the late judiciary law; what was then contended for was the repeal of the law, and not whether Congress had the power of removing the judges. The present was not repealing a law in order to abrogate the office, but it was creating a new court and providing for the appointment of a judge thereto, who by the constitution is to hold his office in that court during good behaviour. Yet this bill declares that the office shall be limited to the war with the Barbary powers.—He did not think that the measure was warranted by the constitution.

Mr. J. Randolph said that this was an old question in a new shape, it was not in the same words, but it turned upon the same pivot. If Congress possessed the power when a court became useless to abolish it, certainly they had the power when creating a court for a particular purpose to declare that, when that purpose was answered, the court should be discontinued. Where was the difference between creating a judicial court now and at the end of the Tripolitan war (or any definite period of time) annulling it, and specifying in the law creating the court that it should cease and be discontinued at the end of the Tripolitan war, or at any definite time hereafter? So far as related to the judges there was more of speciousness in the claim of him who entered into an office the term of whose existence was not defined in the law creating it, than of him who knew when he accepted an appointment that on a certain contingency or at a certain time his office was to cease and be discontinued.

In regard to the ninth section, without seeing it in the very objectionable point of light in which it was viewed by the gentleman from Connecticut, he thought the bill would be as well without it. Whatever might be the relative situation which he might hold on that floor, he should always be averse to an unnecessary accumulation of patronage and power in the hands of the executive. The salary bill the next session of Congress, supposing peace in the mean time to be made with Tripoli, was no object.

Mr. Elliot did not view the subject in the same point of light as the gentleman who had preceded him. He did not consider the first section as limiting the duration of the court, but merely authorising the President by and with the advice of the senate to appoint a judge of admiralty in the territory of some foreign nation at war with the same nation with which we are now at war. But the 9th section gave the President the power of abrogating this court after it should be established. He would never consent to give the President the power to abrogate any judiciary tribunal whatever. He should therefore vote for retaining the first section and subsequently for striking out the 9th.

Mr. Nelson, as one of the committee who had reported the bill, begged to be permitted to assign some reasons in its defence. He did not pretend to understand the forms of proceeding in this body. The short time he had had the honor of a seat on this floor forbad his aspiring to that knowledge; but in all the legislative bodies with which he was acquainted, it is not deemed parliamentary to argue against the first section of a bill that the last section is imperfect or incorrect. When a bill is to be considered by sections, the merits or demerits of each is to be considered by itself. Now the first section does not fix the time at which the law shall expire or the office shall cease; and although the constitution says that judges shall hold their offices during good behaviour, who is there here that can say that this office may not last during the life of the judge, nay, may not last to the end of time, for no man can say when the war will end. But admitting it to be in order to refer to the 9th section while discussing the first, he would ask how did that infringe the constitution? The power to abolish the office is fixed somewhere, and when once abolished, and the officer left with nothing to do; will it be yet contended that he shall still be entitled to receive his salary? Does the constitution prohibit Congress from making a judge a justice, or a commissioner, call him what you please, on an extraordinary emergency, and insist upon his holding such office during good behaviour? He had always construed differently. The idea of a tenure during good behaviour in the office of a judge was borrowed from England, and there it was considered as a great point gained over the crown, by which they were appointed, and upon which they had heretofore been wholly dependant. But was it ever contended that the British parliament, including king, lords, and commons, were incompetent to dismiss them from their seats; it never was so contended, nor it never can be so contended with success; and though here the President has not the power to remove inferior judges, yet the legislature may remove them with their offices, and the body of the people may remove them by an expression of their sovereign will; but perhaps these remarks are unnecessary and need not be dwelt upon. He would vote against striking out the clause.

The question was taken on striking out the first section, and lost without a division.

Mr. Lucas moved to strike out the 9th section, and assigned for reason that Congress ought not to attempt to do that indirectly which could not be done directly. The fundamental principle of the constitution was the separation of the powers of the government. The judge therefore ought to be independent of the executive for the tenure of his office; by this section he is rendered altogether dependent upon the will of the President. There is no limitation as to the time or to the power which the executive may exercise over the judge. He may not hold his office even during the present war, for during the present war it is only made lawful for the President to appoint such an officer, and by this section it is also made lawful for him to abolish the same when in his opinion it shall be proper so to do. It may be said that the judge cannot be removed, unless the court is suppressed; this is but an evasion, for the President has not the power of actually removing him, yet he can virtually do so, and the effect upon the judge is exactly the same. This power is unconstitutional in itself, and dangerous as a precedent. He hoped it would not be granted—nor did he see any necessity for it on the ground of expediency, even supposing Congress had a right to vest the power in the President. It is well known that Congress are enjoined by the constitution to meet annually, and if the usefulness of the judge should cease on the cessation of the war, the inconveniencies which may ensue, or the expence which might accrue, would be short and inconsiderable; for Congress will meet in 9 months after the close of the present session. It will be therefore better to leave it to Congress to abolish this court when they see cause for it, than transfer the power into other hands.

Mr. Rodney had no great objection to striking out the clause, because he thought the bill adequate to its object without it. The eighth section he observed, established a principle that had heretofore been considered of considerable importance, viz. that a judge shall not receive a salary beyond the time he continues in the exercise of the duties of his office. The committee had supposed it possible that a speedy end might be put to this war, and thereupon conceived it unnecessary to charge the treasury with the payment of the judges and others compensations beyond the term of service. He was himself much averse to vesting in the President any unusual or extraordinary power; but he thought a proclamation by the President was an official proceeding proper to attract the attention of the executive authority of foreign nations to its subject matter. He was the proper organ to express the will of the law and to give information to those interested. Although, in all human probability, the war will not continue long, he had no objection to the clause being struck out.

Mr. Smilie said, if it had not been in the bill, the bill would have been well enough without it; but as it was in, he was not inclined, through an unfounded jealousy, to strike it out. He would ask gentlemen to point out any probable ground for jealousy of the President in the exercise of this power; for he took it for granted, that the constitution furnished no obstacle. Its injunctions in regard to judges holding their offices during good behavour, extended to the courts of the United States, within the limits of the several states represented on this floor. Now the law itself cannot affect the person or property of any citizen within the United States, and as its usefulness may suddenly cease after the close of the session, he did not see why we should subject ourselves to a single dollar's expence, which might be prevented by the immediate publication of the President's proclamation.

Mr. Lucas was not governed by jealousy of the executive in making his motion. The present executive possessed his entire confidence; but when we are legislating, we do not legislate on the confidence we have in the executive, but on those circumstances which are most likely to procure happiness to our fellow citizens, and secure their liberties on the basis they have themselves established them; and my colleague will recollect that the executive will not always be filled by the same person, and that a change of men may produce a change of measures, if the man is the standard of legislation; but if we legislate upon principles, the principles will remain after the persons who propounded them are forgotten. He did not consider the inference made by his colleague (Mr. Smilie) correct, for he did believe the officers and seamen employed in the marine of the United States were particularly interested, and that they were citizens of the United States. He observed, upon the remark made by Mr. Rodney, that foreign nations would be more likely to take notice of the President's proclamation than of a law—He did not see that the President would be prevented from issuing his proclamation in the event of peace, if the abolition of the court depended upon Congress.

Mr. G. Griswold expressed a jealousy for the preservation of the constitution, and conceiving the proposed regulation in enmity with one of its most important injunctions, he hoped it would be struck out, and he, for one, would never give his consent that a judge, under the constitution of the United States, should hold the tenure of his office by presidential will.

Mr. *Southard* differed with gentlemen who thought the section a violation of the constitution. The law itself grew out of the exigency of the war with the Barbary powers, and it so expresses itself. It therefore carries its own remedy with it; during the existence of the war and so long as any nation at war with the same power shall consent or permit the United States to establish a judge of admiralty within its territory, so long shall the office remain, but no provision is made for its remaining any longer. Nor can the judge complain of the abolition of his office, or consequent loss of salary, because he consents to receive it upon the terms of the law. He considered the section a proper one, though not absolutely necessary. If peace takes place the President will be the first person to know it, and his proclamation of the cessation of the court will render it of greater notoriety than any law can possibly render it. One more observation, and he had done. It may be suggested in favor of a determinate abolition of the court, that the judge may become arbitrary, and the court prove injurious, in which case the sooner it was abolished the less would be its evil.

Mr. *Dana* thought the section very objectionable. It is true it does not say that the judge shall hold his office during the pleasure of the President and no longer, in those precise terms, but it says what is tantamount, that when in the opinion of the President it shall be proper so to do, it shall & may be lawful for him by proclamation to abolish the said court. This is not the precise form of expressing the pleasure of the crown; the President must manifest his pleasure by proclamation; the crown might manifest its pleasure privately before the act of settlement; but the power of the judges in both cases is held by the loose and insecure tenure of will and pleasure. Gentlemen cannot set up a good distinction between judges of courts of admiralty acting within or without the boundaries of the United States, and if you once declare that the President shall have power to dismiss one of your judges, nothing can prevent you from giving him power to dismiss them all. The principle once established goes through. For his part he for one was decidedly against granting such power. The question ought not to be considered for a moment on the light ground of being a good or a bad bargain for the judge; but on the broad and solid ground of preserving what remains of the due administration of justice.

Mr. *Rodney* would not have risen again but in consequence of Mr. *Dana's* remarks and refined distinctions where there was no difference. The bill provides that the judge shall receive his salary as long as he has jurisdiction, and that jurisdiction is limited by the duration of the war. This itself is a limitation of the office. The President has no power over the individual person of the judge;—he cannot turn out A and put in B. So the tenure is not precarious; it is fixed and depends upon the abolition of the jurisdiction; and this principle is strictly conformable to what was formerly decided to the general satisfaction of a great majority of the people.

The observation of the gentleman from Connecticut (Mr. R. Griswold) respecting a distinction between judges within the limits of the United States and within the territory of Louisiana concluded nothing; for he will find the judges of that territory exercising all their functions under the constitution and laws of Congress, and he believed there was a time when the gentleman thought differently on the subject before the committee. He referred to the Yeas and Nays called on passing a bill limiting the duration of office in respect to the judges or justices of the territory of Columbia, by which they are continued in office for the term of five years only, while the constitution declared as it does now, that judges of the supreme and inferior courts shall hold their offices during good behavior. He hoped the gentleman would abandon the idea of the officer continuing to receive a salary after the office was abolished.

Mr. *Dana* had no idea of an officer totally destitute of office, receiving a salary, but until he was divested of all judicial authority he ought to be independent, and salary was but a mere contingency.

Mr. J. Randolph said that the first section established the court during the continuance of the Mediterranean war—and the ninth gave a power to the President to abrogate it at his discretion. He thought the section, to say the best of it, superfluous. So soon as we, or the nation within whose limits this court shall be erected, shall have made peace with Tripoli, its jurisdiction would terminate by the provisions of the bill itself. It might indeed be expedient to prolong the existence of the court beyond the term contemplated by the bill, but no circumstances could arise which would render it necessary to shorten it.

Mr. Eustis, thought the judge ought to hold the office, during good behavior, and yet this section makes him dependent on the executive, Congress could not vest the executive with any power which they had no right to exercise themselves; yet this section proposes to do so. And on this precedent occasion may hereafter be taken to frustrate and contravene the constitution in its most important regulations.

Mr. Jackson meant only to make a single observation, with a view of rescuing the section from the inconsistency charged upon it by Mr. Eustis. The first section was not at variance with the last, the first declared the duration of the office to be during the war; the last that the President may by proclamation abolish the court. There might be something formed as a substitute to designate the precise duration of the court, as from the mode of expression used in both sections it seemed not sufficiently definite.

Mr. Gregg would vote for striking out unless his colleague (Mr. Lucas) would modify his motion, for he would never vote to vest the President with the power intended to be given by the 9th section, yet he thought that a modification of the clause would cure the defect without striking out; if the time was precisely defined for which the court should continue, the President might notify the expiration of the office by proclamation.

Mr. R. Griswold. The gentlemen who advocate this measure appear to differ in this construction; some entertain an opinion that the first section does not limit the tenure of the office of the judge; other gentlemen think the office limited by that section to the duration of the war. He thought the first section explicit, that the President should appoint a judge of the admiralty during the existence of the war, and in conformity to this idea the second section was penned. The said judge shall exercise the admiralty jurisdiction for trying captures in the said war; these last words shew expressly the limitation of the law. The true and fair meaning of which is, that the judge shall hold his office during the war and no longer. The 9th section gives the power to the president of shortening this period, and it was this power he believed the constitution never meant should be exercised by the executive.—As to the observation about the judges or justices of this district, it did not bear on the present question, the constitution providing only for the tenure of offices held by the judges of the supreme and inferior courts of the United States, and not for justices of peace; beside as

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