REMOVAL FROM OFFICE CASE

THE RIGHT OF THE PRESIDENT TO REMOVE EXECUTIVE OFFICERS AND THE POWER OF CONGRESS TO RESTRICT HIM IN THE EXERCISE OF SUCH PREROGATIVE

ORAL ARGUMENTS

By GEORGE WHARTON PEPPER,
Senator from Pennsylvania, as Amicus Curiae

And by JAMES M. BECK,
Solicitor General of the United States

IN THE

SUPREME COURT OF THE UNITED STATES

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THE REMOVAL FROM OFFICE CASE

[In this case, *Myers* v. *United States*, W. R. King, Esq., appeared for the appellant, Hon. James M. Beck, Solicitor General of the United States, for the appellee, and Hon. George Wharton Pepper, Senior Senator from Pennsylvania, as *amicus curiae*, at the invitation of the court, in favor of the appellant.

The argument was opened by Mr. King, who explained the facts of the case and discussed the question whether the postmaster had waived any right which he had to the office in question by a tacit acquiescence in his removal.

The constitutional questions involved in the case were then discussed by Senator Pepper, in support of the power of Congress to limit the President's right of removal, and by Solicitor General Beck, in support of the power of the President to make the removal unrestrained by any legislation to the contrary.

These oral arguments on the question of constitutional power were as follows:]

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The CHIEF JUSTICE. Senator Pepper.

Senator PEPPER. May it please your Honors: There are two questions before the Court which I shall discuss as clearly and briefly as I can.

With respect to the matter of laches, I have only this to say: That up until the time of the expiration of the Congress, during whose session the appointment took place, it was at all times possible for the President to submit to the Senate a request for approval of the removal which he had undertaken to make. I take it, therefore, that the bringing of a suit while the Senate was in session would have been the bringing of a suit in advance of the perfection of a cause of action. If suit had been brought on the first pay day after the removal, and there had been a recovery, and subsequently the President had sent in a report of his action and the Senate had either approved it by consent or had consented to the appointment of a successor within the term, we should have had an award or judgment entered in advance of the time when it was clear that the President was acting without an intention to consult the Senate.

The Congress having expired on the 4th of March, 1921, the present action was begun by petition on April 25, 1921, only six or seven weeks after the

perfection of the cause of action, and three months before the expiration of the term for which the appellant had originally been appointed. So that it was necessary at a later day to file an amended petition in order to bring in so much of the salary as had accrued between the date of the filing of the original petition and the expiration of the term.

I submit that if an officer of the United States claiming to have been illegally removed, who has protested continuously during the whole of the session to which his removal might have been reported; who has kept himself free from other employment and received no compensation from any other source; for whose successor no provision was made either by the President alone, or by the President with the advice and consent of the Senate; who then brings his suit within six or seven weeks after the perfection of the cause of action—if he is to be denied a right of recovery on the ground of laches, the Government is handing to him with one hand the privilege of suing for the salary on the theory of unjustifiable removal, and with the other hand withdrawing the possibility of recovery, because the course of conduct that in that event would be prescribed for him is one which it would have occurred to few people to pursue.

That, may it please the Court, is all that I have to say on the question of laches.

I come to the question on the merits, which, after all, is the great question in the case.

With the permission of the Court, I read the section (section 6 of the Act of July 12, 1876) under which this appellant was appointed by the President, by and with the advice and consent of the Senate. The section in question appears in the brief which I have filed, at page 3, and reads thus:

> Postmasters of the first, second, and third classes shall be appointed and may be removed by the President, by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law.

"Postmasters of the first, second, and third classes"—and this postmaster was a postmaster of the first class—"shall be appointed and may be removed by the President, by and with the advice and consent of the Senate."

The Solicitor General all but concedes that this language evidences the intent of Congress that the Senate's consent shall be essential to the removal as well as to the appointment. In other words, may it please the Court, the situation which confronts Your Honors is this:

The Congress, in the exercise of an undoubted legislative power to create the office in question, creates it; prescribes the duties of the office; fixes the salary; specifies the term; and declares that the Senate shall have something to say with respect to removal, if removal is attempted. And the question is whether the Executive, having exercised his Constitutional right to appoint, with the advice and

consent of the Senate, to the office which Congress has thus created, may ignore that part of the statute which specifies the conditions under which there may be a removal. The Congress in creating the office has declared that the responsibility of removal shall be the joint responsibility of the Executive and the Senate. May the Executive act under the statute, in so far as it creates the office, and may he ignore that portion of the statute which prescribes the conditions and circumstances under which a removal may take place?

That, may it please your Honors, is the question; and reflection will satisfy your Honors, I am sure, that it is a fundamental question. A review of the history of the matter shows that it is a debatable question, and a survey of existing legislation affected or to be affected by the decision in this case demonstrates that it is an intensely practical question.

In beginning my discussion, I wish to make the point that the act of 1876 is in no sense a bit of isolated or eccentric legislation. With the aid of one of the most efficient of Government agencies, the legislative counsel for the Senate, I have collated, as exhaustively as has been possible within the limits of the time for preparation, the statutes now upon the books, which in some degree undertake to place limitations upon the Presidential power or right of removal, if such a power or right exists.

The CHIEF JUSTICE. It is in your brief, is it?

Senator PEPPER. Yes, Mr. Chief Justice; I have incorporated that matter, which I can not help thinking may prove useful to the Court, in an appendix to the brief, a separate pamphlet. And I am indebted for much the larger part of the work to Mr. Lee, the very capable legislative counsel of the Senate, for cooperating with me in this matter.

When your Honors glance over that summary, you will find, I think, that in no less than four classes of cases the Congress has assumed the power to declare that the conditions of removal from offices created by act of Congress are conditions under which the President is not left to himself in determining the propriety of removals.

The first group of statutes are those in which it is specified that the removal may be by the President alone, but only for certain causes which are enumerated, and it is specifically provided that the removal shall be for no other causes.

Then there are cases in which the President is to remove, he alone removing, but only after action by somebody other than the Congress or the Executive. Those are the statutes, for example, which provide that in time of peace officers of the Army or the Navy may not be removed by the President except after sentence of court-martial.

Then, in the third place, there are statutes which provide that certain officers may be removed only as the result of the concurrence of the Senate in

the removal; the instant case presenting an illustration of such an act.

And the fourth class of cases contains those, of which the budget legislation is an example, where, as in the case of the Comptroller General, it is provided in the act creating the office that removal shall be only by joint resolution of the two Houses and not by the Executive at all, except to the extent that the Executive's approval may be necessary to perfect the legislative action of the two Houses of Congress.

Mr. Justice SANFORD. Were all of those acts approved by the President at the time, or were they passed over the Presidential veto?

Senator PEPPER. My impression, sir, is that every one of the statutes which are listed in this appendix—certainly all the important ones—are statutes which were approved by the President in the first instance. It will be remembered that the first statute creating the office of Comptroller General in somewhat its present form was vetoed by President Wilson; and it will also be remembered that an act, long since repealed—the historic tenure-of-office act, passed in 1867 and repealed in 1887—was vetoed by President Johnson and passed over his veto. But substantially all—I speak subject to correction—but I think substantially all of the important statutes now upon the books and included in the appendix before your Honors are statutes which have received the approval of the Executive.

Now, may it please the Court, in this summary I have taken no account of a very great and important class of statutes in the case of offices created by act of the Congress, which prescribe certain grounds upon which the President may remove, the statute using affirmative language only. I have left those out of consideration, so far as my brief is concerned, in deference to the decision of this Court in *Shurtleff* v. *United States,* in 189 U. S.,[1] in which case the President had removed a member of the Board of General Appraisers who had been appointed under a statute which prescribed that he should be removable for misfeasance or malfeasance in office. It was contended by him in his endeavor to make good his contention that his removal had been illegal, that those affirmatives were pregnant with a negative, and that it was the true intent and meaning of Congress that there should be a removal for these causes, but not for any others; the President not having in that case removed for any one of the specified causes, or, indeed, for any specific cause.

This Court held that that rule of interpretation was not applicable upon such a state of facts. This Court held that the affirmative language was not inconsistent with an intention to leave the President free to remove for other causes not specified in the statute.

I call attention to that for two reasons: In the first place, because it is an interesting bit of

[1] 189 U. S. 311.

history that, that case having been decided, I think, in 1903, the Congress two or three years afterwards so amended the act which was under consideration in that case as to provide that the officer in question should be removable for the specified causes, and not for any others, but should hold his office during good behavior.

The point is that, under the decision as originally rendered, the Court held that the prescription by the Congress of the grounds of removal contained no implication that there might not be an executive removal for other grounds; and then the Congress, being desirous of expressing its meaning more clearly, amended the act and put it into the form in which it now stands, namely, that the removals may be for the specified causes and for no others, that the officers shall hold "during good behavior," borrowing in that respect the constitutional expression applicable to the Federal judges.

The statutes under which officers hold office under affirmative words specifying the grounds of removal are some of the most important statutes on the books. They affect the Interstate Commerce Commission, the Federal Trade Commission, the Tariff Commission, and many others that I might specify. And it will be observed that they would be brought into the realm of the discussion in the present case merely by superadding to the affirmative words the words of negation, providing that the removal may be for such-and-such causes,

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" and for no others "; or specifying that the officers shall hold during good behavior, which, I take it, must be pregnant with the negative that there can not be a removal while there is good behavior.

I have also, may it please the Court, laid aside from consideration a number of cases which do not bear directly upon the existence of an executive right to remove, but which do bear directly upon the constitutionally granted executive right to appoint. There are many cases in the statutes (and they are collected in the memorandum before your Honors) where Congress has undertaken to limit the area of selection which the President must observe in making nominations which, under the second section of the Second Article of the Constitution, he has the constitutional right to make; statutes which declare, for instance, that only so many members of a board shall be selected from one political party; zoning statutes, which declare that the vacancy to be filled must be filled by an appointment from a particular geographic area, and so on.

I call attention to them, because it seems to me that if there is to be an argument that the implied power of removal is one which Congress can not in any way limit by legislation or qualification, an argument to the same effect might equally well be made that all of these acts of Congress are unconstitutional in respect of the limitation that they impose upon the expressly granted constitutional right to nominate and, by and with the advice and consent of the Senate, to appoint.

When your Honors look at the statutes that concern only the question of removal, I think you will be of opinion that I am not overstating it when I say that this act of 1876 is not an eccentric or isolated bit of legislation but that there are upon the statute books to-day many statutes of the four classes that I have enumerated, all of which must be at least in the background of thought when your Honors approach the consideration of the question before us.

Now, coming to the question itself: Here we have a constitutional "no man's land." It lies between the recognized lines of executive prerogative and of legislative power. The question is, who may rightfully occupy it? And the decision of this Court in this case will be of enormous significance in helping to clear up the question as to who may enter in and possess that area which up to date has been debatable.

I lay aside from consideration the case of officers of the United States whose tenure is prescribed by the Constitution, the Justices of this Court, and the Federal judges generally; and I turn to other officers for whose term or tenure the Constitution makes no provision. And with respect to them, and in relation to this matter of the power of removal, I suggest that the Court must choose between three theories.

One is the theory that the power of removal is an Executive power; that it is inseparably incident to the power of appointment; and that since the

Constitution places the limitation of Senatorial consent only upon the power of appointment, the inference is that the power of removal is left untrammeled and free. That, I take it, is the position which the Government must take here. It is the position which the Solicitor General took at the previous argument. It is a proposition the consequences of which, I think, he shrinks from recognizing now; but in the last analysis it must be upon that proposition that the appellee must base its case.

Then there is the second proposition: that if the power of removal is a reciprocal of the power of appointment, then, since the Constitution has insisted that there shall be joint responsibility with the Senate in the case of appointment, the inference is that there is an intention that there shall be joint responsibility in the case of removal. There is very respectable authority in the books for that view; but for myself I confess that it seems to me to be unsound. The third proposition is that which I venture to press upon your Honors: that the act of removing an officer is itself an executive act, but that prescribing the conditions under which that act may be done is a legislative power, inseparably incident to the legislative power to create the office, to prescribe the duties of the office, to fix the salary, and to specify the term.

If the Congress, in creating an office, fixing the salary, prescribing the duties, and specifying the term, had gone one step further and had legislated

that the appointment should be made in such-and-such fashion, it would have been exercising a legislative function. If it goes further and prescribes that the removal shall be made under such-and-such conditions, it is still a legislative function that it is discharging. The mere circumstance that the Constitution in the case of the appointment provides that the President shall have the duty to consult the Senate, does not change the nature of the duty which the Constitution creates in the case of the appointment, nor constitute a basis of inference that the power to prescribe the conditions under which the Executive may remove is in its nature an executive rather than a legislative power.

If one approaches the discussion in the familiar way, he begins by taking note of the contention that the President under the Constitution is charged with the duty to take care that the laws are faithfully executed. It is said that he can not take care that the laws are faithfully executed unless he can remove, and remove without giving his reasons.

It is also said that the Constitution declares, as it does, that the "Executive power shall be vested in a President of the United States." It is said, "Here is an executive power; it is vested in him; the Constitution having vested it in him, the legislature may not interfere with its exercise."

But I am contending that it is only the act of removal that is executive in its character; and that prescribing the terms under which the removal may take place is a legislative act; a thing

to be performed by Congress in the exercise of powers expressly granted, and under the power to pass all laws "necessary to carry the foregoing powers into effect," etc.

May it please your Honors, I suggest in passing that the language of section 2 of Article I of the Constitution is nicely chosen. It provides, in the case of treaties, that the President shall have *power* to do thus-and-so; and in the case of appointments to vacancies occurring during recess, there is the provision that he shall have the *power* to fill vacancies.

But respecting appointments in general the language of the Constitution is not the language of power, but the language of executive *duty*—

> and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls—

and the other officers for whom provision is made.

Mr. Justice SUTHERLAND. Could Congress provide that the power of removal should exist in the Senate alone?

Senator PEPPER. Could the Congress provide——

Mr. Justice SUTHERLAND. Yes; could Congress pass a law providing that, instead of devolving the power upon the President with the advice and consent of the Senate, the Senate should act alone?

Senator PEPPER. Undoubtedly; in my opinion.

Mr. Justice SUTHERLAND. You think it could?

Senator PEPPER. Undoubtedly it could, in my opinion. The *wisdom* of such action is another matter.

Mr. Justice STONE. Is there any definition of the executive power in the Constitution?

Senator PEPPER. I believe not, sir. My contention is that there is, on this point, much misapprehension of the functions of government; that removal, the act of removal, is an act done in the execution of the laws; but that the laws are the laws which Congress passes; and the President may not break the laws in order to see to it that other people perform them.

The question is, What laws is the President to see are faithfully executed? They are laws constitutionally passed by Congress.

What is "*the* executive power" that is vested in the President? Not the vague executive prerogative which was resident in kings at the date of the adoption of our Constitution. It is the executive power which this instrument grants to him.

Nobody has better pointed that out or driven it home more powerfully than Calhoun, in a great argument in the Senate in President Jackson's Administration, to which I shall presently take the liberty of referring. I suggest, may it please the Court, that while it takes me a little aside from the order of my argument, it is yet so directly in line with Mr. Justice Sutherland's question that I shall refer here rather than elsewhere to the historical background.

It is said that this whole question has been settled by practice and by constitutional history in this country. I enter a flat denial. I think there has been a great misconception of what the testimony of history is in this matter. I call attention to the fact that when you are discussing the origins of the Constitution and debates in the Constitutional Convention, so far from finding material from which any inference can be drawn of the sort that the Solicitor General, with great ability, seeks to draw, the data are at least equivocal or even the basis of a contrary inference.

Let me remind your Honors that in the Constitutional Convention, Madison and others were in favor of vesting the power of appointment in the President alone, without the concurrence of the Senate. Pinckney and others were in favor of vesting the power of appointment in the Senate alone. Oliver Ellsworth was of opinion that the initiative of appointments should be with the Senate, and that the President should have only the power to negative. The report of Rutledge's committee, which was the conciliatory committee intended to reconcile the different views, brought in on the 6th of August, was to the effect that the making of treaties and the making of important appointments should be by the Senate.

Then came the compromise; and the compromise was that the Executive should make appointments, by and with the advice and consent of the Senate.

It is nevertheless said that you can draw from that historical circumstance the inference that they meant that the Executive alone was to have the power of removal. I say you can either draw no such inference, or else it is equally competent to draw the inference that the Senate alone was to have the power of removal.

But I hasten to point out that the issue in this case is not an issue between the President and the Senate. In public discussion it is sometimes so referred to. It is a question between the existence of a vague executive prerogative, on the one hand, and the existence, on the other, of legislative power to determine, in connection with the creation of an office, what is the wise way to provide for vacating it. The well-deserved confidence of the public in the President at the present time, and the generally conceded unpopularity of the Congress, made it easy to dismiss a question of this sort by saying, "Why, of course, the President must have the power." But it must not be forgotten, and surely it will not be forgotten by your Honors, that in the long run and through centuries of experience, English-speaking people have found it wise to entrust these great prerogative powers to the legislature.

I have cited in my brief reasons for thinking that the story, in English constitutional history, of the phrase "advice and consent" is coincident with the whole story of the rise and development

of English parliamentary government. I find the phrase first used back in the eighth century, in 759, when a Northumbrian king does such-and-such things with the "advice and consent" of his advisers. It comes down through Magna Charta. It comes down through all the ages. And when in 1787 it became necessary, as between those who were championing a strong executive and those who were championing the legislature, to find a middle ground, it was provided, in the language of old English law, that such-and-such things should be done by the President "with the advice and consent of the Senate."

When, however, it comes to the question of *removal,* as to which the Constitution itself is silent, there is not a significant word in the debates that I can find.

When you turn, may it please your Honors, to contemporaneous exposition, absolutely the only utterance on the subject of removal that I can find in the interval between the action of the Constitutional Convention and ultimate ratification of the instrument by the States is the utterance in No. 77 of The Federalist, usually attributed to Hamilton, which is to the effect that the assent of the Senate to removals will be necessary, as it is necessary to the appointments. I have cited in my brief a very interesting Illinois case[2] in which the Court, after an examination of the authorities, gives reasons for believing that it was only upon a representation that

[2] *Field* v. *People,* 3 Ill. 79.

the President would not have the power of removal that the Constitution could have been ratified by the States; that if it had been supposed that the President had the power of removal, as an executive prerogative which the legislature could not curb, the Constitution never would have become effective as the fundamental law of the land.

I am saying this, may it please the Court, for the purpose of enforcing the point that what we are now considering is not a temporary question respecting where popular confidence may best be placed as between a particular Congress and a particular Executive. We are taking our place now in the process of evolving the law of the English-speaking world; and I contend that it is only as you recognize that the legislative power which creates the office, prescribes the term, and fixes the duties, may also determine the terms of removal, that you are keeping in line with the great constitutional precedents in the old country and in this one.

Mr. Justice SANFORD. Suppose the legislative power does not fix any method of removal, what would be the result? I mean, according to your argument?

Senator PEPPER. Mr. Justice Sanford, my answer is that in that case the act of removal is an act that the President may perform. It is a matter of conferring on him a power to act, either by express words or by the implication of silence. He is the Executive. But if the legislature, in the exercise

of the legislative power to create the office, says that this office shall be vacated only thus and so, then the President, like any other citizen, is bound to the recognition of that law; and he is not faithfully executing that law if he ejects from office somebody whom he desires to discipline into greater diligence in the enforcement of other laws.

Mr. Justice STONE. Where does the Executive derive the power to remove in that case—from the words of the statute or from the Constitution?

Senator PEPPER. I should say, Mr. Justice Stone, that in the books you sometimes see it expressed by saying that there is an inference of the intention of Congress that he shall be left free; at other times, that there is an inference of the intention to confer the power upon him. But the theory that has appealed to me is that the Executive, in virtue of the terms of the statute, may do any act which is in execution of the statute, and that the legislature, in the exercise of a lawful power, may declare that the act of execution shall be done only in such-and-such a way.

Now, let me suggest further, not merely that the appellee gets no comfort from the debates in the Constitutional Convention; not merely does the appellee get nothing from contemporaneous exposition except Hamilton's very positive statement that the power of removal is exercisable only concurrently with the Senate, but that when you come to the debates in the First Congress, of 1789, which have been so often referred to, there is found no

basis for the statement that those debates settled this question in favor of the presidential right of removal. I appeal to the record, because when this great tribunal declares the law we all bow to it; but history remains history, in spite of judicial utterances upon the subject.

When you turn to what actually took place in the Senate and in the House, you find, may it please the Court, that the issue which was before that Congress was an act to create a Department of Foreign Affairs, and to provide for the office of a Secretary of Foreign Affairs, to be appointed by the President, by and with the advice and consent of the Senate, and to be removed by the President.

A great controversy was aroused in the Senate and the House over the presence of the phrase "to be removed by the President." In the House an amendment prevailed, which was afterward accepted by the Senate, which side-stepped the question, after prolonged debate, by providing that if and when the Secretary of Foreign Affairs should be removed by the President of the United States, temporarily such-and-such things should happen to the records and books of the Department. That was upon a division following a debate, where, if you compare the way in which people voted with the way in which they spoke in the course of the debate, you find that no inference at all can be drawn from their vote as to whether they were voting that the President had the power of removal and needed not that it be conferred, or that he had it not

and that Congress must confer it upon him; or that the President had not the power and that the Congress could not confer it upon him.

The most interesting analysis that I know of on the effect of debates and votes in a Congress is that contained in the judgment of Senator Edmunds, in the impeachment proceedings of President Johnson; where he analyzed the votes in the Senate and the House in that First Congress and came to the conclusion that you can not even guess as to what was the opinion of those who voted respecting the question at issue.

It will be remembered that in the First Congress there was a tie vote in the Senate. Only ten States were represented in the Senate at that time, there being twenty Senators. There was a tie vote, and John Adams, who was in the chair, cast the deciding vote and broke the tie, which carried the decision in favor of the measure as the House had amended it.

Now, I suggest that you can not draw any inference at all from those debates or from that vote, excepting that many of those who participated were believers in the power of the legislature; that many of those who participated were believers in the prerogative of the President; and that a clean-cut decision was obscured by a compromise.

When you come to the subsequent legislative history of this question, you will find the same difficulty in drawing historical inferences. The great confidence in President Washington con-

tributed largely to such acquiescence as there was in those days in the theory of presidential power. Story testifies to it, as do many others of our great jurists. Jefferson made a great many removals; but he had both Houses of Congress with him, and no issue arose. The succeeding Presidents, Madison, Monroe, and John Quincy Adams, raised no issue with the Congress; although the Benton report made in 1820 showed apprehensions on the part of some statesmen that trouble was ahead if the existence of an executive prerogative was recognized.

Then came Jackson's administration and his removal of his Secretary of the Treasury because he would not obey the President in his direction to remove the Government deposits from the United States Bank. And as a result of that removal there took place a memorable debate in the Senate. The Senate was hostile to the Administration. The debate is notable for the remarkable arguments of Webster, Clay, and Calhoun. Those men have been quoted, and I admit in one or two instances referred to by former Justices of this Court in opinions, as having been advocates of the Executive prerogative of removal. Not so. Webster, after having made an argument to that effect, said (and this is cited in the brief) that on reflection he had come to the conclusion that those who in 1789 claimed that this was a legislative power had the best of the argument, and that he would acquiesce merely for the time being in the passage of a law

requiring the President to furnish Congress with his reasons for removals.

Clay took precisely the ground which I am feebly attempting to take here, that the act of removal is an executive act, but that the power to determine the conditions under which removal may be made is a great legislative power and is resident in the Congress.

Calhoun, in a great argument, went even further, and held that it was a power which was resident in the legislature alone and doubted whether it could be in any sense committed to the Executive.

Mr. Justice SUTHERLAND. Senator, may I interrupt you at this point to ask a question? You have stated (and I think your argument leads logically to that) that Congress would have the power to provide that the Senate alone might exercise this authority to remove. Now, if that were done, would that be fixing the terms of the removal or the conditions upon which the removal could be made, which probably would be a legislative power, or would it be conferring the power itself?

Senator PEPPER. Well, Mr. Justice Sutherland, I find it hard to answer that question, in view of the great divergence in forms of expression that I find among the authorities. I have supposed that under our system of government Congress can not confer executive power upon the President; that if it is a question of executive power you look to the Constitution. But I have supposed that the

acts done by the Executive in the discharge of his duty faithfully to execute the laws are such acts as those laws prescribe, and that where the Congress which makes the law declares that it is of the substance of the law that only such-and-such things shall be done in the execution of it, that declaration is binding upon the Executive. Not because it is clipping his power, but because it is a valid exercise of the power of Congress to declare how the incumbency of the office may be terminated. Let me illustrate:

Marbury v. *Madison*[3] we think of always for the notable decision that this Court may declare an act of Congress unconstitutional. May I remind your Honors that, not by way of *obiter dictum,* but involved in the substance of the decision was a decision by the great Chief Justice and the Court that an officer who had been appointed for a term was irremovable during that term by the President, except through the process of impeachment. That was a case in which Marbury and others had been named as justices of the peace of the District of Columbia by the President. Commissions had been signed by the President, had been sealed by the Secretary of State, and were in the office of the Secretary of State. An act of Congress conferred on this Court—or purported to—original jurisdiction to issue a mandamus; and in this case a petition was filed for a mandamus to the Secretary of State to compel him to deliver the commissions.

[3] 1 Cranch, 137.

This Court decided, first, that when the commission had been signed and sealed and was in the office it was the property of the office-holder and must be delivered; second, that the duty to deliver it was not a political duty involving discretion but was a ministerial duty which could be enforced by mandamus; that mandamus was the appropriate remedy at common law, but that this Court could not issue the mandamus because the attempt to enlarge its original jurisdiction was unconstitutional.

Some people have tried to get rid of that decision by a wave of the hand; by saying, "Oh, well, everything in it was *dictum* except the decision that there was no jurisdiction."

But, may it please the Court, the decision that there was no jurisdiction was reached only by declaring the act of Congress unconstitutional; and this Court never would have declared the act of Congress unconstitutional if they could have disposed of the case on the ground that this was an appointment which was revocable by the Executive, and that if they were to issue the writ to compel the delivery of the commission the next day the President could recall it. Marshall so thought; and he said with admirable clearness that as long as the commission is unsigned or unsealed and in the hands of the President it is revocable, and therefore the officeholder has no rights and there can be no mandamus; but that the instant the duty to deliver it becomes minis-

terial, at that moment the duty must be performed, and it is a mere question of who is to compel the performance, because the appointee has tenure for his term. It is an interesting fact, may it please Your Honors, that in 1803 you have that significant utterance of Marshall's, too rarely commented upon in subsequent cases.

I find myself under the very great difficulty of dealing with a subject vast in its scope within a time that seems long to Your Honors but not so long to me. And I pass from this brief reference to legislation to a statement respecting judicial decisions.

And in order to meet the thought that I think was implicit in Mr. Justice Sutherland's question, I may say that in the brief I have attempted to state the eight specific cases to which the principle for which I am now contending should be applied, with the consequence in each case of its application. I shall then make bold to assert that there is nothing in the decisions of this Court inconsistent with the proposition for which I am contending, or in the application that I make of it to those eight cases.

In the first place, let us suppose the act that creates an office fixes its duties and the emoluments of the officer and then is silent respecting what is to happen in the case of removal. I suggest that, either on the theory that the act of removal is an Executive act suitable for the execution of that law and not controlled in that case by legislative declaration or on the theory that the act of removal is

done under a power that is conferred—that under one theory or the other the Executive may act. And that is in accordance with all the decisions in the cases and all the practice on the subject.

In the second place, suppose there is creation of the office and an express legislative reference to the power of the President to remove, but no prescription of the terms of removal. The inference then is that that removal is subject to the discretion of the Executive only.

In the third place, an office is created and affirmative words are used. That is the *Shurtleff* case;[4] and the decision is that the affirmative is not pregnant with a negative and the President may still act.

The next case is that in which you have a term prescribed. And there, under practice and executive custom, where there is nothing but the prescription of the term to limit the Executive, I am willing to concede that the rule or interpretation in the *Shurtleff* case should be implied; and that is that you do not import a negative that the man shall not be removed during the running of the term. But I point out, may it please the Court, that that is contrary to what I regard as the decision of this Court in *Marbury* v. *Madison*.

In the next place, there is the introduction of the negative language, "for no other cause." And under those circumstances it is the intention of Congress to limit the Executive, and limited he

[4] 189 U. S. 311.

must be, according to the argument that I am presenting.

And I may observe that in the last utterance of the Court on this subject, in the language of the Chief Justice writing the opinion, that question is specially saved as to what is to happen where there is the presence of restrictive language upon the action of the President? That was the *Wallace* case,[5] and he was dealing with a case like the *Parsons* case.[6] In the *Wallace* case and the *Parsons* case you have cases in which officers were removed by the President, and then before the expiration of their terms their successors were appointed by the President and confirmed by the Senate; and that is held to have had the same effect as if the Senate had originally consented to the removal; so that the question does not arise.

And then there is the case of a provision by Congress that the President can remove only after action by some other body, as, for instance, a court-martial; officers in the Army and the Navy in time of peace are removable by the President only after sentence of court-martial.

Then there is the case, of which the instant case is the type, where the consent of the Senate is required; and my contention is that that is not because the Senate, as such, has any inherent rights or powers in the premises, but because the legisla-

[5] *Wallace* v. *United States*, 257 U. S. 541.
[6] *Parsons* v. *United States*, 167 U. S. 324.

ture has chosen to designate the Senate as the body to divide responsibility with the Executive.

And finally, there is the case in which the legislature provides that the legislature itself shall remove—not the Senate; because I can not reiterate too strongly that this is not an issue between the President and the Senate. This is not like the issue that was raised in Cleveland's time, following the contest over Tenure of Office Act. This is an issue between the legislature and the Executive; and where the legislature declares that the power of removal, as in the case of the Comptroller General, shall be, not in the President at all, but the joint responsibility of the two Houses, I contend that that is constitutional legislation.

May it please your Honors, think of the psychology of this matter; because to its significance and the considerations growing out of his appointment and the power to remove him is due the conduct of the officer. Apart from one's conscientious desire to serve, there are two great motives for conduct that actuate the officers of the United States, like any other people: One is gratitude, and the other is fear. Gratitude is the psychology of past appointment; fear is the psychology of apprehended removal. And the question in the long run is where it is safest to vest that tremendous prerogative of terrorizing people into conduct of the sort acceptable to the Executive; whether it can most safely be lodged with him, or whether, in accordance with age-old precedents,

it should be left to the determination of the legislature. Of course the legislature may abuse it, just as they abused it in the Tenure of Office Act. That was most unwise legislation, may it please the Court, passed confessedly to embarrass the President. But it was not unconstitutional.

It is said, however, that "It will be a cruel injustice if you hold the President accountable for enforcing the laws, but leave it in the power of the legislature to embarrass him in this way." But, may it please your Honors, you are not going to hold the President accountable for failure to enforce an impossible law. The responsibility of creating a workable law is the responsibility of Congress; and attaching to the office conditions of removal which make it unworkable is a responsibility for which Congress must face the people.

It is said by my friend, the Solicitor General, in his brief that the *reductio ad absurdum* of my whole argument is to be found in the case in which Madison removed a Secretary of War, because, during the War of 1812, the Secretary of War, being an enemy of the cause of preparedness, had refused to take the necessary steps to fortify Washington and protect it against the British, and they captured Washington and burned some of the public buildings; and he says that to say that Madison should not have had the power to remove an incompetent officer like that is a *reductio ad absurdum.*

If we are going to weigh absurdities, what shall be said of taking as the basis of your argument an illustration in which a President who thought he had the power waited until after the enemy had captured Washington to dismiss his Secretary of War? The fact is that Madison had the power. He thought he had it. He had been an advocate of it from the beginning. Congress never fettered him. He might have dismissed that Secretary of War seasonably. But the trouble was that he was a poor executive; and he waited, with the power, to do that which a good executive, without the power, would have done long before. A Cleveland or a Roosevelt would have brushed his Secretary into the Potomac and fortified the city.

The fact is, may it please the Court, that you can, within the realm of forensic argument and prophecy, build up a great structure of calamity that is going to result if you deny to the President the power to discipline people by terrorizing them through threat of removal. But you can equally well imagine acts of executive tyranny if you do concede the power. It is a question respecting the place most safely to lodge this great power. And I venture to believe that, with your eyes upon the background of history and with your minds focused upon the decisions which this Court has made and with due regard to the issues involved in the question itself, Your Honors will come to the conclusion that you can not do better than to declare that the Constitution leaves this thing in the hands of the

legislature, rather than in the hands of the Executive.

May it please the Court, the learned Solicitor General in his last brief attempts to get away from the fundamental proposition that the President must either have this power or must not have it.

I say this: I say that he has not an inherent power; that it is resident in the Congress—not in the Senate, but in the Congress, the legislative body of the country.

The Solicitor General shrinks from the consequences of his original proposition, that the President has the inherent power, because he perceives that, if the President has it, it is an uncontrollable executive prerogative; whereas if the Congress has it, while they may abuse the power at times, yet ultimately they are speaking as the representatives of the people, to whom they are answerable for the use they make of it. It was public opinion which compelled the repeal of that vicious Tenure of Office Act.

But if you once decide that the President is the residuary legatee of the executive power of kings and that he inherits the uncontrollable power to remove, then forever you are closing the door upon any kind of legislative regulation of the conditions under which removal may take place.

You take the case of the Comptroller General, for example; and there the psychology that I have

spoken of becomes evident. The budget officer must sit in judgment upon the disbursement of appropriations for the Executive Departments. The Comptroller General under the law has a term of fifteen years; may not be reappointed; is removable only for specified causes (otherwise than by impeachment), by joint resolution of the two Houses of Congress, and not by the President.

Now, if the Comptroller General is subject to removal by the President, the psychology of the situation is such that his judgments will ultimately be judgments in conformity with advice given by the Attorney General. Of course, there are at least two members of this Court who might think that he could do worse than rely upon the judgment of Attorneys General. [Laughter.] But, after all, the question as to how the appropriations for the Department of Justice shall be applied should be decided by an officer who is outside that Department, as he is outside of every other.

And I suggest that the case of the Comptroller General, under the legislation of 1921, is a capital illustration of the importance of saving to the legislative branch the powers which I believe are resident in it.

The CHIEF JUSTICE. We will suspend now.

(Thereupon, at 4.30 o'clock p. m., the Court adjourned until Tuesday, April 14, 1925, at 12 o'clock noon.)

WASHINGTON, D. C.,
Tuesday, April 14, 1925.

The above-entitled cause came on for further oral argument before the full Court at 12 o'clock noon.

The CHIEF JUSTICE. Senator Pepper, you may continue.

Senator PEPPER. May it please your Honors, when the Court rose yesterday I had been maintaining two propositions: First, that the power to prescribe the conditions of removal from an office created by law is incident to the power to create the office; that it is legislative in character, and under the Constitution is vested in Congress; and, second, that the duty of the President to see to it that the laws are faithfully executed is a duty which includes the obligation to conform to the conditions of removal prescribed in the law creating the office; that where the statute is silent respecting restrictions upon removal, it is a reasonable inference that the Congress intends removals to be at the discretion of the Executive; but that the right in virtue of which the President acts when he removes is conferred upon him not by the Constitution but by the law creating the office, the legislative enactment passed by Congress in the exercise of its legislative power.

Now, three points, very briefly stated, and I shall have finished:

The Solicitor General in striving to find a middle ground between the alternative that there is a prerogative power of removal in the President and

the proposition for which I contend, that the power to prescribe conditions of removal is legislative and inheres in Congress—the Solicitor General in attempting to find a middle ground and to save some laws that are on the statute books seems to me to concede my case.

A concession, for example, that Congress may declare a legislative policy respecting how an office is to be administered and for what causes the incumbent is to be removed is an end of the argument that the President must have a free hand if he is effectively to enforce the laws. It will not do to say that the President must have a free hand in the matter of determining when and how he shall remove and at the same time to say that Congress may whittle away his freedom by prescribing the causes for which he may remove and the circumstances under which he may do it. To concede any power in the premises to Congress seems to me to be wholly inconsistent with the theory of a prerogative resident in the Executive, derived from the Constitution, in virtue of which he controls the officers of the United States. And with respect to them, I beg leave to say that the officers, incumbents of offices established by law, are officers of the United States; they are officers of the Government; they are officers of the people. They are not servants of the President.

In the second place, may it please your Honors, I wish to call attention to that portion of section 2 of Article 2 of the Constitution which, after deal-

ing with the manner of appointment of ambassadors, other public ministers, consuls, justices of this Court, and all other officers whose offices may be established by law, proceeds thus:

> But the Congress may by law vest [in the case of such inferior officers as may be from time to time established, the appointment either] in the President alone, in the courts of law, or in the heads of Departments."

I take it that "inferior officers" is a broad term and covers all officers not specified in the Constitution, and not heads of Departments. Certainly a postmaster is an inferior officer.

And I take it that if Congress might have, notwithstanding the provision that the President shall nominate and, by and with the advice and consent of the Senate, appoint such-and-such officers—if the Congress under the Constitution might have lifted the appointing power in this case out of the President altogether and vested it in the Postmaster General, then Congress has clearly the right, in vesting it in the President, to prescribe the terms upon which that vesting shall take place and how the power of removal shall be exercised. In other words, with reference to an important decision of this Court, the *Perkins* case, in 116 U. S.[7] where the Congress had vested the appointment of cadet engineers in the Secretary of the Navy, and had prescribed conditions of removal, and the Secretary of the Navy removed without compliance

[7] *United States* v. *Perkins*, 116 U. S 483.

with the terms, this Court decided that the power to vest in the head of a Department the appointment carried with it the power to prescribe conditions, including those affecting removal. And it would be a distorted application, may it please the Court, of the prerogative theory of Executive power to say that Congress might have vested the appointment of this officer elsewhere than in the President and have retained control over the removal, but that having chosen to vest it in the President, it might not annex conditions to the vesting which concerned the circumstances of removal.

Mr. Justice HOLMES. What case was that?

Senator PEPPER. That was *United States* v. *Perkins*. My recollection is that it is in 116 U. S. I shall have great pleasure in citing it to Your Honor. It is on page 60 of my brief. It is 116 U. S. 483, and was decided in 1886. And there is a very interesting passage in the opinion, in the course of which the Court says this:

> It is further urged that this restriction of the power of removal is an infringement upon the constitutional prerogative of the Executive, and so of no force, but absolutely void. Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President, by and with the advice and consent under the authority of the Constitution, does not arise in this case and need not be considered.

And, finally, I wish to emphasize as earnestly as I may that the issue in this case is not an issue between the President and the Senate. Excepting in newspaper headlines, there is no such controversy. This is an issue between executive power and legislative power; and the question is where the Constitution has vested the power of removal, either in the Congress, as I contend, or in the President, as I think the Solicitor General must contend.

There was a controversy between the President and the Senate in Mr. Cleveland's time. There was a case where what was left of the Tenure of Office Act—passed originally in 1867 and whittled down in 1869—had withdrawn the requirement that the President must give his reasons for what he had done, and required merely that, within thirty days after the convening of Congress following the recess in which he had removed, he must send in the name of a successor to the Senate. He did so; and the Senate in that case, having been given by the Congress no responsibility whatever in the matter of removals, undertook to say, when President Cleveland sent in the name of a successor, that they would not confirm the successor until the President had complied with a request, made upon the Attorney General in form but really upon the President, to give the reasons why he had created the vacancy by a removal. The Senate undertook, for purposes of control over patronage, to usurp a function which the legislature had not charged it with and in-

truded itself into the matter of removals by refusing to confirm appointments of successors until information respecting the removals had been given. And in the struggle that ensued the Attorney General having refused to give reasons, acting under instructions from the President, and a condemnatory resolution having passed in the Senate, the whole matter ended in rather opera bouffe fashion, by the discovery that the term of the man removed had expired before the Senate sent in the request for the reasons for the removal. So there was nothing to be done but confirm the successor, which was done.

But this controversy resulted, in 1887, in the final repeal of what was left of that vicious legislation, the Tenure of Office Act.

That was a controversy between President and Senate. That was a case of senatorial usurpation. But over and against a case of senatorial usurpation in a former day, I set what in the instant case seems to me to be a case of executive usurpation. And I close by urging Your Honors to set this controversy at rest once and for all by determining that the power to control removals is neither in the President nor in the Senate, but that in accordance with the age-long traditions of English constitutional history, it resides in the Congress of the United States, where the Constitution has placed it.

ORAL ARGUMENT OF THE SOLICITOR GENERAL

If the Court please:

I agree with opposing counsel that, if this statute is constitutional, the appellant has a good cause of action. The statute of limitations, which Congress prescribed, gave Mr. Myers six years within which to assert his rights. While this Court has held that a less time can result in a waiver of an office by virtue of acquiescence in the act of removal, yet such acquiescence must be shown by circumstances that clearly justify the conclusion that the man thus unlawfully removed never intended to assert his just rights in the premises.

In this case, I am frank to say, I can find no evidence of any waiver or acquiescence. I do not know what more Mr. Myers could have done in asserting his rights. The pertinacity with which he asserted his title until his commission had expired is worthy of the legendary boy on the burning deck. He stood by his guns in respect to the alleged unlawfulness of his dismissal and awaited an opportunity to serve in an office, of which he consistently asserted he had been unlawfully deprived, until his commission had expired, and then within a few weeks thereafter he commenced this suit.

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Therefore, if the Government is to prevail in this case, it must be on the ground that the statute, in so far as it required the consent and approval of the Senate to his removal, is unconstitutional.

I therefore address myself to this great constitutional question—a question which has repeatedly been submitted to this Court, but which the Court up to the present hour has found it unnecessary to decide; a question of great delicacy, because it affects the relative powers of two great departments of the Government; and a question, the decision of which, I venture to say, can not long be postponed. I quite concur in the concluding statement of the distinguished Senator from Pennsylvania that, as this great question is squarely presented in a concrete case, this Court should now determine it for the benefit of both departments of the Government.

I am glad that the case was not disposed of on the preceding *ex parte* argument, and that the Court has now had the benefit of the argument of the appellant's counsel, formerly a distinguished member of the Supreme Court of Oregon. The wisdom of inviting the senior Senator from Pennsylvania to represent the views of Congress has been amply vindicated in the scholarly and powerful brief that he has filed, and in the very interesting and eloquent argument that he has orally made. I take a just pride in his brief and argument; for I share with him the great privilege of

having been called to the bar by the historic bar of Philadelphia; and I think that Senator Pepper's oral argument and his very able brief are worthy of the best traditions of that bar.

His scholarly research and the earnestness with which he has pressed the argument are only equaled by his courage; because he has not shrunk from the logical implications of his argument; and I shall try to show, *in limine,* that that argument, if applied by a hostile Congress to the President, might make our Constitution little more than a house of cards.

For, if I understand Senator Pepper's contention, it is this: that the President's power of removal is not a constitutional power; that he derives nothing from the Constitution. under which the " executive Power " was vested in the President of the United States. That he gains nothing by reason of the solemn obligation imposed upon him by that Constitution to " take care that the laws be faithfully executed." That he gains nothing by the oath which the Constitution exacts from him that he will support, maintain, defend and preserve the Constitution of the United States. That his only power in this vital matter of administration of removing officers is derived from the inaction of Congress, which has plenary power over the subject of removals from office. So I understand the Senator to contend.

It seems to me an amazing proposition. I had not so understood his brief; but I do so understand

his oral argument of yesterday. As I read the brief, he said that the power of removal is "an Executive act"; he did not say "an Executive power"; and perhaps he had in mind that fine shading of expression in the Constitution, to which he attached a significance which I do not think it deserved, between the "*power*" to negotiate treaties and the *duty* imposed merely to nominate. I think there is no practical distinction between the two grants of power.

But he did not in his brief challenge the fact that, from the beginning of this Government to the present hour, and by the sanction of this Court in the *Parsons* case [1] and the *Shurtleff* case,[2] the power to remove has been recognized as an Executive power; that it exists in the President by force of the Constitution; that it is a part of the "Executive power" granted to him in words, and that it is a part of the necessary means to carry out the great objective of his duties. What he did not challenge in his brief, he now challenges in oral argument, for I understand him to argue that the power of removal as exercised by the President is only by the sufferance of Congress.

The one question that this Court has never decided has been, whether Congress, under its limited grant of legislative power, may restrict, limit, or modify the Executive power of removal. If so, and the contention is carried to its logical conclu-

[1] *Parsons* v *United States*, 167 U. S 324.
[2] *Shurtleff* v. *United States*, 189 U S. 311.

sion, then it can destroy the Executive function of removal altogether.

Senator Pepper has argued—and I want to show the Court the grave implications of his contention, not merely by suggesting fanciful illustrations, but by illustrations that have their basis in reality—that the power to create an office is legislative in its nature—I grant that—and that in thus creating an office Congress may impose, as an inherent condition of the continuance of that office, whatever conditions it pleases, even if those conditions, as in the instant case, involve a transfer of the Executive power of removal from the Executive to the Congress.

He would sustain the law on the ground that Congress was not obliged to create the position of postmaster of Portland, Oregon; and therefore could create it upon such terms as it pleased, and if so, those conditions are beyond judicial review. In other words, Congress can provide—as it has provided in the statute under consideration—that the postmaster at Portland, Oregon, should serve during the pleasure of the Senate. If this be true, then the Executive power of removal, hitherto supposed to be granted by the Constitution to the President, is no longer in the President, but when Congress creates the office it may grant Executive powers with respect thereto to the Senate.

But the grave implications of that doctrine—and I venture to say that no more surprising one has been addressed to this Court for a long time—

are further illustrated by the fact that the Senator and Judge King, champion, as an illustration of their argument, the law with respect to the Comptroller General; and while that law is not before this Court, yet it does so illustrate the extent to which Senator Pepper's argument can be carried as to the paramount authority of Congress, to redistribute powers, in the guise of creating an office, that I want to read that act to the Court.

It provides:

> There is created an establishment of the Government to be known as the General Accounting Office, *which shall be independent of the executive departments*—

If this law be valid there is nothing to prevent the Congress from saying that postmasters of the first, second, and third classes are also to be " independent of the Executive branch of the Government "—not merely with respect to removal, but for all purposes of administration.

The Budget Law statute continues:

> and under the control and direction of the Comptroller General of the United States,

Not a word of the President of the United States, to whom it has hitherto been supposed the Executive power had been granted by the Constitution. This fiscal agency, properly a part of the Treasury Department of the Government, is not only affirmatively made independent of the Executive branch of the Government, but in order to exclude the possibility of any power of the Presi-

dent, we are told that it is to be under the control and direction of the Comptroller General of the United States. And then it provides—

> Except as hereinafter provided in this section, the Comptroller General and the Assistant Comptroller General shall hold office for fifteen years. The Comptroller General shall not be eligible for reappointment. The Comptroller General or the Assistant Comptroller General may be removed at any time by joint resolution of Congress after notice and hearing, when, in the judgment of Congress—

You see, there is not the shadow of Executive power left.

> the Comptroller General or Assistant Comptroller General has become permanently incapacitated or has been inefficient, or guilty of neglect of duty * * *, and for no other cause and in no other manner except by impeachment.

Its purpose was to take the office out of the doctrine of the *Shurtleff* case,[10] in which this Court recognized that, even if Congress prescribed some grounds of removal, yet, unless it clearly indicated to the contrary, the President's power to remove for other causes still remained.

If Senator Pepper's argument be a sound one, Congress, in creating the offices of the Government—and through what other means does the Government function except through officers?—

[10] *Shurtleff* v. *United States*, 189 U. S. 311.

can create them in such manner and with such conditions as it may think proper, even if those conditions involve a portentous transfer and shifting of power from one department to the other. If that be true, then where does the power to alter the form of our Government stop? Congress, like Warren Hastings, might well marvel at its own moderation; because it could have added to this clause with regard to the Comptroller General's office, that it should be independent of the Judicial department of the Government also.

Because, if the Congress can create an office, upon such conditions as it may think proper, and if it can make such an office, essentially executive in character, independent of the Executive, then obviously, it can make it equally independent of the Judiciary. Possibly the Comptroller General may have had this idea of the independence of his office. Let me read from his decision of February 7, 1924, in which he says:

> Under the Act of June 10, 1921, responsibility to settle and adjust claims against the United States and to determine the availability of appropriations for their payment is upon this office and while opinions of the court are given most careful consideration, especially where it appears that the merits or legal principles involved have been fairly presented to *and fully considered by the court,* it is not believed that this office would be justified in applying the de-

> cision in the *Quinn* case to the case here under consideration.

In other words, the Comptroller General judges not only whether the case has been properly presented to the court, which might well be within his power, but also whether the court has fully considered the question; and if he reaches the conclusion that the court has not done so his independence would be justified on Senator Pepper's theory.

Let me again suggest to the Court the grave implications of the contention made by the distinguished Senator. If Congress has this thaumaturgic power, by reason of its legislative duty to create offices, then this power is not exhausted in the act of creating the office; because, obviously, Congress can abolish an office whenever it sees proper; and therefore, not merely in the original creation of the office, but at all times during the continuance of the office, Congress always, according to the contention, has the power to impose upon the office such conditions with respect to the manner in which Governmental power shall be divided, as it sees proper.

Let us see, then, where that would lead us. Our Government has over 556,000 civilian employees. If you add to that the Army and the Navy, the employees of the Judicial Department, and of the territories and of the District of Columbia, there are over 800,000 employees of the United States.

Logically this Court must pass upon this question as though the act included all these officials. If this law be valid on the grounds submitted by the distinguished Senator, the law which I am about to suggest would be equally valid. Suppose that Congress passes an omnibus law, whereby it is provided that all civilian officers of the State shall hold their offices during the good pleasure of the Senate, or of Congress; that they shall be independent of the Executive Departments of the Government; and that they may never be removed by the President, no matter how culpable their conduct may be, even though it may amount to disloyalty or treason, unless the Senate or the Congress (whichever the law might state) should so provide.

Eliminating offices created by the Constitution, as to which this Court could find a limitation upon the power of Congress to extend this statute, yet as to every other civilian employee of the State, Congress could effectually take them out of the control of the Executive Department of the Government and even of the judicial department.

And if that is so, you might as well put out a sign " To Let " at the White House; because the President would be *functus officio*. His great power would be diminished to a shadow.

Mr. Justice McREYNOLDS. I would not say that. Congress could cut off every civilian employee of the Government by cutting off his salary.

Mr. BECK. Certainly.

Mr. Justice McREYNOLDS. Congress could absolutely stop the wheels of the Government from turning if it wanted to; so I do not see why you should be drawing a picture like that. Suppose Congress should say to-morrow, " We will not appropriate a dollar for the support of the Government "; it could do that, could it not?

Mr. BECK. That would be by virtue of an express constitutional grant which gives to Congress the power to appropriate money——

Mr. Justice McREYNOLDS (interposing). But it would stop the Government?

Mr. BECK. Undoubtedly, Congress has the power to stop the Government, if it sought to work a revolution by bringing the Government to a standstill.

Mr. Justice McREYNOLDS. So that I do not see that it will help us very much for you to say that it would stop the Government if the President had not the power to remove officers.

Mr. BECK. But stopping the Government through the power of Congress over the purse; or by abolishing all offices whatever—either of which, of course, would be an essentially revolutionary step—may be within the power of Congress. To provide, with respect to all officers, that they shall no longer be a part of the Executive department of the Government, and, above all, that they may not be removed, except with the consent of the Senate, is quite another thing, which would

seem to be a prodigious transfer of the principal Executive power from the Executive to Congress.

Of course, no one pretends that any such omnibus legislation would be suggested; but nevertheless, the fact remains that, if this law is constitutional, such an omnibus law would likewise be constitutional. And in that event it would necessarily follow that there would be two Executive departments, one the Executive department of the Constitution, which would be shorn of its powers and its halls like the poet's "banquet hall deserted," which the President would tread alone, with "all but him departed" and the other, a Congressional Executive department, which would function independently of the President and be responsible only to Congress and removable only by Congress.

But if Congress has this power to delegate to one branch the determination as to whether the President shall exercise his right of removal, then it has equally the power—and, if applied to all the officers of the State, it would be a prodigious undertaking—to delegate to any part of itself the Executive power or function of removal. For, after all, that is what Congress has done in this act. The Congress has not itself assumed the power to remove this postmaster. It has delegated it to the President of the United States, by and with the advice and consent of the Senate. If it could do that, it could then delegate the viséing of the President's removals to the Speaker of the House and the President of the Senate as the representatives of

the two branches of Congress. And thus you would have revived the old triumvirate of Rome, for you would have three great officers of the State sharing that which is vital in the practical administration of the State, that which requires hourly exercise in the administration of the State, namely, the removal of unworthy, incompetent, or inefficient officials from the public service. And the Constitutional Convention rejected a triumvirate when they refused to have an executive of three individuals.

I have, I trust, sufficiently stressed what seemed to me to be the necessary implications of Senator Pepper's far-reaching claim that the President only enjoys his power by the inaction of Congress, that is, by the sufferance of Congress, and that Congress at any time may apply conditions to the right of removal.

I come to what I suggested in my revised brief, with respect to the question whether there may be a middle ground in this matter between the absolute power of the President to remove and the absolute power of Congress to dictate the method of removal.

I shall suggest to this Court (and I want to stress it, because it may be of some value to the Court in its deliberations) that it is not necessary in this case to determine the full question that is involved in this record. In other words, this Court can say that this particular act is unconstitutional, without denying wholly to the Congress the power to create legislative standards or public policies which have a legitimate relation to the

nature and scope of an office. Let me illustrate what I mean:

Suppose a law is passed that an office is created and that the incumbent may be removed for inefficiency or dishonesty. I take it that no one would have any difficulty in reconciling such a statute with the Constitution; because the Executive power of the President is in no respect impaired; his exercise of his duty is guided by a legislative standard which prescribes efficiency and integrity as a condition of the tenure of office. The President, however, applies the standard. He determines whether the officer in any given case is efficient or inefficient, dishonest or honest; and he removes upon his ascertainment of the facts.

But suppose the law does not provide that. Suppose it says that an office is created and that the incumbent may be removed for inefficiency or dishonesty, but *for no other reason whatever.*

It would be far more difficult, if I am right, to reconcile that with the Constitution of the United States, if the President has as a constitutional prerogative the power of removal. Because that does say to the President, "You can remove for the two causes; but for all other causes we forbid you to remove."

But in this case it is not necessary for this Court to pass upon that class of cases. For even as to such a law, even though it results in an undoubted impairment of the full freedom of the Executive to

remove, the Court might still say that such an act merely prescribes a legislative standard, or declares a public policy with respect to tenure of office, which was an inherent part of the office, and left to the President, as an Executive function, the duty of applying it to a concrete case.

I am not conceding that such a law, which limited the President to only two causes of removal, would be a constitutional law; but I simply say that it is not necessary to decide that in this case.

Why? Because this law differs, *toto caelo,* from the kind of law to which I have just referred. This law prescribes no legislative standard. It declares no public policy with respect to any inherent attribute of an office. It simply says, "We create this office, provided that you allow the Senate and President to remove, and not the President alone." In such case, there is no legislative standard of efficiency; it is a mere redistribution of power—a giving to one branch of Congress some of the power which belongs to the President—which differs from a legislative act prescribing the standards of public service.

And, therefore, as you have here the naked assumption of Congress that it can transfer the Executive power from the President to the Senate, you have it in your power to say: "Without now deciding how far the President's power of removal can be guided, or modified, or controlled by laws that are inherently part of the nature and the scope of an office, Congress can not, under the guise of

creating an office, transfer a constitutional prerogative of the President to the Senate of the United States, when the Constitution gave no sanction to any such transfer."

I contend that the power of the President is not a mere implication from the Constitution and existing only from the inaction of Congress. That is a new theory which the Senator has advanced; and, so far as I know, it finds no countenance in any previous discussion of this great question.

The power to remove is based on a just interpretation of the language of the Constitution; an interpretation that has had the sanction and confirmation of unbroken usage; except to the extent that the question has been raised whether there can be such an interdependent exercise of the legislative power as to control and regulate this power of removal.

But the power of removal is constitutional in its origin.

Let us first take the background of the Constitution, and let us recall what it was that the framers were trying to accomplish.

The great defect that called the Constitution into being was that under the Confederation all judicial, executive, and legislative powers were vested in the Congress of the Confederation. And it was because the old Congress exercised executive power that there came the tragedy of the Revolution, and especially the dark and terrible days of Valley Forge, when Washington's little army starved in

a land of plenty, because of a headless Government that had no Executive whatever, but which, under the guise of a legislative tribunal, attempted to exercise both legislative and executive powers.

The result was that, when the Constitution was formed, quite apart from the teachings of Montesquieu as to the distribution of power as a safeguard of liberty, the one thing that they were anxious to create (and my brief supports this by contemporaneous allusions) was a strong independent executive, who, carrying out the laws of Congress, would yet have sufficient inherent strength to preserve his department against the creation of a parliamentary despotism.

In the debates of the Constitutional Convention, it must be admitted that there is very little to be found on this subject. They discussed nearly every other subject relating to government but they did not discuss this. They did discuss the question of removal, so far as the President is concerned, because he could not remove himself, and so far as the judiciary is concerned, they intended to give the Justices a life tenure and necessarily made some provision for removal for extraordinary reasons.

They did assert—and this is the answer to Senator Pepper's charge of executive absolutism—a power in the legislature, to be traced to the old Anglo-Saxon reliance upon the legislature as the ultimate safeguard of liberty; that if the President, in the exercise of his executive functions,

failed in his duty; if he tolerated dishonest, inefficient, or disloyal men in the Executive department, he or any other officer of the State could be impeached by the House of Representatives and tried by the Senate and removed from office. And that was the great reservation of power by the legislative branch to prevent any absolutism by the Executive. But with that exception, there was no suggestion in the debates with respect to the question of removal.

And from that I draw a conclusion favorable to my contention. Why? Because at that time, in the science of government, according to the custom of the nation from which we drew our institutions in great part, and according to the custom of every country, so far as I know, the power to appoint and the power to remove had always been regarded as executive functions. I examined the other night a book which contained the constitutions of nearly all the great modern States at the present day. My examination was cursory and may not be wholly accurate; but as far as it went, with the exception of the Argentine Republic, there is not a clause in any one of the constitutions that specifically confers the right of removal upon anybody; but it has always been regarded as an inherent attribute of the executive branch of the Government, where there is any division of the powers of Government into the great trinity of the legislative, the executive, and the judicial.

Mr. Justice BRANDEIS. Mr. Solicitor General, if the power of removal is an inherent prerogative of the President, why is not the power of appointment without the advice and consent of the Senate an inherent prerogative of the President?

Mr. BECK. Because the Constitution says otherwise.

Mr. Justice BRANDEIS. I beg your pardon?

Mr. BECK. Because the Constitution says otherwise.

Mr. Justice BRANDEIS. Well, does it say otherwise in respect to every office?

Mr. BECK. Every office.

Mr. Justice BRANDEIS. Regardless of whether they are named——

Mr. BECK. Every office. The President "shall nominate, and by and with the advice and consent of the Senate, shall appoint" such-and-such officers, "and all other officers of the United States"; except that Congress may vest such appointments *as it thinks proper* in somebody else than the President; but it need not vest a single one in any other body.

Mr. Justice BRANDEIS. But it says Congress may vest the appointment to an office such as this office in some one other than the President?

Mr. BECK. Well, if it did it would not make any difference for the purpose of my argument, as I shall try to show.

Mr. Justice BRANDEIS. I am not referring to the constitutional officers, of course; but I am referring

to the offices which are created, not by the Constitution but by the Congress itself.

Mr. BECK. In my judgment, on this question of the scope or nature of the constitutional power of the President to remove, the nature of the office is not important. It is important only in this respect: That no one questions that the Congress, if it vests in the Postmaster General the appointment of a postmaster, can restrain the Postmaster General from removing his subordinate. Congress has control over those upon whom it confers the mere *statutory* power of appointment. But it has no such power as against the President; because the President's power is not statutory; it is *constitutional.* That is my point, for what it is worth.

Mr. Justice MCREYNOLDS. Do you mean that every officer appointed by every source in the United States is subject to removal by the President?

Mr. BECK. Yes; every officer in the Executive Department of the Government.

Mr. Justice MCREYNOLDS. Take the marshal of this Court: Can the President remove him?

Mr. BECK. If he is part of the Executive Department of the Government, yes.

Mr. Justice MCREYNOLDS. He is provided for by Congress, and paid by Congress; and the method of his appointment is provided by Congress. Can the President remove him?

Mr. BECK. In my judgment, the President can remove any one in the Executive Department of the Government.

The employees of the judicial branch of the Government and the special and direct employees of the Congress, like the Sergeant at Arms, are not officers of the executive branch of the Government, and therefore are not within the grant of executive power to the President.

That is one theory. The other theory is the one I first suggested, that the Executive power is even more comprehensive. But it is not necessary for me to press the argument that far.

When the Constitution was adopted, therefore, what were the provisions with respect to powers?

In the first place, there was the division of the Government into three great branches: The legislative, the executive, and the judicial.

Mr. Justice BRANDEIS. I do not know, Mr. Solicitor General, that you have fully answered my question: Assuming that this is an office—and I presume it is—which is wholly within the control of Congress as to its existence; and that Congress chooses to have the President make the appointment to this office: Why, having created the office, if this is a prerogative of the President, can not the President disregard altogether the provision as to the advice and consent of the Senate, and say that an office has been created which is not a constitutional office; and that the appointing power exists in him as to that office?

Mr. BECK. You say, why could the President not do that?

Mr. Justice BRANDEIS. Yes.

Mr. BECK. Simply because the Constitution says explicitly that the President "shall nominate, and, by and with the advice and consent of the Senate, appoint" certain officers therein named—constitutional officers and all other civil officers—leaving it to Congress to determine the extent to which it will waive the question of the Senatorial confirmation.

Mr. Justice BRANDEIS. You are undertaking, therefore, to limit this by confining the term "officers"?

Mr. BECK. It says, "and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Mr. Justice BRANDEIS. Well, I mean, why the distinction as to inferior officers? There does not seem to be anything particularly inherent in the office of one who is a postmaster; I do not know why a distinction should be drawn between first, second, third, and fourth class postmasters and any other officer of the United States, except so far as the Congress chooses to give them a certain kind of appointment.

Mr. BECK. Well, I do not know whether your Honor has in mind the theory that the sole source of the power to remove is the power to appoint, and therefore that Congress, having the power to vest the appointment of an inferior officer in the heads of departments or the courts of law, instead of in the President—that therefore, the President's right of removal is gone, because he has lost the only source from which he derives his power, namely, the original power of appointment.

If it were true that the sole source of the President's power to remove is the power of appointment, there would be great force in that argument.

But, as Mr. Madison showed in the first great debate on this subject (and I have quoted at length from it in the brief), the power to remove is not a mere incident and is not solely attributable to the power to appoint. It has a much broader basis.

To assume that the only source of the power to remove is the power to appoint is to put the pyramid on its apex; whereas you put the pyramid on its base where you say that the power to remove is part of that which, in sweeping and comprehensive and yet apt phrase, is denominated the "executive power," coupled with the explanation that the executive power is to "take care that the laws be faithfully executed," a mandate of tremendous significance and import.

I was about to say that the Constitution, in addition to this division of the Government into three great branches, draws this tremendous distinction

between the grant of legislative power and the grant of executive power:

In the grant of legislative power, it said (and it never uses a word idly):

> All legislative powers *herein granted* shall be vested in a Congress.

And when you come to look at the "powers herein granted," you will search in vain for any suggestion of a power to remove by the Congress. The most you can say is that, under the general power, the omnibus clause of the legislative grant, namely, the power to make laws "for carrying into execution the foregoing powers," there is the implied power to create offices, and according to the theory advanced by opposing counsel, the resultant power to step over the dead line into the Executive Department and assume the right of removal.

When you come to the executive branch of the Government, it is significant that the framers omitted the words "herein granted."

Why? They could specify the nature of and classify the legislative powers with reasonable precision. But the executive power was something different. And therefore they simply said "the executive power"—not "the executive powers." It was not only in the singular number; but it was intended to describe something that was very familiar to them, and about which they did not believe men could disagree; and therefore they said, remembering the innumerable ills of the old Confederation, "the executive power."

It was not granted to an Executive Department. That is, again, a very significant thing. They might have limited it. But they said:

> The executive power shall be vested in a President of the United States—

distinguishing him from all other servants of the Executive Department, and making him the repository of this vast, undefined grant of power called " the executive power."

Then they went on to say what that power was—not in any way attempting to classify or enumerate it; but they simply gave its objective, and that was " to take care that the laws be faithfully executed."

It was common sense in the days of the Fathers, when our country was a little one; it is common sense to-day, when we are the greatest nation in the world; when we have, as I say, 800,000 employees of the State—that the President can not take care that the laws are faithfully executed, unless he has the power of removal, and the summary power of removal, without any interference or curb upon him. And that has been shown again and again in our history.

But it did not stop there. There is a clause to which very little significance has been attached in the discussion on this question, but which I submit has great significance.

It says that the President shall " commission " officers. The Constitution never descends to details. You can not find in the whole document

any other case where they descended to what might otherwise be regarded as a mere mechanical or clerical detail. And there was special significance in the minds of the framers when, in this broad grant of "executive power," they said that the President should commission. Not that Congress should commission. The Congress of the old Confederation commissioned; and Washington's experiences during the seven years of warfare were the bitterest experiences of his life. He trod his Gethsemane because he could not control the men that were under him, because they owed their commissions to Congress and not to the President.

And therefore, sweeping aside the attempt to have a many-headed Executive (which never has worked in history), in order to emphasize what they meant by the executive power, they provided that the President shall commission the officers of the State.

And that is very significant; because just before this Constitution was adopted, there was a great crisis in the Government from which we are sprung. The Crown (and I use the word "crown" as distinguished from "the king" because it answers to our Executive Department) dismissed Fox as Prime Minister, although he had the support of a majority of the House of Commons. Pitt was substituted for him. There was a great debate in Parliament; and that must have had its reflexes in this country. It was then determined that the ministers, although they are members of the House

of Commons, at that time drew the source of their authority from the Crown.

And so to-day the commission that any of the members of this Court has, and that which I have as Solicitor General—each would read, if it were the appointment of the present Administration—

> I, Calvin Coolidge, reposing special trust and faith in the integrity, etc., do commission and authorize and empower, etc.

The commission comes from the President.

The Constitution also provides:

> "The President shall nominate."

The Committee of Detail, when it reported to the convention before the last revision, had provided that the Senate should appoint all officers, if my recollection serves me correctly. At all events, it was either that the Senate should solely appoint, or that the President and the Senate should appoint.

And then these wise men, who were not muddled dreamers, in the last revision by the Committee on Style, said:

> The President shall nominate, and, by and with the advice and consent of the Senate, shall appoint.

And then they said he "shall commission."

Thus there are four steps—nomination; confirmation; appointment; commission.

What did nomination mean? Nomination implies in its very essence the power of removal. What is the power of nomination? It is the power

to select at all times and at all places the best man for a position. I do not say that great ideal is always realized; but that is not the question. But that ideal is the objective.

The President must at all times, if he is to nominate—if nomination be selection—determine, having regard for the public interests, who is the best man for a particular position.

An office may be filled. It may be filled by a man who is neither inefficient nor dishonest; it may be filled, however, by a man who is not as good a man as another man whom the President has selected. Therefore, before the President can nominate, he must first displace. The power to nominate does not include the power to remove, so far as the original creation of an office is concerned. But in the matter of an existing office, the power to nominate is always the power, if necessary, to remove an existing incumbent, to make way for a better man.

In President Arthur's administration Congress passed a law that it would create an office, provided that the President named a certain man to fill it. President Arthur vetoed the bill, on the ground that Congress could not create an office and name the incumbent.

So that the power to nominate as given in the Constitution carries within itself, as an essential ingredient, the power to remove.

Then comes the one qualification of the Constitution: That as to all offices which the Congress may

think sufficiently important, no one can be appointed except with the advice and consent of the Senate.

The framers of the Constitution recognized that, in the matter of appointment, the President would require local knowledge. If he attempted to distribute, even with the country as small as it then was, the offices of the State throughout the country, as presumably he would, it was desirable for him to have the advice and the consent of the local representatives, who would be a kind of a jury of the vicinage, and who would better know whether or not the appointment was in all respects desirable.

But is it not significant that there is no suggestion that he can not remove except by the advice and consent of the Senate? It is true, as I have said, that the power of removal can only be given to the President—or to anybody—by attributing it to the proper grant; and the proper grant is the executive power. But it is significant that, while the power of nomination, the power of appointment, is subject to the confirmation of the Senate, nowhere is there a suggestion in the Constitution that in the conceded power of removal, as an executive power, any such limitation has been put upon it.

The power of appointment required local information. At all events, it was a matter in which the framers might well say that the ambassadors of the State desired to be consulted before a man was

taken out of their vicinage to be made a part of the Civil Service of the United States.

But when a man has been taken from his locality and has become a part of the Federal machinery; when he has been for one or more years under the supervision of the President, who knows best whether that man is faithfully or unfaithfully discharging his duties? How can the Senate know? Preoccupied in its work of legislating (and that is enough of an undertaking) how can it know whether an employee of the executive branch of the Government, scattered from Manila to Alaska, deserves removal?

And therefore these wise Fathers were correct in so carefully limiting the Senatorial privilege—and mark you, that Senatorial privilege of confirmation was a departure from the doctrine of Montesquieu, to which they otherwise attached great importance; it was an interblending of the Executive and Legislative; and as Mr. Madison pointed out, such interblending must be confined to its fair terms; you can not interblend the executive and the legislature by putting a curb on the Executive through the powers of the legislature, unless you can find in the text of the Constitution some warrant for it.

From those grants of power; from the nature of the Government; from the division into three different departments; from the sweeping grant of executive power; from the power to nominate; from the duty of taking care that the laws be faithfully executed; from the power to commission, im-

porting a continuation of that confidence which the President, in the very text of the commission, reposes in the appointee—from all those things, I assert that it is a just interpretation of the Constitution, and not a mere implication, that the power to remove is a part of the executive power granted to the President.

If it be a part of his executive power, does it not throw the whole machinery of our Government into cureless confusion if you assume that the Congress can take that power from him and transfer it to itself, or to one branch of the Congress, at its discretion and for its purposes?

This question was discussed very ably about 136 years ago. It was one of the great debates in Congress. Senator Pepper has tried to minimize the force of that great discussion. Not so those who have considered it, including those who did not favor the executive prerogative of removal.

Mr. Webster, who, in his antipathy to President Jackson, did take advanced ground in that direction—but not going to the great lengths of Senator Pepper—still recognized the tremendous force of the judgment that was reached in the First Congress of the United States. And it can not be quite so idly dismissed or minimized as is indicated in the briefs of opposing counsel. And remember what that First Congress was. They were starting the wheels of the Government into operation. Of the Senate, one half of them had sat in the Constitutional Convention. Possibly, as they met

there in the first Senate of the United States, it was the first time since they had parted company in the historic State House in Philadelphia on that fateful seventeenth day of September, 1787. There must have been a general handshaking when they thus saw each other again.

In the House of Representatives, not a majority but a considerable number had also sat in the first Constitutional Convention. They were creating the first of the Departments of the Government, the Department of State and the Secretary of State.

And at once, in this first Congress under the Constitution, the question arose, Is the power to remove in the Congress or in the President? If it is in the Congress, can the Congress delegate the power to the President; or if it is in the President, can the Congress limit or restrict that power?

Why, to show the immensity of the subject as it dawned upon those supremely great men, I read the words that James Madison used in the course of the debate:

> The decision that is at this time made will become the permanent exposition of the Constitution; and on the permanent exposition of the Constitution will depend the genius and character of the whole Government. It will depend, perhaps, on this decision whether the Government shall retain that equilibrium which the Constitution intended, or take a direction towards aristoc-

> racy or anarchy among the members of the Government.

And it was in that spirit that they proceeded to discuss the very subject we are now discussing.

I have not the time to read excerpts from what Mr. Madison said in that great debate. He took the lead in favor of the proposition that the grant of power was a Constitutional grant to the President. He repudiated the suggestion that it was a mere incident to the power to appoint. On the contrary, he said that it was the just derivative of the executive power and the power to execute the laws, and that the power to appoint was a mere incident. He reasoned it out on the ground that the separation of the Government into three departments would be quite impracticable, unless this power to remove was in the President.

I say I have not time, because there is so much else that I want to say. But I do want to read what was not in my first brief, two very practical suggestions made by two of his colleagues, Mr. Boudinot of New Jersey, and Mr. Sedgwick of Massachusetts.

Says Boudinot, who was taking Madison's side:

> If the President complains to the Senate of the misconduct of an officer, and desires their advice and consent to the removal, what are the Senate to do? Most certainly, they will inquire if the complaint is well-founded. To do this, they must call the officer before them to answer. Who, then, are the parties? The supreme Executive officer against his

> assistant; and the Senate are to sit as judges to determine whether sufficient cause of removal exists. Does not this set the Senate over the head of the President? But suppose they shall decide in favor of the officer, what a situation is the President then in, surrounded by officers with whom, by his situation, he is compelled to act, but in whom he can have no confidence, reversing the privilege given him by the Constitution, to prevent his having officers imposed upon him who do not meet his approbation?

That, of course, is implied in the power to nominate. And Sedgwick says this:

> How is the question—

that is, as to whether a man is properly to be removed—

> to be investigated? Because I presume there must be some rational rule for conducting this business. Is the President to be sworn to declare the whole truth, and to bring forward facts? Or are they to admit suspicion as testimony? Or is the word of the President to be taken at all events? If so, this check is not of the least efficacy in nature. But if proof be necessary, what is then the consequence? Why, in nine cases out of ten, where the case is very clear to the mind of the President that the man ought to be removed, the effect can not be produced, because it is absolutely impossible to produce the necessary evidence. Are the Senate to proceed without evidence? Some gentlemen contend not. Then the object will be lost.

> Shall a man, under these circumstances, be saddled upon the President, who has been appointed for no other purpose but to aid the President in performing certain duties? Shall he be continued, I ask again, against the will of the President? If he is, where is the responsibility? Are you to look for it in the President, who has no control over the officer, no power to remove him if he acts unfeelingly or unfaithfully? Without you make him responsible, you weaken and destroy the strength and beauty of your system.

And that is just as true to-day as it was when Mr. Sedgwick said it. If the contention of Senator Pepper were adopted by this Court and the Congress acted upon it, you would destroy the beauty and the strength of your system.

What was the result of the debate? The House of Representatives sustained Mr. Madison. The Senate equally divided; but Vice President Adams in the chair voted for the law in the form that would sustain the President's prerogative. And George Washington, the first President of the United States, the presiding officer of the Constitutional Convention, added his concurrence to the view thus expressed, and would have acted upon it if he had had any occasion to exercise the power of removal.

Let me say in passing that whenever the question has arisen every President of the United States has taken this view. I do not mean to say that every President has had occasion to take it.

But I do say that no President has ever disaffirmed his executive prerogative to remove; and wherever it has been challenged the President has always maintained what he believed to be the great mandate given to him.

But there is one quotation from a President so striking, and recalling events of such tragic memory, that I venture to say that if I read no other declaration of the many declarations of the Presidents (even up to and including the present President) which have asserted the President's prerogative in this matter, I should read this.

President Johnson, who had lived with Lincoln through the tragic days of the Civil War, took up the scepter of power which had fallen from the hand of the martyred President; and a hostile Congress attempted to put President Johnson in a strait-jacket by making it impossible for him to remove any officer, even his Cabinet; and then impeached him for removing a member of his own Cabinet. And this is what President Johnson said—and I think it will be his ample vindication for all time:

> The events of the last war furnished a practical confirmation of the wisdom of the Constitution as it has hitherto been maintained in many of its parts, including that which is now the subject of consideration—

namely, the tenure of office act.

> When the war broke out, rebel enemies, traitors, abettors, and sympathizers were

> found in every Department of the Government, as well in the civil service as in the land and naval military service. They were found in Congress and among the keepers of the Capitol; in foreign missions; in each and all the Executive Departments; in the judicial service; in the post office and among the agents for conducting Indian affairs. Upon probable suspicion they were promptly displaced by my predecessor—

Who? Abraham Lincoln. Did the men who impeached Andrew Johnson, led by Thaddeus Stevens, ever question Abraham Lincoln when he displaced men who he thought were plotting to destroy our Government?

> Upon probable suspicion they were promply displaced by my predecessor, so far as they held their offices under Executive authority, and their duties were confided to new and loyal successors. No complaints against that power or doubts of its wisdom were entertained in any quarter. I sincerely trust and believe that no such civil war is likely to occur again. I can not doubt, however, that in whatever form and on whatever occasion sedition can raise an effort to hinder or embarrass or defeat the legitimate action of this Government, whether by preventing the collection of revenue, or disturbing the public peace, or separating the States, or betraying the country to a foreign enemy, the power of removal from office by the Executive, as it has heretofore existed

and been practiced, will be found indispensable.

Can anybody challenge the force of that reasoning, as you apply it to the tragic episodes of the Civil War?

My friend, the distinguished Senator from Pennsylvania, had a little fun at the expense of my James Madison illustration. Let me supplement his retort to my original argument.

Let me say, before doing so, that James Madison lived to be a Cabinet officer and to be twice President of the United States; and he lived until some time after 1835. He witnessed the bitter attack of the great triumvirate of Senators upon Andrew Jackson, when, for the first time since the question was settled in the first Congress, in the hatred of Jackson the question arose whether the President could remove against the opposition of Congress. And old Madison, nearing eternity—he was far advanced in the eighties—thereupon wrote three letters that are in my brief, and which I unfortunately have not the time to read, in which he reaffirmed what he had said in 1789, and again said that not only was it a fair construction of the Constitution that the President's Executive prerogative of removal was beyond the control of Congress, but, in addition to that, as he argued, the unity of the system, the symmetry of the Constitution, the equipoise between the three great departments of the Government would be fatally shattered if the paramount power of Congress in

the creation of offices to prescribe any condition that it saw fit with respect to those offices was accepted as a true construction of the Constitution.

I was about, in a very amiable and not at all an offensive way, to reply to Senator Pepper's retort on my Madison illustration. The Senator regarded it as amusing that I should instance the fact that James Madison tardily discovered that he had a very incompetent Secretary of War—an aged officer who had apparently outlived his usefulness, namely, Armstrong. He had taken no steps to defend the Capital; he had left our gates open to the enemy. And unfortunately, after this Court was destroyed and the House of Representatives taken and the Capitol partly burned, and Madison was a fugitive and the Congress was a fugitive—that is important for the purposes of my reply—it was then that Mr. Madison removed Gen. Armstrong as Secretary of War. "And," says the Senator, "is that any argument for your position, when the Congress could have more effectively removed him?"

Suppose this law that we are now considering had applied at that day, and Madison, with the smoke rising from the ruins of the Capitol; with the country in such mortal peril that he could not even borrow $20,000,000 to save the country until old Stephen Girard of Philadelphia came forth and, with a sublime faith, took the whole loan—suppose that Mr. Madison should then have been unable to remove his Secretary of War until he

had the consent of the Senate, would there have been any improvement in the situation? The Senate could not be convened; they were in full flight. It would have been very difficult, in the panic that then raged in Washington, to have secured a quorum of that august body.

But assuming that the Senators could, in some convenient place other than the Capital—because the British were in control of the Capital—have met at some other place, and that thereupon the Senators had said, "Well, you may think Gen. Armstrong is an unfit Secretary of War; but we do not share your opinion; and before you remove Gen. Armstrong we would like very much to have you give us substantial reasons." And thereupon the President would say, "I told him to fortify Washington and he failed to do it."

In the meantime, while they were discussing the matter—and you can not discuss matters of that import in the midst of war—for all we know the country might have fallen into cureless ruin. And I think my Madison illustration was far from weakening my argument, and that on the contrary it strengthens it. For, while Madison may have been slack or injudicious in not sooner exercising his power of removal, the duty of summary removal remained just as important after the British had entered Washington as before.

Let me read the last of the three letters of Madison; because, coming as it did from him at that time, at the great eminence of his age, the words

have peculiar force; and they were spoken with reference to the great political struggle that was then in progress:

> The claims for the Senate of a share in the removal from office, and for the legislature an authority to regulate its tenure, have had powerful advocates. I must still think, however, that the text of the Constitution is best interpreted by reference to the tripartite theory of government to which practice has conformed, and which so long and uniform a practice would seem to have established.
>
> The face of the Constitution and the journalized proceedings of the Convention strongly indicate a partiality to that theory, then at its zenith of favor among the most distinguished commentators on the organizations of political power. * * *
>
> If the large States could be reconciled to an augmentation of power in the Senate, constructed and endowed as that branch of the Government is, a veto on removals from office would at all times be worse than inconvenient in its operation, and in party times might, by throwing the executive machinery out of gear, produce a calamitous interregnum.

Some weight must be given to the almost unbroken usage in this matter.

The first Congress of the United States, which one might almost call an adjourned session of the Constitutional Convention, so determined it. And

from that day until it was challenged in Jackson's time, a period of nearly half a century, there never was a question as to the power of the President, nor any attempt by Congress to regulate or curb it.

When that great controversy was determined in Jackson's favor—not merely by the continued adherence to the existing theory of government, but by the popular mandate of the people, that in the period of great financial distress first reelected him and then elected Van Buren, his residuary legatee or political heir—I say in both respects he had the support of the people.

And then the question never arose again until the "tenure of office" acts in President Johnson's administration, and these acts resulted—if I may use a pragmatical argument—in one of the most discreditable chapters in the history of this country. I do not believe, if those who participated in the impeachment of Andrew Johnson, could again come to life, that any of them would feel any pride in their conduct; and on the contrary, I believe that the great body of opinion of posterity would, without any hesitation, say that, with respect to the question now under consideration, President Johnson was right. Certainly, the Congress repealed all those laws, except this law, in 1876.

And now, more than a half century later, as a part of the "irrepressible conflict" between the Congress and the Executive Congress again raises the question in its most offensive form in the Comptroller General act, which President

Wilson vetoed on that ground, and which I am satisfied that President Harding would have been glad to veto if he could have separated it from the other provisions of the Budget Law, in whose welfare he had taken a very deep interest. I am very confident that President Harding's signing of the Budget Law was never intended to deny that which nearly all his predecessors—and all of his predecessors so far as they have ever made any public declaration on the subject—had consistently affirmed, namely, the inability of Congress to curb the power of the Executive to remove his own subordinates.

But Congress passed the law, not merely taking wholly from the President the power of removal, but making the office independent of the Executive Departments and putting it peculiarly under the tutelage of Congress.

I would repeat what I said at the beginning of my argument if it were not idle repetition, and I want to avoid that: That if this Court is prepared to sustain this law, then the door is opened, and an unlimited opportunity is given to Congress to strip the President of nearly every essential power.

If you take my middle ground, that Congress may guide and direct the discretion of the President by such statutory qualifications as are properly inherent, in the nature of an office, but without disturbing the power of removal as the Constitution vested it, Congress can not destroy the independence of the Executive.

But if you take Senator Pepper's view and that of his colleague, the power of Congress to put the President in a strait-jacket is unlimited.

This is a grave question. The men who framed the Constitution honestly believed that we could never succeed through a legislative despotism. I am quite willing to concede also that they believed that our nation could not endure an executive despotism. I am not contending for an executive absolutism; but I am protesting against a legislative absolutism.

The CHIEF JUSTICE. Mr. Beck, would it interrupt you for me to ask you to state specifically what your idea is in regard to the middle ground to which you referred? What kind of a method did you mean?

Mr. BECK. Well, I instanced one case, Mr. Chief Justice. I will now try to give two or three illustrations: Take, for example, the kind of law I first cited, a law that says that an office is created and that the President shall appoint somebody to the office, and that he shall be removable for inefficiency and dishonesty. That largely leaves the President's prerogative untouched.

The CHIEF JUSTICE. Do you mean that he still would retain the power of absolute removal without having any such cause as that mentioned in the statute?

Mr. BECK. Exactly. And he would apply the legislative standard that had been given to him, viz, whether the incumbent was inefficient or dishonest.

In other words, the execution of the law is left to him. All that Congress has done in that case is to prescribe a certain standard of the office; and if it be a legitimate ingredient and not merely the assumption of a power that is not authorized, I am not prepared to say that it would be unconstitutional.

Let me give another illustration that is far more to the point: Suppose the Congress creates an office and says that it shall only be filled by a man learned in the law; and suppose it further provides that, if a man ceases to be a member of the bar, he shall be removed. I think that can be reconciled with the Constitution: The office itself, by reason of its nature, may call for a man with legal qualifications. The Congress may be quite indisposed to create such an office if a layman were to be appointed to it. Therefore, it first limits the character of men from whom the President may select; he must be a lawyer. It then says, as a part of the tenure of office, that if he ceased to be a member of the bar, *ipso facto,* his tenure shall cease. Of course, they could abolish the office and provide for it in that way; but they might say that the President shall remove in that case. Now, I am not prepared to say that such a law can not be reconciled with the Constitution.

What I do say is that, when the condition imposed upon the creation of the office has no reasonable relation to the office; when it is not a legislative standard to be applied by the President, and is

not the declaration of qualifications, but is the creation of an appointing power other than the President, then Congress has crossed the dead line, for it has usurped the prerogative of the President. In vain does he have the power to remove if he can not remove without the advice and consent of the Senate. What he does have, if such a law is possible, is the power to nominate for removal; and only that is left of a prerogative which hitherto has distinguished an American President from "figurehead" Presidents.

Mr. Justice BRANDEIS. Has he not the power to suspend, and has that power been questioned?

Mr. BECK. No. And yet the power to suspend, within the interpretation of the Constitution, is only part of the power to remove. The suspension may be a temporary one or it may be a permanent one; but it is a part of the same power to determine who shall fill that office.

Mr. Justice BRANDEIS. Well, it seems to me that many of the dangers to which you call attention of such an interpretation of the Constitution could be met by the power of suspension by the President.

Mr. BECK. Do you mean until the Congress has acted?

Mr. Justice BRANDEIS. Well, either until Congress has acted or otherwise. From what I understand, the power of the President to suspend is not infrequently used?

Mr. BECK. Not infrequently; yes, sir. But the power to suspend is as much either a matter

of correct interpretation of the Constitution or a matter of implication from it as the power to remove. Can you distinguish between them?

You will recall that those who in the First Congress took the side against the President had two contentions: One was that the only way to remove an officer was by impeachment. And they had some slight sanction for that, because the Constitution said that all officers, from the President downward, could be removed by impeachment; therefore they argued that that was the only way. But no one contends now that impeachment is the only way; but all now agree that impeachment is only a paramount way of asserting the power of the people as against a negligent or a recalcitrant Executive if he fails to discharge his duties.

The other argument of those who took that side was that, whenever an officer was appointed by the President with the advice and consent of the Senate, in such case the removal must also be made with the advice and consent of the Senate.

Hamilton was of that view. He expressed himself to that effect in No. 77 of The Federalist. But Lord Acton says, in his review of Bryce's "American Commonwealth"—although I have not been able to verify it—that Hamilton recanted from that view. I find this slight confirmation of it, that in the edition of 1802 of the "Federalist Papers," which Senator Lodge says was revised by Hamilton, there is a foot note to the effect that Hamilton's statement is no longer a fair statement of the Con-

stitution, and that the concurrence of the Senate is not necessary to the President's power of removal.

At all events, there has never been since the first Congress a contention that, unless Congress affirmatively requires the consent of the Senate to a removal, the Senate concurrence is necessary. That has long since been settled by this Court, and by the unbroken practice of the Government. For there is not a day; there is hardly an hour, that the power is not exercised. It may be that while I am speaking the President is removing somebody; it is not at all unlikely that he is. And it has never been from the time of George Washington down to the possible removal at this instant by the President of some one of the 800,000 officeholders a contention that, unless Congress affirmatively confirms the power of the President he must go to the Senate and get its consent for the removal.

Mr. Justice SUTHERLAND. Your contention, as I understand it, is that Congress has authority to regulate or limit the power of removal, but it has no power to appropriate it?

Mr. BECK. Your Honor has stated my suggestion of a possible middle ground between two extreme theories more felicitously than I fear I have. I am not conceding that any impairment of the power of the President to remove is constitutional. I am only suggesting to the Court that in this case it is not necessary for you to decide the full scope of the power. In other words, you need not determine in this case whether Congress may not reasonably

regulate and control or guide the discretion of the President as to the act of removal, so long as it does not impair his essential power of removal. You do not have to decide that. It would be, in my judgment, unwise to decide it, for this reason: that if Congress passes a law such as I instanced before, that a man shall be removed for inefficiency and for dishonesty, and for no other cause, it might well be that the President would have the fullest justification for removing that man and yet neither of the statutory causes existed in the case. And I do not want to question any part of the great prerogative of the President by conceding, or by inviting this Court to say, that there is any power of control which would prevent the President, in a case properly within his discretion, from exercising the power of removal in the teeth of an act of Congress.

Mr. Justice SUTHERLAND. You might concede that without conceding the validity of the statute in this case.

Mr. BECK. Yes, sir, that is correct. Under this law there is no control or regulation; you have simply a bald, naked, unquestioned, indefensible usurpation of the power of the Executive—unless you are willing to say that the Executive has no such power except by the sufferance of Congress.

The CHIEF JUSTICE. Mr. Solicitor General, how much of a concession is it that you make? You may have some machinery in your mind by which you are going to work it out. But if you say that

Congress may provide reasons why a man shall be removed and the Executive may still retain the power to remove him absolutely, how much of a concession do you make? Is that a mere gesture by Congress or a mere suggestion of Congress?

Mr. BECK. Well, I apparently did not make myself clear to your Honor. I simply conceded the possibility (though it is not involved in this case) that the President might be controlled in the exercise of his power of removal by some legislative standard that naturally and properly inheres in the nature of the office. I recognize that as a possibility.

The CHIEF JUSTICE. How are you going to exercise that control and make it effective? What kind of a law would you suggest?

Mr. BECK. Well, I instanced the case of an office which could only be held by one learned in the law, and where the President is directed to remove the officer if he ceased to be a member of the bar. That is rather a far-fetched illustration, I admit.

The CHIEF JUSTICE. Well, how are you going to put that through? Will the auditors refuse to pay him?

Mr. BECK. Well, assuming the constitutionality of an act which, in prescribing such an ingredient of the office as affects and guides the President in the exercise of his right of removal, then it is to be presumed that the President would respect that law and be guided by the policy of the nation as declared by Congress. But if my friend answers——

Mr. Justice SANFORD (interposing). How would you have him treat that? Would he only treat it as a guide entitled to some consideration, but not as being controlling?

Mr. BECK. No; I did not mean that it might not have the force of a legal regulation. I do not concede that it can; but I simply said that it is a debatable question whether this Court in passing upon such a law, and holding in nice equipoise the respective powers of the President and Legislature, might say of a given regulation of the nature of an office, that that is not such an infringement of the essential power of removal as to be in violation of the Constitution.

Mr. Justice VAN DEVANTER. Your contention is that such a provision of law would be effective, in so far as your conception of the powers is concerned?

Mr. BECK. Yes, sir.

Mr. Justice STONE. Suppose Congress passed a law creating a board of commissioners, and provided that the members of that commission should not be engaged in any other activity, and made that a prohibition upon the officers: that would not enlarge or diminish the President's power of removal under your theory, would it?

Mr. BECK. No; not at all.

Mr. Justice STONE. It would suggest to him that the officer ought to be removed if he engaged in other activities?

Mr. BECK. Yes.

Mr. Justice STONE. Suppose he did engage in other activities: would that be a ground for impeaching him under the impeachment provision of the Constitution?

Mr. BECK. No; I should think not.

Mr. Justice STONE. Although he violates the provision of the statute?

Mr. BECK. Of course, that was the question involved in the Andrew Johnson impeachment. He violated an act of Congress which forbade him to remove a member of his own Cabinet. It is fair to say that the majority of the Senate voted for impeachment——

Mr. Justice STONE (interposing). That is a different question; that is as to the constitutional power. Now, a member of this commission that I instanced would not have the constitutional power to engage in any other activities?

Mr. BECK. But your Honor's proposition went further, and questioned whether, if the President refused to remove him for violation of an act of Congress, the President could be impeached.

Mr. Justice STONE. Oh, no—the officer himself; whether he could be impeached?

Mr. BECK. Oh, I thought your Honor meant whether the President could be impeached in that case. I think the officer clearly could be impeached.

Mr. Justice STONE. Well, does not that suggest the validity of your middle ground, namely, that it would be ground for impeachment if that was violated by the President?

Mr. BECK. Yes; in the case your Honor mentioned, the legislative standard, if I may call it so, is plainly created as an ingredient of the office; it is not a thing outside of the office.

Well, I have only five minutes left; and if I may I will close my argument in a very few words:

Suppose the Court sustains this law: You will have broken the uninterrupted flow of Constitutional development in this country for 136 years.

Suppose you refuse to sustain this law: You will have maintained that unbroken flow.

Senator Pepper says in his argument that the genius of our race requires that the last hope of the people shall be reposed in the legislative branch of the Government. I do not think the last hope is reposed in either the legislative branch or the Executive. The last hope of the American people is reposed in the Constitution of the United States, which has seen fit to divide the powers in such a way that neither of these three great departments can monopolize the powers of government.

I have no love for one-man power. I am inclined to think that the two greatest dangers in this country are, in the first place, what I call "nullification by indirection"; that is, the perversion of Federal powers to accomplish purposes that are beyond the purposes of the Federal Government, of which we have recently had abundant evidences in the legislation of recent years, and the other is the steady concentration of power in one man, which does threaten the equilibrium of the Government.

Aristotle said, 2,000 years ago, that no constitution would long endure unless it corresponded to what he called the *ethos* of the people, that is, the spirit of the people; and when it ceased to correspond to the spirit of the people, then it would not be the spirit of the people that would be broken; it would be the Constitution.

I believe that is everlastingly true. And I believe that one of the most sinister signs of the times, in all departments of life—social, political, and economic—is that there is a strong centripetal tendency, toward one-man power.

But see how wisely the Constitution preserves the equipoise; how it takes away from the President the temptation to remove any man without cause; because the moment he appoints a successor the Senate must be consulted.

Moreover, Congress has its power over the purse strings. Congress has the power of impeachment. Congress can abolish the office altogether. Congress can do anything except create an office upon conditions which change the fundamental nature of our Government. That is what it can not do; and that is what it has attempted to do in this law, unless I am very much mistaken.

Again I assert solemnly, that if it is within the power of Congress to create offices in such a way and by such methods as to constitute a redistribution of the powers of government, by transferring this executive power to Congress (which, being human, is also naturally ambitious and glad to have

a power superior to that of the President)—if such be the fact then the Constitution will sooner or later become, by Congressional usurpation, a mere house of cards.

Our form of government is a magnificent edifice to-day, erected by a hundred and thirty-six years of patient sacrifice and labor. It has its "cloud-capped towers"; its "gorgeous palaces"; its "solemn temples"—and this great Court is such a temple. But if the Court should sustain Senator Pepper's contention, this noble edifice of constitutional liberty might one day become an "insubstantial pageant faded," and Posterity might then say that it was not the work of supremely great men, but of muddled dreamers, for it would be of "such stuff as dreams are made of."

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