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SENATE OF THE UNITED STATES.

THURSDAY, FEB. 12.

Debate on the Bill for the Establishment of Tribunals, and of other revenue and judicial courts in the United States.

Mr. Eaton's speech concluded.

The next question which presents itself for consideration is, how shall this further abolition be obtained? What department is most competent to do it? Who is the proper department under the constitution? He said, there could be no doubt but the legislature is the only constitutional and competent department for that purpose.

Mr. Eaton said, it would be recollected, that according to the interpretation put upon the clause of the constitution first cited, it was stated that the power of declaring or ascertaining the acts which would amount to the treason of levying war, has, and adhering to the enemies, &c. was conferred on the government generally, and not on any department exclusively.—If this position be correct, which appeared to him to be a matter of fact, he would now call the attention of the Senate to another clause in the constitution, which he considered directory as to the proper department for exercising this power. The clause he alluded to was in the 8th sec. of the 1st article of the constitution. He would read both clauses together, and article 3d, article 8th. "Congress shall have the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof." Now ask the question, is the power of declaring or ascertaining what acts amount to the treason of levying war, against the United States, or of adhering to their enemies, &c." vested by the constitution in the government of the United States? Answer, Yes—Then, 2d. What is the proper department for passing all laws necessary and proper for carrying this power into execution? The constitutional answer certainly is Congress.

If this supposition be correct, and it appeared to him to be self evident, it is no longer a constitutional question, but it is a question of expediency, that is, is it necessary and proper under existing circumstances, to pass such a law? This question has been before answered in part, but would be further considered presently. The clause in the constitution last read has also had a general constitutional phrase tacked to it, it is called "the sweeping clause," and attempts have been made to infer from it, general powers in the government, enough he should discard the interpretation, and readily admit, that it confers no power on the legislature, the government. It is of infinite importance in adjusting all powers vested in the government of the constitution. It determines upon the departments in which the ultimate power of the government is lodged. The first part of the claim relates to powers previously, and specifically enumerated. The words are "to make all laws necessary and proper for carrying into execution the foregoing powers." This, though extremely proper, is the least important part of this clause, because it necessarily implies proper means for carrying into execution all the powers specifically vested in Congress, might have been inferred; it was however, perhaps, better to express it, and leave nothing to inference; but the remaining part of the claim, is the real operative part of it. The words are "and all other powers vested by this constitution in the government of the United States or any department or officer thereof." The wisdom and foresight of the framers of our constitution, is particularly discernable in this article. They clearly foresaw, that many difficulties might arise in the execution of many of the powers vested in the government of the United States or in some of the departments thereof, which at the time, could not be conceived or imagined; for the purpose therefore of meeting these difficulties, and facilitating the due execution, and administration of the government, this clause was introduced; declaring in effect, that whenever any such difficulties should occur in relation to any powers vested in the government, &c. Congress should have power to pass all laws necessary and proper for removing such difficulties, and carrying such vested powers into due execution. This construction of the clause, he said, must be considered as absorbing all questions amongst the departments respecting the ultimate depositi of power.

But a certain difficulty here is, to avoid. The danger of legislation on this subject. It is said, if Congress should undertake to define what shall amount to the treason of levying war, and adhering to the enemies, they may declare acts treasonable not contemplated by the framers of the constitution; and supposing they should do so, where is the remedy? In the first place it may be said, that Congress is on such supposition warranted by the constitution, and the supposition is therefore accommodated. The constitution has declared certain crimes against its violation in this respect, as well as in all others. The representatives of the people, and their senators, are themselves subjected to the same penalties, and punishments, and take a solemn oath to support the constitution. It is true, it is believed, that their oaths are sufficient for the protection of the people against the abuse of this violation is merely imaginary; but in the next place, this supposition is unwarrantable, for they suppose the judges were to be corrupted, and to pronounce opinions, which are not warranted by those laws, or treaties, adopted by the constitution, and the laws made in pursuance thereof. The danger in this case appears to be greater, than in the case of the legislature, inasmuch as, because the judges are irresponsible, except to their own consciences, God and their own consciences. They are not subject to any tribunal, but alone possess the ultimate personal power, whereas their representatives are responsible to their constituents, or their peers, and the President, and Senate have the power of removing the judges, at the end of every five years. But it can be demonstrated, that the judicial department under its present organization, is entirely incompetent to the decision of questions, as far at least, as it was from the following statement, he believed, that the Supreme Court of the United States has no criminal power whatever. That power is confined to the inferior courts. There are eighteen circuit courts in the U. S. including the circuit courts of the territories, and the territorial courts. These courts are composed of 18 judges, and there are 19 district courts, exclusive of those of the territories, and there are 19 district judges, and some of these judges have been accustomed to believe, that their sacred duty consisted in adjusting all the cases which issue in the treason of levying war, with the utmost rigour, and that they were to clear for adjudication, the other questions, which appeared to be consistent with U. S. &c." not having yet received the U. S. laws, they supposed, issues in treason, and that they were to reserve the adjudication of the constitution. If that speculation, which appears to be, in some measure highly probable, in case of a decision of the U. S. laws, by the state of war, a similar result may be expected. What prospect of getting the decision of the U. S. laws, if the collector of Boston should order, the collector of Philadelphia, or collector in the usual course of judicial decision, should issue a warrant of commitment upon a case not happening in a country, where the constitution, amongst other things, is that respect, could not be supposed, to be violated, or disregarded, in contemplation of offences, constitutions inadmissible, must be the consequence.

But let more what the Chief Justice said, in the case of Ex parte Bollman, delivered upon the trials at Richmond, it is true, it has no authority, but it shows the opinion that no treason could be committed, because it is treasonable, as it is, but in addition to the crime, might have concurred with grievance; but the Chief Justice adverses, that it is to be remembered, that the judges are not appointed by the constitution, or by the laws, as the express practice in this which might be instituted, and accordingly have taken upon themselves to make judgments on the point could be presented a case of treason, which is to be deplored by all. It was surprising that the Chief Justice should make some attempt to settle principles which would prevent such a case, and which would be the most deplorable of all.

Judge Chase on the subsequent trial of Fries, declared "that the court would adopt, as a general rule, of instructions from the English books; and, as such, prefer whatever they were, and not as opinions and decisions of men, of great legal learning and ability, and even then the court would not confine itself to the time of the decision, and in no case would be bound by the decisions; as this was that I could not legally be prevailed on to disobey it, were I even convinced that it was erroneous, but I would certainly use my means, to have the decision in my power to carry the question again before the Supreme Court, for determination, in a case in which it would directly occur to the judge's mind."

Here we see the Chief Justice pathetically deploring the consequences of a decision, which he was about to make, in remaining his inability to bring these cases before the Supreme Court. Two what? He tells us *to settle principles*, in other words to prescribe rules to the government of the circuit courts—to which, considerable force ought to be added, from the judicial legislation of the supreme court to its circuit Congressional legislation, and certainly absurd, are incompetency of the circuit courts to legislate upon this subject—and unauthorised for the legislation of the Supreme Court, it has no jurisdiction in criminal cases; and therefore, there is no legal mode of bringing the cases before the Supreme Court *to settle principles*, or in other words for the government of the circuit courts.

Hence, said result all the confusion of the Chief Justice, so deplorably and pathetically deplored. Yet, sir, the uncertainty and confusion resulting from the decisions of the circuit courts upon the definition of treason against the U. S. is, in the opinion of the Senate, of no small consequence. The court and jury, in the trial of Fries, have, perhaps, are themselves subjected to the same penalties, as the president, and senate, and take a solemn oath to support the constitution. It is to be hoped, believed, but their oaths are sufficient for the protection of the people against the abuse of this violation is merely imaginary; but in the next place, this supposition is unwarrantable, for they suppose the judges were to be corrupted, and to pronounce opinions, which are not warranted by those laws, or treaties, adopted by the constitution, and the laws made in pursuance thereof. The danger in this case appears to be greater, than in the case of the legislature, inasmuch as, because the judges are irresponsible, except to their own consciences, God and their own consciences. They are not subject to any tribunal, but alone possess the ultimate personal power, whereas their representatives are responsible to their constituents, or their peers, and the President, and Senate have the power of removing the judges, at the end of every five years. But it can be demonstrated, that the judicial department under its present organization, is entirely incompetent to the decision of questions, as far at least, as it was from the following statement, he believed, that the Supreme Court of the United States has no criminal power whatever. That power is confined to the inferior courts. There are eighteen circuit courts in the U. S. including the circuit courts of the territories, and the territorial courts. These courts are composed of 18 judges, and there are 19 district courts, exclusive of those of the territories, and there are 19 district judges, and some of these judges have been accustomed to believe, that their sacred duty consisted in adjusting all the cases which issue in the treason of levying war, with the utmost rigour, and that they were to clear for adjudication, the other questions, which appeared to be consistent with U. S. &c." not having yet received the U. S. laws, they supposed issues in treason, and that they were to reserve the adjudication of the constitution. If that speculation, which appears to be, in some measure highly probable, in case of a decision of the U. S. laws, by the state of war, a similar result may be expected. What prospect of getting the decision of the U. S. laws, if the collector of Boston should order, the collector of Philadelphia, or collector in the usual course of judicial decision, should issue a warrant of commitment upon a case not happening in a country, where the constitution, amongst other things, is that respect, could not be supposed, to be violated, or disregarded, in contemplation of offences, constitutions inadmissible, must be the consequence.

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Here, said he, it is manifest that this opinion, he imagined, ought not to be adopted, because it is contrary to the constitution; it was not that I could not legislate upon the subject, but I could not legally be prevailed on to disobey it, were I even convinced that it was erroneous, but I would certainly use my means, to have the decision in my power to carry the question again before the Supreme Court, for determination, in a case in which it would directly occur to my judgment