INDEX

AUTHORITIES CITED

36168—25——1

In the Supreme Court of the United States

OCTOBER TERM, 1924

LOIS P. MYERS, ADMINISTRATRIX of the estate of Frank S. Myers, deceased, appellant
v.
THE UNITED STATES
No. 77

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES ON REARGUMENT

STATEMENT

President Wilson appointed the appellant's decedent postmaster at Portland, Oregon, for four years from July 21, 1917. The Senate confirmed the appointment, which was made under the act of July 12, 1876, section 6 (19 Stat. 78, 80), which provides:

> 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. . . .

He was appointed a postmaster of the first class. The President, without taking the advice or having the consent of the Senate, removed him from office on January 31, 1920, but he refused to vacate his office until February 3, 1920, when a postal inspector was placed in charge thereof. He protested that his removal was contrary to law and that he was ready and willing to perform the duties of the office. The President subsequently appointed a successor at a time when the Senate was not in session. The Senate, however, did not at any time during the period for which he had been appointed ratify the action of the President in removing him or confirm the appointment of his successor.

The postmaster had no other occupation during the entire term and drew no salary or compensation from any other service. By a petition filed in April, 1921, and a supplemental petition filed in February, 1922, he brought suit for $8,838.71, the amount of salary to which he would have been entitled if he had continued to serve as postmaster for the remainder of the term for which he was appointed.

The Court of Claims decided that his delay in bringing this action was fatal to any recovery and dismissed his petition. He thereupon took this appeal. Upon his death his administratrix was substituted as party appellant.

The case was set for argument on November 17, 1924. Briefs were filed by both sides, but appel-

lant's counsel did not appear but submitted the case on his brief. On suggestion of the Solicitor General, the case was reassigned for argument on December 5, 1924. On that day appellant again submitted the case on his brief and the Solicitor General made a brief statement and oral argument. On January 5, 1925, the court restored the case to the docket for reargument, and subsequently invited the Hon. George Wharton Pepper, senior Senator from Pennsylvania, to make an argument as *amicus curiæ* in behalf of Congress.

At the former argument I suggested, but did not press with confidence, the contentions that the appellant had been guilty of laches and that the statute need not be interpreted as designed to restrain the President from removing the postmaster. I assume that the Court has not been impressed with either of these suggestions, and I am frank to say—but without technically confessing error—that neither of them seems to me tenable.

In this substitute brief, therefore, I shall consider only the question of constitutional power, and few more important cases have been argued in recent years in this court.

ARGUMENT

I

The nature of the question

The question in this case is of profound importance. The principle is of the very foundation of our Government.

It affects vitally the distribution of powers which the Constitution attempted to ensure, for it involves the independence of the executive. If the President, in discharging his executive duties, can not remove any member of the large civil establishment of the United States without the concurrent action of the Senate, then, instead of having one executive head, as the Framers of the Constitution clearly contemplated, the Government would have, in the primary necessity of selecting and removing the servants of the Nation, a many-headed executive.

To the alternative suggestion, that unless Congress can thus control the power of removal, that it, in turn, will become the subordinate of the President, I reply that the independence of Congress is safeguarded in the matter of the civil establishment of the Government by requiring the President, in the selection of all the higher offices of the state, to have the " advice and consent " of the Senate; and as to inferior offices the Constitution authorizes Congress to vest the power of appointment in the heads of Departments or the courts of law, and, in so doing, Congress can undoubtedly prescribe, in respect to the heads of Departments or the courts of law, the conditions under which they may remove their appointees. Their power is a *statutory* right, whereas the power of the President to appoint and remove the higher officials of the state

is his prerogative by virtue of the Constitution, and can not therefore be impaired by Congress, except as the Constitution itself may have authorized Congress to regulate either appointments or removals.

This power to delegate the right of appointment to the heads of Departments or the courts of law does not affect the constitutional power of the President to see that the laws are faithfully executed, and to this end to remove his subordinates in the executive department who aid him in the discharge of this executive duty.

If the President can not do this, and remove officials, however unfit or unworthy they may prove to be, without the consent of Congress, then the President has neither the independence nor the power which has hitherto been attributed to his great office and which has given to the Government its efficiency and stability.

Either the President, as a part of his " executive power " and because of his responsibility to see that the laws are faithfully executed, may remove his subordinates in the executive department, or Congress may take over the control of the whole civil service of the United States by making it impossible for the President to remove anyone except with its consent. It may in that event wholly refuse such consent and confer a life tenure upon all officials. In such event, the President is deprived of one of his greatest powers, and is impotent to see that the laws are faithfully executed.

Thus, Congress might provide that the President could not remove any executive official unless with the advice and consent either of two-thirds of the Senate or such committee or individual that it may designate as its representative in the matter of removal. If Congress should provide that the President should never remove any executive official except with the concurrence of the Vice President of the Senate and the Speaker of the House as the representatives of Congress, then we would, for many practical purposes, have a triumvirate of executive power, with all the probable consequences that attended a like attempt to divide executive power in ancient Rome and in France after the Revolution.

The Framers of the Constitution wisely rejected a triple-headed executive, but their purpose would be defeated if the President—responsible as he is for the actions of the civil servants of the state—could not remove one of them without obtaining the concurrence of the representatives either of Congress or of their delegated representatives.

II

The question in its narrower aspects

In limine, I stress the point that it may not be necessary in the instant case to determine the broader aspects of this important question, for the statute under consideration can be held unconstitutional without assuming the absolute power of the President to remove any executive officer.

Congress alone has power to create an office. The President's power to appoint is not exercised until Congress has created the office. Congress may abolish the office just as it may create it. Abolishing an office is no more an interference with the President's power of removal than is refusal to create the office an interference with his power to appoint. So Congress may, in creating the office, limit the duration of the term thereof. That is no more an interference with the President's power of removal than would be a refusal to create the office in the first place.

But when Congress provides that the President may not remove except with concurrence of the Senate (that is, that the incumbent shall hold the office during the pleasure of the Senate), such an act does not prescribe qualifications nor enact conditions to be deemed sufficient for removal. It does not create an office, abolish one, nor limit the duration thereof. *It takes from the President a part of his constitutional power and divides it with the Senate.*

Take, for example, a statute which would provide that a postmaster should be removed for inefficiency or dishonesty, or that he should *not* be removed *except* for inefficiency or dishonesty.

The first statute could probably be reconciled with the Constitution. It is a declaration of public policy and prescribes a standard of service.

The second statute would be of very doubtful constitutionality, for it deprives the President of the power of removal for any other cause than inefficiency or dishonesty.

I can, however, concede, *arguendo,* that each of these statutes could be reconciled with the Constitution, for each simply prescribes a legislative standard and defines a public policy in respect to the qualifications of appointment and the causes of removal, and leaves to the President the executive function of applying the standard in the administration of the executive department. As he determines whether the incumbent has been either inefficient or dishonest, his executive function, while to some extent restricted (especially in the second act), nevertheless remains.

A very different question, however, is present in the instant case, where no legislative standard is prescribed and no general policy laid down, except that the President may not exercise his executive function of removal except with the consent of the Senate.

This necessarily associates the Senate with the President in the exercise of a purely executive function. Such a law does not regulate the power of removal. It asserts a right to exercise it. It differs, *toto caelo,* from the two imaginary statutes which I have cited for the purposes of illustration.

Hitherto it has been assumed in the discussion of this question that there is no middle ground between the *absolute* power of the President to remove and the *absolute* power of the Congress to control the right of removal. The illustrations that I have given suggest that there may be a middle ground, and that the power of removal may be subject to such general laws as do not destroy the exercise by the President of his power of removal, and which leaves to him the exercise of the power subject to such general laws as may fairly measure the standard of public service.

Whether this middle ground exists need not be decided in this case, for the law now under consideration simply asserts an unqualified right of the Senate to participate in the executive function of removal.

Such a law is not the declaration of a legislative policy. It is a redistribution of the powers of government.

It is therefore condemned by the Constitution unless it can be assumed that the power of removal is not an executive function, was never granted to the President, but is an essential part of the legislative power.

Such an assumption is utterly untenable. It finds no sanction either in the letter of the Constitution, in the history of its development, or in the interpretation of the judiciary. Whatever else is debatable in this matter, it is beyond controversy

that the power to remove is an executive function, and that it has been vested in the President under the grant of " executive power " and as a necessary incident to his duty to " take care that the laws be faithfully executed."

It is not an implication, but a just interpretation of the powers thus granted to the President and the duties thus imposed upon him.

If this " middle ground " interpretation of the Constitution does not commend itself to the Court, then the broader question, which I took on the first argument of this case again confronts the Court, which must then consider whether the power of removal is a constitutional prerogative of the President and, as such, can not be regulated by Congress.

On this theory, Congress may undoubtedly control the power to regulate the removal, when exercised *by any other official,* to whom the power of appointment has been delegated (for they owe their power of appointment solely to Congress), and unquestionably the Congress can grant to other officials—such as the heads of departments—the power of appointment upon any conditions as to the power of removal by them that it thinks proper.

The power of the President, however, is not *statutory,* but *constitutional.* This was the view that was taken in the First Congress by Madison and others, and it is the view that has been generally taken by the successive Presidents of the

United States when this prerogative was challenged by Congress. There is much force in the suggestion that in grave crises it might be vital to the very existence of the Republic that the President should have this power to remove any executive officer when he deemed it essential to the safety of the state.

I repeat that, for the purposes of the instant case, it is not important to the Government which of the two theories of the President's power this Court may take; for in either case this statute stands condemned, as it prescribes no legislative standard, but simply assumes the right of Congress to participate with the President in the executive power of removal.

Let me now discuss the question in the light of the text of the Constitution; and, in the first place, it seems desirable to consider the historic background of that document.

III

The historic background

The grave defect of the Articles of Confederation, which led to the present Constitution, was the concentration of legislative, executive, and judicial power in the Congress. While Congress had a president, the country had no executive. Congress made the laws, tried to execute them, and where judicial power was required it exercised it through

its own committees. The result was the great tragedy of American history. The government of the Revolution was a headless and impotent government, and destroyed Washington's plans and nearly broke his spirit. He himself was but the mere agent of Congress, as the General of its Armies, and was wholly dependent upon its action. The result was the tragedy of Valley Forge, when his army starved in a land of plenty, simply because of the impotence of a headless government.

Probably it was this disastrous chapter in the epic of our Nation that caused the Framers of the Constitution to attach so much weight to Montesquieu's doctrine, which said:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.

They decided, in obedience to Montesquieu's doctrine, to distribute the powers of government into three departments, and the very form of the Constitution, with its separate chapters on the legislative, executive, and judicial branches of the government, evidences that intent.

They did not, however, share the illusion of Montesquieu that each of the three departments could be so completely independent of each other that each should discharge its several functions without respect to the other. The Framers were not empiricists, but very practical men; and they had a clear idea that if the Government was to function

efficiently there must be cooperation between the different departments.

Therefore, the Framers undoubtedly did provide for a system of checks and balances, whereby each department—while not wholly independent of the others, but to some extent dependent upon the others—should have sufficient independent power to preserve its own prestige. They never intended that the new government should so far return to the errors of the Articles of Confederation as to make either the legislature the mere creature of the executive or the executive the mere creature of the legislature. What they tried to do, and what they did do with surpassing wisdom, was to provide a system of cooperation between the departments which would give the government a certain unity and yet preserve to each department sufficient independence that it would not weakly become the mere vassal of the other.

Thus, the judiciary was safeguarded by a system of life tenures and by the inability to change the compensation of a judge during his term of office.

Again, the legislature, while subject to the veto of the President, yet could pass a law over the executive veto by a two-thirds vote.

Again, the Congress, while having no power to control the operations of the executive government, yet had a modified control of appointments to the

36168—25——2

higher offices of the state through the requirement of confirmation by the Senate.

Above all, the Framers desired, in order to cure the conditions of anarchy that then prevailed, to create a powerful executive who would not be the mere vassal of Congress. They never intended that the executive functions of government should be vested in Congress. Its power was to be largely legislative. The execution of the laws, enacted under specific grants of power, was given to a different department of the government, and that department was intended to be free from the control of the legislature in executive matters, except to the extent that the Constitution itself provided, as in the concurrence of the Senate in the appointment of higher officials and in the ratification of treaties.

John Adams clearly recognized this when he wrote in 1787:

> If there is one certain truth to be collected from the history of all ages, it is this: That the people's rights and liberties, and the democratic mixture in a constitution, can never be preserved without a strong executive, or, in other words, without separating the executive power from the legislature.

As it is indisputable that the removal of a civil servant is essentially an executive power, it must follow that, as executive power is vested in a President, the power of removal inheres in him as a part

of his prerogative, except where such power is expressly limited by the Constitution.

The President's right of removal is not, as has been so often said, a mere matter of implication, although, if it rested upon implication, no implication is more necessary and none has had a more sustained recognition than the principle that the right to appoint carries with it the right to remove.

IV

The text of the Constitution

I assert that the President's right of removal is not an implication of the Constitution, but a fair interpretation of its language. It is true that the word "removal" rarely occurs in the Constitution. It is referred to in Article I, Section 3, Clause 7, as a part of the punishment which follows a successful impeachment, and in Article II, Section 1. Clause 5, provision is made for succession in the event of the removal of a President from office. The nearest approach to a direct provision with respect to removal is Article II, Section 4:

> The President, Vice President, and all civil Officers of the United States, shall be removed from Office on impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

If it were a question of first impression, it might be argued, as indeed it was argued at the beginning of the Government, when it first became necessary to interpret the Constitution, that this contained an implication that, except by impeachment and for

the causes mentioned, there could be no removal of the President, Vice President, or any civil officer of the United States; but as the power of removal has been exercised by the President without challenge from the very beginning of the Government, and as the machinery of government could not function without such power of removal, it cannot now be seriously contended that the removal by the President of civil officers, who are his subordinates, must await the slow process of impeachment. The impeachment power was a parliamentary corrective, when the President failed to execute the laws by himself removing unfaithful officials.

No one now contends that the President has not the power to remove. From the beginning of the Government it has been recognized as essentially an executive function. In no sense is it either judicial or legislative.

The only question, therefore, is whether Congress by reason of its *legislative* power can control the exercise by the President of his *executive* power of removal; and that power of removal, as I have said, does not depend upon any implication of the Constitution but upon the well-considered delegation of powers in the Constitution itself.

My argument, therefore, will be based upon this fundamental premise—that the President's supervision of the executive branch of the Government, through the necessary power of removal, has always been recognized, and is now recognized, alike by considerations of necessity and the theory

of government as an executive power, and is clearly indicated in the text of the Constitution, even though the power of removal is not expressly granted. In this respect, it is not peculiar. A cursory examination of the constitutions of many modern states discloses that, with one or possibly two exceptions, no power of removal is expressly given and that it is invariably treated by necessary implication as a function of the executive. All modern forms of government recognize this trinity of powers—the legislative, the executive and the judicial; and invariably the power to remove is accepted as a necessary incident to the power to appoint.

While this Court has never found it necessary to determine the question, now again presented to it, as to whether the legislative power can control or restrict the executive power to remove, yet it has often recognized—and it may be therefore accepted as an unquestioned premise to this argument—*that the power to remove is a necessary incident to the power to appoint, and that it is an executive power.*

The burden is therefore upon the appellant to satisfy this Court that under the Constitution a power has been vested in Congress to regulate and control the *executive* power of removal, for unless the Constitution can be fairly interpreted as requiring the same concurrence of the Senate in the executive power to *remove* as in the executive power to *appoint,* then Congress is without power to participate in what is conceded by an *executive*

function, except possibly to the extent indicated in my "middle ground" theory. (*Ante,* pp. 6–11.)

Let me now trace the development of the Constitution in this respect.

The debates in the Constitutional Convention throw little light on the subject. If we can trust Mr. Madison's transcript, then the question of the power of *removal* was little discussed in the Constitutional Convention, and only in reference to a possible removal of the President and of the judges. There was an obvious reason why the power should be discussed in respect to these offices, for obviously the President could not remove himself under his general power of removal; and as to the judges the constitutional provision that they should serve during good behavior—*i. e.,* for life—required some special provision for the removal of an unfaithful judge. As to these the debates turned largely upon the method of removal. Some favored it by the action of the Congress, and some by the concurrent action of the States.

While the Framers finally decided upon the method of impeachment, the adoption of this method does not carry with it the implication that all the lesser officers of the state were only removable by impeachment. There is no reason to believe that the Framers were enamored of those slow and painful processes. A year before they met the impeachment of Warren Hastings had been decided upon, and, as this impeachment ran for nine years before there was a final result, the method of im-

peachment would have impressed the generation that witnessed with amazement the proceedings in Westminster Hall as a very inadequate method of promoting efficient government.

With these exceptions, the Convention of 1787, while it seemed to discuss nearly every governmental topic, for some reason gave little consideration to the power of removal. It is true that Gouverneur Morris made a proposal that the Constitution should itself create the heads of departments—that we now call the Cabinet—and they, too, under his plan, were to be removable by impeachment. The Convention voted down this proposition and wisely left the creation of the great departments of the executive to the Congress.

So also when Dickinson proposed to add to the provision that judges should hold their offices during good behavior the qualification that they might "be removed by the executive on the application of the Senate and House of Representatives," Morris, Wilson, and others took the position that judges should not be removed without trial, and Dickinson's motion was voted down almost unanimously, Connecticut alone supporting it.

In this silence as to the power of removal of other officers there is no implication that the power was not recognized. Nothing can be clearer than that they must have taken into account the necessity of removing faithless or inefficient public servants.

There seems to be but one explanation for the failure of the Convention to discuss this question

(except in respect to the President and the judges), and that is that they regarded it as axiomatic that the power to remove was an executive power and that it was included within the grant of "executive power" to the President and the special grant that he should "take care that the laws be faithfully executed." To argue that their silence meant that Congress should determine the conditions of removal would mean that in one of the most important functions of the state the executive power remained in Congress and was not granted to the President.

The Virginia Plan provided:

> 7. *Resolved,* that a National Executive be instituted; to be chosen by the National Legislature for the term of * * * years; to receive punctually, at stated times, a fixed compensation for the services rendered, in which no increase or dimunition shall be made, so as to affect the magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the national laws, *it ought to enjoy the executive rights vested in Congress by the Confederation.*

The italicized portion will be noted, for, under the Articles of Confederation, the Congress had the power of removal, but the Virginia Plan contemplated the transfer of such "executive rights" to the national executive.

The Virginia Plan was the Constitution in embryo. That constitution, as finally developed by the Committee on Style, commenced with three separate articles, which were intended to carry out the division of powers, then so generally recognized, and which Montesquieu regarded as essential to liberty. Article I dealt with the legislative power. Article II dealt with the executive power. Article III dealt with the judicial power.

The various powers respectively assigned to each of the trinity were classified with admirable precision in these three Articles; and the attempt to keep them separate and distinct, except in so far as the Constitution expressly interblended them, is clear. There is, however, a very significant difference between the first sections of Article I and Article II, respectively.

Article I, Section 1, provides:

> All legislative Powers *herein granted* shall be vested in a Congress of the United States.

It was therefore not the legislative power as theretofore understood in the science of government that was vested in the Congress, for the wise Framers well knew that legislative power had been theretofore so vaguely interpreted as to include many executive powers. Therefore, they did not delegate to Congress the legislative power, but the "legislative powers *herein granted;*" and the powers that followed in the nine succeeding sections are all of them purely legislative, and in none

of them is there a suggestion of the power to remove the civil servants of the State.

Section 1 of Article II is, however, differently phrased. It provides:

> The executive Power shall be vested in a President of the United States of America.

It does not use the words "herein granted," nor does it speak of a class of powers as the preceding section, but it speaks of the "executive power"; and the executive power, as understood at that time in the science of government, always included both the power to appoint and the power to remove.

It is, moreover, noteworthy that the Virginia Plan was so far modified that it did not vest the executive power in a "National Executive," which might mean a mere body of men, but it specifically vested it in a single servant of the state—the chief of those servants, whom it called the President of the United States. While the Framers had no intention of creating a king, yet they intended that the chief servant of the state should have some of the powers of a king, and the chief of those powers was the control of the civil establishment of the state. They intended to safeguard his independence, for they gave to him a fixed tenure of office and provided that his compensation should not be diminished during that period.

What was the nature of this "executive power"? They did not attempt to specify the various kinds

of executive power, as they had done in respect to the legislative. Remembering the impotence of the Confederation because of its lack of an executive, they desired to give to the President the fullest "executive power," except where they limited it; but, without defining, they indicated the nature of that power by several sweeping phrases. Upon him was the great obligation to "take care that the laws be faithfully executed" and he "shall commission all the officers of the United States." Thus the human agencies that he would necessarily employ for that purpose were left largely to his discretion, and it is significant that it was the President who should "commission all the officers of the United States."

Too little attention, I submit, has been given to this section of the Constitution. (Article II, section 3.) So far as I can discover, it has rarely been referred to in the discussion of this question.

What was the significance of the power to commission? The Constitution never descends to unnecessary details, and unless the power to commission had some special significance, it is difficult to understand why the Constitution should have especially referred to a mere detail of executive power, such as the formal evidence of an official's title. I am persuaded that the power to grant commissions had a much greater significance.

It was said by this Court in the very recent case of *Ex parte Grossman* (decided Mar. 2, 1925):

> The language of the Constitution can not be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Convention of the thirteen States were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary.

What, then, was the significance of the word "commission" to them? To grant a commission was a prerogative of the Executive, which in England was called the "Crown," as distinguished from the legislature. A few years before the Constitution was framed, England had passed through an important constitutional crisis. In December, 1783, the King removed his ministers, of whom Fox was the Premier, although his ministers had the support of the House of Commons. His right to do so was challenged, and a debate of great vigor followed. The King, however, carried his point by removing Fox and appointing the younger Pitt. This was on the theory that the Crown was the fountain head of executive power and the ministers were the representatives of the Crown. Every officer of the state in England at that time received his commission directly or indirectly from the King. He did not receive his commission from Parliament.

Is it not reasonable to suppose that the Framers of the Constitution, in authorizing the President to

nominate and to commission, so far imitated the British model as to vest the power in the executive branch of the government, although they also departed from the model by the requirement that the Senate should consent to the appointment? Having thus consented, the function of the Senate had ended, and, by virtue of this clause of the Constitution, the commission of every high Federal official comes to him not from Congress, which created the office, but from the President. The commission recites that the President " reposing special trust and confidence " does appoint ——— and " authorizes and empowers ——— to execute and fulfill the duties of the office." This is something more than a clerical detail; and, reading it in connection with the British theory that the executive and not the legislature was the fountain head of political preferment, it means that it is the President that commissions. This is further shown by the fact that, even after the Senate has consented to the apportionment, the President may still refuse to deliver the commission and invite the Senate to concur in another selection. It is the President's " special trust and confidence " which is the motive of the appointment, and when that ceases it is therefore the President who removes.

Moreover, the Constitution required the President to take the following oath on assuming his duties:

> I do solemnly swear (or affirm) that I will faithfully execute the Office of President of

> the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.

To this end, by Section 2, it was provided that:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.

If Congress can require the concurrence of the Senate in the removal of officers of the Army and the Navy as against the President's power of removal, then the President's power as Commander in Chief of the Army and the Navy is potentially as weak as was that of Washington when he commanded the American Army, between 1775–1781, and the officers and soldiers of the States came and went at the pleasure of those States.

In three respects only did the Constitution limit the executive power of the President, and these were respects in which the wise Framers declined to follow the empiricism of Montesquieu and his followers. They were not prepared to make the President a king, and they had no illusions that a king would be less a king because he was called a President.

The first of these exceptions to the executive power was the declaration of war. That had always been the prerogative of the crowned executive. The Constitution, however, provided that only Congress could declare war.

Only secondary in importance was the great question of international relations, for the Framers were quite unwilling that the President could pledge the faith and hazard the man power of the nation by making on his own responsibility treaties of offense or defense with other nations. For this reason, while giving him the power to negotiate treaties, the advice and consent of the Senate were required.

Then follows the third and most pertinent clause to this controversy:

> and he shall *nominate,* and by and with the Advice and Consent of the Senate, shall *appoint* Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, 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.

In the Constitution no word is ever wasted or used for an idle purpose. Thus a clear distinction is made between the *nomination* of a public official, his *appointment,* and *commission.* Three stages, in only one of which does the Senate participate.

To nominate is to select. It is to determine who is the best man for a given position. It is to determine this question—having in mind many conflicting considerations of time and circumstance.

Upon the Congress there is no duty of selection, even though it creates the office which is to be filled and defines the scope and limits of that office. When, however, the office is created by law, *legislative* power ceases, and it then becomes the power of the *executive* to determine, in faithfully executing the laws and defending the Constitution, who is the best citizen to be selected for that office.

Charged with the responsibility to the people for such faithful execution of the laws, the President must have the power to select the human agencies through whom he discharges these duties, if he is to meet the responsibility.

Therefore, the Congress has no power to participate in the work of nomination or selection. That is not its concern. Its function does not begin until the President has, as a part of his executive power, made a selection of the right man for a given position.

Then, however, follows the only limitation upon his executive power of selection. He cannot appoint the higher officers of the State until he has first obtained the advice and consent of the Senate. Here is unquestionably an important restriction upon his power, which has had a profound influence upon the whole course of American history; and it would be difficult to say whether that influence has been more of a good than an evil. However, whether wise or unwise, the restriction is there; but the restriction, being an exception to a general

grant, must be limited to the fair meaning of the words used.

Nowhere is there a suggestion that the President's power to *remove,* which the Constitution takes for granted as a part of the executive power, must likewise be effected with the advice and consent of the Senate. *To justify this exception, it is necessary to read words into the Constitution which are not there.* To justify such a contention, the clause should read that the President "shall nominate, and (*from time to time remove*) by and with the advice and consent of the Senate," etc. The failure to insert the italicized words is most significant.

It can not be argued that the Framers of the Constitution did not take into account the possibility that removals would be necessary. Where they intended a servant of the State to have a life tenure they said so. Only judicial officers were thus to serve. They knew that the President would necessarily discharge his duties through many civil servants. They knew that the success or failure of his work would depend upon the character of those servants. They knew that humanity was very fallible; that men could be dishonest, inefficient, disloyal, and even treasonable. They knew that it might be a matter of life and death to the Nation that a dishonest, inefficient and disloyal officer should be removed—*and summarily removed.*

36168—25——3

The men who framed the Constitution were the men who fought the Revolution, and they could not have been unconscious of the treachery of a Benedict Arnold and the cabals of a Charles Lee. Moreover, they knew that Congress would generally not be in session, for it was not an easy thing at the beginning of the Nation for men to travel from the different States to the seat of Government. Congress was in session only a small part of the year. During the rest of the time the functions of the Government depended upon the President.

Unless we are to assume that the Framers of the Constitution were mere muddled dreamers, we must impute to them a full consciousness that, in the great experiment upon which they were entering, many unfortunate selections would be made that would require removals. They were treading unbeaten paths. The very form of the Government was a great experiment. It all depended upon the wisdom of those who should conduct its operations; and as no one in 1787 could have had any practical experience with the workings of a new Government of an unprecedented character, it is quite obvious that they must have recognized that the selection of civil servants would inevitably be attended by many errors in judgment.

With all this in mind, it seems inconceivable that they could have intended that no officer should be removed except with the consent of the Congress—often not in session—or that their careful restriction of the senatorial power of confirmation to the

appointment of public servants should apply also to the very different question of a *removal* of those servants.

There was substantial reason why they should thus qualify the power of appointment, for intercommunication between the constituent States was very inconsiderable; and if the patronage of the Government was to be distributed, no President would have the local knowledge to select the men from various localities. Therefore, the appointment, after nomination, was to be made with the advice and consent of the Senate. When, however, with such concurrence, the appointment was made, the official then became a subordinate of the President.

The greater work of the State, even in those days of simplicity, the President could only do through these human agencies. Therefore, the President became the best judge as to whether the retention of an official was in the interests of the public service. No local knowledge was essential for that purpose, because while his original selection had been made with reference to the knowledge of his locality, the extent to which he had faithfully executed his duties was a matter peculiarly within the observance of the President and for which the President was himself responsible.

Therefore they were very careful not to qualify the power of removal by requiring the concurrence of the Senate.

Indeed, the very word "nominate" in itself comprehends the power of removal. *Nomination is selection.* Upon the President is a duty to see that every office in the State is filled by the best man for that office. That duty is always with him.

Often he can not thus select or nominate a man as the best man for a given position until there is a vacancy, and at times there can be no vacancy unless the incumbent of the office is first removed. Therefore, it is a clear essential to the power to nominate to have the power to remove; and therefore when he is given this broad and sweeping power to select the servants of the State, it carries with it the right to substitute for one officer another officer who is better qualified, and this power of substitution necessarily includes the power of removal.

That is the practical construction of the Constitution, justified by the common experience of mankind, essential to the effective working of the Government, and can not be denied unless the language of the Constitution clearly makes such construction impossible.

As I have said, there is not a line in the Constitution that suggests that the executive function of removal is dependent upon the consent of Congress, unless it be the broad delegation of "all legislative powers *herein granted;*" and when we come to the specific grant of the powers none can be found which expressly vests in Congress the right to determine when the servants of the State shall be removed.

There remains, however, the final clause, which, if it stood alone, would justify the implication of the President's power to remove; for Article II, Section 3, provides that the President "shall take care that the laws be faithfully executed." If he fail in this duty, he may be impeached. Apart from impeachment, the people may refuse to give him another term of office. His reputation is vitally concerned in the ability to do those things which this grave responsibility requires.

It would be a cruel injustice to the President, to express it mildly, to hold him responsible for the faithful execution of the laws, if he has no control over the human agencies whom he must, of necessity, employ for this purpose.

He is responsible that a General in the field shall wisely conduct operations in time of war, but if that officer proves himself inefficient or disloyal, the President cannot meet his responsibility unless in the crisis of a war he can remove an inefficient or disloyal General.

He must see that the fiscal operations of the Government are faithfully conducted. If a Treasury official robs the United States, the President can only be responsible, if he has the power to remove the delinquent official. If he has no such power, he can have no such responsibility.

If he has no such responsibility, then it is not his function to see that the laws are faithfully executed, but it is the function of Congress and responsibility is upon them.

The Constitution directly negatives the idea that any such responsibility is on Congress. The Constitution does not say that Congress shall take care that the laws be faithfully executed, but that the President shall. Can it be questioned that it would be a grave perversion of the meaning of the Constitution to charge the President with the duty and the responsibility of executing the laws of Congress and at the same time make it possible for Congress to maintain in office men whom the President believes, and may have reason to believe, are either inefficient, dishonest, or disloyal?

The question carries with it its own answer.

V

History of question reviewed in Parsons v. United States

While this Court has not expressly or directly decided this great and vital question, it gave careful consideration to it in *Parsons* v. *United States,* 167 U. S. 324. In that case the actual decision was that Congress had not *intended* to limit the power of the President to remove district attorneys. The Court, however, devoted a number of pages of its opinion to a review of the constitutional history of the President's power of removal.

The Court pointed out that on May 19, 1789, Madison moved in the House of Representatives—

> That it is the opinion of this committee that there shall be established an executive department, to be denominated the department of foreign affairs; at the head of which

> there shall be an officer to be called the secretary of the department of foreign affairs, who shall be appointed by the President by and with the advice and consent of the Senate; and to be removable by the President.

Subsequently a bill was introduced embodying these provisions. Then ensued a debate which lasted in the House from June 16 to June 22 and in the Senate from July 14 to July 18, and all arguments that could be thought of by men—many of whom had been instrumental in the preparation and adoption of the Constitution—were brought forward in favor of or against that construction of the instrument which reposed in the President alone the power to remove from office.

As the Court pointed out—

> The House refused to adopt the motion which had been made to strike out the words "to be removed from office by the President," but subsequently the bill was amended by inserting a provision that there should be a clerk to be appointed by the secretary, etc., and that said clerk, "whenever said principal officer shall be removed from office by the President of the United States, or in any other case of a vacancy," shall be the custodian of the records, etc., and thereupon the first clause, "that the secretary should be removable from office by the President," was stricken out, but it was on the well-understood ground that the amendment sufficiently embodied the construction of the Constitu-

> tion given to it by Mr. Madison and those who agreed with him, and that it was at the same time free from the objection to the clause so stricken out that it was itself susceptible to the objection of undertaking to confer upon the President a power which before he had not. The bill so amended was sent to the Senate and was finally passed after a long and able debate by that body, without any amendments on this particular subject. The Senate was, however, equally divided upon it, and the question was decided in favor of the bill by the casting vote of Mr. Adams, as Vice President.

This Court in the *Parsons case* referred to the fact that many distinguished lawyers originally had very different opinions upon this subject, but when the question was alluded to in after years they recognized that the declaration of Congress in 1789, and the universal practice of the Government under it, had settled the question. For example, when Congress debated the removal of the deposits of the Government from the Bank of the United States by direction of President Jackson and his dismissal of Secretary Duane as a means to accomplish that purpose, Webster admitted that the President had the power to remove, saying, "I regard it as a settled point, settled by construction, settled by precedent, settled by the practice of the Government, settled by legislation." He sought only to interpose a moral restraint upon

the President, in requiring him, when he removed from office, to assign the reasons of the removal.[1]

The Court cited numerous opinions of Attorneys General sustaining the President's power of removal and then took up the dictum in *Marbury* v. *Madison,* 1 Cranch, 137, 162, that the President could not revoke the commission of a justice of the peace in the District of Columbia, and explained it by calling attention to the peculiar relation and plenary power of Congress to the District of Columbia and the Territories. It added:

> The view that the President had no power of removal in other cases outside of the District, as has been seen, is one that had never been taken by the Executive Department of the Government, nor even by Congress, prior to 1867, when the first tenure of office act was passed. Up to that time the constant practice of the Government was the other way, and in entire accord with the construction of the Constitution arrived at by Congress in 1789.

The Court pointed out that this explanation of the *dictum* in *Marbury* v. *Madison* was made in *McAllister* v. *United States,* 141 U. S. 174. In the latter case the Court decided that Congress could authorize the President to remove a territorial judge,

[1] Webster's speech appears in Gales & Seaton's Register of Debates in Congress, XI, part 1, 458–470, especially 461, reprinted in Webster's Works, IV, 178–199, especially 185. In candor, it must be conceded that Webster later claimed that Congress possessed power to reverse the decision of 1789, although he did not then urge Congress to do so. Debates, 468, Works, 196

since the authority of Congress over judges within the Territories is different from its authority over federal judges in general; and the Court showed that there was no inconsistency between this decision and the *dictum* in *Marbury* v. *Madison,* for in the *McAllister case* it recognized the complete authority which Congress possesses over territorial offices in virtue of " those general powers which that body possesses over the Territories of the United States," just as *Marbury* v. *Madison* was a recognition of the power of Congress over the term of office of a justice of peace for the District of Columbia. As the Court pointed out in the *Parsons case,* the *McAllister case*—

> contains nothing in opposition to the contention as to the practical construction that had been given to the Constitution by Congress in 1789 and by the Government generally since that time and up to the act of 1867.

The Court might also have distinguished the *Marbury* and *McAllister cases* upon the ground that the positions there involved were not executive positions, and it might have called attention to the attitude taken by Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 399, toward the *dicta* in *Marbury* v. *Madison.*

Again turning to the legislative history of the question, this Court in the *Parsons case* referred to the tenure of office act of 1867, passed because of the bitter feeling between Congress and President Johnson over reconstruction measures, enacted for

the purpose of keeping in office those men who were supposed to be friendly to the views of Congress upon that great subject. The President vetoed the act upon the ground that it was unconstitutional; but it was passed over his veto. As this Court said:

> The continued and uninterrupted practice of the Government from 1789 was thus broken in upon and changed by the passage of this act, so that, *if constitutional,* thereafter all executive officers whose appointments had been made with the advice and consent of the Senate could not be removed by the President without the concurrence of the Senate in such order of removal. [Italics ours.]

The Court then quoted from Blaine's characterization of the act; and it might have added his further statement that " if it had been President Johnson's good fortune to go down to posterity on this single issue with Congress, he might confidently have anticipated the verdict of history in his favor," and that the tenure of office law " was only the cause of subsequent humiliation to all who had taken part in its enactment." (Blaine, Twenty Years of Congress, II, 273, 274.)

At the next election, as the Court pointed out, there was elected a President whose relations with Congress were friendly. Within five days after the meeting of Congress a bill to repeal the act of 1867 was introduced in the House and was passed by that body. In the Senate the repeal failed, but the

act was modified by the act of April 5, 1869, and was finally repealed in 1887.

While this Court did not find it necessary in the *Parsons case* to base its decision upon the constitutional rights of the President, its review of the history of the subject shows that the overwhelming weight of authority is in favor of the President's power to remove from office, so that it seems clear that, if necessary, the Court would have then held that an act depriving the President of this power was unconstitutional.

VI

The importance of the decision of the First Congress

This Court has declared repeatedly that a contemporaneous legislative exposition of the Constitution acquiesced in for a long term of years fixes the construction to be given to its provisions. (*Stuart* v. *Laird,* 1 Cranch, 299, 309; *Briscoe* v. *Bank of Kentucky,* 11 Pet. 257, 318; *Burrow-Giles Lithographic Co.* v. *Sarony,* 111 U. S. 53, 57; *Ames* v. *Kansas,* 111 U. S. 449, 469; *Cooper Mfg. Co.* v. *Ferguson,* 113 U. S. 727, 733; *United States* v. *Philbrick,* 120 U. S. 52, 59; *United States* v. *Hill,* 120 U. S. 169, 182; *Robertson* v. *Downing,* 127 U. S. 607, 613; *Schell's Executors* v. *Fauche,* 138 U. S. 562, 572; *Field* v. *Clark,* 143 U. S. 649, 683; *Ex parte Grossman,* decided by this Court March 2, 1925.) As Lord Coke said:

> Great regard ought, in construing a law, to be paid to the construction which the sages,

> who lived about the time or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time when the law was made. *Contemporania expositio est fortissima in legem.*

This quotation was made by Blaine when condemning the tenure of office act as

> against the early decision of the founders of the Government, against the ancient and safe rule of interpretation prescribed by Lord Coke, against the repeatedly expressed judgment of Ex-President Madison, against the equally emphatic judgment of Chief Justice Marshall, and, above all, against the unbroken practice of the Government for seventy-eight years. (Twenty Years of Congress, II, 270.)

These words are as pertinent to-day as they were when they were first uttered.

Therefore, it is not necessary for this Court to reexamine at length the reasons which caused the First Congress to recognize the right of the President to remove executive officers. The essential fact is that at the very outset of our Government a Congress, composed largely of men who had been members of the Constitutional Convention and all of whom had followed with intense interest the discussions attending its ratification, decided after ample consideration that the Constitution gave to the President the power of removal.

And yet the debates in the First Congress are of interest, especially the reasons advanced by Madison, the proponent of the measure, who had done possibly more than any other man in bringing about the assembling of the Constitutional Convention, who had shown great constructive statesmanship during its deliberations, who had attended every session and recorded every vote and the substance of every speech which was there made, so that he had in his private possession the only adequate record of its deliberations, who had been an active member of the Congress which submitted the Constitution to the States for ratification, and the leader of the ratification forces in the convention in the most populous of the States—the State convention in which the proposed Constitution was most adequately discussed—and had taken a very important part in securing its ratification in other States. Surely, when Madison, well named the "Father of the Constitution," addressed Congress in June, 1789, he was a most competent expositor of the fundamental principles of the Constitution.

VII

Arguments in First Congress against President's power of removal

Several arguments were advanced against recognizing that the President possessed a power of removing from office without the consent of the Senate men who should be appointed with its advice and consent.

So far as Representatives contended that the House should not take a position upon the subject (*e. g.,* Annals of Congress, I, 376, 383, 459, 467, 509, 538, 543, 573) their arguments may be disregarded.

Nor is it necessary to consider the extreme position (taken by Smith of South Carolina, *Ibid.* 372, 376, 457, 470, 508; by Jackson of Georgia, 374, 487, 488; and by Huntington of Connecticut, 459) that an officeholder could not be removed prior to the expiration of the term for which he was appointed except by impeachment proceedings, which could be based only on treason, bribery or other high crimes and misdemeanors. The argument against the power of removal was carried to such lengths that Huntington contended (459) that infirmity or incapacity could not be reached even by impeachment, and Jackson contended (487–488) that even in case of insanity there was no process for removing any officer of the government.

The argument that officers could be removed only by impeachment proceedings was not only answered by supporters of the President's power of removal (374, 376, 377, 460, 464, 465, 468, 474, 475, 480, 482), but it was also disavowed by speakers who urged that the Senate must be consulted before an officer could be removed. (*E. g.,* 373, 376, 378, 381, 466, 478, 517, 544.) This extreme and unworkable construction of the Constitution is too absurd to require discussion.

The two members who urged most strenuously the necessity of impeachment before removal also

called attention (456, 508, 531) to the fact that Hamilton had said that the consent of the Senate would be necessary to displace as well as to appoint. It is true that in one paragraph of Number 77 of the Federalist Hamilton did so assert; but it is also true that the members who quoted that paragraph supported a position inconsistent with his conclusion and that the other members of the House did not rely upon Hamilton's statement as an authority. Lord Acton in his review of Bryce's *American Commonwealth* asserts that Hamilton subsequently changed his opinion, but he does not give his authority. I have been unable to verify it. The Federalist is not always the best evidence of the intention of the Convention, for Hamilton was not one of the leaders in framing the Constitution. It is simply a collection of arguments of advocates of the adoption of the Constitution. While it was the work of able advocates, not all of the arguments are equally convincing. In the paragraph in question Hamilton simply made an assertion as to what the Constitution provided, without showing that the Constitution warranted his assertion.

Hamilton said:

> It has been mentioned as one of the advantages to be expected from the cooperation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. A change of the Chief

> Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration, will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government.

As pointed out, his statement stressing the desirability of retaining men in office was cited by members who claimed that no official could be removed except by impeachment, and then only for treason, bribery, or other high crimes or misdemeanors, and no attention was paid to it by the other members of the House.

The practices of State governments were also referred to by White of Virginia and by Gerry of Massachusetts. The former declared (377) that

> In some of the State governments, the chief Executive Magistrate appoints to office, but can not remove.

36168—25——4

Subsequently he added (513):

> It is not contended, that the power which this bill proposes to vest is given to the President in express terms by the Constitution; or that it can be inferred from any particular clause in that instrument. It is sought for from another source, the general nature of Executive power. It is on this principle the clause is advocated, or I mistake the arguments urged by my colleague (Mr. Madison). It was said by that gentleman, that the Constitution having invested the President with a general Executive power, thereby all those powers were vested which were not expressly excepted; and therefore he possessed the power of removal. This is a doctrine not to be learned in American Government; is no part of the Constitution of the Union. Each State has an Executive Magistrate; but look at his powers, and I believe it will not be found that he has in any one, of necessity, the right of appointing or removing officers. In Virginia, I know, all the great officers are appointed by the General Assembly. Few, if any, of a subordinate nature are appointed by the Governor, without some modification. The case is generally the same in the other States. If the doctrine of the gentleman is to be supported by examples, it must be by those brought from beyond the Atlantic; we must also look there for rules to circumscribe the latitude of this principle, if indeed it can be limited.

Gerry, who had been a member of the Philadelphia Convention but who had refused to sign the proposed Constitution and who had been denied membership in the State ratifying convention, spoke along the same line as White, but less persuasively (472), and Smith of South Carolina contributed the thought that appointments are made by the legislature in the case of republics and by the king in the case of monarchies (545). " I am," he said, " led to believe that the gentleman may be wrong, when he considers the power of removal as an Executive power, and incidental to the prerogative of the President."

The answer to these references to the State governments of that period must be found in the fact that the Federal Constitution did not strictly follow State models in apportioning governmental powers among three departments of government.

It was argued by White that the President possesses only enumerated powers (466). Even if this were so, it does not follow that the President can not make a removal from office unless the word " remove " is to be found in the Constitution. The power may be granted by the Constitution otherwise than in that particular form. It may follow by necessary implication from the use of broader terms. The provision of the Constitution that the President shall take care that the laws be faithfully executed is sweeping in its scope. (*In re* Neagle, 135 U. S. 1, 64.)

The same speaker contended that a removal from office can be made only by the appointing power (467, 517), and this position was concurred in by Sherman of Connecticut (491, 537), Livermore of New Hampshire (478), and Stone of Maryland (492). Baldwin of Georgia, who had represented that State in the Constitutional Convention, and who now supported the President's power of removal, showed that the proposition which they had advanced was not of universal applicability (557). Moreover, it did not meet the question whether acquiescence in the making of an appointment is equivalent to participation in the making of that appointment.

Individual Senators doubtless make suggestions to the President, but it is the President who decides whether in the case of the office then being established by Congress the Secretary shall be chosen from Minnesota or from Texas, and upon what man in the State of Minnesota his choice shall fall. The Senate simply decides whether it shall acquiesce in that selection or require the President to turn again to the problem and make another selection for consideration by it. That body simply says "Yes" or "No," and can not itself make a selection.

The situation is not, as was contended by some speakers (478, 538), analogous to that which would exist if one branch of Congress should attempt to repeal a law enacted by both branches. The Senate is not a participator in the nomination or commis-

sioning. It simply says whether the man chosen by the President to serve under him may be appointed. If it rejects the nomination, it is the President who makes a new choice. If it confirms the nomination it possesses no vested right of keeping in office in the executive department a man to whose appointment it has consented. If the President does not continue satisfied with his appointee he may make a removal without consulting the Senate but must secure its consent before he fills the vacancy. If the Senate does not continue satisfied with the appointment it must follow a different course, as outlined in the debates in the First Congress. To meet such a situation Congress provided that the appointment should be for only a limited term; and it has always the right to refuse to appropriate money for the salary of an office-holder or the maintenance of an office.

The speeches in opposition to a recognition of the power of the President to make removals from office without the consent of the Senate show that before Congress enacted the law of 1789 the subject was discussed exhaustively.

VIII

Arguments in First Congress in support of President's power of removal

The arguments advanced in support of the President's power of removal were based upon the grounds that the Constitution recognized marked distinctions between legislative, executive, and ju-

dicial powers; that the executive power was vested in the President and he was required to take care that the laws were faithfully executed; that the appointment and removal of the subordinate officers in his department were exercises of executive power and, while the Senate had power to pass upon his appointments, *it possessed that power only because it was expressly conferred,* while the President, by virtue of the requirements of his office, possessed all power over the appointment and removal of officers which was not expressly denied to him by the Constitution. The supporters of the President's power of removal also called attention to the fact that while the Senate might know even better than the President whether a man were apparently qualified for office, the President would know better than the Senate whether one of his subordinates after his appointment was rendering faithful service; and they called attention to the further fact that prompt and satisfactory improvements in the personnel of the administration could be better secured if the President possessed full power of removal than would be possible if he were obliged to consult the Senate before removing any subordinate from office.

Thus, on June 16, after pointing out that the President could not properly be held responsible for the conduct of the executive department if the officers who were to aid him were not responsible to him but could rely upon another branch of the Government for protection against removal, Madi-

son dwelt upon the fact that the Constitution makes definite distributions of the legislative, executive, and judicial powers among three departments. He said (463, 464):

> I suppose it will be readily admitted, that so far as the Constitution has separated the powers of these great departments, it would be improper to combine them together; and so far as it has left any particular department in the entire possession of the powers incident to that department, I conceive we ought not to qualify them further than they are qualified by the Constitution.

Taking up these departments one by one, he carefully pointed out the nature of the power of each, saying of Congress:

> The Legislative powers are vested in Congress, and are to be exercised by them uncontrolled by any other department, except the Constitution has qualified it otherwise. The Constitution has qualified the Legislative power, by authorizing the President to object to any act it may pass, requiring, in this case, two-thirds of both Houses to concur in making a law; but still the absolute Legislative power is vested in the Congress with this qualification alone.

He then discussed the power of the President, saying that the Constitution had vested in him the "executive power" and that, while the Senate had power to pass upon his appointments unless in the case of inferior officers the law should direct other-

wise, Congress had not the right to extend this exception to his authority.

> If the Constitution has invested all Executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his Executive authority.
>
> The question now resolves itself into this: Is the power of displacing an Executive power? I conceive that if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws. If the Constitution had not qualified the power of the President in appointing to office, by associating the Senate with him in that business, would it not be clear that he would have the right, by virtue of his Executive power, to make such appointment? Should we be authorized, in defiance of that clause in the Constitution, "The Executive power shall be vested in a President," to unite the Senate with the President in the appointment to office? I conceive not. If it is admitted that we should not be authorized to do this, I think it may be disputed whether we have a right to associate them in removing persons from office, the one power being as much of an Executive nature as the other; and the first only is authorized by being excepted out of the general rule established by the Constitution, in these words, "the Executive power shall be vested in the President."
>
> The Judicial power is vested in a Supreme Court; but will gentlemen say the judicial

> power can be placed elsewhere unless the Constitution has made an exception? The Constitution justifies the Senate in exercising a judiciary power in determining on impeachments; but can the judicial power be further blended with the powers of that body? They can not. I therefore say it is incontrovertible, if neither the Legislative nor Judicial powers are subjected to qualifications, other than those demanded in the Constitution, that the Executive powers are equally unabatable as either of the others; and inasmuch as the power of removal is of an Executive nature, and not affected by any Constitutional exception, it is beyond the reach of the Legislative body.

On the following day he again took up the same thought, saying (496, 497):

> If nothing more was said in the Constitution than that the President, by and with the advice and consent of the Senate, should appoint to office, there would be great force in saying that the power of removal resulted by a natural implication from the power of appointing. But there is another part of the Constitution, no less explicit than the one on which the gentleman's doctrine is founded; it is that part which declares that the Executive power shall be vested in a President of the United States. The association of the Senate with the President in exercising that particular function, is an exception to this general rule; and exceptions to general rules, I conceive, are ever to be taken strictly. But

> there is another part of the Constitution, which inclines, in my judgment, to favor the construction I put upon it; the President is required to take care that the laws be faithfully executed. If the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end. Now, if the officer when once appointed is not to depend upon the President for his official existence, but upon a distinct body (for where there are two negatives required, either can prevent the removal), I confess I do not see how the President can take care that the laws be faithfully executed. It is true, by a circuitous operation he may obtain an impeachment, and even without this it is possible he may obtain the concurrence of the Senate, for the purpose of displacing an officer; but would this give that species of control to the Executive Magistrate which seems to be required by the Constitution?

He called attention to the fact that it is everywhere held as essential to the preservation of liberty that the three great departments of the Government be kept separate and distinct, and if in any case they are blended, it is in order more effectually to guard against a complete consolidation.

> I think, therefore, when we review the several parts of this Constitution, when it says that the Legislative powers shall be vested in

> a Congress of the United States, under certain exceptions, and the Executive power vested in the President, with certain exceptions, we must suppose they were intended to be kept separate in all cases in which they are not blended, and ought, consequently, to expound the Constitution so as to blend them as little as possible.

He then dwelt upon the fact that if the President does remove a man from office he can not fill the vacancy without the approval of the Senate. In this and other ways ample check is placed upon any temptation to misuse his powers.

Later in the same speech Madison added (499):

> Vest this power in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the Executive department, which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community.

Other Representatives dwelt further upon the same point. Fisher Ames, of Massachusetts, said (539, 540, 474) that in the Constitution it is declared that the executive power shall be vested in the President.

> Under these terms all the powers properly belonging to the Executive department of the Government are given, and such only taken away as are expressly excepted. If the Constitution had stopped here, and the duties had not been defined, either the President had had no powers at all, or he would acquire from that general expression all the powers properly belonging to the Executive department. In the Constitution the President is required to see the laws faithfully executed. He can not do this without he has a control over officers appointed to aid him in the performance of his duty. Take this power out of his hands, and you virtually strip him of his authority; you virtually destroy his responsibility. * * *
>
> The Executive powers are delegated to the President, with a view to have a responsible officer to superintend, control, inspect, and check the officers necessarily employed in administering the laws. The only bond between him and those he employs is the confidence he had in their integrity and talents; when that confidence ceases, the principal ought to have power to remove those whom he can no longer trust with safety.

Goodhue, of the same State, declared (378) that it was the peculiar duty of the President to watch over the executive officers but that his supervision would be useless unless he had power to correct any

abuses which he might discover. And Vining of Delaware added (572):

> The Senate are combined with the President to aid him in the choice of his officers. The officers are not the agents of the Senate; they do not act for the Senate; they act for the Executive Magistrate. If you give the Senate a power in the removal, you give them an agency in the Executive business which the Constitution never contemplated.

George Clymer of Pennsylvania spoke briefly but emphatically in favor of the President's power of removal, free from any control by the Senate. He was well qualified to speak, for he understood the practical operations of government. During the Revolutionary War he had served in Congress and also in important executive positions, and after the Revolution he had been a member of the Pennsylvania legislature. When the Constitutional Convention assembled he was a delegate from Pennsylvania, and although he was one of the leading bankers of the country he devoted sufficient time to the Convention to render faithful service in the framing of the new Constitution. On May 19, the day in which the question was first raised in Congress, he said (382):

> The power of removal was an Executive power, and as such belonged to the President alone, by the express words of the Constitution: "The Executive power shall be vested in a President of the United States of America." The Senate were not an Execu-

> tive body; they were a Legislative one. It was true, in some instances, they held a qualified check over the Executive power, but that was in consequence of an express declaration in the Constitution; without such declaration, they would not have been called upon for advice and consent in the case of appointment. Why, then, shall we extend their power to control the removal which is naturally in the Executive, unless it is likewise expressly declared in the Constitution?

Baldwin of Georgia, who had represented that State in the Constitutional Convention, took the same position. (558.) Lawrence of New York also showed the limit to the power of the Senate when he said (483):

> The Constitution gives an advisory power to the Senate; but it is considered that the President makes the appointment. The appointment and responsibility are actually his; for it is expressly declared, that he shall nominate and appoint, though their advice is required to be taken. If from the nature of the appointment we are to collect the authority of removal, then I say the latter power is lodged in the President. * * *

Other Representatives dwelt upon the same point. (465, 521, 527.)

Madison, Vining of Delaware, and Goodhue of Massachusetts showed the need for Senatorial advice before the appointment of an officer and showed that the reason for relying upon advice

from that source did not continue after the appointment had been made. Madison said (380):

> But why, it may be asked, was the Senate joined with the President in appointing to office, if they have no responsibility? I answer, merely for the sake of advising, being supposed, from their nature, better acquainted with the character of the candidates than an individual; yet even here the President is held to the responsibility—he nominates, and, with their consent, appoints. No person can be forced upon him as an assistant by any other branch of the Government.

Vining added (512):

> It has been asked, if the same properties are not requisite in removing a man from office as to appoint him? I apprehend a difference in the degree of information necessary. A man's ability may be known to many persons; they may entertain even a good opinion of his integrity; but no man, without a superintending power, can bring this fidelity to the test. The President will have every opportunity to discover the real talents and honesty of the officer; the Senate will have none but from common fame. How then are their properties equal?

Goodhue further brought out the same thought when he said (534) that in the case of appointments the Senators may furnish valuable advice—

> because it is more probable that the Senate may be better acquainted with the characters

> of the officers that are nominated than the President himself. But after their appointments such knowledge is little required. The officer is placed under the control of the President; and it is only through him that the improper conduct of a person in a subordinate situation can be known. He is therefore the only person who can properly apply the remedy; unless, indeed, the officer's malpractices are so conspicuous as to furnish ground for impeachment * * *.

The grave inconveniences which would attend the submission to the Senate of the question whether an officer might be removed from office were also dwelt upon by a number of members. Madison, for example, pointed out (375) that it would be necessary for the Senate to be constantly in session in order to be prepared to give prompt assent to removals. Sedgwick discussed the delays and expense which would accrue before the consent of the Senate to a removal could be secured. (460.) Other members pointed out that the country would suffer no great danger from the removal of a worthy man if the Senate must be consulted prior to the appointment of his successor (489) but that if it were necessary to retain an unworthy officer, one whose presence in power might even endanger the safety of the Government, great mischief might result. (475, 486, 489, 506, 507.)

Even in a normal case, the interposition of the Senate would be destructive of the morale of the

Executive Department. As said by Boudinot (468):

> 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?

Sedgwick dwelt further upon the same problem (522):

> How is the question 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

36168—25——5

> 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. What is to be done in cases which can only be known from a long acquaintance with the conduct of an officer?

During the course of the debate several members had spoken in favor of a recognition of the power of removal in express terms, saying that even if the power did not otherwise exist Congress could bestow the power upon the President. The original bill, however, was amended so as to prevent the placing of such a construction upon it. Congress took pains not to grant any power of removal to the President. It expressly recognized, how-

ever, that he already possessed a power of removal which rested not upon legislation but upon the Constitution itself. (June 22.) The bill as amended was passed by a vote of twenty-nine to twenty-two. (591.)

IX

Action in the Senate of the First Congress

Until 1794 the doors of the Senate were kept closed, with a single exception, throughout all the legislative as well as the executive proceedings (Annals, I, 16), and therefore but little is known of the discussions which took place in that branch of Congress in 1789. For the debate on the bill for the establishment of the Department of Foreign Affairs, which lasted from July 14 to July 18, we must rely almost entirely upon notes which were taken by Vice President Adams, probably for the purpose of guiding his judgment if he should be called upon to cast the deciding vote. (See Life and Works of John Adams, with notes by Charles Francis Adams, III, 407–412.)

It is true that the Journal of William Maclay (edited by Edgar S. Maclay) 109–118, contains some discussion of the question, but the main points there brought out are that Senator Maclay contended that officers could be removed only by impeachment, and that under the proposed law the chief clerk, who was to be appointed without consultation with the Senate, would become the principal in office upon the removal of the Secre-

tary, and the Senate could not force the President to name a new officer. Beyond those points we can more profitably rely upon the Vice President's notes than upon Maclay's vivacious Journal.

According to these notes, Ellsworth of Connecticut and Paterson of New Jersey spoke effectively in support of the President's power of removal. Ellsworth said:

> There is an explicit grant of power to the President, which contains the power of removal. The executive power is granted; not the executive powers hereinafter enumerated and explained.
>
> The President, not the Senate, appoints; they only consent and advise.
>
> The Senate is not an executive council; has no executive power.
>
> The grant to the President express, not by implication.

Paterson contended that exceptions are to be construed strictly. "This is an invariable rule."

Read of Delaware, who had been a member of the Constitutional Convention and a signer of the Constitution, declared:

> The President is to take care that the laws be faithfully executed. He is responsible. How can he do his duty or be responsible, if he can not remove his instruments?
>
> It is not an equal sharing of the power of appointment between the President and Senate. The Senate are only a check to prevent impositions on the President.

> The minister an agent, a deputy to the great executive.

Butler of South Carolina, who had been a member of the Convention, opposed any concession that the President possessed a power of removal without consultation with the Senate, saying that "This power of removal would be unhinging the equilibrium of power in the Constitution." Johnson of Connecticut, also a member of the Convention, apparently took the position that the grant of executive power was so indefinite in its meaning that it was impossible to base any argument upon that grant of power.

Apparently the most vehement opponents of the measure were the two Senators from Virginia, neither of whom had been a member of the Constitutional Convention, but both of whom had vigorously opposed the adoption of the Constitution. Grayson urged that the removal of officers would not be palatable. Lee said:

> The federal government is limited; the legislative power of it is limited; and, therefore, the executive and judicial must be limited.

Possibly the brief notes made by Vice President Adams do not do full justice to all of the arguments. They show, however, how far those arguments impressed an able statesman who was giving careful attention to both sides of this great debate.

The vote is stated in a note to the Works of John Adams, III, 412. According to the list there

given neither Ellsworth nor Butler voted. Those who approved of the bill were Paterson of New Jersey, Robert Morris of Pennsylvania, Read and Bassett of Delaware, all of whom had been signers of the Constitution, Strong of Massachusetts, who had been a member of the Convention and, while he had not remained to the end of its sessions, had assisted in securing its ratification as a member of the Massachusetts convention (Elliott, II, 6, 24, 179), and Carroll of Maryland, Dalton of Massachusetts, Elmer of New Jersey, and Henry of Maryland. Its opponents were Few of Georgia, Johnson of Connecticut, and Langdon of New Hampshire, all of whom had been signers of the Constitution, and Grayson and Lee of Virginia, Gunn and Izard of South Carolina, Maclay of Pennsylvania, and Wingate of New Hampshire. Vice President Adams cast the deciding vote in favor of the legislation.

Whatever we may think of the arguments advanced during these exhaustive debates in support of the President's power to remove a subordinate from office without consulting the Senate, and the arguments upon that side of the question appear to be unanswerable, they convinced the First Congress, whose members were thoroughly familiar with the circumstances attending the adoption of the Constitution. The law which was then enacted received the approval of George Washington, the President who had presided over the deliberations of the Constitutional Convention, and the prin-

ciples which it recognized were thereafter accepted without question for generations and until, in the fiery passions of the Civil War, the enemies of Andrew Johnson sought to cripple him.

It must be noted that the President's power of removal was not based upon any grant by Congress. In this legislation Congress recognized that his power to make removals arose from the Constitution itself and not from any Federal legislation. As the debates showed, moreover, this power is not simply an incident of his power to nominate. It rests also upon the grants to him of the executive power and of the power as well as the duty to take care that the laws be faithfully executed. The President's power to make removals is more extensive than his power to make appointments. It rests upon broader foundations.

I need not apologize for this extended analysis of the arguments *pro* and *con* in the First Congress. Great value has always, and very naturally, been given by susequent generations to the conclusion then reached. This great debate in the First Congress, composed in part of men who had taken part in the Constitutional Convention, has almost the sanction and authority of a debate in the Constitutional Convention itself. Apart from the great respect for the illustrious men of that Congress, the arguments then made have an intrinsic value. I have quoted at length from the speeches of Madison, Fisher Ames, Clymer, Baldwin, Vining, Goodhue, Boudinot, Sedgwick, Ellsworth, Paterson,

Read, and others, who supported the prerogative of the President, because the argument in its favor could not be better stated or better fortified with convincing reasons.

Madison's argument alone not only carries conviction but places the doctrine upon its true foundation. He does not balance the pyramid on its apex by merely alleging that the power to appoint includes the power to remove, but he securely places the pyramid on its four-square base, by arguing that unless the President has such power he cannot discharge his duty to see that the laws are "faithfully executed." To read Madison's argument is to find fresh confirmation of the belief that he was the closest thinker and the most acute reasoner in the Constitutional Convention. Not as brilliant as Hamilton, nor as versatile as Franklin, yet this great statesman—than whom no one took a more profound interest in the development of the Constitution—not only merits his title as the "Father of the Constitution," but he may well be regarded in his philosophic grasp of the principles of government as the Edmund Burke of America.

His subsequent experience as President for eight years only confirmed the wisdom of his views as expressed in the First Congress. In his later years he voiced the same conclusions in some letters.

In 1834 and 1835, near the end of his long and useful life, he wrote three letters dealing with the power of removal.

To John M. Patton he wrote on March 24, 1834:

> Should the controversy on removals from office end in the establishment of a share in the power, as claimed for the Senate, it would materially vary the relations among the component parts of the Government, and disturb the operation of the checks and balances as now understood to exist. If the right of the Senate be, or be made, a constitutional one, it will enable that branch of the Government to force on the Executive department a continuance in office even of the Cabinet officers, notwithstanding a change from a personal and political harmony with the President, to a state of open hostility towards him. If the right of the Senate be made to depend on the Legislature, it would still be *grantable* in that extent; and even with the exception of the heads of departments and a few other officers, the augmentation of the Senatorial patronage, and the new relation between the Senate directly and the Legislature indirectly, with the Chief Magistrate, would be felt deeply in the general administration of the Government. The innovation, however modified, would more than double the danger of throwing the Executive machinery out of gear, and thus arresting the march of the Government altogether. * * *
>
> The light in which the large States would regard any innovation increasing the weight of the Senate, constructed and endowed as it is, may be inferred from the difficulty

of reconciling them to that part of the Constitution when it was adopted.

Seven months later, on October 15, 1834, he wrote to Edward Coles:

> The claim, on *constitutional* ground, to a share in the removal as well as appointment of officers, is in direct opposition to the uniform practice of the Government from its commencement. It is clear that the innovation would not only vary, essentially, the existing balance of power, but expose the Executive, occasionally, to a total inaction, and at all times to delays fatal to the due execution of the laws. * * *
>
> Apart from the distracting and dilatory operation of a veto in the Senate on the removal from office, it is pretty certain that the large States would not invest with that additional prerogative a body constructed like the Senate, and endowed, as it already is, with a share in all the departments of power, Legislative, Executive, and Judiciary. It is well known that the large States, in both the Federal and State Conventions, regarded the aggregate powers of the Senate as the most objectionable feature in the Constitution.

In the following year, October 13, 1835, he returned to the subject, writing to Adams:

> 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 Con-

stitution 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.

X

The retirement of officials during Washington's administration

President Washington was never obliged to exercise the power of removing any member of his Cabinet, but the events of his administration show how necessary it is that the President should possess such a power.

While he sought, with remarkable patience, to secure the hearty cooperation of the two high-spirited Secretaries, who became the organizers and leaders of rival political parties, Hamilton and Jef-

ferson disagreed in the Cabinet, carried their disagreements to the voters, and sought to array into two opposing camps the friends of England and the friends of France. Hamilton's activities in this respect to some extent escape criticism because the President concurred with his views on questions of foreign policy. Jefferson is properly criticized because, remaining in the Cabinet, he was active in arousing opposition to the position taken by his official chief, just as in the next administration there were members of the Cabinet who were loyal to Hamilton and unfriendly to the foreign policies of President Adams.

Jefferson, moveover, retained in office under him a political writer, who was constantly indulging in scurrilous abuse of the President. On the other hand, if Washington had believed the charges which were made against Hamilton of using Treasury funds for private speculation, it would unquestionably have been his duty to remove his Secretary of the Treasury from office.

Jefferson resigned late in the year 1793 and was succeeded by Edmund Randolph, who retired in the summer of 1795 under charges more serious than any that could be made against Jefferson. Randolph had unquestionably sought to defeat the foreign policy of the administration. The French Minister, in a letter to his home government, had declared that Randolph had been conspiring with him to defeat a treaty between the United States

and England and had made corrupt propositions for the use of French money in the United States. This letter had been intercepted, and Washington placed it before Randolph with a demand for explanations. Probably the letter gave a distorted version of Randolph's conduct, but his actual conduct had been such that resignation was the only course open to him. (Foster, *A Century of American Diplomacy,* 163, 164.) If he had not resigned Washington would undoubtedly have removed him. Suppose he had refused to resign. Could not Washington have removed him without the consent of the Senate?

James Monroe, the American Minister to France, was recalled by Washington because of injudicious conduct which was surprising in a man of such large experience, well-balanced temper, and patriotism. Monroe called upon the Secretary of State for the reasons for his removal and then entered into an unseemly altercation in which he published confidential communications between himself and his government. Is it possible that the President was obliged to tolerate him, when he was compromising the Government, until the Senate permitted his removal? Secretary Pickering, who afterwards refused to resign his own office, properly took the position that the President had power to remove a foreign minister at pleasure, without assigning any reasons. (Foster, 174, 175.) The revelation of state secrets was a not unnatural accompaniment of a controversy over the removal

from office. It shows the desirability of the rule that the President may call for the retirement of any of his subordinates without discussing matters which he may wish to regard as confidential.

The President may even wish to make a change in his subordinates for reasons which reflect no discredit upon the incumbents, but which can not always be made public. A change in the problems confronting the country may well warrant a change in the personnel of the administration.

It is in the ever-recurring crises of international relations that the necessity for summary action in the matter of removal becomes most vital. Here there can be no excuse for delay, if the Republic is to be saved.

Our history gives no better illustration of this than the experience of Madison when he was President. He lived to realize the force of what he had so ably argued in the First Congress.

Our country had drifted into the second war with England, and Madison was obliged to face it with an incompetent Cabinet. He found it necessary to dismiss his Secretary of State for incompetency and disloyalty to his Administration. His Secretary of War and his Secretary of the Navy also broke down and were forced to resign. His next Secretary of War had been entrusted with plans to defend Washington, which might have been adequate if they had only been carried out, but with the happy optimistic belief so characteristic of our country—and which is the chief reason of its

general state of unpreparedness—it was inconceivable to this Secretary that Washington might be attacked. As a result, the British Fleet landed in Chesapeake Bay a small army, fought and won the ridiculous battle of Bladensburg, and then marched into Washington, where the soldiers destroyed the House of Representatives and even set fire to the Supreme Court Room. Madison became a fugitive, and the country was in such desperate straits that it was unable to raise a loan of $20,000,000 until Stephen Girard, the Philadelphia banker, came forward and subscribed for the whole amount.

It was natural under these circumstances that Madison summarily dismissed the Secretary of War, who had neglected to fortify Washington and who had sent against the little British Army some hastily assembled regiments of ill-trained militia.

Assuming that the consent of the Senate was necessary to the removal, what was Madison to do if the Senate was not in session? They could not meet in Washington without danger of capture by the enemy. Could a more striking instance be given of the unutterable folly of any construction of the Constitution which would hold that the President, in executing the laws and defending his country, is impotent to act until he can first go through the parliamentary procedure of the consent of the Senate. This historical illustration could be classed as a *reductio ad absurdum.*

Take, now, a later crisis and another illustration. Consider the difficulty which Lincoln had

with Mr. Seward at the beginning of the Civil War. Seward reached the crazy conclusion that the best way to unite America was to plunge it into a war with England and France. Had he had his way, he would have done this; and it is altogether probable that, with war thus thrust upon them, England and France would not have contented themselves with a mere recognition of the Southern Confederacy.

Seward at first looked down on Lincoln with patronizing condescension. Let us suppose, therefore, that Mr. Seward—believing that the life of the Republic was at stake—would have continued to disregard President Lincoln's views and proceeded further with his plan. In that event, Lincoln would have needed the immediate power to remove Mr. Seward. In such event, if the President could only act with the consent of the Senate, Seward might have had his partisans in the Senate who would have precipitated a prolonged controversy as to whether he was right or Mr. Lincoln was right. Thus, the Government in its greatest crisis would have had no head, and it is not difficult to see what the result would have been.

The necessity for summary action, without consulting any one or giving any reasons, is not, however, confined to such crises. At any moment, the President may be confronted with a situation which does not admit of delay, or even of explanation. He may have probable cause for believing that some essential operation of the Government is being ob-

structed, possibly by a minor official of the Government; for such an official, with the printing facilities of the Treasury Department, might conceivably issue millions of spurious obligations. The President must act, and he must act on his own responsibility, for, under the Constitution, the responsibility is his, and his alone.

Conceding that this power of summary removal, with or without the consent of Congress, may lead to great abuses, yet for this the Constitution has not failed to provide a remedy. The Constitution limits the tenure of the President to four years, and every four years he must appeal to the people for a renewed mandate and a vote of confidence. If he abuses his power, the appeal is to the people, and if he abuses it corruptly and treasonably the remedy is by impeachment.

XI

Presidential insistence upon the power of removal

Presidents of the United States have repeatedly made removals from office without asking for the consent of the Senate. For example, when Vice President Adams in 1789 cast the deciding vote in recognition of the President's power he showed the opinion which he had formed during the debate in the Senate. In May, 1800, as President he acted upon this opinion by summarily discharging Pickering from the position of Secretary of State after the Secretary had refused to resign.

36168—25——6

(Life and Works of John Adams, IX, 55.) It was this dismissal, without consultation with the Senate, which made the vacancy in the Cabinet to which John Marshall was appointed.

President Jackson met a similar situation in September, 1833, when Duane refused to resign from his position as Secretary of the Treasury. The President dismissed him from office without consulting the Senate and appointed Taney to the position. (Sumner, Andrew Jackson, 354.)

Later many Attorneys General have advised their official chiefs of the power of the President to make removals from office. (Attorney General Legare in 1842, 4 Op. A. G. 1; Attorney General Clifford in 1847, 4 Op. A. G. 609; Attorney General Cushing in 1851, 5 Op. A. G. 223, 288; Attorney General Devens in 1878, 15 Op. A. G. 421.)

President Jackson, in a message to the Senate on February 10, 1835, declined to comply with a resolution of the Senate requesting the charges which caused the removal of an official from office, saying (Messages of the Presidents, III, 133):

> The President in cases of this nature possesses the exclusive power of removal from office, and, under the sanctions of his official oath and of his liability to impeachment, he is bound to exercise it whenever the public welfare shall require. If, on the other hand, from corrupt motives he abuses this power, he is exposed to the same responsibilities. On no principle known to our institutions can he

> be required to account for the manner in which he discharges this portion of his public duties, save only in the mode and under the forms prescribed by the Constitution.

President Johnson vetoed the tenure of office act on March 2, 1867, upon the ground that it was unconstitutional, setting forth precedents which supported his position and instanced the Civil War to show that *the impotence of a President to remove disloyal subordinates might prove fatal even to the existence of the Republic.*

He said (Messages of the Presidents, VI, 497):

> 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. 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, so far as they held their offices under executive authority, and their duties were confided to new and loyal succesors. 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.

President Grant, in his first Annual Message to Congress, December 6, 1869, earnestly recommended the total repeal of the tenure of office act, saying (Messages of the Presidents, VII, 38):

> It could not have been the intention of the framers of the Constitution, when providing that appointments made by the President should receive the consent of the Senate, that the latter should have the power to retain in office persons placed there by Federal appointment against the will of the President. The law is inconsistent with a faithful and efficient administration of the Government.

President Cleveland, in a message to the Senate on March 1, 1886, discussed the requests which the Senate had made for his reasons for removing officials and the assumption that the Senate had the right to pass upon those removals and thereby limit

the power of the President, saying (Messages of the Presidents, VIII, 379, 381):

> I believe the power to remove or suspend such officials is vested in the President alone by the Constitution, which in express terms provides that "the executive power shall be vested in a President of the United States of America," and that "he shall take care that the laws be faithfully executed."
>
> The Senate belongs to the legislative branch of the Government. When the Constitution by express provision superadded to its legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment, it conferred upon that body all the control and regulation of Executive action supposed to be necessary for the safety of the people; and this express and special grant of such extraordinary powers, not in any way related to or growing out of general Senatorial duties, and in itself a departure from the general plan of our Government, should be held, under a familiar maxim of construction, to exclude every other right of interference with Executive functions. * * *
>
> The requests and demands which by the score have for nearly three months been presented to the different Departments of Government, whatever may be their form, have but one complexion. They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and Executive function, for which I am solely responsible to the people from whom I have

> so lately received the sacred trust of office. My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of their great office and not to relinquish them, and my duty to the Chief Magistracy, which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands.

President Wilson, in the last year of his administration, vetoed the bill providing for a national budget because in section 303 it provided that a Comptroller General and an Assistant Comptroller General should be appointed by the President with the advice and consent of the Senate, but that he should be removable only by concurrent resolution of both Houses of Congress for specified causes or by impeachment. In his message to the House of Representatives he said (Cong. Rec., June 4, 1920, pp. 8609, 8610):

> It has, I think, always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it, as an incident, the power to remove. I am convinced that the Congress is without constitutional power to limit the appointing power and its incident, the power of removal, derived from the Constitution.
>
> The section referred to not only forbids the Executive to remove these officers but undertakes to empower the Congress by a concurrent resolution to remove an officer appointed by the President with the advice

> and consent of the Senate. I can find in the Constitution no warrant for the exercise of this power by the Congress. There is certainly no express authority conferred, and I am unable to see that authority for the exercise of this power is implied in any express grant of power. On the contrary, I think its exercise is clearly negatived by Section 2 of Article II.

The bill was not passed over President Wilson's veto, but it was passed in the next administration and was signed by President Harding. This law is not now before the Court. If, however, the Comptroller General and the Assistant Comptroller General are performing duties, which are of such a nature that they pertain strictly to the Executive Department of the Government, those officials must be regarded as subordinate to the President and subject to a power of removal which can not be limited by any act of Congress.

President Coolidge, scarcely more than a year ago, took a strong position upon the power of the President to remove an officer of the Government without the consent of the Senate and the impropriety of Senatorial interference in favor of or against his exercise of that power. The Senate, on February 11, 1924, adopted a resolution declaring that it was the sense of the Senate that the President should immediately request the resignation of the Secretary of the Navy. (Cong. Rec., vol. 65, p. 2245.) Upon the same day the President declared emphatically (Cong. Rec., vol. 65, p. 2335):

No official recognition can be given to the passage of the Senate resolution relative to their opinion concerning members of the Cabinet or other officers under Executive control.

* * * The dismissal of an officer of the Government, such as is involved in this case, other than by impeachment, is exclusively an Executive function. I regard this as a vital principle of our Government.

In discussing this principle Mr. Madison has well said: "It is laid down in most of the constitutions or bills of rights in the Republics of America, it is to be found in the political writings of the most celebrated civilians, and is everywhere held as essential to the preservation of liberty that the three great departments of government be kept separate and distinct."

President Cleveland likewise stated the correct principle in discussing requests and demands made by the Senate upon him and upon different departments of the Government, in which he said: "They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and Executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office. My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of their great office and not to relinquish them, and my duty to the Chief Magistracy, which I must preserve unimpaired in all its dignity and vigor, compel

> me to refuse compliance with these demands."
>
> The President is responsible to the people for his conduct relative to the retention or dismissal of public officials. I assume that responsibility, and the people may be assured that as soon as I can be advised so that I may act with entire justice to all parties concerned and fully protect the public interests I shall act.

When this statement by President Coolidge was placed before Congress the only comment was by Senator Robinson, who conceded that the power of the President " to reject advice from the Senate, or from any other source, is undoubted." (Cong. Rec., vol. 65, p. 2339.)

XII

Appellant's contention

The appellant contends that the President has no unqualified constitutional right to appoint a postmaster; that Congress is vested with the power to designate who shall appoint postmasters; and that, as the President's power to make any appointment to the office is derived from Congress, Congress may attach such conditions to the appointment as it sees fit, including a limitation upon the power of removal.

This contention was answered by Mr. Madison one hundred and thirty-six years ago when he said (Annals of Congress, I, 581, 582) that if there is a principle in our Constitution, more vital than an-

other, it is that which separates the legislative, executive, and judicial powers. If there is any point in which the separation of the legislative and executive powers ought to be maintained with greater caution, it is that which relates to officers and offices. The powers relating to offices are partly legislative and partly executive. As Madison said:

> *The Legislature creates the office, defines the powers, limits its duration, and annexes the compensation. This done, the Legislative power ceases.*

President Cleveland was equally emphatic when he declared in a message to the Senate (Messages of the Presidents, VIII, 377) that it must be that the public offices of the United States—

> were created for the benefit of the people and to answer the general purposes of government under the Constitution and the laws, and that they are *unencumbered by any lien in favor of either branch of Congress growing out of their construction, and unembarrassed by any obligation to the Senate as the price of their creation.*

Unquestionably, the strongest argument that can be made by appellant is that in respect to statutory offices. The legislative power extends to their creation, definition, and termination, and it will be therefore argued that, as Congress could have refrained from creating the position of postmaster, it could do so on such conditions as it thought

proper, and that these conditions necessarily included the nature of the office, the scope of its duties, the length of its duration, and, as a final implication, the method of removing an incumbent.

This argument will be fortified by the suggestion that the Constitution expressly authorizes Congress to deprive the President even of the power of appointment to a position thus created.

Congress could undoubtedly have enacted that postmasters of the first, second, or third classes should be appointed either by the Postmaster General or by the courts, and that it could have limited either of these appointing powers from removing any incumbent except for the reasons and in the manner provided by Congress.

It would be idle to question the force of this argument. Nevertheless, as applied to the constitutional prerogative of the President, it is a *non sequitur,* and a very dangerous *non sequitur*. It fails to take into account that, without respect to the legislative power of Congress to create an office and prescribe its nature and duration, when the office is thus created and an appointment made, *then the legislative power has ceased,* and it then becomes a part of the executive power to determine whether the public good requires the removal of the incumbent. Congress could undoubtedly provide that the commission of the appellant should run for four years, and that he could be only appointed by the Postmaster General, and only removable by the Postmaster General for certain reasons; but the consti-

tutional prerogative of the President to remove any executive official, in order to faithfully execute the law, remains, and if Congress attempts to limit that prerogative, especially if it asserts a rigth to participate in the exercise of the power to remove, and to say that the President shall not exercise it, except with its sufferance and upon terms that it prescribes, then Congress has crossed the dead line, for it has assumed to control the exercise of a *constitutional* executive power.

If this were not so, it is difficult to know where the power of Congress would end. If the power of Congress to create an office and define its nature and duration is broad enough to impose any condition, then it permits an unlimited invasion into the field of the executive. For example, Congress could create an office on condition that the President would nominate a man whom it had selected. This is not a fanciful illustration, for such a law was enacted by Congress during the Administration of President Arthur, and that President vetoed the law on the ground of its unconstitutionality.

Congress can not by any expedient secure for the Senate any executive powers which the Senate would not otherwise possess. The powers of the Senate can not constitutionally be increased in that manner, nor can Congress diminish the natural accompaniment of the President's power of appointment, when that power exists, nor his duty to take care that the laws be faithfully executed nor

the duties which accompany the grant to him of the executive power. As previously indicated (ante, p. 6–11) it may be that Congress can prescribe legislative standards as to removal, if they do not unreasonably invade the executive function of deciding the question of removal.

The contention of the appellant can not apply to postmasters alone. If it is sound, Congress may limit the power of the President as to all appointees except officers whose tenure the Constitution regulates, as judicial officers. Few offices are created by the Constitution.

Nearly all of the offices of the vast civil establishment of the United States are created by statute. The magnitude of that civil establishment can be measured by the fact that on February 28, 1925, over 556,600 persons were employed in the *civilian* force of the executive branch of the Government. 2,805 in the legislative branch, and 3,257 in the judicial branch. If to these be added the employees of the District of Columbia and of the territorial dependencies of the United States and the Army and the Navy (236,946 men), it is probable that the civil establishment of the United States employs over 800,000 persons.

If appellant's contention be sound, then the Congress may attach, with respect to all of these positions, the proviso that they shall be irremovable except with the consent of Congress, such consent to be given in such manner as Congress may provide.

To all of them could be given life tenures, or all of them could hold their offices wholly by the sufferance of Congress, and, in that event, they would look to Congress and not to the executive for supervision and direction.

It would be difficult to run a ship if the captain on the bridge was powerless to remove any of his officers or crew, and the ship of state does not differ in this respect.

In this matter no distinction can be drawn between the humblest servant of the Government and the Members of the President's Cabinet. Indeed, the Constitution does not recognize the existence of a Cabinet. Each Member of the so-called Cabinet holds an office which was created by Congress, the scope of its duties and the duration of the commissions being prescribed by statute; and if Congress can limit the power of the President to remove the postmaster at Portland, Oregon, it can similarly prevent the President from removing any Member of his Cabinet, even though a President did not himself appoint the Members of such Cabinet, they being " hold overs " from the preceding Administration.

This would seem to be a fanciful, and even ridiculous, illustration were it not for the fact that the tenure of office acts of 1867 sought to prevent the President from removing any Member of his Cabinet; and President Johnson was impeached because he removed Secretary Stanton against the terms of the statute.

This logical result of the appellant's contention suggests two arguments based on inconvenience, either of which goes far to support the soundness of my contention.

In the first place, the asserted power of Congress might be the end of the party system of government, which, with all its defects, alone makes the working of so large and heterogeneous a democracy as ours possible.

A President of one party is elected in November. He assumes office on March 4th. He finds in office the heads of the departments comprising the Cabinet which his predecessor, who was of another party faith, had appointed. The new President, with a fresh mandate from the people, might therefore, on his Inauguration Day, find himself in the position that he could not proceed to carry out his mandate because all of his advisers were of an opposite political faith, not in sympathy with his policies and irremovable except by the will of Congress, and that Congress might conceivably be hostile. The political issue of the preceding election might have turned upon the efficiency of the public service, and the new President might have been elected upon a distinct promise that he would cleanse the public service. Nevertheless, he might find himself wholly impotent to remove any Federal official, from the humblest to the greatest, and this notwithstanding the fact that many of them might be of the class that the people had condemned.

It is often suggested that this country suffers for want of a true form of parliamentary government, but certainly it would be " confusion worse confounded " if a President found himself in office not merely with a hostile Congress but a hostile civil establishment, including the Cabinet, through whom he would be obliged to work.

The second argument from inconvenience arises from the fact that Congress is not always in session and that the power of removal must often be exercised summarily.

The President is always exercising his duties. The Congress is not always in session. During the Constitutional Convention one of the members (King of Massachusetts, August 7) declared that he could not think that it would be necessary for Congress to meet each year. In the earlier days of the Republic, it was in session only a small portion of the year, and, except in recent years and during the Great War, the Congress is infrequently in session for more than six months.

Therefore, if the President could not remove a subordinate who was guilty of gross neglect or positive misfeasance without first securing the approval of the Senate, he would frequently be obliged to hold necessary action in suspense until the Senate next convened. He can make recess appointments; but if he can be lawfully forbidden to remove an official without the consent of the Senate, and no provision is made for such removal during a recess of the Senate, then it would follow that

each year for a space of some months, and in many instances many months, the President would be powerless to protect the interests of the Government.

Such a condition would be intolerable. It could not have been within the contemplation of the framers of the Constitution. They never contemplated a continuous session of Congress. It can not be that if a minor executive official proves unworthy of his trust the President must either retain him until the next session of the Senate or summon that branch of Congress in extraordinary session for no other purpose than to obtain its consent to the removal of the official.

XIII

Conclusion

Let me finally suggest the pragmatic argument for my contention. Without suggesting that the pragmatic test is the only test, yet there is much practical wisdom in the old adage that "the proof of the pudding is in the eating."

Let me, therefore, test the soundness of the two theories, which will be argued in the instant case, by the practical results that might follow the acceptance of either.

If the Court accepts the Government's contention in this case, there will be no perceptible change in the operations of the Government, and the course of our history will placidly flow on as be-

fore, for the reason that from the beginning of the Republic the President has always—and most jealously and most naturally—insisted upon his prerogative of removal, and to sustain that prerogative would result in no change in the practical application of the Constitution.

If, however, the Court should accept the appellant's contention, and, for the first time, hold that Congress may regulate the power of removal, and if Congress, with its existing powers thus amplified, should hereafter exercise that power as did the Congress in 1867, the equilibrium of our Government would be destroyed. Power, instead of being truly balanced between the executive and the legislature, would pass to the legislative branch of the Government. The *morale* of the executive department would be shattered, for there can be no spirit of authority in that department when an unworthy official could appeal from the President to the Congress. It may not always be true that "no man can serve two masters," but it is true that he will not willingly do so; and nothing could be more destructive of the discipline of the executive department than the ability of any official in the vast civil establishment to appeal over the head of the President to the Congress.

If it be suggested that this argument deals with shadows and that the Court need not take into consideration potential mischiefs which may never be realized, *the answer is that the Court is now*

dealing with something more than a shadow—it is dealing with a reality.

Congress by the Budget Law of June 10, 1921 (42 Stat. at L., page 20), asserted the right to regulate the power of removal by providing (Section 301) that—

> There is created an establishment of the Government to be known as the General Accounting Office, *which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States.*

The Statute then provides:

> Sec. 303. 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, the Comptroller General or Assistant Comptroller General has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment.*

Section 305 provides:

> "All claims and demands whatever by the Government of the United States or against

> it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

President Wilson vetoed this Bill when originally proposed, because he recognized in Section 303 a clear infringement upon his prerogative. President Harding signed it, but only because he was indisposed to defeat the whole budget law because of one provision, and he presumably felt that the constitutionality of that provision would be determined in due course.

The Bill was not an inadvertence, for its proponents declared on the floor of Congress that the purpose was to take from the President any supervision over this official of the executive department and to make the Comptroller General " accountable only to Congress " (letter from Mr. Madden, chairman of the Committee on Appropriations, to the Hon. Ogden L. Mills, dated April 30, 1924).

The issue is thus nakedly raised, and because of its possible extension to many other officers of the Government *it is of exceptional importance.* This provision in the Budget Law has had its inevitable result in constant conflicts of authority between the Comptroller General and the heads of the different departments, and has thrown the administration of the executive departments into confusion.

As this brief goes to press, the most recent illustration of this " confusion worse confounded " has taken place.

The Secretary of the Navy had transferred one Conway to the Fleet Reserve Force, which entitled him to certain pay. The Comptroller General then ruled that Conway was not eligible to such transfer. The Secretary then took the opinion of the Attorney General, who sustained the action of the Secretary of the Navy and held that the power to determine eligibility had been vested in the Secretary by Congress. Thereupon, the Secretary referred the case to the Comptroller General for a modification of his opinion, and the Comptroller General adhered to his original position that, the Attorney General to the contrary notwithstanding, Conway had not been properly transferred. Again the opinion of the Attorney General was taken, and again the position of the Secretary of the Navy was sustained. Thereupon the Comptroller General held that the question was not within the jurisdiction of the Attorney General and that the Secretary of the Navy was without power to pay the statutory compensation of Conway. Thereupon the Secretary of the Navy determined to pay the compensation, and the Comptroller General is quoted in the press as stating that " when the voucher comes through for the money I may have something to say." Whether he was correctly quoted is immaterial, for such is his undoubted position, for in

the spirit of fidelity to the law which creates his office, he recognizes the Congress as his only master. He claims in all good faith that his decision is final. If so, what becomes of the "Executive power," which the Constitution vested in the President?

It is difficult to understand how there can be any teamwork in the executive departments under the circumstances, and apparently there is no remedy if the paramount supervisory power of the President over the executive departments be denied.

The sole accountability of the Comptroller General to the Congress has not merely impaired the power of the Executive to decide purely administrative questions, but it has even called into question the binding power of the Judiciary. Thus, in a decision rendered February 7, 1924 (Vol. 3, Decisions of the Comptroller General, p. 479, 485), the present Comptroller General holds:

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

Many illustrations could be given to show that while the Comptroller General's assumption of extraordinary powers may have its advantages, it also has its great disadvantages. While it may at times save, on other occasions it wastes. Where at times it helps the other departments of the Government to function, at times it disarranges the machinery of the Government.

I assume that the Comptroller General would disclaim any intention to exercise his powers as broadly as the Statute literally provides. Nevertheless, the inevitable implication of his interpretation of his powers, and the practical result of his unaccountability to the executive branch of the Government, is that, under his asserted power to settle and adjust all claims by and against the Government, the Comptroller General at any time may embarrass the Department of Justice by taking such action as to any claim by or against the Government as he, the Comptroller General, may think wise.

Thus there is now presented to this Court two concrete instances of existing laws in which a vital prerogative of the President is involved.

The one his power to remove a postmaster for the good of the service and without accountability to the Senate.

The other his power to bring the office of the Comptroller General into harmonious cooperation with the other departments of the Government.

It is these practical illustrations of the asserted power of Congress that give to the instant case its gravity, and this must be my apology for the length of this brief and the care which I have taken to defend the prerogative of the President, not merely by the text of the Constitution but by its historical interpretation.

The preservation of the independence of the President—and no lesser question is involved—is essential to the perpetuity of our institutions.

The Constitution attempted to maintain a just equilibrium between the legislative and the executive departments of the Government, those being the departments in which the menace of inordinate ambition might be more naturally expected. The Framers sought to steer between the Scylla of a legislative despotism and the Charybdis of an executive despotism. They did not wish to create either a parliamentary omnipotence or an executive omnipotence.

They recognized that if the executive had an absolute power of appointment and removal that the necessary equilibrium between the two departments would be destroyed. Hence the qualification with respect to the greater offices of the State, that the concurrence of the Senate was necessary for a confirmation, and hence, also, the power of Congress to vest the appointment of lesser officials of the state in other officials than the President. Not only did the Constitution thus provide a restraint upon

absolute power in the matter of appointment, but there was even a qualified restraint on the power of removal; for while the President could remove in his discretion he could not appoint a successor without the consent of the Senate. Thus they safeguarded the State from the undue power of the executive.

Upon the other hand, they were also indisposed to create a legislative despotism over appointments and removals. They had bitter experience of such a form of undue power in the Congress of the old Confederation. They carefully provided that the selection of the servants of the State should be the exclusive function of the executive, and, by necessary implication, that the power of removal was likewise his exclusive prerogative.

Thus, with marvelous wisdom, the scales were held in equipoise, and it is of great importance that, in the instant case, this Court shall maintain this just and necessary equilibrium.

> For government, though high, and low, and lower,
> *Put into parts*, doth keep in one consent,
> Congreeing in a full and natural close,
> *Like music.*
>
> *Shakespeare, Henry V., Act 1, Sc. 2.*

JAMES M. BECK,
Solicitor General.

ROBERT P. REEDER,
Of Counsel.

APRIL 13, 1925.

○