Congreſs of the United States.

SENATE.

THURSDAY, February 3.

Debate in the Senate of the United States on the report of the committee to whom was referred the Memorial of the judges of the Circuit Courts of the United States.

[CONTINUED]

Mr. Cocke having ſat down,

The Vice-Preſident roſe, and ſaid he muſt call the attention of the ſenate to the point in diſcuſſion, which was, whether the ſenate would requeſt the preſident to cauſe a proceſs to be inſtituted for the purpoſe of aſcertaining whether the petitioners ſtill hold the office of judge. On this queſtion it could not be in order to go back to a law paſſed at the laſt ſeſſion and to diſcuſs the merits of that law.

Mr. Jackſon ſaid it appeared by the memorial that the petitioners conſidered themſelves as being ſtill judges, notwithſtanding the law of the laſt ſeſſion. He thought, therefore, it could not be out of order to ſhew that that act deprived them of their offices.

Mr. Wright premiſed, that he would endeavor to confine his remarks to the point before the ſenate; he felt no diſpoſition to travel again over the ground which had been traverſed at the laſt ſeſſion.

The petition, he ſaid, was addreſſed to both houſes, and prayed for two things; firſt, that congreſs, in their legiſlative capacity, would aſſign to the petitioners ſome judicial duties; and ſecondly, that they would authoriſe a judicial inveſtigation of their claim to compenſation. The committee, therefore, ought to have confined their enquiries to theſe points, and to have reported accordingly. Inſtead of that they had reported a reſolution which, if adopted, would be neither a grant nor a denial of the prayer of the petition. In doing this the committee had exceeded their powers, and propoſed a meaſure which the ſenate itſelf was not authorized to adopt.

Mr. Wright took a review of the conſtitutional powers of the ſenate, in its legiſlative and executive capacities, and enquired, Have we any conſtitutional authority to make ſuch a requeſt of the preſident? In what part of the conſtitution is ſuch power delegated to this houſe? Are we to make the requeſt as private gentlemen, or as a conſtitutional organ of the government? If as private gentlemen, the act would clearly be a nullity; the preſident would ſtill be at liberty to comply with the requeſt or not, as he might think proper. If as a conſtitutional organ of the government, where is the power given to the ſenate? And what would be the remedy if he ſhould refuſe to comply? The ſenate is the conſtitutional adviſer of the preſident, in the formation of treaties, and in the appointment of officers, &c. The conſtitution expreſsly declares that the preſident ſhall exerciſe theſe powers, *by and with the advice and conſent of the ſenate.*—Here, then, it is their right and their duty to adviſe him: But the conſtitution further ſays, "*He ſhall take care that the law be faithfully executed.*" Have the ſenate any authority to adviſe him as to the faithful execution of the laws? They can go no further than they are expreſsly commiſſioned by the conſtitution. The ſpecification of particular executive powers, by the conſtitution, is a denial of all others. *Admiſſio unius eſt excluſio alterius*—and as the conſtitution has given no power to this effect, it follows that no ſuch power can be exerciſed by the ſenate.

If the courts have power to try the validity of laws of congreſs they can exerciſe that power as well without the authority of this reſolution as with it. If they have not the power, neither this houſe nor the legiſlature can give it them. The duties and the powers of the ſupreme court are defined by the conſtitution. Should the ſenate, then, adopt the reſolution, the ſupreme court would have no power to act under it unleſs that power is given by the conſtitution. Let us then examine the authority of this court. The conſtitution ſays, "*In all caſes affecting ambaſſadors, other public miniſters and conſuls, and thoſe in which a ſtate ſhall be a party, the ſupreme court ſhall have original juriſdiction.*" Will the gentlemen ſay that theſe judges are ambaſſadors, other public miniſters or conſuls, or that they are a ſtate? If not, the ſupreme court can have no juriſdiction of the caſe, and the committee have impoſed upon the ſenate a reſolution which they had no authority to ſubmit.

As to the law of the laſt ſeſſion by which theſe judges had been deprived of their offices, Mr. W. had no fear that the ſupreme court, or any body elſe would attempt to ſet it aſide. The whole motion, ſaid he, has approbated the meaſure, as many of thoſe who oppoſed it have *fatally experienced.*

Mr. Ogden. Mr. Preſident, upon an examination of this memorial, we ſhall find, that it compriſes two different ſubjects; firſt, A formal claim of office; ſecond, A prayer that the legality of this claim, may be ſubmitted to a judicial deciſion.

In reſpect to the claim of office, Mr. Preſident, it is ſtated in the memorial to have ariſen out of the *conſtitution* and a *law* made in purſuance thereof. This memorial refers to thoſe words of the conſtitution where it ſays, "That the judges both of the ſupreme court and inferior courts ſhall hold their offices during good behavior, and ſhall receive for their ſervices, a compenſation which ſhall not be diminiſhed during continuance in office." It refers, alſo, to that act of congreſs, which, in *connection* with the conſtitution, gave exiſtence to thoſe judicial offices, to which the memorialiſts were appointed, and concerning whoſe continuance in office, the queſtion now is.

This queſtion is, whether, notwithſtanding the repealing law of the laſt ſeſſion, the memorialiſts have any *color of claim*, to retain the character of judges and a capacity to officiate as ſuch, ſo that exiſting duties may be defined or new ones aſſigned by law, without any further appointment, by the executive.

I do not mean, Mr. preſident, to argue upon the *conſtitutionality* of this law of the laſt ſeſſion. It has been properly ſtated from the chair, that ſuch an argument, at this time, would not be in order. I truſt, however, ſir, that it will not be conſidered as *out of order*, to ſay that a *real variance* of opinion has exiſted, in regard to the *operation* of that law. This is proved by the memorial itſelf, ſigned by ſo many characters, who have been thought worthy of the honorable appointment of judges of the United States. Witneſs alſo the arguments which have been uſed both in this and the other houſe, and the recorded negatives in the journals, on the paſſage of the law. Witneſs, moreover, the public prints and more private diſcuſſions. Witneſs the great ſenſibility which it excited in the public mind. All theſe completely prove what is fully ſufficient for my preſent purpoſe, namely, that this claim is *not* merely a pretence, without any color of right. It cannot be ſaid that this claim deſerves no attention. It is proper, therefore, that it ſhould be decided upon, and the controverſy put at reſt. It muſt be preſumed, that this ſenate, as faithful guardians of the rights of the nation, will adopt *ſome mode* whereby theſe important objects may be effected.

In reſpect to a deciſion on this claim, Mr. Preſident, the memorialiſts themſelves have appealed to the higheſt imaginable *authority*—an *authority*, to which all muſt bow—I mean, the *authority* of the *law*—Perhaps, ſir, from my education and habits in life, I may think more highly of this authority than others, whoſe education and habits may have been different. For my own part, I think the appeal to be a proper and a juſt one, in which we ought to join fully and fairly—That we ought not to ſhrink, from meeting this queſtion, *in that forum* whoſe ſole and peculiar province it is, to pronounce the law upon *all caſes* "ariſing under the conſtitution and the laws made under its authority." I hope, ſir, that the pride of the ſenate will not be hurt by this propoſition. Let us nobly bear in mind, that no higher tyranny can exiſt, than in ſuch countries, where the ſame corps which makes a ſtatute, can abſolutely *control* its expoſitions. This would be, ſir, to convert a legiſlature into a national and *revolutionary* convention.

I will now, Mr. Preſident, enquire a little into the nature of a quo warranto, and endeavor to ſhew, that the reſolution on the table preſcribes the proper mode for producing the deciſion of the law on this queſtion.

To this end I ſhall beg leave to read a few lines from the third vol. of Blackſtone's Commentaries, fol. 262.—"A writ of *quo warranto* is in the nature of a writ of right, for the king, againſt him who *claims* or uſurps any office, franchiſe or liberty, to enquire by what authority *he ſupports his claim*, in order to determine the right." Again, in fol. 263, where ſpeaking of an *information in nature of a quo warranto*, the book ſays—"This is properly a criminal method of proſecution, as well to puniſh the uſurper by fine for the uſurpation of the franchiſe, as to ouſt him, or ſeize it for the crown, but hath *long* been applied to the *mere* purpoſes of trying the *civil* right, ſeizing the franchiſe or ouſting the wrongful owner: the fine being *nominal* only." Again, ſir, in the act of congreſs, entitled, an act to eſtabliſh the judicial courts of the United States, paſſed September 24, 1789, ſect. 14. there is the following proviſion—"That all the before-mentioned courts of the United States ſhall have power to iſſue writs of ſcirefacias, habeas corpus, and *other writs not* ſpecially provided for by ſtatute, which may be neceſſary for the *exerciſe* of their reſpective juriſdictions, and agreeably to the principles and *uſages* of law." Now, ſir, as a quo warranto is a writ well known in the uſages of the law, it is perfectly clear, under the foregoing authorities, that this queſtion can be tried in the mode contained in the reſolution. Should this mode be purſued, the defendant will either *deny* his claim, which will put an end to the buſineſs at once, or he will avow his claim, which will bring it to legal iſſue. In ſuch caſe, the defendant will be obliged for the ſucceſs of his cauſe, to eſtabliſh two things—firſt, The exiſtence of the office. Second, A right to exerciſe the duties which, now or in any future time, may belong to it, without any further appointment from the preſident. In order to this, ſir, he will be under the neceſſity of ſhewing, that he had been inveſted, *during good behavior*, with a judicial office, that had been *eſtabliſhed* by the *conſtitution*, and that it was not within the conſtitutional power of the legiſlature to *depoſe* him of it.

I ſhall now, Mr. Preſident, delay the ſenate, while I notice ſuch of the obſervations, which have been made by the gentlemen from Tenneſſee and Maryland, (Mr. Cocke and Mr. Wright) as appear to me, to be of the moſt importance.

Both the gentlemen have inſiſted that it was improper for the ſenate to *adviſe* the preſident in any caſe, excepting where required by the conſtitution. I anſwer that the ſenate in this reſolution, *do not adviſe* the preſident: He is only requeſted to procure for the ſenate judicial information, and a legal deciſion upon a matter in controverſy, from a forum which is competent to decide in a caſe where the diſcuſſion here would be improper & *out of order*. Such requeſts for analogous information from the ſeveral great departments of the government, have been frequently made, and as often complied with. Two occurred at the very laſt ſeſſion, one in a claim made judge Symmes for the benefit of a contract entered into between him and the government, in regard to lands in the N. W. Territory: Another in relation to claims in the ſtate of Tenneſſee. The legiſlature need the information, which the adoption of this reſolution will obtain, before they can, with propriety, as I conceive, either reject the memorial, or proceed to legiſlate upon it. This reſolution merely requeſts ſuch legal information and nothing further.

The gentleman, ſir, from Tenneſſee, has further obſerved, that it would be improper for the ſenate to aid in any meaſure, which may tend to procure compenſation, where no ſervices have been performed.

This reſolution, Mr. Preſident, contains no ſuch propoſition. Offices may exiſt without ſervices, or even without compenſations. There may be great force in the argument, that compenſation can only follow ſervices, but certainly the adoption of this reſolution will not affect that queſtion the one way or the other. It is not the queſtion what duty or compenſation is to be aſſigned, but whether the memorialiſts are ſtill inveſted with judicial characters, to which any official duties may now or hereafter attach in virtue of their former appointment to office. I truſt, therefore, that we ſhall not be told again, that we are making an attempt to gain compenſation, where no ſervices can be performed.

The ſame gentleman from Tenneſſee is of opinion, that the people do not need any protection againſt *themſelves.*

Were I permitted, ſir, to expreſs an opinion, it would be, that the people *do* need a protection againſt *government*, and that *courts* are their *ſhield* againſt oppreſſion, as well as *ſwords* for the execution of the law. The hand of government is large and broad, and heavy—Courts are neceſſary to defend the people againſt its violence—they ſtand between the people and the government—through this medium only, can the rights of the citizen be aſſailed while even a ſemblance of the conſtitution remains. But, ſir, courts will ceaſe to be this ſhield, whenever they ſhall ceaſe to be independent. Whenever it is ſettled that judicial offices are holden at the WILL of the government, courts muſt neceſſarily execute that WILL, or certainly expect to ceaſe to be courts. It is time to *know* on what foundation our liberties ſtand, and whether the citizen can any longer rely upon the protection of INDEPENDENT courts.

Again, ſir, this attempt to obtain a judicial deciſion has been called by the gentleman from Tenneſſee an act of force and fraud—merciful heaven!—This decent and reſpectful memorial this well-timed and moderate reſolution—acts of *force and fraud.* If we hear ſuch language *now*, what may we expect hereafter.

The gentleman from Maryland has obſerved, that this memorial is addreſſed to the legiſlature, and can *only* be acted upon *jointly* by both houſes—The anſwer to this has been already hinted at—No legiſlative meaſure whatever can be adopted until the queſtion contemplated by the reſolution, ſhall be firſt diſpoſed of—after that only can we undertake to legiſlate upon the ſubject of this memorial—to require information may be the act of either houſe *ſeparately*, although to legiſlate muſt be their *joint* act.

Once more, ſir, and I will have done. The gentlemaa from Maryland has argued that our courts have no juriſdiction over this queſtion granted to them by the conſtitution, and for this purpoſe has cited the cauſe in the conſtitution which grants judicial juriſdiction. Permit me to obſerve, ſir, that in making this citation, the gentleman has taken care while he read every other part of the ſection to omit that part which expreſsly grants this juriſdiction.

The omitted part reads thus, "The judicial power ſhall extend to *all* caſes in law or equity ariſing under this conſtitution and the laws of the United States which ſhall be made under its authority." And having read the reſidue of the ſection only, the gentleman triumphantly aſks whether theſe memorialiſts are ambaſſadors or other public miniſters, or conſuls, or ſtates, &c.

Let me now aſk, Mr. Preſident, with my honorable friend from New-York, what have gentlemen to fear from the courſe which has been propoſed, in relation to this memorial? Why do they flinch from judicial enquiry? If reaſon and ſound arguments be on their ſide, they will certainly triumph—Let us not therefore, I pray, uſurp to ourſelves the power both of enacting and excluſively expounding this law of the laſt ſeſſion. When we paſſed the law, we had done what belonged to us. We were then in reſpect to it, *functi officis.* Its conſtruction and expoſition belong to the forum, to which the reſolution on your table properly refers it.

Mr. Jackſon thought this ſubject was fully diſcuſſed at the laſt ſeſſion, and that no new arguments could now be advanced. He conſidered the proceeding upon this ſubject as altogether novel. The petitioners, ſaid he, have aſked for one thing, and the committee have reported another. What end is to be anſwered by referring this queſtion to the judiciary? Do we doubt our own power, or our own juſtice? Ought we to go to the courts and aſk them whether we have done our duty, or whether we have violated the conſtitution?

I ſhall not attempt, ſir, to follow the gentleman from New York (Mr. Morris) in his attempt to raiſe the paſſions, but ſhall endeavor to confine myſelf to the queſtion.

I conſider this report of the committee as contrary to the ſpirit of the conſtitution and government of the country, and contrary to our own dignity. The courts have no power to control the proceedings of the legiſlature or the executive.

In what capacity do we ſit here? Is it as legiſlators alone? No—but as a part of the executive power. Shall we then, as legiſlators, condemn ourſelves by adopting this report? Or can we, as a conſtituent part of the executive, call upon the head of the executive power to do ſuch an act?

But, Mr. Preſident, I conſider the proceeding propoſed by the reſolution to be unconſtitutional. The writ of *quo warranto* is a criminal proceſs, and is followed by fine and impriſonment. No perſon can be called upon in a criminal action except by indictment of a grand jury. But here you would proceed againſt theſe men, who have not been charged with any crime, by a *quo warranto*, and perhaps would fine and impriſon them. Where does this writ of *quo warranto* come from! Do we find any ſuch thing in the laws of congreſs? No, ſir—it is derived from the common law of England, and has come down from the days of that great and good king Alfred, when, as the gentleman told us laſt year, a purſe of gold might hang for months on the ſide of the highway, and nobody would touch a penny of it. God forbid that we ſhould ever give countenance to cruel and vindictive ſtar-chamber *informations.*—I remember, ſir, a time when an attempt was made to amend the conſtitution by giving the courts power to proceed by information, but I lifted up my voice againſt it—I had heard too much of the proceedings by information in the ſtar-chamber in that country from which this writ is derived. I have heard many gentlemen in this houſe and the other who claimed the common law for our courts. If we go back to feudal times we ſhall ſee what a ſituation we ſhould be in with this common law. Until the reign of William and Mary, women in England were not allowed the benefit of clergy. Let them be ever ſo learned or elegant, if convicted of a felony, they muſt be hanged, while the men, if they could merely read, eſcaped. Very pretty law this, indeed! Under this law your M'Cauleys, your Williamſes, and perhaps ſome in the boſom of our own country would be liable to ignominious death, and their huſbands, who perhaps can ſcarcely read, while they are capable of writing the moſt elegant eſſays and the moſt ſublime ſentiments, theſe huſbands, I ſay, under this bleſſed common law would merely be burnt in the hand, while thoſe elegant females muſt be hanged.

But why ſhould we go acroſs the Atlantic for common law to reſtore theſe judges to their offices? As well might you ſay that the pretender, becauſe he called himſelf king of England, was a king, as to ſay that becauſe theſe men call themſelves judges, they are judges. I contend that they are not judges. Their office was taken away & given to others who are now in the exerciſe of it. You might as well ſay that Louis the eighteenth who at preſent calls himſelf king of France, is king——Every body knows that Bonaparte is.

The gentleman from New-York (Mr. Morris) ſays, if you think yourſelves right and theſe judges wrong, meet them, and examine their claim: But if you ſuſpect or know that you are wrong, ſhrink from the inveſtigation & refuſe to let them be heard. Sir, I am willing to meet them, and I would meet them on this floor. Here I would decide their claim as they have aſked us to do. This is the only proper place to meet them. Here I would decide that they have no office and therefore are entitled to no ſalary. We cannot go out of our proper place to meet them in the courts.

Sir, if theſe men think that they ſtill hold their offices, I believe they may be ſatisfied without our paſſing that reſolution. Let them take their ſeat upon the bench and ſee if the marſhal will obey them.—Let them attempt to ſend a man to the whipping-poſt or to jail, and I believe they will find out whether they are judges or not. But if they wiſh to have the queſtion decided for them, there is no occaſion to trouble the court with it. We have the power and the right of deciding it. The petition itſelf proves that we have this power and this right, otherwiſe it would not have been ſent to us. I hope therefore we ſhall uſe it and not give it away. To ſay that it muſt go to the ſupreme court, and that we have not authority to decide it, is begging the queſtion.

But I contend further, ſir, that if we ſhould even adopt this reſolution, and the preſident ſhould inſtruct the attorney-general to file the information, the ſupreme court have no power to decide the controverſy. By turning to that common law which the gentlemen think ſo highly of, it will be ſeen that in England the judges cannot control an act of parliament.—[*Here Mr. Jackſon read from ſome book, the title of which was not heard, that a certain lawyer had declared that parliament have no power to do an immoral act or one manifeſtly unjuſt, ſuch as to make a man a judge in his own cauſe; but the commentator held it to be law, that no bounds could be preſcribed to the power of parliament; and that ſhould they, imitating the example of Herod, decree that all children under a certain age ſhould be ſlain, it would be the duty of the judges to reſign their commiſſions, but they could not declare the act void.*]

Such appears to be the law of England, and there is ſo far an analogy between that government and ours, that our judges cannot exerciſe a power over the acts of the legiſlature, which is denied even to the Engliſh judges. It is true that in England they have no written conſtitution, and we have. We are ſo far ſuperior to them in that reſpect. But ſtill our judges have no power to control the acts of the legiſlature.

Though it may be true, as has been ſaid, that this is not a reſolution to pay money for nothing, ſtill it is true that they petition for their compenſations as well as duties to be aſſigned to them, and I believe if they had their ſalaries they would be very quiet, and if we had laſt year made proviſion for paying them their compenſations, we ſhould never have heard of their coming to petition for duty to perform. I am againſt paying money to any perſon for doing nothing. I want no Iriſh penſion liſt in this country, nor the *red book* of France, which I dare ſay the gentleman (Mr. Morris) has ſeen. In my view, office conſiſts of duty, and compenſation is given for the performance of duty. I cannot conceive of an office without ſervice. The ſervice of theſe men was taken away by the act of laſt ſeſſion: and the office is therefore gone and the compenſation muſt go with it.

But ſuppoſe we adopt the reſolution, and the preſident ſhould refuſe to comply, how can you get the queſtion before the court? Can you compel the preſident to comply? Suppoſe then you command the attorney-general to file the information, will he comply? He is an executive officer—he holds his commiſſion at the will of the preſident. If he attempts to act contrary to the preſident's wiſhes, he will immediately be informed that there is no further occaſion for his ſervices. How can we command the executive officers? Can the court then command the officers of the executive; and by the way, I will take the liberty of remarking, that I believe the court are willing to go very great lengths. In like manner, if the court ſhould ſend the marſhal with a mandamus to the ſecretary of ſtate, and he ſhould be told, the moment you touch him your office ceaſes: Can it be expected that he will riſk his office in ſuch buſineſs? How then can this buſineſs be done? It cannot be done by any body unleſs the preſident will conſent.

On the whole Mr. Jackſon thought it ſufficiently evident that this was a proceeding unknown to our conſtitution and laws, and was nothing more than an attempt to inflame the public mind, and bring the government into diſrepute and ruin.

HOUSE OF REPRESENTATIVES.

Monday, February 21.

An engroſſed bill making an appropriation for the navy for the year 1803, was read a third time and paſſed.

The bill appropriates the ſum of one million ninety-eight thouſand ſeven hundred and ninety-ſeven dollars and forty-two cents.

An engroſſed bill concerning the inſurance of goods, buildings and furniture in the county of Alexandria, in the territory of Columbia, was read a third time and paſſed.

Mr. Leib preſented a petition from Daniel St. Clair, which was referred.

The bill in addition to an act, entitled an act to eſtabliſh an uniform rule of naturalization, &c. was read a third time.

The queſtion was put on the paſſage of the bill.

Mr. Goddard ſpoke againſt the bill, and concluded by moving the poſtponement of the further conſideration of the bill to the firſt Monday in November.

This motion was ſupported by Meſſrs. Dana, Davis and Goddard, and oppoſed by Mr. Smilie.

The queſtion was taken by yeas and nays and loſt—yeas 40—nays 42.

Mr. Griſwold moved a reſolution to recommit the bill to a ſelect committee, with inſtructions to enquire whether the petitions from certain aliens, preſented on the 14th of February, were in fact ſubſcribed by the perſons therein named.

Mr. Randolph called for a diviſion of the queſtion.

The ſpeaker put the queſtion on the firſt member of the motion, to recommit the bill.

Motion loſt; ayes 36, noes 37.

The reſidue of the motion fell of courſe.

The queſtion was then taken by yeas and nays on the paſſage of the bill; yeas 38, nays 42.

The bill was therefore loſt.

Mr. R. Williams called up his reſolution, making it a ſtanding rule of the houſe that all queſtions reſpecting priority of buſineſs ſhould be decided without debate.

Carried without a diviſion.

Mr. Griſwold ſaid he would ſubmit a motion which had grown out of the debate on the bill amendatory of the naturalization act; which was, that a ſelect committee be appointed to enquire whether certain petitions from ſundry aliens preſented on the 14th inſtant, were in fact, ſubſcribed by the perſons therein named.

The taking of this motion into conſideration was ſupported by Mr. Griſwold, and oppoſed by Meſſrs. Jackſon, Nicholſon and S. Smith.

Loſt—Ayes 33—Noes 49.

The houſe went into a committee of the whole—Mr. Varnum in the chair—on the amendments of the ſenate to the bill providing an additional armament for the protection of the commerce and ſeamen of the United States.

The ſenate propoſe a new ſection, authoriſing the preſident to build a number of gun boats not exceeding fifteen, and appropriating 50,000 dollars therefor.

Mr. Griſwold moved the recommitment of the bill to a ſelect committee.

Loſt—Ayes 17.

The amendment of the ſenate was then agreed to.

The houſe went into a committee of the whole on the bill making an appropriation for the ſupport of the government for the year 1803.

The ſeveral blanks were filled and the