

THE DEBATE OVER REMOVAL OF EXECUTIVE OFFICERS

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One of the First Congress's most important tasks was to establish executive departments. In so doing, members found themselves embroiled in an unexpected dispute over who, if anybody, could remove the officers that would preside over these departments. The Constitution, it seemed, was silent on the matter.

James Madison to Tench Coxe June 24, 1789

. . . A very interesting question has grown out of the silence of the constitution with regard to the power of removal from offices. Four different expositions were contended for. 1. that the power of removal was involved in that of appointing & belonged to the Presidt. & Senate—2. that no removal could take place but by way of impeachment. 3. that it devolved on the Legislature to be disposed of according to its discretion—4. that being of an Executive nature and not taken from [the] President by the exception in favor of the Executive agency of the Senate, it remained to him by virtue of the general clause vesting him with the Ex. power—Each of these doctrines was defended by a very free use of the argumentum ab inconvenienti² agst. the others. The decision was in favor of the 4th. as most consonant to the text of the Constn. to the maxim which forbids an unnecessary mixture of powers—& to the responsibility of the President. I will not troubl[e] you with a further state of the case, because you will be able to form a better idea from the Newspapers, mutilated and erroneous as their accounts are, than c[oul]d. be brought within the compass of a letter.

Speeches in the House of Representatives

May 19, 1789^[L]_[SEP] Speech of James Madison (Virginia)

Mr. Madison moved, that it is the opinion of this committee, that there shall be established an executive department, to be denominated the department of foreign affairs; at the head of which there shall be an officer, to be called, the secretary to 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 removeable by the president.

That there shall be a treasury department, &c. And there shall be a war department, &c.

Speech of William Loughton Smith (South Carolina)

Moved to strike out the words “who shall be appointed by the president, by and with the advice and consent of the senate.” He conceived the words to be unnecessary, besides it

looked as if they were conferring power which was not the case, for the constitution had expressly given the power of appointment in the words there used. He also objected to the subsequent part of this paragraph, because it declared the president alone to have the power of removal. . . . Said he had doubts whether the officer could be removed by the president; he apprehended he could only be removed by an impeachment before the senate, and that being once in office, he must remain there until convicted upon impeachment; he wished gentlemen would consider this point well before they decided it.

Speech of Madison

Did not concur with the gentleman in his interpretation of the constitution, what said he would be the consequence of such construction? it would in effect establish every officer of the government on the firm tenure of good behaviour, not the heads of departments only, but all the inferior officers of those departments would hold their offices during good behaviour, and that to be judged of by one branch of the legislature only on the impeachment of the other. If the constitution means this by its declarations to be the case we must submit, but I should lament it as a fatal error interwove in the system and one that would ultimately prove its destruction. I think the inference would not arise from a fair construction of the words of that instrument. . . .

I think it absolutely necessary that the president should have the power of removing from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanours against the United States, or neglects to superintend their conduct, so as to check their excesses. On the constitutionality of the declaration I have no manner of doubt.

June 16, 1789^[L]_[SEP] Speech of Alexander White (Virginia)

The constitution gives the president the power of nominating, and by and with the advice and consent of the senate, appointing to office. As I conceive the power of appointing and dismissing to be united in their natures, and a principle that never was called in question in any government, I am averse to that part of the clause which subjects the secretary of foreign affairs to be removed at the will of the president. In the constitution special provision is made for the removal of the judges, that I acknowledge to be a deviation from my principle: but as it is a constitutional provision, it is to be admitted. In all cases, not otherwise provided for in the constitution, I take it that the principle I have laid down is the governing one. Now the constitution has associated the senate with the president, in appointing the heads of departments; the secretary of foreign affairs is the head of a department; for the words of the law declare, that there shall be a department established, at the head of which shall be an officer to be so denominated. If then the senate is associated with the president in the appointment, they ought also to be associated in the dismissal from office.

Speech of Smith

I would premise, that one of these two ideas are just, either that the constitution has given the president the power of removal, and therefore it is nugatory to make the declaration here; or it has not given the power to him, and therefore it is improper to make an attempt to confer it upon him. If it is not given to him by the constitution, but belongs conjointly to the president and senate, we have no right to deprive the senate of their constitutional prerogative. . . .

Speech of Madison

If the construction of the constitution is to be left to its natural course with respect to the executive powers of this government, I own that the insertion of this sentiment in law may not be of material importance, though if it is nothing more than a mere declaration of a clear grant made by the constitution, it can do no harm; but if it relates to a doubtful part of the constitution, I suppose an exposition of the constitution may come with as much propriety from the legislature as any other department of government. If the power naturally belongs to the government, and the constitution is undecided as to the body which is to exercise it, it is likely that it is submitted to the discretion of the legislature, and the question will depend upon its own merits.

I am clearly of opinion with the gentleman from South-Carolina (Mr. Smith), that we ought in this and every other case to adhere to the constitution, so far as it will serve as a guide to us, and that we ought not to be swayed in our decisions by the splendor of the character of the present chief magistrate, but to consider it with respect to the merit of men who, in the ordinary course of things, may be supposed to fill the chair. I believe the power here declared is a high one, and in some respects a dangerous one; but in order to come to a right decision on this point, we must consider both sides of the question. The possible abuses which may spring from the single will of the first magistrate, and the abuse which may spring from the combined will of the executive and the senatorial qualification.

When we consider that the first magistrate is to be appointed at present by the suffrages of three millions of people, and in all human probability in a few years time by double that number, it is not to be presumed that a vicious or bad character will be selected. If the government of any country on the face of the earth was ever effectually guarded against the election of ambitious or designing characters to the first office of the state, I think it may with truth be said to be the case under the constitution of the United States. . . .

It is evidently the intention of the constitution that the first magistrate should be responsible for the executive department; so far therefore as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country.

Speech of White

I differ also with my colleague [Mr. Madison] in the principle that he has laid down, that this is in its nature an executive power. The constitution supposes power incident to government, and arranges it into distinct branches with or without checks; but it enumerates under each department the powers it may exercise; the legislature may exert its authority in passing laws relating to any of its particular powers: The executive power is vested in the president; but the executive powers so vested, are those enumerated in the constitution: he may nominate and by and with the advice and consent of the senate appoint all officers, because the constitution gives this power, and not because the power is in its nature a power incident to his department; my idea of the legislative and executive powers are precisely the same; the legislature may do certain acts because the constitution says, they shall have power to do them, and the executive magistrate is authorised to exercise powers because they are vested in him by the same instrument . . .

June 17, 1789^[SEP] Speech of John Laurance (New York)

This is a case omitted, or it is not; if it is omitted, and the power is necessary and essential to the government, and to the great interests of the United States, who are to make the provision and supply the defect? Certainly the legislature is the proper body. It is declared they shall establish officers by law. The establishment of an officer implies every thing relative to its formation, constitution, and termination; consequently the congress are authorised to declare their judgment on each of these points. But if the arguments of the gentleman from South-Carolina (Mr. Smith) prevail, that as the constitution has not mediated the removal of an officer in any other way than by impeachment, it would be an assumption in congress to vest the president, courts of law, or heads of departments with power to dismiss their officers in any other manner. Would a regulation of this kind be effectual to carry into effect the great objects of the constitution? I contend it would not: Therefore the principle which opposes the carrying of the constitution into effect, must be rejected as dangerous and incompatible with the general welfare. Hence all those suppositions, that because the constitution is silent the legislature must not supply the defect, are to be treated as chimeras and illusory inferences.

Speech of Elbridge Gerry (Massachusetts)

There are two questions relative to this clause: The first, whether the sovereignty of the union has delegated to the government the power of removal? And the second, to whom? That they have delegated such power has been clearly proved by the gentlemen who advocate the clause; who justly say, if the power is not delegated, the clause in the constitution, declaring the appointment of judges to be during good behaviour would be nugatory, unless some branch of government could otherwise have removed them from office. As to the second question it depends upon the first; if the power is delegated it must vest in some part of the government. . . .

The gentlemen in favor of this clause, have not shewn that, if the construction that the power vests in the president and senate is admitted, it will be an improper construction. I call on gentlemen to point out the impropriety, if they discover any. To me it appears to preserve the unity of the several clauses of the constitution; while their construction produces a clashing of powers, and renders of none effect some powers the senate by express grants possess. What becomes of their power of appointing, when the president can remove at discretion?

June 18, 1789 Speech of White

This question, complicated in its nature, and interesting in its consequences, has occasioned a serious and solemn debate; although some gentlemen have thought it so clear in its nature, and trivial in its consequences, as to excite in them surprise at its being brought a second time under the consideration of the house. For my own part I consider it as the most important question that has yet come before the legislature of the union; I am sure it is the most important question I ever had a voice in discussing, or a vote in determining, except that of adopting the constitution itself in the convention of Virginia. I consider the day, on which the sense of the house is to be taken on this subject, as a memorable day in the annals of America. . . .

The opposers of the constitution formed their arguments upon it. They contended that the constitution was defective, that you would go beyond it and make constructions in your favor, and assume powers which the people never intended to grant. My apprehensions therefore are not mere chimeras of my own invention; I hope they are ill-founded, and may be contradicted by the event.

Speech of John Page (Virginia)

. . . I call on the gentlemen to reflect; they must see plainly, that conferring this power, so far from making the president more responsible, diminishes his responsibility, and inclines to establish him an independent monarch.

Speech of Theodore Sedgwick (Massachusetts)

Notwithstanding the length of the debate, and the fatigue gentlemen have undergone, I still flatter myself that the importance of the subject will entitle me to a farther indulgence. . . .

Let me ask, what will be the consequence of striking out these words? Is the officer to be continued during an indefinite time? For it has been contended that he cannot be removed but by impeachment; others have contended that he is always in the power of those who appoint him. But who will undertake to remove him? Will the president undertake to exercise an authority which has been so much doubted here, and which will appear to be determined against him if we consent to strike out the words? Will the senate undertake to exercise this power? . . . The question upon either of those points would be involved in

doubts and difficulty.

Speech of Gerry

If this is the meaning of the constitution, it was hardly worth while to have had so much bustle and uneasiness about it. I would ask gentlemen, if the constitution has given us power to make declaratory acts, where is the necessity of inserting the fifth article for the purpose of obtaining amendments? The word amendment implies a defect; a declaratory act conceives one. Where then is the difference between an amendment and a declaratory act? I call upon the gentleman to point out what part of the constitution says we shall correct that instrument by a declaratory act. If gentlemen once break through the constitutional limits of their authority, they will find it very difficult to draw a boundary, which will secure to themselves and their posterity that liberty which they have so well contended for.

Speech of Madison

Nothing has yet been offered to invalidate the doctrine, that the meaning of the constitution may as well be ascertained by the legislative as by the judicial authority. When a question emerges as it does in this bill, and much seems to depend upon it, I should conceive it highly proper to make a legislative construction. In another point of view it is proper that this interpretation should now take place, rather than at a time when the exigency of the case may require the exercise of the power of removal. At present the disposition of every gentleman is to seek the truth, and abide by its guidance when it is discovered.

Speech of Page

But I am astonished at the arguments of gentlemen, who contend, that granting this authority to the president is the best security to public liberty. Has any state in the union, ever thought it necessary to put such a power into the hands of their chief magistrate, in order to secure the liberties of the citizen? If it is that great security which some gentlemen seem to think, it is strange that it should never as yet have been thought of under the state governments. . . .

I cannot agree to let these words stand as part of the bill; because I think them incompatible with the spirit if not with the letter of the constitution . . . and as directly tending to confirm the suspicion of those who have asserted that the new government would run instantly headlong into a monarchy. Having this idea of the matter, and being persuaded at the same time, that the heaped-up powers on the chief magistrate especially as the bill proposes, does not render him more responsible; but on the contrary, by increasing his importance, and multiplying his dependants, directly tends to diminish his responsibility, and secure him if not against suspicion at least against charges of delinquency. To the argument which has been urged against the amendment, which is drawn from the necessity of having energy in government, dispatch, secrecy and decision . . . The doctrine of energy in government, as I said before, is the true doctrine of tyrants.

June 19, 1789^[17]_[SEP] Speech of John Vining (Delaware)

Who, let me ask, is the chief magistrate under this government? The president. What are his duties? To see the laws faithfully executed; if he does not do this effectually he is responsible: To whom? To the people. Have they the means of calling him to account, and punishing him for neglect? They have secured it in the constitution, by impeachment, to be presented by their immediate representatives; if they fail here, they have another check when the time of election comes round.

Speech of Gerry

Sir, we are not the expositors of the constitution; but if we were the expositors, we ought to give our exposition by a declaratory act, and not foist it in where no one would ever look for it. But if it were done by a declaratory act, I conceive it would be impossible to draw the line at which declaratory acts should stop. Hence we should alter the constitutional mode of amending the system of government. . . . This is our doctrine, that no power of this kind ought to be exercised by the legislature. But we say, if we must give a construction to the constitution it is more natural to give the construction in favor of the power of removal vesting in the president, by and with the advice and consent of the senate; because it is in the nature of things, that the power which appoints removes.