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CONGRESS OF THE UNITED STATES,

House of Representatives.

Wednesday, February 24, 1802.

DEBATE

On the bill received from the Senate, entitled "An Act to repeal certain acts respecting the organisation of the courts of the United States."

Mr. Rutledge.—I have kept my seat, Mr. Chairman, until this late stage of the debate, under a hope that the arguments of gentlemen who advocated the passing of this bill would convince me it is not unconstitutional; but after having listened most attentively to them for many days, I find the deep impression made upon my mind, that it attacks the very vitals of our constitution, has been fortified and extended instead of being dismissed.

It is not necessary, sir, for me to call to your recollection w.. it was the situation of America anterior to the formation of the present governments Our state governments had proved to be mere ropes of sand. Experience had shown the confederation to be miserably defective in all its parts. Those evil times, when anarchy and jealousy distracted our state governments, and clashing interests threatened to break our federal union, called all America upon its legs. The people of this nation summoned their wisest and best men to meet in convention, to form a constitution which should promote the lasting welfare of our country, and secure the liberties their valour and wisdom had won.

The difficulty of the task was fully equal to its importance. In reviewing the histories of other republics, the convention saw that like the splendid shows of a magic lanthorn, they had appeared and disappeared in almost the same moment of time; as had been observed by a celebrated writer, they rose like a rocket and fell like the stick. Although their existence had every where been transient, yet it had been protracted wherever the institutions of the country had excited any kind of veneration for its judicature. At Athens in particular, and indeed throughout G..ece, the liberties of the people were for a season preserved by the respect felt towards the august court of Areopagus. Notwithstanding the aspiring ambition of some of the states, the intrigues of powerful demagogues, and the general degeneracy of manners, yet, as long as this venerable judicature was respected, Greece continued free. As soon as it lost its influence the people lost their liberties.—Taught by these examples the value of a good judiciary, the patriots who met at Philadelphia determined to establish one which should be independent of the executive and legislature, and possess the power of deciding rightfully and finally on conflicting claims between them.—The convention laid their hand upon this invaluable and protecting principle; in it they discovered what was essential to the security and duration of free states; what would prove the shield and palladium of our liberties; and they boldly said, notwithstanding the discouragement in other countries in past times, to efforts in favor of republicanism, our experiment shall not miscarry, for we will establish an independent judiciary; we will create an asylum to secure the government and protect the people in all the revolutions of opinion, and struggles of ambition and faction. They did establish an independent judiciary. There is nothing, I think, more demonstrable than that the convention meant the judiciary to be a co-ordinate and not a subordinate branch of the government. This is my settled opinion; but on a subject so momentous as this is, I am unwilling to be directed by the feeble lights of my own understanding, & as my judgment, at all times very fallible, is liable to err much where my anxieties are much excited, I have had recourse to other sources for the true meaning of this constitution. During the throes and spasms, as they have been termed, which convulsed this nation prior to the late Presidential election, strong doubts were very strongly expressed whether the gentleman who now administers this government was attached to it *as it is*. Shortly after his election, the legislature of Rhode-Island presented a congratulatory address which our chief magistrate considered as soliciting some declaration of his opinions of the federal constitution; and in his answer, deeming it fit to give them, he said "the constitution *shall* be administered by me, according to the safe and *honest* meaning contemplated by *the plain understanding of the people at the time of its adoption*; a meaning to be found in the explanations of those who advocated, not those who opposed it. These explanations are preserved in the *publications of the times*." To this high authority I appeal. To the honest meaning of the instrument; the plain understanding of its framers. I, like Mr. Jefferson, appeal to the opinions of those who were the friends of the constitution at the time it was submitted to the states. Three of our most distinguished statesmen, who had much agency in framing this constitution, finding that objections had been raised against its adoption, and that much of the hostility produced against it had resulted from a misunderstanding of some of its provisions, united in the patriotic work of explaining the true meaning of its framers. They published a series of papers, under the signature of Publius, which were afterwards republished in a book called the Federalist. This cotemporaneous exposition is what Mr. Jefferson must have adverted, to when he speaks of the publications of the time. From this very valuable work, for which we are indebted to Messrs. Hamilton, Madison and King, I will take the liberty of reading some extracts, to which I solicit the attention of the committee. In the seventy-eighth number we read, "*good behaviour* for the continuance in office of the judicial magistracy, is the most valuable of the modern improvements in the practice of government. In a republic it is a barrier to the incroachments & oppressions of the representative body. And it is the best expedient that can be devised in any government to secure a steady, upright and impartial administration of the laws. The *judiciary* in a government where the departments of power are separate from each other, from the nature of its functions, will always be the least dangerous to the political rights of the constitution. It has no influence over the sword or the purse, and may truly be said to have neither *force* nor *will*, but merely judgment. The *complete* independence of the courts of justice, is essential in a limited constitution, one containing specified exceptions to the legislative authority; such as that it shall pass no ex post facto law, no bill of attainder, &c. &c. Such limitations can be preserved in practice no other way than through the courts of justice, whose duty it must be to declare all acts manifestly contrary to the constitution, *void*. Without this, all the reservations of particular rights or privileges of the states or the people *would amount to nothing*. Where the will of the legislature declared in its statutes, stands in opposition to that of the people, declared in the constitution, the courts designed to be an intermediate body between the people and the legislature, are to keep the latter within the limits assigned to their authority. The convention acted wisely in establishing *good behaviour* as the tenure of judicial offices. Their plan would have been inexcusably defective had it wanted this important feature of good government." The authority I have read proves to demonstration what was the intention of the convention on this subject; that it was to establish a judiciary completely independent of the executive and legislature, and to have judges removeable only by impeachment. This was not only the intention of the general convention, but of the state conventions when they adopted this constitution. Nay, sir, had they not considered the judicial power to be co-ordinate with the other two great departments of government, they never would have adopted the constitution. I feel myself justified in making this declaration by the debates in the different state conventions. From those of the Virginia convention, I will read some extracts, to shew what were there the opinions of the speakers of both political parties. The friends of the constitution insisted that our federal judges would be independent of every thing but their behaviour and their God.—The opposers of the constitution insisted that they would not be *perfectly* independent of the legislature, because they might increase their salaries. Most affectionately attached to the sovereign rights of the states and the people, the opposers of the constitution displayed all the suspicion of jealous lovers. They supposed the judges would not be *completely independent*, and insisted if they were not there would soon be a concentration of all power in the legislature and a perfect despotism in our country. Hence it appears that both parties thought the judges ought to be beyond the reach of the legislature except by impeachment. The friends of the constitution insisted they were so; the opposers feared they were not. Let us attend to the debates in the convention of Virginia.

General Marshall, the present chief justice, says 'can the government of the United States go beyond those delegated powers? If they were to make a law, not warranted by any of the powers enumerated it would be considered as an infringement of the constitution *which they are to guard*: they would not consider such a law as coming under their jurisdiction: *they would declare it void*.' Mr. Grayson, who opposed the constitution, we find saying 'the judges will not be independent because their salaries *may be augmented*. This is left open. What if you give 600l. or 1000l. annually to a judge? 'Tis but a trifling object when by that little money you purchase the most invaluable blessing that any country can enjoy. The judges are to defend the constitution.' Mr. Madison in answer says, 'I wished to insert a restraint on the augmentation as well as diminution of the compensation of the judges—but I was over-ruled; the business of the courts must increase. If there was no power to increase their pay, according to the increase of business, *during the life of the judges*, it might happen that there would be such an accumulation of business, as would reduce the pay to a most trivial consideration.' Here we find Mr. Madison not using the words, good behaviour, but he says (what we say was meant by good behaviour) *during the life of the judges*. The opinions of Mr. Madison I deem conclusive as to the meaning of the words good behaviour; but I will read what was said by Mr. Nicholas, which is substantially the same. (Here Mr. Rutledge read several extracts from the debates in the Virginia convention. Those quotations shew that, in Virginia at least, the public wish and intention was to have an independent judiciary.) Let us now see what was the opinion on this subject of the first congress under the constitution when the first judiciary bill was debated. Mr. Stone says, 'the establishment of the courts is *immutable*.' Mr. Madison says, 'the judges are to be removed only on impeachment, and conviction before congress.' Mr. Gerry, who had been a member of the general convention, expresses himself in this strong and unequivocal manner. 'The judges will be independent, and no power can remove them; they will be beyond the reach of the other powers of the government; they will be unassailable, and cannot be affected but by the united voice of America, and that only by a change of government.' Here it is evident Mr. Gerry supposed a project like the present could only be effected by the people, through the medium of a convention—he did not suppose it possible for congress ever to grasp at this power. The same opinions were held by Mr. Lawrence, and Mr. Smith, (here Mr. Rutledge read further extracts from the congressional debates.) In addition to those high authorities permit me, Mr. Chairman, to read some parts of the lectures, on the judiciary of the United States, of the celebrated judge Tucker, the present professor of law at the university of William and Mary, in Virginia, (here Mr. Rutledge read from Tucker's lectures.) I wish gentlemen who compare the official tenure of our judges with those of Great Britain, to attend to the wide distinction between their independency, as shewn by the learned judge and professor whose lectures I have cited—he shews that the judges in England have only a *legal* independence, while in America they enjoy a constitutional independence.

The advocates of this bill say, the people could not have meant to establish an independent judiciary, because a permanent body of men, beyond all controul, would prove hostile to the liberties of the people. Sir, we do not contend for any such establishment—we do not wish for a judiciary permanent and beyond controul—No, sir, all we insist upon is, that the judges are liable to that sort of controul only which the constitution establishes, that *good behaviour*, is the tenure by which they hold their office, and that they cannot be removed from it but by impeachment. That the judicial authority was never designed to depend upon the executive and legislative powers, but in some sort to balance them. That our federal judicature was meant to give to the government a security to its justice against its power—it was contrived to be, as it were, something exterior to the state. The honorable gentleman from Vermont, (judge Smith) who preceded me, says, our construction of the constitution is derived from implication. This is not the case, sir, we require no ingenuity, no sophistry, no metaphysical distinctions to bear us out in our construction. We resort to the plain meaning of the words of the constitution. Knowing the constitution would contain the seeds of its dissolution, should it contain articles liable to ambiguity, the convention cautiously avoided obscurities—they selected as plain words as any in our language to represent their intention of having an independent judiciary—they used words that are intelligible to almost every capacity. Let us read, them. 'The judges, both of the supreme and inferior courts, shall hold their office during good behaviour.' These are the words of the constitution, and what words, sir, could have been found more express, more unequivocal in their meaning? Let us suppose, Mr. Chairman, that instead of being the legislature, and instead of having the constitution before us upon trial, and (as is the case I fear) being about to sign its death warrant, we were a convention called by the people, to form a constitution, that we had determined to establish an independent judiciary—to have judges removable only by impeachment—that having decided this principle, 'twas referred to a committee to draft a clause conformably to the idea of having the judicial entirely independent of executive and legislative power, and that this service was assigned to the honorable gentleman from Virginia, (Mr. Giles) could his ingenuity, could his knowledge of our language, furnish words to represent the intention of having an independent judiciary, more appropriate, more unequivocal, more familiar, than the words used by the convention, and which I have just read? They are explicit, simple, unqualified, and at the same time imperative. The understanding of the convention, of the states, and of the people at large was, that our judiciary should be independent. They deemed this constitutional check essential to the duration of the government; and until the fourth day of last March, I believe the judiciary was considered as sacred. The state governments, and the people, and the friends of our federal union, reverenced it as the fortress and ark of their safety.

While this shield remains, it will be difficult to dissolve the ties which knit and bind the states together. As long as this buckler remains to the people, they cannot be liable to much or permanent oppression. The government may be administered with indiscretion, and with violence—offices may be bestowed exclusively upon those who have no other merit than that of carrying votes at elections—the commerce of our country may be depressed by nonsensical theories, and public credit may suffer from bad intentions—but so long as we have an independent judiciary, the great interests of the people will be safe. Neither the President, nor the legislature can violate their constitutional rights. Any such attempt would be checked by the judges who are designed by the constitution to keep the different branches of the government within the spheres of their respective orbits, and say thus far shall you legislate and no further. Leave to the people an independent judiciary, and they will prove that man is capable of governing himself—they will be saved from what has been the fate of all other republics, and they will disprove the position that governments of a republican form cannot endure. I did hope from the promises made by the honorable gentleman from Virginia, (Mr. Giles) on a former occasion, when we attempted to postpone this bill, that he would have given it an unimpassioned consideration—if it were possible for him to dismiss party feelings, and argue any question upon its real merits, it was to be hoped he would have given a cool and deliberate consideration to this all important subject, and argued it upon the ground of constitutionality. But unmindful of his promise not to consider this as a party question, the gentleman prefaced his observations with saying he designed to make them personal.

His preliminary remarks were highly afflictive to myself and friends—we deprecated this course, but the gentleman's crimination must be deemed a justification of the recrimination which he has rendered necessary.

This is a painful task, and if gentlemen should feel themselves or their friends wounded by any of our observations, they must recollect the situation in which they have placed us, and that the necessity of defending ourselves has been imposed upon us by their attacks. In a speech which occupied two hours, ten minutes only of that time were given to a consideration of the constitutionality of this measure, and then the gentleman found it convenient to employ the rest of it in fulminating his anathemas against the past administrations, and reiterating those invectives and censures which on all past occasions he has indulged himself in bestowing upon those who are no longer in power. Whether attacks are to be continued upon the past administrations to divert the public eye from the present administration, or, whether they are calculated to raise a smoke under the cover of which gentlemen may march unobserved to attack the vitals of our constitution, is best known to themselves. The gentleman from Virginia has rendered homage to the judiciary of Great Britain—acknowledges much of the prosperity of that nation to be produced, by the independency of their judges—says ours are at least as independent, but that the doctrine of making them *completely* independent is a monstrous one. Sir, there is no kind of analogy between the governments of America and Great Britain, and none between the situation of the judges, in that and in this country. The people of England gained much, and had an abundant source of oppression dried up, when they got their judges made independent of the monarch, whose creatures they had been, and whose arbitrary measures they had been obliged to support. But, sir, it was impossible to make the judges a check upon parliament, for nothing in that government is independent of parliament. In this country things are far different, we have a written constitution—the people have given certain powers to the executive, other defined powers to congress, and delegated other powers to the judiciary. But the gentleman from Virginia wishes to make congress as powerful as the parliament of Great Britain—he wants the legislature in America to be (like the parliament in England) *without controul*: he wants to destroy that check which the people in their constitution formed for us—he wants to prostrate that protecting principle which was never before known in a republican government, and for the want of which all republics have perished. In England the independence of the judiciary as far as it goes I highly appreciate, but I venerate the independence of our judges (as designed by the people when they adopted the constitution) because it is complete—in England it is not. There they have a legal independence; here a constitutional one. Although the independence of the judges in England is partial, yet it has been productive of vast good; although they may be said to be in some measure still independent on the monarch, in as much as pensions and places are in his gift, yet it is well known the independence they do possess of the crown prevents reasons of state from entering the courts, and that the royal will sinks into nothing and disappears at the seat of justice when opposed by the law. From many proofs of this fact I beg leave to select the case of Mr. Wilkes at the time of his second election, and when he had been outlawed; although the whole power of the crown was most actively employed to crush this obnoxious subject, yet Lord Mansfield, and the whole bench of judges, declared the outlawry contrary to the principles of common law, and reversed it as being illegal. Permit me to read this case—(here Mr. R. read an account of the proceedings and the whole of Lord Mansfield's celebrated speech.) The judiciary on this occasion we see checking arbitrary executive measures, because they were independent of the executive.

In America the judicial power was designed as a constitutional check upon both the executive and legislature—but gentlemen on the other side, deprecating all controul, are for prostrating the check imposed by the people on their representatives, and the destruction of which will make them omnipotent. The gentleman from Virginia says the judicial power was not formed by the constitution. I shall not be surprized by any declaration he m.y make about the meaning of the constitution after this. Sir, the judicial power is established by the constitution equally with the executive and legislature. The organization of the courts has been left to congress, but the instrument under which we act has established the judiciary, and has also assigned its duties. A charge has been made against us by the honorable gentleman which I must deny, I plead not guilty to it, and say he is wholly mistaken. He has charged us with having changed with the times and with having formerly advocated the extension of the powers of this house. Sir, this is not the case, tempora .. utantur fed non mutamur in illis. Knowing how strongly disposed in governments like ours the popular branch always is to grasp at illegitimate powers, we have in times past

(*Continued on last page.*)