IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1924~~ 1925

No. ~~77~~ 7

LOIS P. MYERS, ADMINISTRATRIX OF THE ESTATE OF FRANK S. MYERS, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

SUBSTITUTED AND REPLY BRIEF FOR THE APPELLANT ON REARGUMENT.

APRIL, 1925.

WILL R. KING,
Attorney of Record for Appellant.

MARTIN L. PIPES,
Of Counsel.

INDEX

Appellant's Substitute Brief

Appellant's Reply Brief

List of Cases

OTHER AUTHORITIES

STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 77.

LOIS P. MYERS, ADMINISTRATRIX OF THE ESTATE OF FRANK S MYERS, DECEASED, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

SUBSTITUTED AND REPLY BRIEF FOR THE APPELLANT ON REARGUMENT, APRIL, 1925.

STATEMENT

On April 24, 1913, the late F S Myers was duly appointed postmaster at Portland, Oregon After the expiration of his first term he was again appointed by the President for a four-year term from July 21, 1917 His appointment was duly confirmed by the United States Senate, and after qualifying as such postmaster he entered upon the duties of his office

On January 22, 1920, the First Assistant Postmaster General requested the plaintiff to resign his office, which the plaintiff declined to do On February 2, 1920, the Postmaster General telegraphed plaintiff that an order had been issued by the President of the United States removing him from the office of postmaster at Portland, Oregon, and that in accordance with the postal laws and regulations, a postoffice inspector would take charge of his office The plaintiff on the same day telegraphed the Postmaster General that no vacancy existed in his office, that he had not resigned, and would not do so, and that his removal was contrary to law, and was therefore ineffectual The inspector took charge of the office on February 3, 1920, and drew his salary as inspector, and not as postmaster, and the salary of the postmaster was not paid to anyone while the inspector was in charge of the office

The President attempted to remove Plaintiff from his office on February 3, 1920, the Senate was then in actual session. The Senate continued in session until it adjourned on June 5, 1920 During that time the President did not communicate to the Senate the removal of the plaintiff, nor request the Senate to consent to his removal, nor did he nominate a successor to the plaintiff

On August 26, 1920, the Senate not being in session, the President appointed John M Jones as postmaster at Portland, Oregon, and on September 19, 1920, Jones took office under that appointment as postmaster

Congress convened in regular session December 6, 1920 That session expired by operation of law March 4, 1921, without any appointment of plaintiff's successor by or with the advice and consent of the Senate.

The 67th Congress was in session from April 11, 1921, until August 24, 1921, when it recessed until September 21, 1921, convening on that day and continuing in session to November 23, 1921 On July 21, 1921, the term of the plaintiff under his second commission expired At neither of these sessions did the Senate consent to the plaintiff's removal from office or upon the appointment of his successor

The Court will take judicial notice of the records of both houses of Congress (23 *Corpus Juris,* 102) The appointment of Jones was intended as a recess appointment, to fill an assumed, but non-existent, vacancy.

It is insisted on behalf of appellant that the removal of Postmaster Myers from his office was without authority of law and void, and this suit is for the salary of the office from January 31, 1920, to July 21, 1921, the date of the expiration of his term of office, and claims that there is due him the sum of $8,838 72, the amount of salary for the period mentioned

The foregoing are the unquestioned facts, and are substantially as stated in the findings in the opinion of the Court from which this appeal is taken (Tr , 21-24)

Since the submission of this cause appellant, Frank S. Myers, died, and Mrs Lois P Myers, decedent's wife, as the administratrix of his estate, has been duly and regularly substituted as appellant

The Issues

The appellant relies upon the following statute

> "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 Sen-

> ate, and shall hold their offices for four years unless sooner removed or suspended according to law, and postmasters of the fourth class shall be appointed and may be removed by the Postmaster General, by whom all appointments and removals shall be notified to the Auditor for the Post Office Department" (19 Stat 80, 8 Fed Stat Ann, 2 Ed, p 53, Sec. 6).

Under the provisions of this statute the appellant contends that Myers' removal from office could only have been effected by and with the advice and consent of the Senate, and that as the Senate did not (either directly or indirectly) act upon his removal from office during his term of office the removal was illegal and void, and that his estate is entitled to receive the salary of the office from the date of his removal until the expiration of his term of office

On behalf of the Government, it is contended that by virtue of the power vested in the United States by the Constitution the President had the right to remove the claimant from his office during his term of office, notwithstanding the provisions of the statute above quoted, which provides that "postmasters of the first, second, and third classes * * * may be removed by the President, by and with the advice and consent of the Senate" In other words, it is asserted by the Government that its own statute, an act of Congress, is unconstitutional and cannot deprive the President of a power alleged to be conferred upon him by the Constitution.

Defense of Laches Untenable

In the submission of this cause, counsel for the defendant, without confessing error in the holding of the Court below regarding laches, has not taken the holding in that regard

with sufficient seriousness to deem necessary the briefing of this feature of the case in either of his briefs filed for the Government, nor was the point strongly urged below But in view of the seeming importance attached to it by the trial Court, in denying the claim on that ground, we do not feel justified in passing this point without respectful mention.

After indicating that if required to pass upon the fundamental question involved, the constitutionality of the statute limiting the President's power in the removal of postmasters to those in which the Senate may concur, it would be impelled to sustain the constitutionality of the Act (Tr , 27), the Court concludes·

> "Aside from this view the plaintiff cannot recover because the action of which he complains was taken in February, 1920 This suit was brought April 25, 1921 If any right of action for salary arose out of the action complained of the delay is fatal to any recovery Norris case, 257 U S 77, Nicholas case, *ib.* 71, Arant *v* Lane, 249 U S 367, Arant case, 55 C. Cls 327. The petition should be dismissed. It is so ordered "

This statement and final result completely ignores the Court's own statement in its findings of fact (Tr., pp. 21-23) deduced from evidence submitted in the trial of the cause. It is extremely unsound both in law and fact.

After stating in finding No 1 that the plaintiff, on April 24, 1913, was duly and regularly commissioned as postmaster at Portland, Oreg , and after the expiration of this term, September 14, 1917, recommissioned as such postmaster for a four-year term from July 24, 1917, a salary of $6,000 per

annum, and that this was confirmed by the Senate, the plaintiff thereupon entered upon his second term as postmaster and continued in the dispatch of the duties of his office until February 3, 1920, that on January 22, 1920, the First Assistant Postmaster General "requested the plaintiff to resign his office, which the plaintiff declined to do, whereupon, February 2, 1920, he wired plaintiff "* * * order has been issued by direction of the President removing you from office of postmaster at Portland, effective January 31," and that "* * * you must have nothing further to do with the office," for he had placed an inspector in charge of the postoffice, the Court adds "On the same date the plaintiff wired a reply to the Postmaster General, stating that he had not resigned, would not do so, * * * that a vacancy did not exist, and that the attempted removal was illegal and therefore ineffectual"

In No 3 (Tr, 22) the Court finds

> "The plaintiff as such postmaster continued his protest against his removal from his first receipt of notice thereof until the expiration of the four-year term specified for in his second commission, offering at all times to function as postmaster if permitted to do so During the entire four-year period of his second commission the plaintiff had no other occupation and at all times stood ready and willing to perform the duties of his office, and drew no salary or compensation from any other service No part of his salary from January 31, 1920, to July 21, 1921, aggregating the sum of $8,838 72, has been paid to him"

These findings by the Court clearly take this case out of the rule announced in the cases cited in support of the ruling,

to wit, the Norris case, the Nicholas case, and Arant case The statute of limitations, fixed by Congress for claims against the United States presented in the Court of Claims, is six years (36 Stat L 1139, 5 Fed Stat Ann 2 ed. 668)

The assumed fatal delay, therefore, relied upon by the Court below, differs from the delay, and the only delay, which the statute makes fatal The cases cited show that the acts fatal to the claim of an officer illegally removed is conduct on his part constituting evidence that he "acquiesces in the removal," and "abandons his title to the office" It is not necessarily a delay in bringing action. The period of delay may only constitute one of the circumstances to be considered in determining an alleged acquiescence in removal, or in abandonment of title to an office. The reasons for the application of this rule is that the Government may be duly advised of an officer's resistance to the order of removal, that it may take action in the interest of the public In the Norris case (257 U S 77), in speaking of the claimant, the Court said

> "It is true that it has been found that he was ready, willing and able to discharge his duties (of his office), but no fact is found explaining his failure to assert his right to the office or its emoluments for the period of eleven months and a little over He did not, as did Wickersham (201 U. S , 390; 50 L Ed , 798; 26 S C R , 469), promptly demand a restitution to the office, nor make any claim to its emoluments because the power of removal had been exercised without giving him the opportunity for a hearing which the statute affords Each case must be decided upon its own facts, and we are of opinion that the findings here do not disclose that exercise of reasonable diligence on Norris' part which the law imposes upon him as a

> duty if he would recover compensation for services in an office which the Government might fill with another, or otherwise adjust its service so as to dispense with the services of the plaintiff" Citing the Nicholas case *supra*

In the Nicholas case (257 U. S. 71), Mr. Justice Day stated the finding of the lower Court as follows:

> "The Court further finds that there was no evidence of the willingness and ability of the claimant to perform the duties of the office in Inspector of Customs from the date of his removal, on February 20, 1913, that it did not appear that he made any report in person or writing to the office of the Collector at Baltimore As a conclusion of law the Court finds the claimant not entitled to recover"

[NOTE —All italics appearing in this brief are ours.]

And, in deciding the case, held

> "We agree with the Court of Claims that a person illegally dismissed from office is not thereby excluded from obligation to take steps for his own protection, and may not, for an unreasonable length of time, acquiesce in the order of removal which it was within the power of the Secretary to make, and then recover for the salary attached to the position In cases of unreasonable delay he may be held to have *abandoned title to the office and any right to recover its emoluments* The claimant relies upon the Wickersham case, 201 U S. 390 In that case this Court held that one entitled to the protection of a ruling or statute requiring notice to be given him could not legally be separated from the service by suspension, without compliance with the rule or statute, and was entitled

> to compensation during the period of his wrongful suspension In that case the record disclosed that Wickersham was suspended on November 1, 1897, and that on November 5, 1897, he *protested against his suspension,* and on December 28, 1897, demanded his salary The case did not present and there was no occasion to decide the question of the effect of delay and acquiescence upon the right to recover compensation It appeared that Wickersham was diligent in asserting his rights, as well as ready and willing to discharge the duties of the Government employment in which he was engaged "

And then the Court gives the reason for the rule of laches, in this language

> "Public policy requires that the Government shall be seasonably advised of the attitude of its officers and employees attempted to be displaced, when they assert illegal removal or suspension as a basis for the recovery of the office or its emoluments This is necessary in order that proper action may be taken in the public interest as well as that which is required *to vindicate the rights of one wrongfully removed from the public service* "

So the Court concluded the Nicholas case in this language

> "The findings in this case disclose that plaintiff took no steps to question the order dismissing him from the service, or to ask for a copy of the charges upon which he was removed He did nothing for his vindication until he brought this suit, three years after his removal from the office, to recover compensation We hold, therefore, as did the Court of Claims, that such a lack of diligence evidences abandonment of his title to the office and of his right to recover the emoluments thereof."

These cases constitute, we believe, the latest expression of this Court on the subject.

By reading the findings of fact as to what Mr Myers did, it will be found that he did everything that Mr. Wickersham did in the Nicholas case, and more. It will also be found from Finding No 2 that he was requested to resign, and declined to do so, and then the Postmaster General sent him a telegram stating that he had been removed from the office of postmaster at Portland by order of the President, to which the claimant replied, stating that he had not resigned and would not do so, and that the authority granted in said Section 262 only applied when a vacancy existed; that a vacancy did not exist, and that the attempted removal was illegal and therefore ineffectual. We find from Finding No 3 that plaintiff, as such postmaster, continued his protest against his removal from his first receipt of notice thereof until the expiration of the four-year term specified in his second commission, offering at all times to function as postmaster if permitted to do so. It also appears from that finding that he had no other occupation, and stood ready and willing to perform the duties of the office, and drew no salary or compensation from any other service

The evidence on which these two findings were made was a matter of record, and these records were introduced in evidence, and are not controverted In fact, the records proved as the basis for these findings of the Court are the exhibits to the petition.

In addition to Finding No. 2, the claimant, on January 31, 1920, in response to a letter from the Assistant Postmaster General, stated that he had not resigned, and did not expect to resign, as, on the advice of eminent counsel, he felt fully

protected under Section 253, Postal Laws and Regulations And, on the same day, this wire was supplemented by a letter to the Postmaster General, declining to surrender his office as postmaster The claimant wired on the 2d of February, 1920, to the Postmaster General again, stating that he had not resigned and would not resign, and questioned the authority of the President to remove him Then, on February 3, 1920, the claimant sent to the Department another letter of tenor and effect as that of January 31st On the 18th of February, 1920, the claimant addressed a letter to Charles E. Townsend, Chairman of the Committee on Postoffices and Post Roads, asking that he be given an opportunity to be heard before said committee on charges, if there were any, and Senator Townsend responded thereto, to the effect that the claimant would be permitted to present such objections to the confirmation of any successor as he might desire The claimant, on February 10, 1920, forwarded to the President of the United States a petition, asking that he be given an opportunity to learn the charges, if any, against him. On August 28, 1920, the claimant wired to the President that the newspapers reported the appointment of Jones as postmaster, and in the wire stated to the President as follows.

> "Please be advised that there is no vacancy to which appointment can be legally made. I have not resigned, but am ready to function as postmaster whenever permitted to do so by the Department I have never had copy of charges or proper hearing"

It would seem, therefore, that the Government has been duly and repeatedly advised that the claimant has not acquiesced in his removal, and had not abandoned the title to

the office, but has offered at all times to perform the duties thereof. This case, therefore, is clearly not within the authority of the cases cited by the Court below.

When Cause of Action Accrued.

There is another reason why the rule of laches is not applicable here. If delay in bringing the suit, rather than in making the protest, is to be the question, then the time for bringing the suit certainly would not begin to run until the claimant could bring his suit. We maintain that he could not have brought a suit for his salary against the United States Government until the expiration of the 66th Congress session of the Senate, which expired by operation of law on the 4th of March, 1921. This suit was filed April 25 following—in less than two months' time

The legal removal of a postmaster, under the statute, is accomplished by two acts, one by the President and the other by the Senate In the course of official business these two acts are never simultaneous The Senate, when it receives notification from the President of the removal, or of the appointment of a successor, which is equivalent thereto, acts upon that in the course of senatorial business, and necessarily oftentimes after delay We think, therefore, that *the inception of a purpose to remove an officer by the President, and a notification to the officer that he has been removed, does not accomplish the removal, but that the matter of a removal is pending until the President asks the Senate for its concurrence in the Presidential action, and until the Senate has acted thereon.*

The record in this case shows that the President never did, during Mr. Myers' term of office, present the matter of

his removal, or the appointment of his successor, to the Senate, either directly or indirectly, by the submission of another nomination for the office

The claimant here had a right to assume, under the statute, that the President would in some form present his removal to the Senate for confirmation. And not only that, but if he had brought his action for his salary, the *Government of the United States could have interposed a valid objection to the suit on the ground that the President still had time to present the matter to the Senate, and that the Senate still had time to act thereon.*

Likewise, after Mr. Jones was appointed by the President, in a recess in September, 1920, the President had the power to present that appointment to the Senate at the beginning of the next term of the Senate, which was on the 6th day of December, 1920 He did not do that, and the Senate, of course, did not have an opportunity to consent or advise concerning the Presidential action . But both the presidential and the senatorial action were in fact pending

To avoid any charge of laches, claimant brought this suit within less than two months after the matter had become a *fait accompli* by the expiration of the senatorial term, and nearly three months before his second term expired, later filing a supplemental complaint to cover the unexpired part of his term. But under the rule invoked by the Court below, claimant would have been required to institute proceedings each month, or to file a suit for collection of his salary immediately after each pay day, else would have been guilty of laches, the absurdity of which should be manifest; the statement includes its response Surely such unreasonable requirement could not have been in the mind of Congress when

fixing the limitation at six years, or in the thought of any of the courts in the decisions relied upon in its construction

We submit that to invoke laches as applied by the trial Court in this case, in denying the claim involved, is not only violative of the maxim that "equity must follow the law", but destructive of it, and wholly without merit

THE QUESTION OF LAW.

The Act of Congress, July 12, 1876, forbidding the removal of postmasters of the first class without the consent, express or implied, of the United States Senate is within the purview of the Federal Constitution

The requirement that removals of postmasters should require the concurrence of the Senate first appears in the Act of June 8, 1872 (ch. 335, 17 Stat. L. 284). These provisions were re-enacted, with some additions, July 12, 1876 (19 Stat 80, 8 Fed. Stat Ann , 2 Ed , p. 53, Sec. 6).

The Tenure of Office Act.

The policy of Congress in restricting the President's power in removals of Federal officials had its first active and effective inception in the enactment of the Tenure of Office Act (14 Stat. L. 430), April 5, 1869.

The first section of this Act reads:

> "That the Secretaries of State, of the Treasury, of War, of the Navy, and the Secretary of the Interior and the *Postmaster General* shall hold their offices for the term for which they are appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate."

A great political controversy arose concerning the constitutionality of that provision The impeachment of President Johnson grew out of it He had vetoed the bill *on the ground that it was unconstitutional* Likewise, President Grant urged the repeal of the law because of the prohibitions of this section, but did not assert that it was unconstitutional As a final result of the controversy, the question was partly compromised by the Act of April 5, 1869 This Act omitted the first section of the Tenure of Office Act above quoted, which section read as follows

> "That every person holding any civil office to which he has been or may hereafter be appointed by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he shall have been appointed, unless sooner removed by and with the advice and consent of the Senate, or by the appointment, with like advice and consent, of a successor in his place, except as herein otherwise provided."

The exception referred to empowers the President to suspend civil officers, except judges of the United States Court, until the convening of the next session of the Senate, and to appoint persons in their place The Act of 1869 evidenced a clear intention to except from the Tenure of Office Act, then passed, the members of the President's cabinet

On June 8, 1872, there was enacted a law including the Postmaster General in the list of restricted removals, as follows:

> "There shall be at the seat of Government an executive department, to be known as the Postoffice De-

> partment, and a Postmaster General, who shall be the head thereof, and who shall be appointed by the President, by and with the advice and consent of the Senate, *and who may be removed in the same manner,* and the term of the Postmaster General shall be for and during the term of the President by whom he is appointed, and for one month thereafter, unless sooner removed" (17 Stat L. 284, 8 Fed Stat Am 2, ed., p. 18, Sec 388).

Thus we see that while the Act of 1869 excepted the cabinet from the provisions of the Tenure of Office Act as then enacted, in 1872 the appointment of the Postmaster General, a member of the cabinet, was made subject to substantially the same provisions of the Tenure of Office Act as first enacted This last provision has never been repealed, and, like the Act of July 12, 1876, requires the advice and consent of the Senate to the removal of postmasters of the first, second, and third classes, is still in force

It will be observed from the course of this legislation that since 1869, as to the Postoffice Department, the principle of the Tenure of Office Act has been continuously asserted by Congress, and the presidential office has recognized the force and validity of *the Act of* 1872 *relating to the Postmaster General* In President Wilson's second term, Mr. Burleson, Postmaster General, was continued as a cabinet officer. Upon a resolution of inquiry by the Senate relating to his appointment, the President, on January 24, 1918, sent Mr Burleson's name to the Senate for confirmation as Postmaster General, under the provisions of this very act of 1872, and on the same day the Senate confirmed Mr. Burleson's appointment as Postmaster General The Postmaster General

was the only cabinet officer sent to the Senate for confirmation of the holdover cabinet during President Wilson's second term

The same practice has been followed, with respect to the office of Postmaster General, by the subsequent administrations, but not with respect to the other cabinet officers Thus, it will be observed a cabinet office is still in force and effect, as it was under the Tenure of Office Act, and so recognized by the Executive.

Section 6 of the law (Act of 1876) on which we rely and which, for convenience we again quote, reads

> "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, and postmasters of the fourth class shall be appointed and may be removed by the Postmaster General, by whom all appointments and removals shall be notified to the Auditor for the postoffice department" (19 Stat 80, 8 Fed Stat Ann, 2 Ed, p 53, Sec 67).

Two questions of law may arise under this section.

1 Upon the construction of the section, whether it contains, in effect, a prohibition of the removal by the President, of a postmaster of the three classes without the advice and consent of the Senate

2. If it shall be construed to contain such prohibition, whether the section is constitutional

From a reading of the section it would appear to be too plain to call for construction Both the appointment and the removal are qualified in the same sentence by the qualifying

clause "with the advice and consent of the Senate" If we strike out the words "advice and consent of the Senate" from the power created to remove they would at the same time be stricken from the power to appoint, and if a postmaster can be removed without the advice and consent of the Senate, *it would follow that he can be appointed without such advice and consent*

We shall be aided in this construction by the construction given by the executives and by the courts to a similar provision in the "Tenure of Office" Act The first section of the Act of April 5, 1869, the second Tenure of Office Act, is in these words

> "That every person holding any civil office to which he has been, or may hereafter be, appointed by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he shall have been appointed, unless sooner removed by and with the advice and consent of the Senate, or by the appointment, with like advice and consent, of a successor in his place, except as herein otherwise provided"

The Tenure of Office Act of 1869 was repealed by the Act of March 3, 1887 (24 Stat 500, 8th Fed Stat Ann, 2nd Ed., p 944) But the equivalent laws relating to the POSTMASTER GENERAL and postmasters (Section 6, *supra*) have never been repealed

Comparing Section 6 of the Act of 1876, *supra,* with the section of the Tenure of Office Act quoted, it will be seen that both sections relate to an office to which a person has been *appointed by and with the advice and consent of the*

Senate The Tenure of Office section provides that a civil officer "shall be entitled to hold such office during the term for which he shall have been appointed, unless sooner *removed,* by and with the advice and *consent* of *the Senate, or by the appointment, with like advice and consent, of a successor, in his place,*" except as therein otherwise provided In Section 6 the equivalent language is " shall hold their offices for four years, unless sooner removed or suspended according to law " Since this section provides that the removal shall be with the advice and consent of the Senate, *a removal without such advice and consent would entitle the officer to hold his office for four years, because such removal would not be according to law*

The effect of the Tenure of Office Act was construed in Parsons *vs* United States, 167 U S 324, 42 L Ed 185 It is construed by the Court in the following language

> "The continued and uninterrupted practice of the Government from 1789 was thus broken in upon (by the Tenure of Office Act), 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 "

It must follow, therefore, that, if constitutional, Section 6 does in fact limit the power of the removal of a postmaster to a removal had with the advice and consent of the Senate

Mr Justice Story, in his unexcelled work on the Constitution (2d Ed., Sec 1537), in discussing this subject, among other things, says.

> "As far as Congress constitutionally possess the power to regulate and delegate the appointment of 'inferior officers,' so far they may prescribe the term of office, the manner in which and the persons by whom the removal as well as the appointment to office shall be made"

and then adds

> "But two questions naturally occur upon this subject The first is, to whom, in the absence of all such legislation, does the power of removal belong, to the appointing power, or to the executive, to the President and senate, who have concurred, in the appointment, or to the President alone? The next is, if the power of removal belongs to the executive, in regard to any appointments confided by the Constitution to him, whether Congress can give any duration of office in such cases, not subject to the exercise of this power of removal? Hitherto the latter has remained a merely speculative question, as all our legislation, giving a limited duration of office, recognizes the executive power of removal as in full force"

This leaves as the only remaining question—

THE CONSTITUTIONALITY OF THE ACT

In the Parsons case, *supra,* the Court declined to pass upon the constitutionality of the law, in the following language:

> "The foregoing references to debates and opinions have not been made for the purpose of assisting us in ourselves arriving at a decision on the question of the constitutional power of the President, in his discretion, to remove officials during the term for

> which they were appointed and notwithstanding the existence of a statute prohibiting such removal, but simply for the purpose of seeing what the views of the various departments of the Government have been upon the subject of the power of the President to remove, and what claims were made, and how much acquiescence had been given to the proposition that to the President belonged the exclusive power of removal in all cases other than by way of impeachment It is unnecessary for us in this case to determine the important question of constitutional power above stated "

Likewise, in the case of Shurtleff *vs* United States, 189 U S 314, 47 L. Ed 829, the Court construed the statute under review, but assumed, for the purpose of the case, as did Justice Story (Const L 2d Ed, Sec. 1537), that "Congress could attach such conditions to the removal of an officer appointed under this statute as it might deem proper, and therefore that it could provide that an officer could only be removed for the causes stated, and for no other, and after notice and an opportunity for a hearing" The Court then proceeded to construe the statute before it which related to the office of Appraiser of Merchandise, and held that Act not to contain such prohibition The language of that Act was, "and may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office" It was there contended that those words were a limitation upon the power of removal, but the Court held, apparently with much hesitation, that the language as then used did not have the effect of prohibiting the President from removing the officer for other causes than for inefficiency, neglect of duty, or malfeasance in office, and that he could remove the official in that instance without giving any reason therefor.

The difference between that case and the case at bar lies in the fact that in the case there considered the statute gave the power of removal to the President, and to no one else The question then was whether the provision for removal for the causes there specified excluded removal for other causes But in the case here presented, the power to remove is not conferred on the President, but on the President *and* the Senate It is, therefore, *in this case the power to remove*, and not merely the manner in which that power is to be exercised, *that is withheld from the President* It is not a question here of *how* an inferior officer shall be removed, but *who* shall remove him. The reasoning in that case by which the Court upheld the President's power to remove is clearly not applicable to this case

> "In the first draft of the Constitution, the power was given to the President to appoint officers in all cases not otherwise provided for by the Constitution, and the advice and consent of the Senate was not required But in the same draft, the power to appoint ambassadors and judges of the Supreme Court was given to the Senate The advice and consent of the Senate, and the appointment by the President of ambassadors and ministers, consuls, and judges of the Supreme Court was afterwards reported by the Committee as an amendment and was unanimously adopted" Story on Const (2d Ed), Sec 1526 Journal of Convention, pp 223-225

We have been unable to find any case which holds that Congress is without constitutional power to create an office and provide for its incumbency, its term, and appointment and removal of the officer, as it may deem proper That question is still an open one There is nothing in the Con-

stitution relating to the President's power of removal His power of appointment is in these words .

> "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur, 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 may think proper, *in the President alone,* in the courts of law, or in the heads of departments" Art 2, Sec 2, cl. 2

Under the concluding sentence Congress was not obliged to vest the appointment of any postmasters in the President alone, nor with the advice and consent of the Senate It could have vested both the power of appointment and removal of all classes of postmasters in the Postmaster General. It would seem that, if it has the power to withhold from the President the power of appointment of a postmaster, it would also have the power, in the creation of the office, to limit the effect of an appointment made by the authority of an Act of Congress, and therefore to limit the power of removal The President has no unqualified constitutional power to appoint a postmaster Congress, and not the President, is vested with the power to provide for the appointment of postmasters The power to appoint inferior officers, such as postmasters, is not vested in the President by the Constitution, but by that instrument that power is vested in Congress. The power of appointment, therefore, of the first,

second and third classes of postmasters, is not derived from the constitution *directly,* but from a law of Congress, passed in pursuance of a power granted Congress by the Constitution itself And since the power of the President in such case is derived from Congress, it would clearly seem to follow that the Congress can attach such conditions to the appointment as it sees fit It may, as it has done, provide that the appointment shall be with the advice and consent of the Senate, and it may, as it has done, provide that it requires both the President and the Senate to effectuate a legal removal As to officers other than inferior officers mentioned in the section ~~quoted~~, of course the power of appointment, by and with the consent of the Senate, is a power vested in the President by the Constitution

The Porter-Coble Case

There is one lone case which seems to hold that the President may remove a postmaster without the advice and consent of the Senate—Porter *vs* Coble (D C), 246 Fed 244 This case was relied upon and urged by the counsel representing the United States in the Court of Claims, but was not alluded to by the Court in its opinion Nor does the Solicitor here make reference to it. However, since the judge there assumed to pass on the constitutionality of Section 6 of the Act here involved, we do not feel justified in passing it without comment.

The suit was brought in a State court to *enjoin* a postal inspector from taking charge of a postoffice The first thing to be said about it is that the last paragraph of the case discloses the entire opinion to be *obiter dictum* (except the concluding sentence) After discussing the law, the Court said:

> "That disposes of this case, but it may be added that the United States District Court, sitting as a court of equity, has no jurisdiction over the appointment and removal of public officers,"

and cited the cases to that proposition

But, as we shall now show, the opinion, even if the case was within the jurisdiction of the Court, does not decide the question presented by the record, nor the point involved in the case here under consideration

It will appear that Section 6, *supra,* which governs the appointment and removal of postmasters, was neither cited nor quoted in the whole length of the opinion Evidently the Court's attention was not directed to it The effect, therefore, of the statute was not considered It is equally true that the Court considered only the constitutional power of the President to appoint and remove from office, *but did not at all consider the question of the constitutional power of Congress to provide both for appointment and removal of inferior officers.*

The Court quotes, page 248, art 2, Sec 2, clause 2, of the Constitution as follows

> "He (the President) shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law,'

but omitted to quote the rest of the said clause of the Constitution, which we have quoted above So the Court manifestly overlooked and, accordingly, *did not seem to consider the fact that there were other appointments;* not otherwise

provided for in the Constitution, *of offices that were to be established by law*

The whole gist of the opinion, however, is found in the following paragraph

> "Turning again to the judicial precedents, it was held in Parsons *vs* United States, 167 U S 324; 17 Sup Ct. 880, 42 L. Ed. 185, that the President could alone, and without the advice of the Senate, remove an officer who had a fixed term before that term expired, and this was followed in Shurtleff *vs.* United States, 189 U S 311, 23 Sup Ct 535, 47 L Ed 828 It must therefore be regarded as settled that the President had the power to remove the plaintiff at any time during his term."

But neither of those cases decided the question What they both decided was that the President had the power to remove the plaintiff at any time during his term, *where there was no constitutional or statutory prohibition* But in the case of a postmaster there is a statutory inhibition And, as we have shown, in the Parsons case, which was followed in the Shurtleff case, the Court expressly declared that it would not decide the question of the constitutional power of the President in case of a statutory limitation of his powers

We submit, therefore, that the opinion of the Court in the Coble case does not touch the question before the Court in this case, and that since it referred to the two Supreme Court cases as the basis of its opinion, the Court did not realize that it was deciding a question not in the case before it.

The Creation and Appointment of Inferior Officers Contingent Upon Congressional Action.

Since, as we have seen, **the President's power of appointment of inferior officers, conferred by the Constitution, is not absolute, but is qualified and contingent upon the action of Congress, it follows that the power of removal, incident to the power of appointment, is also qualified and contingent upon the action of Congress;** also that when Congress acts, and the contingency takes place, it is the Act of Congress, in pursuance of the powers conferred by the Constitution, that vests both the power of appointment and the power of removal, and whether the Act of Congress vests the power in the head of a Department or in the President, *the power exists only by virtue of the Act of Congress, and not directly by force of any constitutional provision* The literal language is that "Congress may vest the power" How can it be said that Congress may vest a power as to inferior officers if it has already been vested by the Constitution? The plain meaning is that Congress is given plenary power to establish offices not created by the Constitution and to prescribe all the incidents and elements of the offices, including the authority to vest the power of appointment and of removal where it may deem proper, with the only limitation (if it be a limitation) that the appointing power must be in a Court of law, a head of a Department, or the President.

The question of the extent and nature of the President's power to remove inferior officers has been long debated in Congress and in the courts, but it is significant that in every case, we believe, where the question has been before the Su-

preme Court, that tribunal has only declared that this power of the President exists, *in the absence of constitutional or statutory prohibition* A late declaration to that effect is that of the Supreme Court in the case of Burnap *vs* United States (252 U S 513, 64 L Ed 692), where it is said

> "The power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint,"

to which is cited an array of precedents

Since the power to remove is not mentioned in the Constitution, it follows that the President's power to remove an inferior officer is derived only from the recognized rule that the power to remove is incident to the power to appoint That the President's power to remove does not exist in the President *ex officio,* or by virtue of the presidential office, is apparent from the fact that this power has always existed and been recognized in the heads of departments, where Congress has often placed it It is so now in the case of fourth-class postmasters Besides, the question is set at rest by the Supreme Court in a decision as late as November 7 1921, Eberlein *vs* United States, 66 L Ed. (U S) 26 In this case the appellant had been removed by the Secretary of the Treasury on charges of misconduct, which, upon reinvestigation by the Attorney General and the Surveyor of the Port, were found not to have been sustained The President thereupon issued an executive order reinstating him in the office from which he had been removed *The Court held that the power of appointment and removal was in the Secretary of the Treasury, stating "It was within the power of Congress to confer this authority on the Secretary."* Citing Burnap *vs.* The United States, *supra*

The case of United States *vs* Perkins, 116 U S 483, 29 L Ed 700, is also instructive on this question This case was decided by the Court of Claims and affirmed by the Supreme Court of the United States Perkins was a cadet engineer in the Naval Academy and was discharged by the Secretary of the Navy on the 30th of June, 1883 He protested his removal as illegal His protest was grounded upon the Revised Statutes, Section 1229

> "No officer in the military or naval service shall, in time of peace, be dismissed from the service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

The Secretary contended that the cadet engineer was not an officer, and therefore not within this prohibitory limitation concerning removal But the Court of Claims held that he was an officer and was protected by that provision of the statute relating to officers It was further contended in the case

> "That this restriction of the power of removal is an infringement upon the constitutional prerogative of the Executive, and was of no force, but absolutely void Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President, by and with the advice and consent of the Senate, under the authority of the Constitution, art 2, Sec 2, does not arise in this case and need not be considered "

We assume the Court had reference to those officers mentioned in the Constitution whom the President is empowered to appoint absolutely, and not to the inferior officers provided for in the last paragraph of the constitutional provision But the Court of Claims continued

> "We have no doubt that when Congress by law vests the appointment of inferior officers in the heads of departments, *it may limit and restrict the power of removal as it deems best for the public interest* The *constitutional authority* in Congress to thus vest the appointment *implies authority to limit, restrict and regulate the removal,* by such laws as Congress may enact in relation to the officers so appointed
>
> "The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto"

If we are correct in our contention that the President has no constitutional prerogative of appointment to inferior offices, *independently of the legislation of Congress,* but that Congress is clothed with the power as to such offices to provide for their appointment and removal, then this case is applicable and decisive of the question at bar

The opinion which we have quoted was not merely approved by the Supreme Court, but was incorporated as the opinion of the Supreme Court. The language, following the quotation of this Court's opinion, is

> "We adopt these views and affirm the judgment of the Court of Claims"

Congress has recently sustained its constitutional power to vest the power of appointment in the President and yet to reserve to Congress the power of removal This was after a debate on the very question That is the budget law. The offices of Comptroller General and Assistant Comptroller General were created, who are to be appointed by the Presi-

dent, but removed for causes specified by joint resolution of Congress or by impeachment "and in no other manner" This Act was signed by the President June 11, 1921, and is now the law If that law be constitutional, then the law involved here is constitutional A similar Act had been vetoed by President Wilson on the ground that the provisions concerning removal were unconstitutional, and Congress failed to pass the bill over the veto, although a large majority of the House voted to override the veto The later Act, receiving the almost unanimous approval of Congress and the approval of the President, is the latest expression of Congress upon its own constitutional power to control the removal of inferior officers This illustrative feature will receive further attention in the reply part of our brief

REPLY TO SUBSTITUTED BRIEF OF THE UNITED STATES

In his excellent work "The Constitution of the United States" (p. 216), the Solicitor General, James M. Beck, aptly states the rule thus

> "The judiciary can declare legislation unconstitutional only when there is an irreconcilable and indubitable repugnancy between the law and the Constitution * * *"

And thus, in the outset of his substituted brief he would have motion impossible, by annihilating the space in which to move, by adopting as his major premise the declaration that

> "There can be in this matter no middle ground, for either Congress has the power, or it has not the power of restriction"

True, Congress either has or has not the power of restriction, but the conclusion stated first in his premise—"There can be no middle ground," is not deducible from either his statement or his logic His declaration in this regard, when measured by the rule announced—the soundness of which we do not question—will not stand the test, as we will show

In State *vs* Cochran (55 Oreg 179, 105 Pac, 884) Mr Justice McBride, speaking for the Court, says

> "The *object and purpose* of the law, whether fundamental or otherwise, must be considered, and the constitution must not be interpreted on narrow or technical principles, but liberally and on broad general lines, in order that it may accomplish the objects in-

> tended by it and carry out the principles of government *The whole constitution must be construed together*
>
> "When two constructions are possible, one of which raises a conflict or takes away the meaning of a section, sentence, phrase, or word, and the other does not, the latter construction must be adopted, or the interpretation which harmonizes the constitution as a whole must prevail"

Here we have two constructions available—one to the effect that there can be no limitation placed upon the Executive's power of removal, the other the "middle ground," the result of the "check and balance" policy adopted by the framers of the Constitution, giving to the President removal powers as to such officers as may not be affected by the statutory restrictions, while those thus affected are to be left to the joint action of the Executive and the Senate as in the case of appointments of inferior officers The Federal Constitution does not specifically refer to the power of removal, it is true, but it does specifically designate the officers which the President may nominate, consisting of ambassadors, public ministers, consuls, judges of the Supreme Court, and such other appointments as may not otherwise be provided by law, followed with the proviso to the effect that Congress may *by law* provide for other appointments, or vest the appointment of inferior officers in either the President alone, in the courts of law, or in the heads of departments

It will thus be observed that the appointments exclusively within the jurisdiction of the Executive are specifically designated *Expressio unius est exclusio alterius* All other officers coming within the "inferior" class, of which the office of postmaster is necessarily one, are specifically placed

within the jurisdiction of Congress which has power to determine by whom the nominations or appointments may be made It will be observed that the officers placed within the exclusive jurisdiction of the President are to be nominated, the other refers to appointment To nominate is to suggest and must first come from the Chief Executive, while to appoint requires the joint action of the two departments

The statement "vest the appointment," says nothing about the necessity of requiring the consent of the Senate thereto Nor does reference to removal by and with the consent of the Senate there appear If, as contended by the Solicitor, the absence of any provision respecting removals in the Constitution must leave that feature exclusively within the power of the Executive, then for the same reason it must follow, that because the words "with the advice and consent of the Senate" does not appear with respect to the vesting of the appointments of inferior officers, etc the President, if the power of appointment of such inferior officers shall be vested in him, the consent of the Senate would not be necessary to effectuate the appointments that might be made under authority of Congress either by the *President,* by the *courts of law,* or by the *heads of the departments* Yet, it would not be seriously questioned, and as we take it, counsel for the Government concedes, that an act requiring the approval, or consent, of the Senate to the validity of an appointment of an inferior officer is constitutional Our position is, that both features are constitutional, and when measured by the long-established rule referred to above, the requirement by the Act of Congress which makes the consent of the Senate essential to the validity of either the appointment or removal of a postmaster of the first, second, or third class is consistent

and clearly reconcilable with the letter, reason and spirit of the ~~Federal~~ Constitution

Much of the argument presented in the brief of the Government merely goes to the question of whether the President *should* have exclusive power of removal, or the limited power for which we contend Many danger signals are pessimistically raised by counsel for the Government with which the country may be confronted if the Act under consideration is held to be valid As stated by Mr Justice Story in his unexcelled work on the Constitution of the United States (2 ed , Sec 1534)

> "But in truth, in every system of government there are possible dangers and real difficulties, and to provide for the suppression of all influence of one department, in regard to another, would be as visionary as to provide that human passions and feelings should never influence public measures The most that can be done is to provide checks and public responsibility The plan of the Constitution seems as nearly perfect for this purpose as anyone can be, and indeed it has been less censured than any other important delegation of power in that instrument"

And, in referring to the very question here under consideration, Justice Story (Sec 1535) continues

> "The other part of the clause, while it leaves to the President all officers not otherwise provided for, enables Congress to vest the appointment of such inferior officers *as they may think proper,* in the President, in the courts of law, or in the heads of departments (All italics in this brief are ours) The propriety of this discretionary power in Congress, to some extent, cannot well be questioned If any dis-

> cretion should be allowed, its limits could hardly admit of being exactly defined, and it might fairly be left to Congress to act according to the lights of experience It is difficult to foresee, or to provide for all the combination of circumstances, which might vary the right to appoint in such cases In one age the appointments might be most proper in the President, and in another age, in a department"

After discussing (Secs 1539-40 ib) the policy concerning the power of removal, in which reference is made to the dangers to confront the nation if the exclusive power of removal should be left to the President, Justice Story concludes

> "No man can fail to perceive the entire safety of the power of removal, if it must be exercised in conjunction with the Senate"

In the section following (in which we direct attention to our italicised part) he continues

> "On the other hand, those who, after the adoption of the Constitution, held the doctrine (*for before that period it never appears to have been avowed by any of its friends, although it was urged by its opponents, as a reason for rejecting it*) that the power of removal belonged to the President, argued that it resulted from the nature of the power, and the convenience, and even the necessity of its exercise * * *"

It is but reasonable to assume that the framers of the Constitution had the same thought in mind, that is to say, that they fully realized the futility of attempting to anticipate for the coming generations which might be the proper method for the selection of the different classes of officials, and there-

fore settled upon those as to which they had no doubt, and which were named in the Constitution itself As stated by this Court in United States *vs* Germaine (99 U S, 510), in referring to our Constitution "That instrument was intended to inaugurate a new system of government, and the departments to which it referred were not in existence" And in further discussing the subject, the Court there stated, in substance, what is concisely set forth on page 394 of the revised and annotated edition of the Constitution of the United States (1924 ed) that

> "The Constitution for purposes of appointment very clearly divides all its officers into two classes The primary class requires a nomination by the President and confirmation by the Senate, but foreseeing that when officers became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specifically mentioned, Congress might by law vest their appointment "in the President alone, in the courts of law, or in the heads of departments"

And, Mr Justice Mathews, speaking for the Court in United States *vs* Perkins, 116 U S 483, says

> "The Constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict and regulate the removal by such laws as Congress may enact in relation to officers thus appointed"

It is an accepted canon in the construction of the Constitution that one must look to the history of the times and examine the state of things when it was framed and adopted (Rhode Island *v* Massachusetts, 12 Peters, 657.) Further, the court is at liberty not only to refer to the historical cir-

cumstances attending the framing and adoption of the Constitution and the entire frame and scheme of the instrument, but the consequences naturally attendant upon the one construction or the other Pollock *v* Farmers Loan & Trust Company, 157 U S 429

As stated by Mr Chief Justice Taft In Re Ex Parte Grossman, March 2, 1925, 69 L ed , p 377

> "The language of the Constitution cannot 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 They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood "

The debates in Congress on the subject in 1789, and the few years following, together with such adjudications as appear on the subject, determined but one question (if anything), and that, as stated in Ex Parte Hennen, 13 Peters, 259, McElroth *vs* United States, 102 U S 426, United States *vs* Perkins, 116 U S 483, and other cases of similar import, was the power of the Executive to remove an official without the consent of the Senate *in the absence of any provision in the Constitution or statutes on the subject* And whatever

may be said of the congressional action in 1789, it must be conceded that for more than a half century wherever and whenever the subject has been before Congress, the latter has, by its enactments, declared in favor of that interpretation of the Constitution, making valid any and all restrictions that it has seen proper to place upon the removal by the President, whether by the direct or implied consent of the Senate, or by compliance with forms of prescribed procedure under the civil service, or other laws This declaration of Congress had its inception in the Act of July 13, 1866 (14 Stat p 92, Sec 5), which provided

> "And no officer in the military or naval service shall, in time of peace, be dismissed from service except upon, and in pursuance of, the sentence of a court martial to that effect, or in commutation thereof"

This was followed by the well-known Tenure of Office Act, a considerable part of which has been at all times, and still is, in force, of which the provision here under consideration is substantially a part President Johnson denied and disregarded its constitutionality and was impeached for it While subsequent presidents have recommended its appeal and modification, none has dared ignore it, and not until the veto of the Budget Act by President Wilson, does its constitutionality seem to have been questioned publicly by any of our chief executives

Recurring again to principles of statutory construction involved in the quotation from Mr Beck's work on the Constitution, let it be noted that Article I, Section 8, Clause 7 of the Constitution, grants to Congress power "* * * to

establish postoffices and post roads" As to this power, this court. In Re Rapier, 143 U S 110, said

> "When the power to establish postoffices and post roads was surrendered to the Congress, it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective"

Reading the provision of the Constitution respecting post roads, together with the provision authorizing Congress to name the inferior officers and provide for their appointment, it should be clear that any provision for the removal of such officers necessarily comes within the rule that Congress has the right to exercise all powers essential to the making of the provision of the Constitution respecting postoffices and post roads effective Especially should this be clear in view of Section 8, Clause 18 of Article I of the Constitution providing that

> "* * * to make all laws which shall be necessary and proper for carrying into execution * * * all other powers vested by this Constitution in the Government of the United States, *or in any department or office thereof.*"

and, as stated in the footnote to that section, page 246, 1924 edition of the Constitution, Rev Ann. that:

> "This clause is not a limitation or restriction upon the powers of Congress, *but an enlargement of them*"

This note properly continues

> "Many powers are necessarily implied under the express grants of power in the Constitution. 'It

> would be Utopian to suppose that a government can exist without leaving the exercise of discretion somewhere.' "

Counsel for the Government seems to concede that discretion must be left somewhere, but would have the discretion with reference to removals exclusively within the jurisdiction of the Executive which, in our view, except as to the officers specified in the Constitution which he has the exclusive authority to nominate, is clearly irreconcilable with the language, reason and spirit of that instrument as a whole

In referring to the Tenure of Office Act, Mr. Paschall, in his work on the Constitution (p. 182, 1868), observed

> "Without pretending to assert positively the constitutionality of the law, the editor ventures to predict, that no political party will ever entirely remove the restriction and leave the tenure of office wholly and exclusively at the will of the President "

It will be noted that this statement was made shortly after the dispute arose with reference to the Tenure of Office Act

Recurring again to the discussion respecting the removal power in the early history of our Government, it would seem that the recognized and uninterrupted interpretation placed upon this power by Congress should be conclusive in our favor.

In business dealings between men, all previous transactions, differences, etc , between them pertaining to the matters in hand are presumed to have been included in the written instrument finally executed purporting to embody same. So it may be said respecting proceedings of a convention notwithstanding the many different views from the

different states urged upon the Convention, and extensive discussions upon the various matters involved, it should be presumed that when a matter so strongly urged as the question of leaving appointments to the President without the advice and consent of the Senate were disposed of, and the appointing power left in part to the Executive, and part to be provided for by Congress, that the silence respecting removals is indicative of an intention to leave with Congress all provisions respecting the appointments delegated to its authority.

The synopsis of the debates and excerpts given in Appellee's substituted brief is valuable, interesting and instructive, but has become ancient literature upon the subject, and those debates, although as classical as the midnight deliberations and orations of Xenophon and others preparatory for the hasty homeward-bound march of the 10,000 Greeks, like his historical record thereof, should be permitted peacefully to rest in the archives of ancient but classical literature, and not dragged forth as precedents to settle questions of construction of our fundamental laws when much more positive and recent information is available.

Much of the discussion in Appellee's brief implies that because the question of removal is not provided for in the Constitution, and that since this power must rest somewhere, it must be in the President This overlooks the fact that the prerogatives of the President consist only of that which is clearly delegated, or incident to those enumerated to the Executive The silence of the Constitution upon the subject, in view of the historical conditions from which the Constitution emanated, and the evils which it sought to remedy, could more properly be said to imply that in all circumstances Con-

gress, and only that branch of the Government, should have control of the subject

The system of reasoning of the Solicitor General is analogous to that invoked in recent years. Secretary Garfield, concurred in by the then Chief Executive, in his final report to Congress, said

> "Full power under the Constitution was vested in the Executive Branch of the Government and the extent to which that power may be exercised is governed wholly by the discretion of the Executive unless any specific act has been prohibited either by the Constitution or by legislation."

In referring to this interpretation of Executive authority, ex-President Taft, in "Our Chief Magistrate and His Powers," page 144, aptly observes:

> "My judgment is that the view of Mr Garfield and Mr Roosevelt, ascribing an undefined residuum of power to the President is an unsafe doctrine and that it might lead under emergencies to results of an arbitrary character, doing irremediable injustice to private right. The mainspring of such a view is that the Executive is charged with responsibility for the welfare of all the people in a general way, that he is to play the part of a Universal Providence and set all things right, and that anything that in his judgment will help the people he ought to do, unless he is expressly forbidden not to do it The wide field of action that this would give to the Executive one can hardly limit."

The framers of our fundamental laws clearly saw the necessity of restricting the powers of the Executive to those delegated, and only to those clearly essential to the enforcement of the laws They were more than conscious of human tendencies towards the eventual establishment of monarchies, by the gradual encroachment of the Executive upon other branches of Government, and that powers, when once delegated to an Executive, whether by fundamental or legislative laws, or whether acquired through generous legislation, or otherwise, are rarely, if ever, returned to the source from which they emanate

The Budget and Accounting Act.

In our substitute brief we have referred to the accounting system, under the Budget and Accounting Act, as illustrative of the power of Congress over the removal of "inferior officers"

The learned Solicitor General, beginning at page 73 of his substituted brief, accepts our challenge in the use of this illustration His argument in support of this contention respecting the dangers to confront the nation if laws of that type may be sustained, is so adroitly stated that it is deemed necessary extensively to elaborate upon our position with reference to this particular statute The offices of Comptroller General and Assistant Comptroller General, like those of the Patent Office, serve as excellent examples of matters in the minds of members of the Convention of 1789 In leading up to a discussion of this subject, Mr. Beck says

> "The Court is now dealing with something more than a shadow—it is dealing with a reality."

and that—

> "If it can be lawfully done in the matter of the Comptroller General, it can be done with reference to every other official of the executive department, including the members of the President's Cabinet."

In this statement we concur The Tenure of Office Act took the exclusive removal power from the President with respect to every member of the Cabinet, plus many other officials, and President Johnson was impeached for questioning and ignoring this Act of Congress. He, too, thought the law unconstitutional Congress did not agree with him, it has not taken his view since, it never has done so, and unless we prove to be in error in our contention here, we predict that it never will

This office of Comptroller General serves as an excellent example of the wisdom of the framers of the Federal Constitution, ~~as we will show~~, in leaving the creation of the so-called inferior officers, together with the authority for their appointment and for their removal, to such one of the authorities as may be there designated, to the wisdom of Congress, as conditions might develop No one more than the framers of that immortal document appreciated the impossibility of human minds foreseeing the emergencies in the future to arise, requiring the combined wisdom of the representatives of all States to provide their proper solution as they develop, and they at that time probably had in mind experiences then in hand respecting the proper handling of the finances of the then Confederated States

As stated by this Court in United States *vs.* Germaine (99 U. S 510) in referring to the Constitution.

> "That instrument was intended to inaugurate a new system of government, and the departments to which it refers were not in existence"

Subsequent experience has demonstrated that these departments at that time were only in their embryo, of which the one dealing with the financial problems of government was probably the foremost in experience The financial problems of government in that early day were of the most perplexing nature It was a situation that puzzled the greatest of minds and none greater are known in history than those who met the issues there presented Then, as in all history, the perpetuity of government rested most largely upon the financial power to keep the government in successful motion As said by Mr Justice Story, *supra,* these matters could best be "left to Congress to act according to the 'lights of experience'"

In this connection the General Accounting Office, with respect to which counsel for the Government would have its Comptroller General subject to removal at any time by the Executive regardless of the Senate or laws enacted by Congress, affords a living example as to which the *results* growing out of the "lights of experience" are sufficient to its answer. Under the contention presented by the Solicitor on behalf of the Government, the President, from the inception of our Government, regardless of any Congressional restriction (although he could not control the Comptroller's decision) could have at any time removed the Comptroller, and counsel for the Government would have this system continued, leaving thereby this officer subject to the dictation of the Executive alone.

The authority of the President to remove either the Comptroller General or the Assistant Comptroller General, or both, is not now directly before this Court, and although the statutory functions performed by those officers are quite different from those of the officials under the Act of July 12, 1876, under which the Appellant's claim in this case is asserted, yet since this illustration has been so strongly brought forward as an example of a case where the Executive should have the sole power of removal as a means of ensuring the enforcement of the law, we will here fully discuss the same

In this connection attention is invited to the fact that the Comptroller General's duties are not executive in character, but on the contrary are semi-judicial See "Our Chief Magistrate and his Powers (Taft, pp 80, 125-6) The creation and regulation of this office are strictly within the domain of the legislative department of the Government Since the history of the accounting officers began at a period anterior to the establishment of the present system of government for the United States, we think it may throw some light on and fairly, in fact clearly, illustrate the many reasons that may be given why many of the officers, including the one here involved, in prescribing their duties, methods of appointments and removals, were to be left to the wisdom of Congress, and a brief historical statement therefore respecting this office, its origin, its duties, and what was expected of it, would here seem appropriate

Its early history serves to illustrate one of the concrete experiences in hand at the time of the adoption of the Constitution serving as a precautionary experience, causing that able body to hesitate in placing the appointing and removal power exclusively in the hands of the Chief Executive

The Continental Congress, September 26, 1778, by ordinance, established an accounting system. The accounting officers of the confederation were required to settle all claims for and against the United States, to collect all balances certified by them to be due the United States, and to countersign all warrants drawn from the Continental Treasury. These three classes of duty were imposed on the accounting officers under the Constitution in the Act of September 2, 1789 (1 Stat 65), and were continued in the Reorganization Act of March 3, 1817 (3 Stat 366), July 31, 1894, 28 Stat 205, 211, and exist today in the Budget and Accounting Act of June 10, 1921, 42 Stat 23, 27 For purpose of ready comparison, the following provisions from the Ordinance of September 26, 1778, and from the statutes under which the Comptroller General and Assistant Comptroller General act are quoted in juxtaposition

Ordinance September 26, 1778 *Resolved,* That the accounting officers shall carefully examine the authenticity of the vouchers, rejecting such as shall not appear good, compare them with the articles to which they relate, and determine whether they support the charges, that they shall reduce such articles as are overcharged, and reject such as are improper

Act of March 3, 1817, 3 Stat 366, as carried into section 236 of the Revised Statutes and as now contained in section 305 of the act of June 10, 1921, 42 Stat 24

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.

Ordinance of September 26, 1778 *Resolved,* That the accounting officers shall draw bills under the said seal, on the Treasurer for such sums as shall be due by the United States, on accounts audited and also for such sums as may, from time to time be ordered by resolution of Congress.

Section 4 of the act of September 2, 1789, 1 Stat 65, as amended by section 8 of the act of March 3, 1817, 3 Stat 367 as amended by section 11 of the act of July 31, 1894, 28 Stat 209, as amended by the act of June 10, 1921

All warrants, when authorized by law and signed by the Secretary of the Treasury, *shall be countersigned by the Comptroller General of the United States*

Ordinance of September 26, 1778 *Resolved,* That in case a party summoned to account shall not appear, nor make good ensoign, the auditor, on proof of service made in due time or other sufficient notice, shall make out a requisition * * * which * * * shall be sent to the executive authority of the state in which the party shall reside That it be recommended to the several states to enact laws for the taking of such persons, and also to seize the property of persons who, being indebted to the United States,

The act of September 2, 1789, 1 Stat 65, March 3, 1817, 3 Stat 366, and the act of July 31, 1894, 28 Stat 208 as amended by the act of June 10, 1921, 42 Stat 24, require the Comptroller General to superintend the collection of all balances finally certified by him to be due to the United States and section 886, Revised Statutes, as amended by the act of June 10, 1921, makes the balances certified by the Comptroller General establish a *prima facie* case against the debtor *Soule* v *United States,* 100 U S, 8, *United*

shall neglect or refuse to pay the same	*States* v *Pierson*, 145 Fed 814, *United States* v *Drachman*, 43 Pacific, 222, *Dennis* v *United States*, 52 Pacific, 353 While the act of March 30, 1868, 15 Stat 54, section 171, Revised Statutes, as amended by section 305 of the act of June 10, 1921, makes such balances final and conclusive upon the executive branch of the Government

It will thus be seen there has not been a period since the Ordinance of September 26, 1778, when all accounts for and against the United States were not required to be settled by the accounting officers, now the Comptroller General and Assistant Comptroller General For more than three quarters of a century, from 1789 to 1855, the settlements of claims and accounts against the Government made by the accounting officers of the United States were conclusive, for there was no provision whereby suit could be maintained against the United States in the courts Even at the present time the judgments of courts of competent jurisdiction against the United States cannot be paid out of the general fund in the Treasury, for Article 1, Section 9, of the Constitution expressly provides that no moneys shall be drawn from the Treasury save in consequence of appropriations made by law Such judgments are not even payable from general appropriations under which the liability was incurred for the act of September 30, 1890 (26 Stat 537), requires such judgments to be reported to Congress for an express appropriation and if and when the appropriation is made, the

act of February 18, 1904 (33 Stat 41), requires the payments to be made on settlements of the Comptroller General An illuminating article on "Judicial precedents" appears in Vol XIX, p 523 of March, 1925, Illinois Law Review

It would, ~~therefore~~, seem to be clear from a mere recital of the duties performed by the accounting officers since the days of the Continental Congress, that such duties are not executive in character On the contrary, they are judicial in their nature and no more deprive the President of his duty to take care that all laws are enforced than do the District Courts of the United States which are likewise created by statute This was clearly recognized by James Madison (Debates in Congress, Vol 1, O S p 636), ~~when~~ in the debate on the bill which became the act of September 2, 1789, establishing the accounting offices, he said

> "In analyzing the properties of the Comptroller's office we shall easily discover they are not purely of an executive nature, it seems to me they partake of a judiciary quality as well as executive, perhaps the latter obtains in the greatest degree The principal duty seems to be in deciding upon the lawfulness and justice of claims and accounts subsisting between the United States and particular citizens, this partakes strongly of the judicial character "

Mr Madison also questioned (page 638), whether the Executive Department

> "Can or ought to have any interference in the settling and adjusting the legal claims of individuals against the United States The necessary examination and decision in such cases partake too much of the judicial capacity to be blended with the executive I do not say the office is either executive or judicial, I

> think it is rather distinct from both, though it partakes of each, and therefore some modification, accommodated to those circumstances, ought to take place."

Mr Baldwin, who brought in the bill, stated in the course of discussion that he "was not an advocate of unlimited authority in the Secretary of the Treasury" and that·

> "He hoped to see proper checks provided a Comptroller, Auditor, Register, and Treasurer He would not suffer the Secretary to touch a farthing of the public money beyond his salary The settling of the accounts should be in the Auditors and Comptroller, the registering then to be in another officer, and the cash in the hands of one unconnected with either"

The accounting officers were placed in the Treasury Department by the act of September 2, 1789, over the protests of James Madison and others, where they continued to remain until the Budget and Accounting Act of June 10, 1921, made them independent of all of the executive departments. While they were administratively within the Treasury Department, it has been recognized throughout the history of the United States, that, until within the last three or four years, their discretion was not subject to the control of either their immediate superior, or the President The accuracy of our statements on these points, it is assumed, will not be questioned Being so, can it be successfully asserted that the framers of the Constitution intended permanently to preclude all congressional authority over removals from office?

As late as John Sherman, we find that distinguished cabinet official saying,

> "A Secretary of the Treasury would not even mention the subject of a claim to an auditor or comptroller If he should do so, he would show his utter unfitness for the office No man who ever held that office would do a thing of that kind It would be in the nature of a criminal act for him to attempt to influence his subordinates. The accounting officers are absolutely independent of him and he can not interfere with them" (See Comp Acc't System of the United States Government Printing Office, 1905, p 33) ~~that~~

In this, Secretary Sherman was in accord with the view of the first Secretary of the Treasury In defending himself against a charge of having violated the law in advancing salary to the President, Alexander Hamilton said

> "As between the officers of the Treasury, I take the responsibility to stand thus The Secretary and Comptroller, in granting warrants upon the Treasury, are both answerable for their legality In this respect the Comptroller is a check upon the Secretary With regard to the expediency of an advance, in my opinion, the right of judging is exclusively with the head of the Department The Comptroller has no voice in this matter. So far, therefore as concerns legality in the issue of money while I was in the Department, the Comptroller must answer with me, so far as a question of expediency or the due exercise of discretion may be involved, I am solely answerable, and uniformly was the matter understood between successive Comptrollers and myself Also, it is essential to the due administration of the Department that it should be so understood" (Hamilton's Works, Vol VII, p. 548)

President Polk, during his administration, was asked to interfere with the adjustment of a claim, which he declined with his endorsement (Aug 9, 1845) over his signature on the papers as follows

> "I have considered the application in the case to open the accounts of Bryant, Clements & Co, and decline to interfere upon the ground that Congress has expressly given the authority to settle the claims to the accounting officers of the Treasury Department, and that I have no right to control these officers in the performance of their duty"

The statements of President Polk, Secretaries Hamilton and Sherman, are in entire harmony with the views subsequently expressed by this Court in Butterworth vs Hoe, (112 U S 67) where, with reference to the right of the Secretary of the Interior to review the decisions of the Commissioner of Patents, it was said that the powers of the Secretary—

> "* * * do not extend to a review of the action of the Commissioner of Patents in those cases in which by law he is appointed to exercise his discretion judicially It is not consistent with the idea of judicial action that it should be subject to the direction of a superior, in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates Such subjection takes from it the quality of a judicial act That it was intended that the Commissioner of Patents, in issuing or withholding patents, should exercise quasi-judicial functions, is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which exclusively, they may be reviewed"

The office of the Commissioner of Patents thus affords another concrete illustration of another important *inferior office*, of a class that the framers of the Constitution did not intend should come exclusively under the Executive respecting his power of removal

If the Commissioner of Patents performed semi-judicial duties which could not be reviewed by officers of the executive departments, even though superior in rank to him, so much the more reason why President Polk and Secretaries Hamilton and Sherman were correct in their statements that neither had power to interfere with the discretionary duties which are now imposed on the Comptroller and Assistant Comptroller General with the direction, now contained in section 304, of the Budget and Accounting Act of June 10, 1921, that they shall exercise those functions "without direction from any other officer"

However, President Polk was not the only President who disclaimed any authority over the accounting officers of the United States. The first instance to arise was in 1823 when Congress passed a statute authorizing and directing the accounting officers to settle and adjust the account of one Wheaton on principles of equity and justice Mr Wheaton was dissatisfied with the adjustment and applied to the President for review of the settlement The President referred the question of his authority to revise the settlement to Mr Wirt, who was then Attorney General Under date of October 20, 1823, (1 Ops Atty Gen 629) he gave an elaborate opinion that the President had no power to interfere in the matter (See also 1 Ops. Atty. Gen 471, *id*, 705, 706) Attorney General Taney, afterwards Chief Justice of this Court, examined the question at length in an opinion of April 5, 1832, (2 Ops. Atty. Gen. 509) and advised President Jackson.

> "That the decision of the Comptroller, in this case is conclusive upon the executive branch of the Government, and that the President does not possess the power * * * for the purpose of taking any measures to repair the errors which the accounting officers appointed by law may have made"

President Andrew Jackson refused to interfere with the accounting officers by an indorsement of July 1, 1835, in his own handwriting, as follows

> "The report made—Attorney General's opinion referred to The decision of the Second Comptroller is final, over whose decisions the President has no power, except by removal. The Secretary of War will make known this decision to Mr Peebles —A. J"

It is to be remembered that all this was prior to the act of March 30, 1868, 15 Stat 54, now section 191, Revised Statutes, which provided that the settlements of the accounting officers should be final and conclusive on the executive branch of the Government The absolute independence of the accounting officers from control in their decisions by executive officials was recognized by Postmaster Kendall (whose authority was then as Postmaster General now), in his annual report of December 4, 1835 (Ex Doc No 2, 1st Sess, 24th Congress, pages 399, 400) urging a reorganization of the financial branch of the Post-Office Department, which recommendations were adopted in the act of July 2, 1836 He said

> "It is believed to be a sound principle, that public officers, who have an agency in originating accounts should have none in their settlement The War and Navy Departments are in general organized upon this

> principle In the orders, contracts, and regulations of the heads of those Departments, or their ministerial subordinates, issued and made in conformity with law, accounts originate, the moneys are generally paid by another set of agents, but partially dependent on the heads of the Departments, and the accounts are finally settled by a third set, who are wholly independent of them If from any cause an illegal expenditure be directed by the head of a Department, it is the duty of the disbursing agent not to pay the money, and if he does pay it, it is the duty of the Auditors and Comptrollers to reject the item in the settlement of his account * * * The most important improvement required is to separate the settlement of accounts entirely from the Post-Office Department, and vest it in an Auditor appointed by the President, with the advice and consent of the Senate"

The Senate Committee summed the matter up in a report dated January 27, 1835 (Senate Document No 422, 1st session, 23rd Congress) after an investigation into the great frauds then discovered in the Post-Office Department as follows:

> "The waste and fraud may be principally traced to the absolute and unchecked power which a single individual holds over the resources and disbursements, and all the vast machinery of the Department The checks of various inferior officers upon each other are of no value, *when all are guided and controlled in their acts by one dominant will*

The learned Solicitor General appears to overlook the fact that throughout the history of this Government, the Presi-

dent, Secretaries of the Treasury, and heads of Departments, with few exceptions, have disclaimed any authority over the accounting officers of the United States and is in error when he would have it appear (page 83 of his brief) that the court is dealing with a new question That it is not a new question and that it is settled by the practice of more than a century, the President has no control over the accounting officers, is shown by the opinions of his own Department and is now beyond question (U S) *v* Lynch, 137 U S 280

President Jackson stated that he had no power over the accounting officers except to remove them This control in the absence of restrictions by statute could only extend to removal from office, and it is evident that it was not intended by the Constitution to preclude Congress from exercising legislative power over removals of these quasi-judicial officers if and when such restriction in "lights of experience" should be found advisable

At a hearing of the Committee on the Judiciary, House of Representatives (Government Printing Office, 1924) Solicitor General Beck stated, that so long as the accounting officers are under the Executive "there can arise no conflict which the Executive cannot adjust" and made reference to a situation where "a President, somewhat miffed because a Comptroller of the Treasury had ruled against his contention, sent word to the Comptroller that if he could not change the opinion of the Comptroller, he would change Comptrollers" In other words, while the President does not have, and has never had power to revise a decision of the Comptroller the contention of Mr Beck is that the President has the power of removal and that it is not subject to restrictive enactments by Congress, so that the Comptroller General, even in face of a stat-

ute to the contrary, holds and must hold his office under a sword of Damocles There is nothing in the Constitution which says he must do so, and Mr Beck has aptly stated the evil of his own present contention on page 290 of his book on the Constitution of the United States, where he quotes with approval from the address of Edmund Burke to the electors of Bristol as follows

> "None will violate their conscience to please us, in order to discharge that conscience, which they have violated by doing us faithful and affectionate service If we degrade and deprave their minds by servility, it will be absurd to expect, that they who are creeping and abject towards us, will ever be bold and incorruptible asserters of our freedom, against the most seducing and the most formidable of all powers No! human nature is not so formed, nor shall we improve the faculties or better the morals of public men, by our possession of the most infallible receipt in the world for making cheats and hypocrites"

It is idle to conclude as did Presidents Jackson, Polk, Secretaries Hamilton and Sherman, Attorneys General Wirt, Taney and others that the President has no power under either the Constitution or the statutes to revise the decisions of the Comptroller General and at the same time to contend that such official will be faithful in guarding the Treasury against illegal payments, when the sword of Damocles is continually hanging over his head and the thought is ever present that the thread may be severed at any time by political influence engineered and directed by powerful interests within and without the Government whose claims he must deny in the proper discharge of his duties

President Taft clearly recognized in his message of June 27, 1912, to the Congress transmitting with approval the recommendations of the Commission of Economy and Efficiency that there must be checks on the usurpation of power by the executive departments We quote his pointed statement in part on page 63 herein, but full exposition of the subject is enlightening (House Document No 854, 62nd Congress, 2nd Session)

We further quote

> "The purpose of creating an official class is, to use the powers and administer the resources of the organized agency (the Government) for the purpose set forth in the Constitution or deed of trust, to serve the people in the capacity of experts by ascertaining what are the needs to be met, to formulate and present for the consideration of the people and their representatives from time to time a definite program of public business, having in mind serving their needs, to take such steps as are necessary to provide the organization and equipment and provide the financial means for rendering such service with economy and efficiency
>
> * * * * * * *
>
> "The first step taken to guarantee protection against usurpation was to invoke the theory evolved under the feudal regime—that of 'balancing powers' This was applied in two ways (1) To the agency as such, and (2) to the official class within each governing agency"
>
> "In the conflict between official classes in government, a wholesome means of restraint was evolved by requiring that such powers as are to be exercised by each branch or designated class of officers shall be defined That is, the principle of 'checks and bal-

> ances' was again applied to each chartered governing agency in such manner that those powers which were to be exercised by one officer or class of officers, would be balanced by the powers exercised or to be exercised by another officer or class of officers
>
> "As has been said, an act of appropriation may be considered not alone a grant of funds, it may take on the nature of a mandate issued by the Congress and approved by the President in his legislative capacity, which is to be executed by the administration The law which requires that no money shall be drawn from the Treasury except pursuant to acts of appropriation puts in the hands of the legislature the power to determine policies, fix conditions to money grants, and to control the administration "

Control over the expenditures of public funds has long been in the hands of the elected representatives of the Anglo-Saxon people As early as 1665, when Charles II had asked Parliament for a very large sum of money for the conduct of the Dutch war, he consented to the insertion of a clause in said act declaring that the money granted should be used only for the purposes of the war In 1690, Parliament provided for the appointment of nine commissioners, members of the House of Commons, for the purpose of examining and settling the public accounts (2 W & M , Sess 2, C 11) Maitland, the great historian of English legal institutions, states at page 43 of his Constitutional History of England that since Cromwell's time, "the practice has, I believe, never varied in granting money to the crown, Parliament has appropriated the supply to particular purposes, more or less narrowly defined " Since 1690, says the English historian Hawtrey at page 51 of his book on the Exchequer, the ac-

counting officers of England, whether known as Comptroller of the Exchequer, or as commissioners, or as Comptroller and Auditor General, as the defender of the financial authority of Parliament, have been prepared to subject every act of the executive to independent criticism, whether the responsibility rested on a nominal subordinate, or had been assumed by the Chancellor of the Exchequer and the Government of which he was a member

Further argument would seem to be unnecessary that the President does not have power to remove the Comptroller General and Assistant Comptroller General of the United States, that the Budget and Accounting Act of June 10, 1921 is clearly constitutional

As stated at the outset of the Solicitor's brief, the constitutional question here involved "is of profound importance The principle is of the very foundation of our Government"

One interpretation and application trends towards the perpetuation of a democracy, the other, towards autocracy Like the choice between roads at Waterloo One points to success, the other to ultimate disaster At the outset of our Government, the ablest and most honest and efficient of statesmen differed as to the course to take Men of both minds filled the convention hall as delegates The result was a compromise on many things, but there were exceptions, one of which was the securing of a government republican in form, and to be perpetuated as such in practice, to secure which the system of checks and balances was adopted

We think there is a middle ground, and these checks and balances constitute in part at least, the middle ground intended to obviate the dangers incident to the gradual encroachment of the prerogatives of the Executive upon those of the legislative branch of the Government

Much of this authority, too, in the well-known historical past, has been due to the head executives of governments gathering unto themselves with the best of motives authority similar in import to that deemed justifiable under the press of an earnest desire to do good, as manifested in the declaration of Mr Garfield, above quoted, and like statements and impulses emanating from the Chief Executive of that time as to which they are far from being the only exceptions The confidence reposed in Washington accounts for the careless precedent established by the much discussed Act of Congress of 1789 It was thought that with safety the power of removal might be left without statutory restrictions

Notwithstanding, as stated parenthetically by Mr Story, supra, in Section 1541 of his excellent work when, in referring to the time of the adoption of the Constitution, he remarks "For before that period, it (the executive power of removal) never appears to have been avowed by its friends, although it was urged by its opponents, as a reason for rejecting it"—the Constitution

The dangers incident to the placing of too much power in the Executive and the benefits to be derived from the safety valve of checks and balances adopted by the framers of our Constitution were clearly recognized and stated by President Taft in his message of June 27, 1912, to the Congress, transmitting with approval the recommendation of the Commission of Economy and Efficiency

> "One of the first dangers to which a representative government is exposed is usurpation of powers granted to the official class Wherever adequate provision has not been made for protecting the people against such danger, the result has been the overthrow of the prin-

> ciple of government as a trusteeship—the underlying principle of democracy Recognizing the need for protection against the government official class, the American commonwealth adopted, as principles of charter organization, the devices which had been evolved after centuries of conflict—principles which have been successfully employed for the reduction of the self-assumed arbitrary powers of monarchs to a plane of controlled responsibility"

As indicated, we think that, in view of the careful consideration and attention given by the framers of the Constitution to the powers to be delegated to the Executive of our Government, and in view of the fact that after all the consideration thereof in the light of the historical experience, well known to them, the members of the constitutional convention deemed it proper to omit special reference to the question of removal, it should be manifest that this important matter was intended to be left to the wisdom of the legislative branch of the Government, to be solved at such time, and as future conditions might develop.

At the same time, we think the debates in Congress, when the question first arose, viewed in the light of debates later had on the same subject, in which Webster, Calhoun and other eminent statesmen of that day participated, taking their discussions in their entirety (not by piecemeal) indicate that this question was not only an open one, but was regarded by Congress as settled only to the extent of the President's right to exercise this prerogative in the absence of legislative declarations upon the subject In no sense did it become a precedent upon the constitutional feature here involved

It is respectfully submitted that in the light of history and under every rule of construction, the Act here involved is in

full harmony with the letter, reason, and spirit of our Federal Constitution, and accordingly, valid It is conceded that the removal of Postmaster Myers was in violation of this statute The removal was accordingly void, and under the admitted facts, the Appellant is entitled to recover

WILL R. KING,
Attorney of Record for Appellant.

MARTIN L PIPES,
Of Counsel.

APRIL, 1925.

(6062)