IN THE

Supreme Court of the United States.

No. 77. **October Term, 1924.**

FRANK S. MYERS,
Appellant,
v.
THE UNITED STATES.

Appeal from the Court of Claims.

Brief for the Appellant

Filed by George Wharton Pepper, Amicus Curiae.

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International, 236 Chestnut St, Philadelphia

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BRIEF FOR THE APPELLANT.

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I.

On the second day of February, 1925, the Court entered the following order:

> "It is ordered that this case be reassigned for argument on Monday March sixteenth next in order that George Wharton Pepper, Esquire, at the invitation of the Court, may address an argument to it as amicus curiæ on behalf of the Appellant."

By subsequent order the re-argument was set for April 13, 1925.

This brief is filed in partial discharge of the duty arising from acceptance of the Court's invitation.

II.

Statement of the Case.

This is an appeal from the Court of Claims. The immediate question is whether the Appellant is entitled to a balance of salary alleged to be due by the United States to him as a postmaster of the first class. The Court of Claims decided against him, basing its decision on the ground of laches. Reasons will presently be given to support the contention that the decision on this point was erroneous.

Pending this appeal the appellant died. Letters of administration upon his estate were duly granted to his administratrix, and the death has been suggested of record.

If the only question involved were this matter of laches extended argument would not be necessary. The real question, however, is a far more important one. It is such as to require an exploration of that debatable ground which under the Constitution of the United States lies between the lines of executive and legislative power. The President nominates, and, by and with the advice and consent of the Senate, appoints a certain Federal officer.

The Act of Congress creating the office provides that the Senate shall have something to say in case removal from office is attempted. May the President, with the consent of the Senate, appoint to the office which the statute creates and may he later ignore that part of the creating statute which declares that the responsibility of removal shall be the joint responsibility of President and Senate? May he ignore the statutory provision and assume the sole responsibility? That is the question presented by this record. Reflection determines it to be a fundamental question; history proves it to be a debatable question; a survey of existing legislation indicates that it is an extremely practical question.

In the instant case the postmaster was appointed under the Act of July 12, 1876 (19 Stat. 78, 80). Section 6 provides that:

> "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. . . ."

The Solicitor General all but concedes that this language evidences the intent of Congress that the Senate's consent shall be essential to removal as well as to appointment.

During the running of the term for which he had been appointed, to wit, on January 22, 1920, the First Assistant Postmaster General requested the officer's resignation. He declined to resign. On February 2 the Postmaster General notified him by telegram that by the direction of President Wilson an order had been issued removing him from the office. On the same day he wired a reply to the Postmaster General that he had not resigned, and would not do so, and that the attempted removal was illegal. He was forcibly ejected on February 3, 1920, but continued his protest against the removal until the expiration of the four-year term specified in his commission, offering at all times to function as postmaster if permitted to do so. During this period he had no other occupation and drew no salary or compensation from any other source. At the time of the attempted removal the Senate was in session, and continued in session until June 5, 1920. The President did not communicate the fact of removal to the Senate, or request that body to consent thereto. Congress was again in session from December 6, 1920 to March 4, 1921, but the President made no communication of the fact of removal, nor did he nominate a successor during this period. The same is true with respect to the special session from March 4th to March 15, 1921, and the extra session from April 11th to August 24, 1921. On July 21, 1921, the term for which the postmaster had been appointed expired.

III.

The Constitutional Question.

Was the action of the Executive in ejecting the postmaster from office a high-handed and unauthorized executive act? Or was it a constitutional removal? If the former, then, unless I am wrong on the question of laches, the appellant is entitled to the salary claimed. If the ejection was a constitutional removal the appeal from the Court of Claims will have to be dismissed.

Before discussing the constitutional question thus raised the point must be made that the Act of 1876 is not an isolated or eccentric bit of legislation. There are many acts of Congress on the statute books which involve a similar assumption by Congress of the power to prescribe the terms of removal from office of officials appointed by the President.

In the following cases statutes now in force impose definite restrictions upon the exercise by the President of the power of removal:—

Under 36 Stat. 1135 and 40 Stat. 1157 the Judges of the Court of Claims are entitled to hold during "good behavior."

Under Section 388 R. S. (the same statute that is involved in the instant case), the Postmaster General is given a term one month longer than the

term of the President who makes the appointment, and is removable by the President and the Senate.

Under 42 Stat. 972, Sec. 518; 36 Stat. 98, Sec. 12; 35 Stat. 406, Sec. 3; 26 Stat. 136, Sec. 12, the members of the Board of General Appraisers are removable only after hearing, and only for neglect of duty, malfeasance in office or inefficiency: they hold office during good behavior.

Under 43 Stat. 336, Sec. 900, members of the Board of Tax Appeals are removable only for inefficiency, neglect of duty, or malfeasance in office, but for no other reason.

Under 41 Stat. 470, Sec. 304, 305, 306 (b), the members of the Railroad Labor Board are removable for neglect of duty, or malfeasance in office, "but for no other cause."

Under 39 Stat. 182-3, Am., 41 Stat. 771-4; 1229 R. S.; 1230 R. S.; 41 Stat. 811, commissioned officers in the regular army are removable by the President in time of peace only after sentence of court martial.

Under Sections 1229, 1428, 1496, 1521 and Articles 36 and 53 of Section 1624 R. S.; 32 Stat. 1197; 33 Stat. 346; 38 Stat. 103, 289; 39 Stat. 576; 40 Stat. 501; 40 Stat. 716; 41 Stat. 137, 140, 834-5, the commissioned officers of the regular navy are

removable in time of peace only after court martial.

Under the provisions of the civil service laws restrictions on removals are made applicable to all officers and employees of the government except those enumerated in five classes of exceptions, and these restrictions on removal are applicable in the case of many officers appointed by the President.

In the following case of an officer appointed by the President, a statute now in force vests the power of removal elsewhere than in the President:—

Under 42 Stat. 23, 24, the Comptroller General of the United States is given a term of fifteen years, and is removable only for specified causes, and by joint resolution of Congress, and "for no other cause and in no other manner except impeachment."

It will thus be seen that much existing legislation is based upon the assumption that the power to remove from an office which Congress has created may by Congress be declared to be exercisable in any of the following ways:

(a) By the President alone, but only for specified cause.

(b) By the President, but only pursuant to the action of a specified body other than Congress.

(c) By the President, but only with the advice and consent of the Senate.

(d) By the joint action of the two Houses, and entirely without reference to the President.

In this summary no account has been taken of the large number of statutes in which it is provided in affirmative words that the officers shall be removable for specified causes. Among such cases are the following:

Federal Trade Commissioners, Interstate Commerce Commissioners, United States Shipping Board Commissioners, and United States Tariff Commissioners are under applicable statutes severally removable by the President for inefficiency, neglect of duty or malfeasance in office.

These statutes and some others like them are laid aside from consideration in deference to the decision of this Court in Shurtleff v. United States, 189 U. S. 311 (1903). In that case the Court was called upon to construe the Customs Administrative Act of June 10, 1890 (26 Stat. 131-136), Section 12 relating to general appraisers of merchandise provided that after appointment by the President, by and with the advice and consent of the Senate, "they may be removed from office at any time by the President, for inefficiency, neglect of duty, or malfeasance in office." A duly appointed

appraiser was removed by the President with no specification of charges, and without notice or opportunity for hearing. He contended that the affirmative language of the statute implied the negation of the power to remove except for the causes specified. This court was of opinion that this principle of interpretation was inapplicable. "The right of removal," said the Court, "would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by constitution or statute. It requires plain language to take it away" (p. 316). It is to be observed, however, that in all statutes of the class construed in Shurtleff v. United States if to the statutory affirmatives were added the words "and for no other cause" or "not otherwise" we should have to include them in the list of statutes in which Congress has undertaken to prevent removal by the President alone.

There are certain other statutes which do not affect the power of removal but are significant because they do impose limitations even upon the President's constitutional right of appointment. If the President under the constitution has a power of removal it is an implied power. If Congressional limitations upon the exercise of this implied power are unconstitutional, it might be argued with at least equal force that similar limitations upon the

express constitutional grant of the right to appoint are likewise unconstitutional.

In the following cases acts of Congress now in force place restrictions upon the presidential right of appointment:—

Under 31 Stat. 158, Am.; 42 Stat. 119-120 the President may appoint as Judge for the District Court for Hawaii only a citizen of the territory of Hawaii who has resided therein three years next preceding the appointment. Under similar statutes similar limitations are imposed upon the area of selection in the case of marshals, district attorneys, supreme court and circuit judges of the territory. Under similar statutes there is a limitation of choice in the case of judge of the municipal court of the District of Columbia, and in the case of judge of the United States Court for China. In the case of members of the Board of General Appraisers, the President may not appoint more than five of the nine from the same political party.

Under 43 Stat. 336, Sec. 900, members of the Board of Tax Appeals may be appointed by the President "solely on the grounds of fitness to perform the duties of the office."

Under 42 Stat. 1473; 39 Stat. 360; not more than three members of the Federal Farm Loan

Board may be appointed by the President from one political party.

Under statutes applicable to the commissioning of officers in the army and navy, there are many limitations upon the right of selection.

In order that the Court may see the legislative situation at a glance a tabular statement has been prepared to accompany this brief, which specifies the offices and statutes in question, the appointing authority where specified in the statute, the term of office if specified therein, the statutory limitations on appointment if any, the removal authority if specified in the statute, and the statutory limitations upon removal. It cannot be asserted that this tabular statement is exhaustive, but it is as complete as has been found possible in view of the shortness of the time available for preparation.

This imperfect summary of existing legislation will suffice to indicate the nature of the ground which lies between the lines of well-established legislative power and of entrenched executive prerogative. It is as yet a constitutional no man's land. It will continue to be such until this Court shall determine under whose control the constitution intends it to be. It is hoped that the decision in the instant case will go far to dispel the existing uncertainty.

IV.

Constitutional Provisions Respecting the Legislature and the Executive.

All of the provisions of the constitution which at various times and by different jurists and advocates have been thought to have bearing upon the present question are as follows:—

Article I.

Section 1. "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.—(Clause 5)—"The House of Representatives shall choose their speaker and other officers, and shall have the sole power of impeachment.

Section 3.—(Clause 6)—"The Senate shall have the sole power to try all impeachments.

Section 8.—"The Congress shall have power:

(Clause 7)—"To establish postoffices and postroads.

(Clause 14)—"To make rules for the government and regulation of the land and naval forces.

(Clause 18)—"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department thereof.

ARTICLE II.

SECTION 1. "The Executive power shall be vested in a President of the United States of America.

SECTION 2.—(Clause 1)—"The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

(Clause 2)—"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 think proper in the President alone, in the courts of law, or in the heads of departments.

(Clause 3)—"The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions, which shall expire at the end of their next session.

SECTION 3. . . . "he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

ARTICLE III.

SECTION 1. "The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour."

The first distinction to be noted is between appointed officers for whom the Constitution prescribes terms of tenure and officers as to whose tenure the constitution is silent. This distinction puts the Justices of the Supreme Court and all of the Federal Judges in a class by themselves. By the Constitution they hold office during good behavior, and are removable only by impeachment.

As to all other officers, whether named in the Constitution or not, it is to be noted that there is absolute silence on the subject of removal. With respect to them the Court is confronted by three possible theories of removal:—

First.—That the power of removal is an executive power and is an incident of the power to appoint, and that as only the appointment requires Senatorial approval, the power of removal is in the President alone.

Second.—That if removal is incidental to the power of appointment, then removals are subject

to the same restriction as appointments, *i. e.,* they can be made only with Senatorial consent.

Third.—That while the exercise of the power of removal is an executive act, yet the duty to prescribe the conditions of removal is not an executive power at all, but is legislative in its nature, and is incidental to the power to create the office in question, and must, therefore, be exercised only in accordance with the terms of the creating act.

In the instant case the contention of the United States can be supported only upon the first of these three theories. The second theory is supported by respectable authority but seems to me unsound. The third is the one which is now pressed upon the Court on behalf of the appellant as being in harmony with the Constitution and responsive to the test of governmental efficiency.

The discussion of this subject is often approached by quoting the constitutional provision that "the executive power shall be vested in a President of the United States of America," and the constitutional declaration that "he shall take care that the laws be faithfully executed." It is said that he cannot effectively execute the laws unless he has an unrestricted power of removal. To argue thus is to beg the question. The laws which he is to execute are the laws made by Congress. The Constitution makes no vague grant of an ex-

ecutive prerogative, in the exercise of which the President may disregard legislative enactments. The executive power vested in him is only that which the constitution grants to him. The proposition was well stated by Attorney General Black in an opinion given to President Buchanan, 9 Opinions Attorney General 516:

> "To the Chief Executive Magistrate of the Union is confided the solemn duty of seeing the laws faithfully executed. That he may be able to meet this duty with a power equal to its performance he nominates his own subordinates and removes them at pleasure. For the same reason the land and naval forces are under his orders as their Commander-in-Chief. But his power is to be used only in the manner prescribed by the legislative department. He cannot accomplish a legal purpose by illegal means, or break the laws himself to prevent them from being violated by others."

Whether or not a certain office shall be created is a legislative question. The duties of the official, the salary which he is to receive, and the term during which he is to serve, are likewise matters for legislative determination. Provision for filling the office is in its nature legislative, and so is provision for vacating it. The fact that the Constitution makes a specific provision in connection with the filling of the office works no change in the nature of the provision for vacating it. The actual removal is an executive act; but if it is legal it must be done in execution of a law—and the making of

that law is an act of Congress. If the Constitution were silent in regard to appointment as it is silent in regard to removal, legislative action would be decisive in both cases. From the mere fact, however, that it is deemed wise to give to the Executive a limited power of appointment, no inference ought to be drawn that he is intended to have an unlimited power of removal.

The language of the second section of Article 2 of the Constitution is nicely chosen. The President is given the *power,* with the advice and consent of the Senate, to make treaties. Elsewhere he is similarly given the power to fill up vacancies during the recess of the Congress. But the executive right to make nominations and appointments to office when the Congress is in session is not described as a *power* at all. "He shall nominate, and by and with the advice and consent of the Senate, shall appoint." That which is laid upon him is an executive *duty.* His business is to effectuate the legislation of Congress. From the existence of the duty no inference should be drawn of the grant of the power.

An office holder, apart from his sense of duty, is moved by two powerful considerations. One, the consideration of gratitude for his appointment; the other, apprehension lest he be removed. The power of control through fear is a dangerous power to

lodge in the hands of any one person. It is far less likely to be abused when it is exercisable only by the vote of a large body of men than if it represents merely the determination of a single will. The case of the Comptroller General is a case in point. It is essential to the operation of a sound fiscal system that the chief accounting officer should be as nearly as possible uncontrolled by the action or influence of executive departments. If he is freely removable by the President, the psychology of the situation is likely to be such that he will be controlled by the opinions of the Attorney General. If this happens, we shall have in practice a situation in which questions of accounting affecting the Department of Justice will be determined in the Department itself, and not by the Comptroller General. If the power to prescribe terms of removal is recognized as being a legislative power of like sort with the power to create the office, and to prescribe its duties, the Congress will have the responsibility of determining in what cases it is wise to confer upon the President an unrestricted power of removal, in what cases it is wise to place restrictions upon his exercise of the power, and in what cases it is wise to reserve the power for its own exercise or to vest it in another body. If, on the other hand, it is determined that the President under the Constitution has the prerogative of removal, then no room is left for the imposition of limitations upon its exercise. The legislation above referred to

must be wiped off the statute books, and nothing will stand between the people and autocracy except the self-control of an individual.

At the present time the well-deserved public confidence in the President is equalled by the unpopularity of Congress. It must never be forgotten, however, that English-speaking people have found it wise to place their trust in the legislature, subject only to constitutional restraints.

The following interesting passage occurs in Prof. Robert McElroy's recently published Life of Grover Cleveland (Volume I, pp. 166-168):

> "From the beginning of the history of popular government to the present day there has gone on a ceaseless conflict between the Executive and those whose 'advice and consent' was essential to effective administration. Indeed, it is not too much to say that the history of the phrase 'advice and consent' is the history of the gradual evolution of the British Parliament from the Anglo-Saxon Witenagemot, or Assembly of Wise Men, and the Norman Great Council of the Realm. Go back into English history as far as constitutional documents permit, and always, in every period, written in Latin, in French, or in English, appear the words 'with the advice and consent.'
>
> "In 759 King Sigiraed gave lands to Bishop Eardwulf 'with the advice and consent of my principal men.' In 774 Alcred, King of Northumbria, 'by the advice and consent of all his people . . . exchanged the majesty of empire for exile,' according to a

contemporary chronicle. Henry II issued the Forest Assize of 1184 'by the advice and consent of the archbishops, bishops, barons, earles, and nobles of England.' The Wicked King John acknowledged that his subjects were to be taxed 'by the common advice and assent of our Council.' Henry III ascended the throne 'by the common advice and consent of the said king and the magnates,' and Bracton, the prince of mediæval lawyers, declares: 'The laws of England cannot be changed or destroyed without the common advice and consent of all those by whose advice and consent they were promulgated.' During all those centuries the people through their representatives, a term of increasing definiteness of meaning, struggled with the crown, first to win power, and later to defend and enlarge it. By 'the glorious revolution of 1688' they became supreme, and at once the Crown devised a system of patronage by which the executive power could control, by indirection, a legislature no longer amenable to the direct control of earlier days.

"Meanwhile the English colonies in America had naturally fallen into the ancient formula, performing their simple acts of government 'by and with the advice and consent' of whatever their legislative branch happened to be called. The old statute book of North Carolina opened with the phrase: 'Be it enacted by his Excellency Gabriel Johnston, Esq., Governor, by and with the advice and consent of his Majesty's Council and General Assembly.' And New York, Delaware, Maryland, South Carolina, and Georgia, prefaced their statutes by that selfsame phrase.

> "After the Revolution, when the weak articles of confederation were leading the new nation toward anarchy, the Constitutional Convention of 1787 assembled at Philadelphia to prepare for a more perfect union. Every lawyer there had thumbed the English statute books, reading each time the ancient phrase 'by and with the advice and consent.' And many of the delegates were accustomed to its use in their state constitutions. It was natural, therefore, that the convention, when seeking a phrase to describe the proposed action of the Senate to which was to be given the right of passing upon executive appointments, should have provided that 'he (the President) shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers, and consuls, etc.' Thus the power of appointment was definitely assigned to what at first sight appears a combination—the President, with the advice and consent of the Senate sitting in executive session. The word 'advice' however, soon lost its independent meaning and became 'merged in "Consent," ' as Wharton informs us, and thus consent alone was left to the Senate, which could check the President's power of appointment, but could not properly claim to share it."

After making this interesting historical summary, Professor McElroy strongly supports President Cleveland in the controversy which took place between him and the Senate as respects the right of the Senate, before confirming a presidential nomination, to inquire the reasons which had led the President to remove the predecessor of the

new appointee, as will be pointed out later in this brief (See page 52). This controversy did not throw light upon the problem of the President's right to remove otherwise than in accordance with the provisions of the statute creating the office. Had President Cleveland attempted to do what was done by President Wilson in the instant case, Professor McElroy would have been compelled either to take sides against the Executive or else to approve an act out of harmony with the evolution of English constitutional government. The issue is not between the President and the Senate; it is between the existence of a power in Congress to decide how the best public service is most likely to be secured, and the existence of an uncontrolled executive prerogative which will be used wisely in some cases and tyrannously in others.

V.

The Back-Ground of History.

But it is said that the question has been settled in favor of the Presidential prerogative by the course of executive and legislative practice from the beginning of the government. This statement I believe to be unfounded and to be historically incorrect.

I find nothing in the record of the debates in the Constitutional Convention of 1787 from which it can be inferred that there was anything like a

concensus of opinion respecting the exercise of the power of removal.

In the first place, it is clear that none of the members of the Constitutional Convention who took part in the debates desired the President to wield the powers which at that time were exercisable by the King of England.

In the second place, it must be borne in mind that in the Constitutional Convention Madison and others urged that the President alone, and without the consent of the Senate, should make appointments to office. (See page 329 of Vol. V of Elliott's Debates containing Madison's notes.) Others, on the other hand, like Roger Sherman (page 328) and Pinckney (page 350), thought that the power of appointment should be in the Senate alone. Oliver Ellsworth (page 350) had suggested that nominations be made by the legislative branch, and that the Executive should have power to negative the nominations. In the report of Rutledge's Committee, made August 6th, it was provided that the Senate should have the power to make treaties and appoint ambassadors and Judges of the Supreme Court, and that the legislative branch should appoint a treasurer by ballot. (See pp. 378, 9.) Finally a compromise was reached under which it took the joint action of the Executive and the Senate to appoint as provided in Section 2, Article II of the Constitution. Certainly no inference can be

drawn, from a compromise reached under these circumstances, that it was the intention of the framers that the President alone should have the power of removal. If that inference were permissible, a similar inference might be drawn that the removal should be by the Senate alone.

In the third place, it seems to me to be clear that it was not the intention of the framers of the Constitution that officers of the United States should be the officers or servants of the President. Had this been the intention he alone would have been permitted to select them. They were and are the officers or servants of the people of the United States—that is, of the Government.

The mingling of the powers of the President and the Senate was strongly opposed in the Convention, but the objections did not prevail. (See Vol. IV, Elliott's Debates, page 401.)

Simeon Baldwin observed in the course of congressional debate in 1789 (page 401):—

> "I am well authorized to say, that the mingling of the powers of the President and Senate was strongly opposed in the Convention which had the honor to submit to the consideration of the United States and the different States the present system for the government of the Union. Some gentlemen opposed it to the last; and finally it was the principal ground on which they refused to give it their signature and assent."

Baldwin, it will be remembered, was an active member of the Constitutional Convention.

The Solicitor General himself, in his admirable book on the Constitution of the United States, says (pages 233 and 236):

> "It would be difficult to find in the Constitution any real evidence of that independence in any of the three departments of the Government which was the great ideal of Montesquieu."

And again:

> "The framers were not blind to the fact that their form of Government would be a drag upon swift action. Their concern was with the abuse of government."

Finally, it cannot successfully be contended that at the date of the drafting of the Constitution the power of removal was a power commonly vested in Governors of States by then existing State Constitutions. In the course of the debates in the First Congress, Smith, a member of the House, said:

> "The gentleman from Virginia has said that the power of removal is executive in its nature. I do not believe this to be the case. I have turned over the constitutions of most of the States, and I do not find that any of them have granted this power to the Governor. . . . It will not be contended that the State governments did not furnish the members of the late Convention with the skeleton of this Constitution." (I Congressional Debates, Part I, page 490.)

If it cannot be successfully contended that a presidential power of removal is inferrable from the debates in the Constitutional Convention, neither can it be contended that during the period when the issue of ratification was before the States the existence of any such power was conceded by the friends of the new instrument. I find no exposition of the intent of the framers of the Constitution during the period of ratification except that found in No. 77 of the Federalist. This declaration has always been attributed to Alexander Hamilton. It was to the effect that "the consent of the Senate would be necessary to displace as well as to appoint." I do not assert that this represented the views of the framers of the Constitution. It may have represented only the personal opinion of Hamilton. What seems to me to be probable is that it was published in order to allay the fears of those who were supporters of and antagonistic to a centralized government, and thus to make ratification the more likely. However this may be, the declaration, as far as I can find, is the only contemporaneous exposition.

An interesting comment on this utterance of Hamilton is to be found in Field v. The People, 2 Scammon (Illinois), page 165:

> "This statesman well knew if the American people should believe that the Constitution conferred this enormous power on the President, a power which in Great Britain en-

> ables the Monarch to control the Parliament of that immense empire at his will, that they would reject the Constitution proposed for their adoption."

I believe it to be likewise unhistorical to assert that any clear inference can be drawn in favor of the executive power of removal either from the debates in the First Congress which met in 1789 or from the course of proceedings in that body. The Solicitor General advances the proposition that "this court has declared repeatedly that the contemporaneous legislative expositions of the Constitution acquiesced in for a long term of years fixes the construction to be given to these provisions." Accepting this proposition as sound, it is to be observed that in the present case there was (as we have seen) no such exposition in the course of the Constitutional Convention, and no such contemporaneous interpretation by the framers. It will presently be pointed out that Presidents have taken different positions from time to time; that the position of Congress and each of its branches has varied from time to time; and that the only persistent legislative interpretation which can be gathered from the whole course of Congressional history is that the Congress when it sees fit may itself determine where the power of removal shall be vested.

When the first Senate met only ten States were represented in the Senate, which was com-

posed of twenty members. Of these precisely one-half had been members of the Constitutional Convention. They were Oliver Ellsworth, William S. Johnson, Robert Morris, William Patterson, George Read, John Langdon, Caleb Strong, William Few, Richard Basset and Peirce Butler.

Of the fifty-four members of the House of Representatives who voted, eight had been members of the Constitutional Convention, namely, Messrs. Baldwin, Carroll, Clymer, Fitzsimmons, Gerry, Gilman, Madison and Sherman.

The first Congress had before it a bill to establish a Department of Foreign Affairs, at the head of which should be an officer to be called the Secretary of the Department of Foreign Affairs, "who shall be appointed by the President by and with the advice and consent of the Senate, and to be removable by the President."

So far as the proceedings in the Senate are concerned, there is no complete record of the debate. We know that the vote on the passage of the bill was a tie, and that the deciding vote was cast by the Vice-President, John Adams. Our information respecting the views of individual Senators can be drawn only from the fragmentary notes of Mr. Adams. The following illuminating comment upon the vote of the Vice-President himself will be found in the Opinion of Senator

Edmunds in the Impeachment of Andrew Johnson, Vol. III, page 84:

> Adams, he says, "was by the public so generally supposed to have been influenced by his expectation of becoming President himself that he thought it necessary to repel the accusation of (to use his own words) 'deciding in favor of the powers of the prime because I look up to that goal.'"

Of the ten Senators who had sat in the Convention, six by voice or vote upheld the President's power and four opposed it. (See Works of John Adams, Vol. III, pages 407-412.)

It is even more difficult to draw any certain inference from the proceedings in the House. In that body, when the bill was in committee of the whole, a resolution was offered to strike out so much of the bill as vested the power of removal in the President. On this question the yeas were twenty and the nays thirty-four. This vote, if considered without reference to the debates or to the subsequent parliamentary history of the measure, would tend to support the inference that a decisive majority was in favor of giving to the President the unrestricted right to remove a cabinet officer. It would of course throw no light whatever upon the question whether the President would have had any such right of removal if the Congress had not conferred it upon him. But the vote must

be analyzed both in the light of the debates and in the light of the subsequent fate of the bill; for when the bill came from the committee of the whole into the House an amendment was proposed to another portion of the bill making a certain disposition of the records of the office, "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy." It was thereupon declared that if this amendment prevailed it would be followed by a motion to strike out the substantive grant to the President of the power of removal as it had appeared in the bill when introduced. The amendment did prevail by a vote of yeas thirty and nays eighteen, and the motion to strike out likewise prevailed by a vote of yeas thirty-one and nays nineteen. The bill was finally passed in the House by a vote of yeas twenty-nine and nays twenty-two.

When reference is made to the expressed views of the members of the House, as found in the debates, the following analysis made by Senator Edmunds in the course of the opinion already quoted will be found in point. (III Impeachment of Andrew Johnson, pages 84, 5.)

> "Of the fifty-four members of the House of Representatives present, those who argued that the power of removal was, by the Constitution, in the President, were Sedgwick, Madison (who had maintained the opposite), Vining, Boudinot, Clymer, Benson, Scott, Good-

hue, and Baldwin. Those who contended that the President had not the power, but that it might be conferred by law, but ought not to be, were Jackson, Stone and Tucker.

"Those who believed that the President had not the power, and that it could not be conferred, were White, Smith of South Carolina, Livermore, and Page.

"Those who maintained that the President had not the inherent power, but that it might be bestowed by law, and that it was expedient to bestow it, were Huntington, Madison at first, Gerry, Ames, Hartly, Lawrence, Sherman, Lee and Sylvester—twenty-four in all, speaking. Of these, fifteen thought the Constitution did not confer this power upon the President, while only nine thought otherwise. But those who thought he had the power and those who thought the law ought to confer it were seventeen.

"Thirty did not speak at all, and in voting upon the words conferring or recognizing the power, they were just as likely to vote upon the grounds of Roger Sherman as upon the reasons of those who merely intended to admit the power. On the motion to strike out the words 'to be removable by the President,' the ayes were twenty, and the noes thirty-four; but no guess, even, can be formed that this majority took one view rather than the other. Indeed, adding only the eight who spoke against the inherent power, but for the provisions of law, to the twenty opponents of both, and there is a clear majority adverse to any such inherent power in the President. And when on the next day it was proposed to change the language to that which became the law, among the

> ayes are the names of White, Smith of South Carolina, Livermore, Page, Huntington, Gerry, Ames and Sherman, all of whom, as we have seen, were of opinion against the claim of an inherent power of removal in the President."

The difficulty of drawing any certain inference from the votes and debates above summarized is a little relieved by the fact that on August 7th, 1789, there was passed an Act for the government of the Northwest Territory, which provided that the President should nominate and by and with the advice and consent of the Senate appoint officers where offices had been appointed by the Congress, and that the President should have the power of removal where Congress could remove. This recognition of a power of removal in Congress is inconsistent with the contention that the power of removal is exclusively an executive prerogative.

I submit that I have now established the proposition that no argument in favor of an executive power of removal can be drawn either from the proceedings in the Constitutional Convention, from contemporaneous exposition, or from the votes and debates in the First Congress. I venture the assertion that the same statement can be made respecting the course of subsequent legislation.

The Act of February 13th, 1795, providing for the occasion of vacancies in the offices of Secretary of State, Secretary of the Treasury, Secretary

of War, *et cetera,* declared that it should be lawful for the President during the recess of the Senate to authorize any person, *et cetera,* to perform the duties of said respective officers until a successor be appointed, "provided that no one vacancy shall be supplied in the manner aforesaid for a longer term than six months." (1 Stat. at Large, 415.) This proviso would appear to be a legislative attempt to construe the constitutional provision giving to the President the power to fill up vacancies and reserving to the Congress control over the appointment in case of vacancies. Congress may or may not have had in mind vacancies caused by removals.

It will not be forgotten that the enormous popular confidence in President Washington was an important factor in shaping public opinion throughout this early period. Such tendency as was manifested to recognize large powers as vested in the President was no doubt stimulated by the conviction that such power might safely be entrusted to the Father of his Country.

In 1801 Jefferson removed many officers by executive acts, but the Senate and the House were overwhelmingly of his political faith. So that no question arose.

The Presidents who succeeded him, Madison, Monroe and John Quincy Adams, forced no is-

sues with the Congress upon the subject of removals.

It is to be noted, however, that on May 15th, 1820, an Act was passed providing that District Attorneys, Collectors of the Customs, Naval Officers, *et cetera,* should be appointed for four years, but removable from office at pleasure. At whose pleasure is not stated. Presumably the President's pleasure is meant. This act shows that the President and the Congress were of opinion that the Congress may by law fix the duration of the occupancy of an office by assigning him a term. From the power to specify a term it is easy to deduce a power in Congress to provide for the manner in which the incumbent of the office may be removed.

In 1826 a select committee of the Senate, of which Benton was Chairman, and having among its members Van Buren and Hayne, submitted a report in which they say:

> "Not being able to reform the Constitution in the election of President, they must go to work upon his powers and trim down these by statutory enactments whenever it can be done by law and with a just regard to the proper efficiency of the Government."

For this purpose they reported certain bills, one of which was a bill to prevent the President from dismissing military and naval officers at his pleasure. The bill was not passed at that time, but

a similar measure became law at a later date, to wit, on July 13th, 1866.

In Washington's time, as we have seen, there was enormous popular confidence in the President. In Jefferson's time there was political harmony between him and the Congress. In the days of his three successors no issues were forced. But when Andrew Jackson took office the question of the extent of executive power occupied a large share of the attention of Congress. Jackson during the course of the struggle over the Bank of the United States instructed his Secretary of the Treasury, William J. Duane, to remove the government deposits from the bank. Duane refused to comply with the President's wish, and the President thereupon removed him and appointed Roger B. Taney. This occurred during recess. After Congress convened in December, 1834, there was a strong administration majority in the House, so that no question was raised there. In the Senate, however, there was an alliance between the National Republicans and the Calhoun States Rights Democracy hostile to the administration. Clay introduced condemnatory resolutions, which were debated for three months and then passed. There was also introduced a bill to repeal the first and second sections of the Act of May 15th, 1820, and to limit the terms of service of certain civil servants. The object of this measure was to limit executive patron-

age. It passed the Senate. Webster, Clay and Calhoun expressed their views at length. The following extracts from what these great men said in debate will show that it is altogether inaccurate to quote them as champions of the executive power of removal.

Daniel Webster (Congressional Debates No. 11, Part I, pp. 458-470) said:

> "The law of 1820, intended to be repealed by this bill, expressly affirms the power. I consider it, therefore, a settled point; settled by construction, settled by precedent, settled by the practice of the Government, and settled by statute. *At the same time, I am very willing to say that, after considering the question again and again, within the last six years, in my deliberate judgment, the original decision was wrong. I cannot but think that those who denied the power, in 1789, had the best of the argument;*"
>
> " . . . *It appears to me, however, after thorough, and repeated, and conscientious examination, that an erroneous interpretation was given to the constitution, in this repect, by the decision of the first Congress; and I will ask leave to state, shortly, the reasons for that opinion, although there is nothing in this bill which proposes to disturb that decision.*"
>
> " . . . *It might, and perhaps it ought to, prescribe the form of removal, and the proof of the fact. It might, I think, too, declare that the President should only suspend officers, at pleasure, till the next meeting of the Senate,*

according to the amendment suggested by the Honorable Member from Kentucky; and, if the present practice cannot be otherwise checked, this provision, in my opinion, ought hereafter to be adopted. But I am content with the slightest degree of restraint which may be sufficient to arrest the totally unnecessary, unreasonable, and dangerous exercise of the power of removal. *I desire only, for the present at least,* that, when the President turns a man out of office, he should give his reasons for it to the Senate, when he nominates another person to fill the place. Let him give these reasons, and stand on them. If they be fair and honest, he need have no fear in stating them. It is not to invite any trial; it is not to give the removed officer an opportunity of defence; it is not to excite controversy and debate; it is simply that the Senate, and ultimately the public, may know the grounds of removal. I deem this degree of regulation, at least, necessary, unless we are willing to submit all these officers to an absolute and perfectly irresponsible removing power, a power which, as recently exercised, tends to turn the whole body of public officers into partisans, dependants, favorities, sycophants, and man-worshippers.

"Mr. President, without pursuing the discussion further, I will detain the Senate only while I recapitulate the opinions which I have expressed; because I am far less desirious of influencing the judgment of others, than of making clear the grounds of my own judgment.

"I think, then, sir, that the power of appointment naturally and necessarily includes the power of removal, where no limitation is expressed, nor any tenure but that at will de-

clared. The power of appointment being conferred on the President and Senate, I think the power of removal went along with it, and should have been regarded as a part of it, and exercised by the same hands. I think, consequently, that the decision of 1789, which implied a power of removal separate from the appointing power, was erroneous.

"But I think the decision of 1789 has been established by practice, and recognized by subsequent laws, as the settled construction of the constitution; and that *it is our duty to act upon the case accordingly, for the present, without admitting that Congress may not hereafter, if necessity shall require it, reverse the decision of 1789. I think the Legislature possesses the power of regulating the condition, duration, qualification, and tenure of office, in all cases where the constitution has made no express provision on the subject.*"

Henry Clay (Congressional Debates No. 11, Part I, pp. 513-524) said:

"*We can now deliberately contemplate the vast expansion of executive power under the present administration, free from embarrassment. And is there any real lover of civil liberty who can behold it without great and just alarm?* Take the doctrines of the protest and the Secretary's report together, and, *instead of having a balanced Government with three co-ordinate departments, we have but one power in the state. According to those papers, all the officers concerned in the administration of the laws are bound to obey the President.* His will controls every branch of the administration. *No matter that the law may have as-*

signed to other officers of the Government specially defined duties; no matter that the theory of the constitution and the law supposes them bound to the discharge of those duties according to their own judgment, and under their own responsibility, and liable to impeachment for malfeasance; the will of the President, even in opposition to their own deliberate sense of their obligations, is to prevail, and expulsion from office is the penalty of disobedience!

"The basis of this overshadowing superstructure of executive power is the power of dismission, which it is one of the objects of the bill under consideration, somewhat to regulate, but which it is contended by the supporters of executive authority is uncontrollable. The practical exercise of this power, during this administration, has reduced the salutary cooperation of the Senate, as approved by the constitution, in all appointment, to an idle form. *Of what avail is it that the Senate shall have passed upon a nomination, if the President, at any time thereafter, even the next day, whether the Senate be in session or in vacation, without any known cause, may dismiss the incumbent?*

"The power of removal, as now exercised, is nowhere in the constitution expressly recognized. The only mode of displacing a public officer for which it does provide is by impeachment. *But it has been argued on this occasion, that it is a sovereign power; an inherent power, and an executive power; and, therefore, that it belongs to the President. Neither the premises nor the conclusion can be sustained. If they could be, the people of the United States have all along totally misconceived the nature*

of their Government, and the character of the office of their Supreme Magistrate. Sovereign power is supreme power; and in no instance whatever is there any supreme power vested in the President. Whatever sovereign power is, if there be any, conveyed by the Constitution of the United States, is vested in Congress, or in the President and Senate. The power to declare war, to lay taxes, to coin money, is vested in Congress; and the treaty making power in the President and the Senate. The postmaster general has the power to dismiss his deputies. Is that a sovereign power, or has he any?

"Inherent power! That is a new principle to enlarge the powers of the general Government. . . . The partisans of the Executive have discovered a third and more fruitful source of power. Inehernt power! Whence is it derived? The constitution created the office of President, and made it just what it is. It has no powers prior to its existence. It can have none but those which are conferred upon it by the instrument which created it, or laws passed in pursuance of that instrument. *Do gentlemen mean by inherent power, such power as is exercised by the monarchs or chief magistrates of other countries?* If that be their *meaning they should avow it.*

". . . In several of the States, removal from office sometimes is effected by the legislative authority, as in the case of judges on the concurrence of two-thirds of the members. . . . In Kentucky, and in other States, the Governor has no power to remove sheriffs, collectors of the revenue, clerks of courts, or any one officer employed in admin-

istration; and yet the Governor, like the President, is constitutionally enjoined to see that the laws are faithfully executed.

. . . . . .

"The power of removal from office not being one of those powers which are expressly granted and enumerated in the constitution, and having, I hope, successfully shown that it is not essentially of an executive nature, the question arises, to what department of the Government does it belong, in regard to all offices created by law, or whose tenure is not defined in the constitution? *There is much force in the argument which attaches the power of dismission to the President and Senate conjointly, as the appointing power. But I think we must look for it to a broader and higher source—the legislative department.* The duty of appointment may be performed under a law which enacts the mode of dismission. This is the case in the post office department—the postmaster general being invested with both the power of appointment and of dismission. But they are not necessarily allied, and the law might separte them and assign to one functionary the right to appoint, and to a different one the right to dismiss. Examples of such a separation may be found in the State Governments.

"It is the legislative authority which creates the office, defines its duties, and may prescribe its duration. I speak, of course, of offices not created by the constitution, but the law. The office, coming into existence by the will of Congress, the same will may provide how, and in what manner, the office and the officer shall both cease to exist. It may direct

the conditions on which he shall hold the office, and when and how he shall be dismissed. . . .

"It has been contended with great ability, that, under the clause of the constitution which declares that Congress shall have power 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all others vested by this constitution in the Government of the United States, or in any department or officer thereof,' Congress is the sole depository of implied powers, and that no other department or officer of the Government possesses any. . . .

"The precedent of 1789 was established in the House of Representatives against the opinion of a large and able minority, and in the Senate by the casting vote of the Vice-President, Mr. John Adams. *It is impossible to read the debate which it occassioned, without being impressed with the conviction that the just confidence reposed in the Father of his Country, then at the head of the Government, had great, if not decisive, influence in establishing it.* It has never, prior to the commencement of the present administration, been submitted to the process of review. It has not been reconsidered; because, under the mild administrations of the predecessors of the President, it was not abused, but generally applied to cases to which the power was justly applicable.

". . . But a solitary precedent, established as this was, by an equal vote of one branch, and a powerful minority in the other, under the influence of a confidence never misplaced in an illustrious individual, and which

has never been reexamined, cannot be conclusive.

. . . . . .

> *"No one can carefully examine the debate in the House of Representatives in 1789, without being struck with the superiority of the argument on the side of the minority, and the unsatisfactory nature of that of the majority. How various are the sources whence the power is derived! Scarcely any two of the majority agree in their deduction of it. Never have I seen, from the pen or tongue of Mr. Madison, one of the majority, anything so little persuasive or convincing. He assumes that all executive power is vested in the President.* . . . In the silence of the constitution, it would have devolved upon Congress to provide by law for the mode of appointing to office; and that in virtue of the clause, to which I have already adverted, giving to Congress power to pass laws necessary and proper to carry on the Government."

John Calhoun (Congressional Debates No. 11, Part I, pp. 553-563) said:

> "If the power to dismiss is possessed by the Executive, he must hold it in one of two modes; either by an express grant of the power by the constitution, or as a power necessary and proper to execute some power expressly granted by that instrument. All the powers under the constitution may be classed under one or the other of these heads; there is no intermediate class. The first question then is, has the President the power in question by any express grant of the constitution? He who affirms that he has, is bound to show it. That in-

strument is in the hands of every member; the portion containing the delegation of power to the President is short. It is comprised in a few sentences. I ask the Senators to open the constitution, to examine it, and to find, if they can, any authority given to the President to dismiss a public officer. None such can be found; the constitution has been carefully examined, and no one pretends to have found such a grant. *Well, then, as there is none such, if it exists at all, it must exist as a power necessary and proper to execute some granted power; but if it exists in that character, it belongs to Congress, and not to the Executive.* I venture not the assertion hastily; I speak on the authority of the constitution itself; the express and unequivocal authority which cannot be denied nor contradicted. Hear what that sacred instrument says: 'Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,' [those granted to Congress itself], 'and all other powers vested by this constitution in the Government of the United States, or in any department or office thereof.' Mark the fullness of expression. *Congress shall have power to make all laws, not only to carry into effect the powers expressly delegated to itself, but those delegated to the Government or any department or office thereof;* and, of course comprehends the power to pass laws necessary and proper to carry into effect the powers expressly granted to the Executive Department. It follows, of course, to whatever express grant of power to the executive the power of dismissal may be supposed to attach, whether to that of seeing the law faithfully executed, or to the still more comprehensive grant, as contended for by

some, vesting executive powers in the President, *the mere fact that it is a power appurtenant to another power, and necessary to carry it into effect, transfers it, by the provisions of the constitution cited, from the executive to Congress, and places it under the control of Congress, to be regulated in the manner which it may judge best.*"

I draw the following inferences from the views thus expresed, respectively, by Webster, Clay and Calhoun:

1. That Webster was clearly of opinion that those who in 1789 argued in favor of the presidential power of removal had the worst of the argument, and that it should then have been decided that the power of removal was exercisable only by the President and the Senate.

2. That Webster regarded legislative practice as having mistakenly recognized the power to regulate the matter of removals as executive, and that for the time being he would be satisfied with a requirement that the President when removing should state his reasons to the Senate.

3. That Clay held the view which in the instant case I am pressing upon the Court, namely, that since the legislative authority creates the office, defines its duties, and prescribes its duration, the same authority may determine the conditions of dismissal.

4. That Calhoun took a view more antagonistic to the power of the Executive than either Webster or Clay, and was of opinion that the power to regulate removals was exercisable by Congress alone.

What is here said with regard to the position of Webster is said with confidence, although I am not unmindful of the fact that in Parsons v. United States, 167 U. S. 324 (1896), the Court attributed to Mr. Webster a view which I venture to suggest was inferred from an isolated statement in the debate divorced from the context in which it was used.

In 1867 Congress, being strongly hostile to President Johnson's reconstruction policy, undertook to embarrass him by passing the Tenure of Office Act. This act provided in substance that various civil officers (and the terms used were broad enough to include all members of the cabinet) should be entitled to continue in office until their respective successors should be appointed by the President with the advice and consent of the Senate.

I freely concede that such an act is unwise legislation, and that the repeal of the act twenty years later removed a blot upon the legislative record. Upon the theory, however, which is being pressed upon the Court in the instant case I submit that the Tenure of Office Act was constitu-

tional, because the Congress which had power to create the offices and prescribe the duties of the incumbents had likewise the power to determine the conditions of removal.

The President vetoed the Act. The Congress passed the Act over his veto. He then in disregard of the Act undertook to dismiss Mr. Stanton, the then Secretary of War, and was impeached by the House of Representatives. The Senate tried the impeachment. The vote for conviction stood yeas thirty-five, nays nineteen. He was therefore acquitted, the requisite two-thirds not having voted to convict.

In the course of his opinion Senator Sherman said (III Impeachment of President Johnson, pp. 3, 5, 6):

> ". . . Section three of the same article [Art. III] provides 'That he shall take care that the laws be faithfully executed.' This duty to execute the laws no more includes the power to remove an officer than it does to create an office. . . .; yet he cannot execute the laws without soldiers, sailors, and officers. His general power to execute the laws is subordinate to his duty to execute them with the agencies and in the mode and according to the terms of the law.
>
> "The power of removal at his will is not a necessary part of his executive authority. It may often be wise to confer it upon him; but, if so, it is the law that invests him with

discretionary power, and it is not a part, or a necessary incident, of his executive power. It may be and often is conferred upon others.

"That the power of removal is not incident to the executive authority, is shown by the provisions of the Constitution relating to impeachment. The power of removal is expressly conferred by the Constitution only in cases of impeachment and then upon the Senate, and not upon the President.

. . . . . .

"If the power to remove is incident to the power to appoint, it can only be co-extensive with the power to appoint.

. . . . . .

". . . Officers of the army and navy can only be removed upon conviction by court martial, . . . "

. . . . . .

"Their judgment that the head of a department should be removable by the President may be wise, but the power to remove is not conferred by the Constitution, but like the office itself, is to be conferred, created, controlled, limited, and enforced by the law. That such was the judgment of Marshall, Kent, Story, McLean, Webster, Calhoun and other eminent jurists and statesmen, is shown by their opinions quoted in the argument; . . . "

In the course of his opinion, already referred to, Senator Edmunds said (pp. 83, 84):

"'*The* executive power' named as to be vested in the President, must of necessity be

that power and no other, which the Constitution grants to him. So speaking, it proceeds at once to define and describe it. All the *powers* of the President are specifically enumerated, with apparently the utmost precision, even those most clearly within the general definition of 'executive power.' . . . The limited *powers* which the framers of the constitution thought fit to grant to the person who was to take the place of kings and emperors in systems of government hostile to liberty, could be easily named, and ought to be jealously defined.

. . . . . .

"The Constitution expressly provides, on the other hand, that *Congress* shall have power 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, *or in any department thereof.*' . . .

"The scheme, plainly, was to leave the *selection of* persons to fill offices to the President, acting with the advice and consent of the Senate, and to leave to the *whole* Government —that is to the law-making power—full discretion as to the establishment of offices, and as to the terms upon which, and the tenure by which, they should be held by the persons so selected. . . . for temporary commissions could be issued from session to session, even to the very persons rejected by the Senate as has been the case. And if officers by the Constitution are removable at the will of the President, why, when once appointed, should they not hold at his pleasure, and if so, how can the

law put a period to their holding, as has been done in various instances from the first, without question from any source?

"Certainly if, when the Constitution is silent, the legislative power may declare that whoever is appointed to a particular office shall *cease* to hold it at the end of four years, it may also declare that the appointee shall enjoy it during that time. . . .

". . . We must, therefore, suppose that the cases not specifically provided for, and the implied powers generally were intended to be left to the provisions of law, in making which both the President and Congress must always participate, and usually concur, and not to the uncontrolled will of the Executive. Indeed, the counsel for the respondent do not seem very seriously to question this interpretation of the Constitution considered independently of a construction, which they insist has been by legislative discussion and enactment, and by long practice of executives put upon it."

He then proceeded to show that such construction was otherwise than as counsel for the President contended (pp. 85):

"As to the supposed recognition by the laws themselves, and a practice under them, it need only be said that the whole course of legislation, comprised in more than twenty statutes, has until 1863, *authorized* the President to make removals; and hence *they furnish no evidence of his powers, independently of the law, but the contrary.* It needs no argument to show that what the laws have *authorized* they may *forbid.* No law can become so old

> that the legislative power cannot change it; and even as to legislative construction it is the same. A later Congress has just as much power in that respect as an earlier. . . .
>
> "Can it be said, then, that where the letter of the Constitution is silent upon another branch of the same subject, the law has no power to speak, and that behind that veil of silence sleeps a kingly prerogative of the President?"

The Act of April 5, 1869, amended the Tenure of Office Act by ridding it of its most obnoxious features. "The sections of the Act regulating suspensions were entirely repealed" says Professor McElroy (Vol. 1, p. 171) "and provisions were substituted which, instead of limiting the causes of suspensions to misconduct and crime, expressly permitted such suspension by the President 'in his discretion' and abandoned the requirement that he report to the Senate 'the evidence and reasons' for his action." Under this statute, the President might make removals but was required "within thirty days after the commencement of each session . . . to nominate persons to fill all vacancies." As a practical proposition, this measure placed it in the power of the Senate alone to obstruct removals (although Congress had imposed upon the Senate no responsibility respecting them) by withholding consent to the appointment of the successor unless actually satisfied with the reasons for the preceding removal. Against this

limitation President Grant filed his protest, President Hayes urged repeal, and President Garfield denounced the senatorial usurpation.

During the recess of Congress, President Cleveland removed 643 officers and within thirty days after the assembling of Congress sent to the Senate his nominations of persons to be appointed as successors to the removed officials. One of the removed officials was a Federal attorney. The Act under which he had been appointed did not undertake to vest the power of removal elsewhere than in the President. The case was therefore unlike the instant case. Before acting upon the nomination of his successor, the Senate Committee on the Judiciary requested the Attorney-General to submit information and papers relating not only to the qualifications of the nominee but to the removal of his predecessor. The Attorney-General, by direction of the President, refused to comply with the request. A heated controversy ensued. After vehement debate a resolution was passed—32 to 25—censuring the Attorney-General and, by implication, the President. The incident ended, however, somewhat in opera bouffe fashion by the discovery that the term of the removed official had expired before the Senate had passed its resolution of inquiry. There was therefore nothing to do but to confirm the appointment of the successor.

It was as a sequel to this conflict that what was left of the Tenure of Office Act was repealed, the repealing measure being signed by the President on March 3, 1887. As already pointed out, however, this repeal had no effect upon the Act of July 12, 1876, which is the Act with which we are concerned in the instant case. While the joint operation of the Act of 1869 and of 1887 leaves the President free to remove other members of his cabinet, the Postmaster-General and Postmasters of the 1st, 2nd and 3rd class are removable only by and with the advice and consent of the Senate.

VI.

Judicial Decisions.

In the light of the foregoing historical review, it may be well at this point to state specifically the application to different practical situations of the theory which underlies this argument. This having been done, it will be in order to point out that the theory thus applied runs counter to no case ever decided by this Court.

1. The act of removal is an executive act but the power to frame the law of which the act of removal is an execution is a legislative power and is vested in the Congress.

2. If the Congress creates an office, prescribes its duties, the qualifications of the incumbent, and

the salary paid to him, but makes no provision on the subject of removal, the inference is that the removal is intended to be at the President's discretion.

3. If the Congress similarly creates the office and specifies in affirmative words grounds upon which the President may remove, it is nevertheless to be inferred that he may still remove at discretion because only negative words can displace this inference.

4. If the creating act gives a term to the appointee, it might still be inferred, in the absence of other provisions, that the President may remove at discretion; but this proposition is inconsistent with the view expressed by Chief Justice Marshall in Marbury v. Madison, (*infra*).

5. If the creating act specifies causes of removal and superadds a provision that there shall be removal for no other causes, the inference is of an intention to limit executive removals to that extent. Probably the same inference should be drawn where the statute provides that the incumbent is to hold "during good behavior."

6. If the statute creating the office provides that the President may remove only after affirmative action by another body, *i. e.,* by a court-martial, the possibility of executive removal is to this extent limited.

7. If the creating act (as in the instant case) provides that removal shall be the joint responsibility of the President and the Senate, the President may not remove without the consent of the Senate.

8. If the creating act provides that removal can take place only after action by both Houses of Congress, this also is a constitutional use of legislative power.

As a mere matter of inferring intention from language, it would be easy in case 3 *supra* to draw the inference of legislative intention to limit the freedom of executive removal. Since, however, Congress in such cases must be taken to have legislated in the light of long-standing practice it may be assumed that if Congress had intended to limit the Executive, it would have expressed itself in unmistakable language.

The decisions of this Court are not in conflict with any of the positions above summarized.

Marbury v. Madison, 1 Cranch 137 (1803). An Act of Congress provided for the appointment by the President, by and with the advice and consent of the Senate, of Justices of the Peace for the District of Columbia, the appointee to continue in office for five years. The President nominated Mar-

bury and others and the Senate confirmed. Their commissions were signed by the President and sealed by the Secretary of State. There having been no delivery of the commissions Marbury and the other appointees moved this Court for a rule on Mr. Madison, the Secretary of State, to show cause why a mandamus should not issue commanding him to cause the commissions to be delivered. The Court, in an opinion by Chief Justice Marshall, stated the following conclusions:—First, that the signing and sealing of the commission constituted an appointment. Second, that the duty of the Secretary of State to deliver the commissions to the respective appointees was not a political duty involving discretion but was a ministerial duty, the performance of which could have been compelled at common law. Third, that mandamus was the appropriate writ to compel performance of the duty; but, fourth, that the Act of Congress undertaking to confer original jurisdiction upon the Supreme Court was unconstitutional and therefore that the rule must be discharged. The Executive had made no attempt to remove any of the appointees. Therefore the question of the power of removal arose only in connection with the question whether the appointee had such a right to his office as entitled him to a mandamus to compel delivery of his commission. On this subject the lanuage of the Court was as follows (p. 161):—

"Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled: it has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised, until the appointment has been made. But having once made the appointment, his power over the office is terminated, in all cases where, by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute unconditional power of accepting or rejecting it.

"Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right."

Matter of Hennen, 13 Peters, 230 (1839) was a case involving the right of the United States District Judge to remove from office the clerk of the District Court for the District of Louisiana. The right of the Judge to remove the clerk was upheld. On the question at bar Mr. Justice Thompson said (pp. 258-9):

"In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained, in the early history of this government. This related, however, to the power of the president to remove officers appointed with the concurrence of the senate; and the great question was, whether the removal was to be by the president alone, or with the concurrence of the senate, both constituting the appointing power. No one denied the power of the president and senate, jointly, to remove, where the tenure of the office was not fixed by the constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted as the practical construction of the constitution, that this power was vested in the president alone. And such would appear to have been the legislative construction of the constitution. For in the organization of the three great departments of state, war and treasury, in the year 1789, provision is made for the appointment of a subordinate officer, by the head of the department, who should have the charge and custody of the records, books and papers appertaining to the office, when the head of the department should be removed from the office of the president of the United States. (1 U. S. Stat. 28, 49, 65). When the navy department was established in the year 1798 (Ibid. 553), provision is made for the charge and custody of the books, records and documents of the department, in case of vacancy in the office of secretary, by re-

> moval or otherwise. It is not here said, by removal by the president, as is done with respect to the heads of the other departments; and yet there can be no doubt, that he holds his office by the same tenure as the other secretaries, and is removable by the president. The change of phraseology, arose, probably, from its having become the settled and well-understood construction of the constitution, that the power of removal was vested in the president alone, in such cases; although the appointment of the officer was by the president and senate."

This case in no way involved the presidential right of removal. The decision is therefore not inconsistent with any of the propositions above laid down. It is somewhat remarkable, however, that the views which had been expressed by Chief Justice Marshall in Marbury v. Madison some thirty-six years earlier were not taken into account by Mr. Justice Thompson in the course of his attempted historical review.

United States v. Guthrie, 17 Howard, 284 (1854). In this case the right of the President to remove a judge of the territory of Minnesota was argued but not decided. In the course of a dissenting opinion, Mr. Justice McLean touched upon our question (pp. 305-6):

> "There was great contrariety of opinion in congress on this power. With the experience we now have, in regard to its exercise, there is great doubt whether the most enlightened statesmen would not come to a different conclusion.

> "The attorney-general calls this a constitutional power. There is no such power given in the constitution. It is presumed to be in the President, from the power of appointment. This presumption, I think, is unwise and illogical. The reasoning is: the President and senate appoint to office; therefore, the President may remove from office. Now, the argument would be legitimate, if the power to remove were inferred to be the same that appoints.
>
> "It was supposed that the exercise of this power by the President, was necessary for the efficient discharge of executive duties. That to consult the senate in making removals, the same as in making appointments, would be too tardy for the correction of abuses. By a temporary appointment the public service is now provided for in case of death, and the same provision could be made where immediate removals are necessary. The senate, when called to fill the vacancy, would pass upon the demerits of the late incumbent.
>
> "This, I have never doubted, was the true construction of the constitution, and I am able to say it was the opinion of the late supreme court, with Marshall at its head."

United States v. Perkins, 116 U. S. 483 (1886). By Section 1229 of the Revised Statutes Congress had provided that no officer in the naval service in time of peace could be removed except pursuant to a courtmartial. Perkins, a naval cadet engineer, was removed by the Secretary of the Navy otherwise than pursuant to courtmartial. The Court

held that the removal was illegal. Mr. Justice Matthews said (pp. 484-485):

> " 'It is further urged that this restriction of the power of removal is an infringement upon the constitutional prerogative of the Executive, and so of no force, but absolutely void. Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution (article 2, section 2) does not arise in this case and need not be considered.
>
> " '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.' "

This case is especially important if the Court in the instant case were to be of opinion that a postmaster of the first class is an inferior officer within the meaning of Sec. 2, Art. 2 of the Constitution and, further, that the power therein given to the

Congress to vest the appointment of such officers in the President alone or in the courts of law or in the heads of departments contains an implied grant of power to prescribe in each case the terms of removal. If the Congress might have vested the appointment of the appellant elsewhere than in the President, it can be argued with much force that when the Congress decided to vest the power in the executive it might superadd such conditions as it saw fit, both as respects the method of appointment and the manner of removal. Even the most extreme advocate of the executive prerogative can scarcely contend that the President has a vested right to ignore legislative restrictions upon the removal of an officer whose appointment the Congress in the exercise of a constitutional discretion might have vested elsewhere than in the President.

Parsons v. United States, 167 U.S.324 (1896). Section 769 of the Revised Statutes provides that district attorneys shall be appointed for a term of four years. Parsons was appointed a district attorney by and with the advice and consent of the Senate. During the running of his term the President removed him and nominated a successor, who was confirmed by the Senate before the expiration of the term of Parsons. At the expiration of four years from the date of his commission Parsons brought suit in the Court of Claims for the unpaid balance of his salary. The Court of Claims

entered judgment in favor of the United States and on appeal the judgment was affirmed by this Court. It was pointed out that while the Tenure of Office Act and the modifying act of 1869 were in force all questions respecting the validity of an executive removal would have been set at rest by the subsequent action of the Senate in confirming the appointment of a successor before the expiration of the term of the removed official. This Court concluded that the repeal of the Tenure of Office Act and the act of 1869 was inconsistent with the contention of Parsons that after the repeal he had rights superior to those which he would have had had the acts remained in force. The actual decision therefore throws no light upon the question now before the Court. Its importance, however, must not be underestimated because it contains an extended historical review by Mr. Justice Peckham and the inferences drawn by him in the course of his review are strongly in favor of an executive power of removal which is beyond the reach of legislative limitation. When this great tribunal declares the law all assent to the declaration. The facts of history, however, are unchanged even by the judgment of this Court. I suggest that over against some of the historical statements in the course of Mr. Justice Peckham's opinion it is not improper to place the record of the debates and votes in the first Congress and the quotations from Marshall, Webster, Clay and Calhoun, which have

been set forth in an earlier part of this brief. With respect to the opinion of Chief Justice Marshall in Marbury v. Madison, Mr. Justice Peckham suggests that the portion of the opinion relating to the tenure of office by an appointee confirmed by the Senate was *obiter dictum* because the ultimate decision was based on the lack of original jurisdiction to issue a mandamus. As to this I venture the comment that the epoch-making decision in Marbury v. Madison that the act of Congress conferring jurisdiction was unconstitutional might itself be regarded as unnecessary to the decision unless the court had first decided that Marbury was entitled to the mandamus as a matter of right because the executive had no power to remove him after his appointment had once been made. When we are discussing contemporaneous expositions of the Constitution and the views of the fathers respecting its meaning, it is well to remember that in a transaction originating during the term of the second president, Marshall, speaking for this Court, announced the doctrine quoted on page 57 of this brief.

Shurtleff v. United States, 189 U. S. 311 (1903). This case has already been discussed at page 8 of this argument. It is in no way inconsistent with the contention of the appellant. It is consistent with the proposition that in the absence of negative words it will not be inferred

from an affirmative specification of certain causes for removal that Congress intends to limit the executive.

Wallace v. United States, 257 U. S. 541 (1922). This is believed to be the latest case in which this Court has been called upon to consider the subject of removal. A lieutenant-colonel was dismissed by order of the President otherwise than after sentence of a courtmartial. The officer contended that as he had been appointed with the advice and consent of the Senate he could not legally be removed except by consent of the Senate or in accordance with Section 1230 of the Revised Statutes, which provides that a dismissal by the President is void unless sustained by sentence of a courtmartial. This Court construed the action of the President and the Senate, in connection with the nomination and appointment of another officer to be lieutenant-colonel as having been in effect the appointment of a successor to the officer removed. It is significant that the effect of restrictive legislation upon executive removals was recognized by the court as still an open question, as appears from the following extract from the opinion by the present Chief Justice (p. 544):

> "Before the Civil War there was no restriction upon the President's power to remove an officer of the Army or Navy. The principle that the power of removal was incident to the power of appointment was early

> determined by the Senate to involve the conclusion that, at least in absence of restrictive legislation, the President, though he could not appoint without the consent of the Senate, could remove without such consent in the case of any officer whose tenure was not fixed by the Constitution."

The cases above cited are believed to be the only decisions of this Court in which the question at issue has been touched upon. It is undeniable that the historical summaries contained in the several opinions tend to conclusions favorable to the contention of the United States rather than to the contention now made on behalf of the appellant. For the reasons heretofore given, and with the greatest possible deference, it is suggested that these summaries may well be supplemented by a further consideration of the whole subject in a case which happily comes before the court for decision at a time far removed from the transaction which gave rise to it and when the Court is unembarrassed by any pending conflict of opinion between the legislature and the executive.

VII.

Laches.

The Court of Claims dismissed the appellant's petition upon the ground that his delay in bringing suit was fatal to any recovery—relying on *Norris v. United States,* 257 U. S. 77

(1921); *Nicholas v. United States,* 257 U. S. 71 (1921); and *Arant v. Lane,* 249 U. S. 367 (1919).

The Solicitor General, with great frankness, says that the disposition of the case made by the lower Court in this respect is not entirely convincing to him.

The Arant case involved a petition for a mandamus. Mr. Justice Clarke said (p. 371):

> "It is an extraordinary remedy, which will not be allowed in cases of doubtful right . . . and it is generally regarded as not embraced within statutes of limitation applicable to ordinary actions, but as subject to the equitable doctrine of laches."

That in the case of a private employer, an action for salary or wages due is not barred by laches, but only by the Statute of Limitations, will doubtless be conceded. It may be that in the case of suit by a government official against the Government for arrears of salary claimed to be due, the plaintiff's right of recovery ought to be defeated under the doctrine of laches where his conduct should estop him. In the *Nicholas case,* the claimant after summary removal from office without charges, *did nothing for his vindication for three years.* It was found as a fact that there was no evidence of his willingness and ability to perform the duties of his office from the date of his removal, and that *it did not appear that he had made any report in person*

or in writing to his superior officer protesting against his removal. Mr. Justice Day said that a "person illegally dismissed from office . . . may not for an unreasonable length of time acquiesce in the order of removal, . . . 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" (p. 75).

In the *Norris case,* the claimant was advised on February 20, 1913, that his services would be dispensed with, and it was not until December 22, 1913, that he addressed a communication to the Secretary of the Treasury with respect to his dismissal. Mr. Justice Day said (p. 80):—

> "No fact is found explaining his failure to assert his right to the office, or its emoluments, for a period of eleven months and a little over."

It is submitted that the present case is clearly distinguishable from the above cases and is governed by *United States v. Wickersham,* 201 U. S. 390 (1906). In that case, Wickersham was suspended November 1, 1897. He protested against his suspension on November 5, 1897, and on December 28, 1897, demanded his salary. He brought suit and was permited to recover.

In the present case the appellant certainly did nothing to indicate that he had relinquished his

office and its emoluments. He could have done nothing more than he did to make it clear that his position was the reverse. He did everything that Wickersham did, and more.

The delay of a little over a year in bringing suit is explainable by the facts that until the expiration of the Sixty-sixth Session of Congress on March 4, 1921, the President might with the consent and approval of the Senate have appointed a successor, and that the appellant's right to salary for the balance of his term of office was not clear in February, 1920. The amount thereof, if any, to which he was entitled depended on facts which no one could know until the time when the suit was actually instituted.

As a practical matter, if the decision of the Court of Claims were affirmed, it would mean that while Congress has given dismissed governmental officials a right of action, if they are wrongfully dismissed, the doctrine of laches has annihilated the right of action so given.

VIII.

Summary and Conclusion.

The able and exhaustive brief filed by the Solicitor-General makes two major appeals: one to history and the other to considerations of convenience. The appeal to history cannot be sustained. The only sound inference from available historical

data is that the legislative power of Congress to regulate removals from office has never been effectively questioned.

As to the argument *ab inconveniente,* two observations may be made: first, that constitutional liberty is more vital than governmental efficiency; and, second, that the inconveniences which can result from the legislative regulation of removals are imaginary rather than real. The Solicitor-General cites the case of President Madison's Secretary of War, who during the War of 1812 failed to fortify and otherwise defend the national capital. He suggests that to deny to Madison the power of removal over such an incompetent is a *reductio ad absurdum.* But if we are to discuss absurdities what can be said of reliance upon an historical incident in which Madison, having the power of removal, failed to exercise it till *after* the city was captured and the public buildings burned? Madison had the power of removal, because Congress had in no way reserved it or limited it. The trouble was that Madison himself was an inefficient executive. Madison, with the power of removal, suffered Washington to be captured. Cleveland or Roosevelt, even if denied the power, would have pushed the Secretary into the Potomac and fortified the city.

It is said to be a "cruel injustice" to the President to hold him responsible for the execution of the laws and to deny him control over executive agents. But nobody proposes to do this. The laws which he must execute are the laws passed by Con-

gress. If Congress passes a law and prescribes conditions which hamper its execution, it is Congress that the people will hold responsible. The Tenure of Office Act was a hampering legislative enactment. Popular opinion compelled its repeal. The same fate would overtake any legislation which created or permitted the conditions of inconvenience which the Solicitor-General contemplates. But his argument should be addressed to Congress if and and when unwise laws are contemplated. The question before this Court is not whether Congress has in the past abused its powers or whether it may do so again, but whether under the Constitution there exists an executive prerogative to ignore that part a statute which prescribes the terms upon which a created office shall be held. I suggest to the Court that the age-old traditions of free government will best be conserved if this question is resolved against the executive and in favor of the legislature.

Respectfully submitted,

GEORGE WHARTON PEPPER,

Amicus Curiae.

April, 1925.