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SENATE OF THE UNITED STATES.

THURSDAY, FEB. 11.

DEBATE on the bill for the punishment of Treason, and of other crimes and offences against the United States.

The bill reported by MR. GILES, *for the punishment of treason and other crimes and offences against the United States,* was according to the order of the day, considered as in committee of the whole. After having been read by sections from the Chair, some verbal amendments were made to the first section. The words of this member of the bill are as follow:

BE it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That if any persons owing allegiance to the United States of America, shall levy war against them, by assembling themselves together with intent forcibly to overturn or change the government of the United States, or any one of the territories thereof, or forcibly to dismember the said United States, or any one of them, or any one of the territories thereof, or forcibly to resist the general execution of any public law thereof, or forcibly to take possession of, or hold any fort, magazine, dock, navy yard, or of any public vessel of the United States, or forcibly to invade or hold any part of the United States, or of the territories thereof, against the authority of the United States, or if any person or persons shall traitorously aid or assist in the doing any one of the acts aforesaid, although not personally present when any such act is done or committed, and being convicted of any one or more of the aforesaid acts, on confession in open court, or on the testimony of two witnesses to the same overt act of treason, whereof he or they shall stand indicted, such person or persons shall be judged guilty of treason against the United States, and shall suffer death.

These alterations having been agreed to, chiefly in the form of the bill, by the transposition of certain words,

MR. MITCHILL expressed his disagreement to the principle itself of the bill. He questioned whether Congress had autharity to act upon the subject. The powers of the legislature were on the crime of treason, limited by the constitution; and it deserved mature consideration whether on the present occasion we were not about to transgress the bounds within which we ought to move. By the 3rd section of the 3rd article of that great charter of our rights and privileges, it is declared that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on the confession in open court." Here is the definition of treason in the constitution, that great national instrument, which is the law-paramount of the land, and by which Congress itself must be governed.

The convention of 1787, when devising a frame of government for a free people, well understood the commotions that frequently agitated societies of men claiming the right to speak and to act as they pleased. That sagacious body possessed perfect knowledge from history of the proscriptions and attainders which an overbearing majority were but too prone to pass upon those who differed from them in their preference of one man or measure to another, or who thwarted their views of interest or ambition, of resentment or power. They therefore provided a salutary check upon the will of the Congress itself; thereby guarding against that heat and violence which the collisions of party have been often observed to produce. Thus was a security enjoyed by the minority of the two Houses, and of their adherents and supporters throughout the nation against the exterminating spirit which the majority might feel, and in an evil hour, be tempted to exert.

Such was his understanding of the meaning of this part of the constitution. But the bill before you Mr. President, has a bold and innovating aspect. It ventures into declarations of various actions which shall be deemed to constitute the *levying of war.* If this proceeding is correct, it will be in our power or in the power of a future Congress, to declare that certain other actions, not specified in this bill, shall also be construed as criminal in the same atrocious degree. And a succeeding legislature may enlarge the catalogue, until constructive this free and happy country will be disarmed of the shield by which their sages and patriots who devised the present admirable frame of government, intended to protect them, even from legislative injury. And they will be exposed to all the multiplied evils, of treasons declared by Congress; and it may possibly happen in some future time, less auspicious than the present, that the majority of that body may be actuated by passions and stimulated by motives of a sanguinary tendency. We ought to take measures of precaution against such alarming consequences. I feel a strong repugnance to the demolition of established land marks. I have, said he, a great veneration for these monuments erected by our predecessors. And I fear the enactment of the present bill will be accompanied with the overthrow of one of the most valuable safeguards of the constitution.

He was willing to admit the great uncertainty with which the doctrine of treason was clouded. All our trials for that offence had demonstrated the unsettled condition of the law. But it was by no means certain that this was a sufficient reason for congressional interference. He felicitated himself, and he congratulated the Senate and his country, that arraignments for treason had hitherto been few and rare. There had not been time nor opportunities enough to elaborate the ultimate decisions of the law. The human mind did not acquire knowledge by intuition but by experience. The march of the understanding in the investigation of truth was slow. In cases of jurisprudence as well as in every other intellectual research, the advances toward truth were gradual. Case after case must be studiously considered, judgment after judgment must be rendered and revised, and consequence after consequence traced to their terminations. In such a course of proceeding, it might happen, according to the amount of business which occurred, that generation might follow generation, and age succeed to age, before the *summa ratio,* the high result of reason on the subject, could be attained. According to this method of perfecting the law by practice, many trials for treason would be necessary to make its exact meaning known. And for his own part, he was was willing to postpone *for centuries* this painful mode of delineating the endless number of *species* and *varieties* that a legislature could in a day arrange under the *generic term* of treason.

But why was it necessary for Congress to expound the constitution? Were there not a department of the government, to which the interpretation of the statutes enacted by the two Houses, treaties concluded with foreign nations by the President and Senate, and the great national act of the convention as ratified by the several states was specially intrusted? He meant the Body of the Judiciary, consisting of men selected from the class of citizens, for the express purpose of declaring what the law is. It seemed more orderly and regular to permit the judges to remove the existing obscurity in the law, by the exercise of their professional talents, than to alter by statute a course of investigation which conformed to the true theory of the constitution. It is certain that inconveniencies of a serious kind do exist; but had we not better bear them than run the risk of rendering them worse by tampering? It would be lamentable indeed if the remedy we are about to apply should prove worse than the disease. It might perhaps be a fault in him that he regarded the courts of justice with a sort of habitual reverence. He owned that he might be mistaken in viewing the present invasion of their province with a sentiment that alarmed his solicitude while it awakened his sensibility. But so it was; he would not conceal his preference to the tried and settled method of deducing the rules and maxims of the law, through the constituted tribunals.

Mr. Mitchill said he would state another consideration which was very impressive on his mind. It was the power claimed and exercised by the judges to repeal or nullify statutes by declaring them unconstitutional. Suppose the bill on your table, Mr. President, should pass; and it should afterwards be considered by the judiciary as a statute which the constitution forbade Congress to enact.—Would not it be pronounced void, and all proceedings under it be discontinued or dismissed? This then is the dilemma to which we are reduced; if Congress proceeds in the manner proposed by the bill to define treason may multiply the species of those offences to any number that may suit the purposes of an infuriated majority, and the courts be compelled to carry those acts into operation, however mischievous or ruinous; or, if statutes which, in the opinion of the judges, militate against the spirit and letter of the constitution, are declared by them to be of no force or effect, we certainly legislate to no purpose. As to the power of deciding on the unconstitutionality of statutes, the courts had, it was well known, exercised it in several instances. Many able statesmen had been induced to believe this was a sound and legitimate employment of their functions. And as the powers granted by the constitution were at present understood and exercised, he doubted whether, even if this bill should ripen into a statute, it would bear the test of judicial scrutiny.

These were imperfect sketches of some of the ideas which he entertained on this important subject. They were uttered in this incipient stage of the debate for the purpose of gaining further information. No one could be insensible of the toil that had been expended by the committee, and more especially by his honorable and learned friend, the Chairman, in preparing it. He wished for a full discussion of this great question; and he entertained no doubt it would be examined with a seriousness worthy so "high an argument".

For the purpose therefore of bringing the subject to a point, and of inviting the supporters of the bill to offer all the reasons they may think proper to urge in its support, Mr. M. concluded by making a motion to strike out the section.

MR. GILES then rose and delivered a speech substantially as follows:

He said that on a subject of so much delicacy, difficulty and importance, as the one now under consideration, it was natural to expect that the committee who reported the bill, would be called upon to present to the Senate the reasons, which had induced them to introduce the principle, upon which that bill was predicated. That as he considered, each individual gentleman of that committee better qualified than himself to state the general motives operating on the committee, and certainly to state his own individual impressions upon the subject; Mr. G. would confine himself to stating some of the leading motives of his own conduct in introducing the principle reported in the bill.

Mr. G. begged to be indulged with a few preliminary observations; which although not directly in point upon the constitutional question presented for discussion, would ultimately be found to be, not without some bearing upon it.

Mr. G. proceeded to observe, that one great object of every government was the protection of the rights of individuals; and however diversified the forms of different governments may have been at different times they have all, at all times, concurred at least in this one point; that one of the most effectual means of protecting rights is the punishment of wrongs. In the execution of this delicate power, so peculiarly interesting to the governed, different governments have been variously organised as to the manner of executing it. In governments founded on force, the power of punishing has generally been left solely to the will and pleasure of the Executive. In governments founded on consent, the modifications of this power have been various; according to the degree of confidence or jealousy entertained by the people towards their rules. Modern jurists has extended their political speculations, very far in multiplying barriers for the protection of innocence against possible or presumed oppressions on the part of the government; and it is even now questionable whether they have not extended them so far as to have them practically converted into shields for the protection of guilt; an effect that never could have been intended by the most speculative philanthropists. Indeed it has been seen, that in a nation celebrated for its political intelligence, as well as for its military prowess, the visionary idea was once conceived, of placing the protection of all rights upon the sole basis of the perfectibility of man; but if this political vision was ever attempted to be reduced to practice, it was soon abandoned; because it was found not suited to the meredian of even that gallant nation, who had the credit of the invention. Hence I in the formation of all governments; and that it ought not to be so limited and restrained, as to destroy its practical energy. The constitution of the United States displays much of this spirit of jealousy against its administrators, and the amendments to it still more, of course they impose many limitations and restraints upon the government in the execution of the power of punishing. This may be accounted for by the circumstances which preceded and gave rise to the constitution, and its amendments. The American revolution was produced by the oppressions of a distant government; and in the formation of all the state constitutions which preceded that of the United States the whole of which was founded upon the fair consent of the people, this natural effect was produced; that in the formation of their own governments, the people transferred a great portion of the jealousies they felt against the rulers of a distant government to the rulers they were about to establish for their immediate government at home. The constitution of the United States although formed some time after the revolution, yet exhibits a great portion of the spirit of jealousy produced by it—and the amendments still more, probably from the passions called into action by the eloquent and animated discussions against the adoption of the constitution itself. The formation and adoption of the constitution of the United States are deemed to be amongst the most wonderful political events, ever presented to the contemplation of the human mind. Considering the cotemporaneous passions excited by the conflicting systems of policy observed by the different states in relation to each other, the strong jealousies existing in relation to real or supposed differences of interest amongst the different states, and highly excited by animated discussions upon great national objects just preceding the calling the convention, the differences of habits, manners, and opinions amongst the people in different parts parts of the United States, &c. &c. &c. it is wonderful, that a constitution founded on a spirit of mutual concession should be formed so admirably calculated to combine and protect the interest of the whole; and at the same time so peculiarly adapted to the peculiar character, genius and temper of the American people.

In addition to these and many more difficulties the convention were without a model for imitation. They had to solve the new and difficult political problems, of extracting from preexisting state governments, all powers of a general nature, and of leaving with them the exercise of all powers of a local nature; and these powers, thus selected, were to be so modified and adjusted as to suit the high and and jealous temper of the American people. Notwithstanding all these difficulties, it will be found upon the most critical examination of the instrument, that whilst it contains sufficient energy completely to effect the object of its institution, it affords to innocence the most complete protection against the oppression of government, that ever has been devised by any political institution. To effect this great object, it was determined to distribute these general powers amongst three great departments, forming the government of the United States. The Legislative, Executive and Judiciary Departments. Mr. G. said this adjustment had been made with such consummate wisdom and skill, that whenever it had been made his duty to examine the arrangement, his reflections had always resulted in new and encreased admiration of the excellency of its provisions. The theory of three distinct departments in government is perhaps not critically correct; and although it is obvious that the framers of our constitution proceeded upon this theory in its formation; yet in the practical adjustment of the departments to each other it was found impossible to carry this theory completely into effect. In the nature of things there can be but two great departments in government; the legislative, whose duty it is to prescribe rules of conduct, or in other words to make laws for the government of the people: The executive, to carry these laws into effect. But as from the imperfection of language, the meaning of the laws is not definitively understood; the judiciary department is introduced to explain the meaning of the laws prescribed by the legislature, to aid the executive in carrying those laws into effect—Hence it is obvious that the judiciary constitution, the President appoint all judicial officers, and except the judges, all other officers of the courts hold their offices during his pleasure.

Mr. G. observed it was not his intention or wish to legislate into the constitution one scintilla of power not intrinsically contained in the instrument itself; nor by a weak or timid exercise of the powers it does intrinsically contain to paralise or destroy its energy, and thus to counteract the great objects of its institution—the common defence and general welfare. It will be observed, said Mr. G. that he did not use these terms as conferring on the government any power whatever; but merely as the ends for which the specified powers were conferred; nor did he propose to disturb the distribution of the powers amongst the several departments of the government. He had made these remarks to rescue the constitution from certain absurdities, which had been attributed to it, by the application of certain generic and technical phrases in the interpretation of it, instead of examining its own intrinsic organization. For instance, superficial observers take it for granted, that the three great departments of the government are co-ordinate and independent of each other. It is to be observed, that the words "co-ordinate, independent," are not to be found in any part of the constitution. They are borrowed from the technical phraseology of another country; and do not apply to the constitution of the U. S. at least not without great limitation. If by the word co-ordinate is meant that the judiciary department is equal in dignity, *co-ordo,* it is admitted. If it be meant in point of time, *co-ordo,* it is not the fact. The legislative department pre-existed the judiciary department, for according to the constitution the establishment of the judiciary department was entrusted to the legislative department; and of course that department must necessarily pre-exist the department to be established by it; and the fact is well known to be so. With respect to the word "independent," as applicable to the judiciary, it is not correct, nor justified by the constitution. This term is borrowed from G. Britain, and by some incorrect apprehension of its meaning there or from some other cause, is applied here to the department itself, instead of the officers of the department. In G. Britain the phrase is *an independent judge, not an independent judicial department.* According to the English constitution such a phraseology would be absolute nonsense. In this country the terms have been used as synonimous, whereas there is the most palpable difference both in the form and effect of their meaning. An independent department of a government is conceived to be a department furnished with powers to organize itself, and to execute the peculiar functions assigned to it, without the aid, or in other words, independent of any other department. A moment's attention to the constitution will serve to shew that this is not the constitutional character of our judicial department. An independent judge may be defined to be a person who, in the exercise of judicial functions, is placed above temptation in the discharge of his judicial duties, or in other words, a judge who will neither gain or lose any thing by deciding for or against the government, or for or against any individual or number of individuals; or a judge whose salary is fixed, and who does not hold his office at the pleasure of another person.

In England the king is the fountain of honor and justice, and formerly decided upon the meaning of the laws in his own person; afterwards, that branch of executive duties was confided to his commissioners, who were appointed by him, held their appointments during his pleasure, and were dependent upon him for their compensations, until by the statute of 13 of William 3rd, it was declared, that the judges should hold their offices during good behavior; still however their offices were vacated upon the demise of the crown until the 1st of Anne, when it was declared that the offices of the judges should not be vacated until six months after the demise of the crown; and finally by a statute of 1st of George 3rd, the salaries of the judges were fixed, and it was declared that their offices should not be vacated upon the demise of the crown. This statute completely established, what in England is called *the independence of the judges.* But to infer from this, that the judicial department there is independent of the