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Argument of Senator Trumbull against Impeachment.

The following is the opinion of Senator Trumbull in the impeachment case, filed Saturday, May 16.

To do impartial justice in all things appertaining to the present trial, according to the Constitution and laws is the duty imposed on each Senator by the position he holds and the oath he has taken, and he who falters in the discharge of that duty, either from personal or party considerations, is unworthy his position, and merits the scorn and contempt of all just men.

The question to be decided is not whether Andrew Johnson is a proper person to fill the Presidential office, nor whether it is fit that he should remain in it, nor, indeed, whether he has violated the Constitution and laws in other respects than those alleged against him. As well might any other fifty four persons take upon themselves by violence to rid the country of Andrew Johnson because they believed him a bad man as to call upon fifty four Senators, in violation of their sworn duty, to convict and depose him for any other causes than those alleged in the articles of impeachment. As well might any citizen take the law into his own hands, and become its executioner, as to ask the Senate to convict outside of the case made. To sanction such a principle would be destructive of all law and all liberty worth the name, since liberty unregulated by law is but another name for anarchy.

Unfit for President as the peple may regard Andrew Johnson, and much as they may desire his removal, in a legal and constitutional way, all save the unprincipled and depraved would brand with infamy and contempt the name of any Senator who should violate his sworn convictions of duty to accomplish such a result.

Keeping in view the principles by which, as honest men, we are to be guided, let us inquire what the case is.

The first article charges Andrew Johnson, President of the United States, with unlawfully issuing an order, while the Senate was in session, and without its advice and consent, with the intent to remove Edwin M. Stanton from the office of Secretary for the Department of war, contrary to the Constitution and the "act regulating the tenure of certain civil offices," passed March 2, 1867. It will be observed that this article does not charge a removal of the Secretary, but only an intent to remove, which is not made an offense by the tenure of office act or any other statute, but, treating it as if the President's order had been obeyed, and an actual removal had taken place, would such removal, had it been consummated, have been a violation of the Constitution irrespective of the tenure of office act? The question of the power to remove from office arose in 1789, in the first Congress which assembled under the Constitution, and except as to offices whose tenure was fixed by that instrument, was then recognized as belonging to the President; but whether as a constitutional right, or one which the Congress might confer, was left an open question. Under this recognition by the Congress of 1789, every President, from that day till 1867, had exercised this power of removal, and its exercise during all that time had been acquiesced in by the other departments of the government, both legislative and judicial. Nor was this power of removal by the President exercised only in the recess of the Senate, as some have supposed, but it was frequently exercised when the Senate was in session, and without its consent.

Indeed, there is not an instance on record prior to the passage of the tenure of office act, in which the consent of the Senate had been invoked simply for the removal of an officer. It is appointments to and not removals from office that the Constitution requires to be made by and with the advice and consent of the Senate. It is true that an appointment to an office, when the appointee becomes duly qualified, authorizes him to oust the prior incumbent, if there be one, and in that way effects his removal; but this is a different thing from a simple removal. The Constitution makes no distinction between the power of the President to remove during the recess and the sessions of the Senate, nor has there been any in practice. The elder Adams, on the 12th of December, 1800, the Senate having been in session from the 17th of November preceding, in a communication to Timothy Pickering, used this language: "You are hereby discharged from any further service as Secretary of State." Here was a positive dismissal of a Cabinet officer by the President, while the Senate was in session, and without its consent. It is no answer to say that President Adams the same day nominated John Marshall to be Secretary of State in place of "Timothy Pickering, removed."

The nomination of a person for an office does not, and never did, effect the removal of an incumbent. And such incumbent, unless removed by a distinct order, holds on till the nominee is confirmed and qualified. The Senate might never have given its advice and consent to the appointment of John Marshall, and did not in fact do so until the following day. The removal of Pickering was complete before Marshall was nominated to the Senate, as the message nominating him shows; but whether this was so or not we all know that a person in office is never removed by the mere nomination of a successor.

Thomas Eastin, Navy Agent at Pensacola, was removed from office by President Van Buren on the 19th of December, 1840, while the Senate was in session, and the office the same day placed temporarily in charge of Dudley Walker, and it was not till the 5th of January following that George Johnson was, by and with the advice and consent of the Senate, appointed Navy Agent to succeed Eastin.

June 20, 1864, and while the Senate was in session, President Lincoln, removed Isaac Henderson, Navy agent at New York, an officer appointed by and with the advice and consent of the Senate, and placed the office in charge temporarily of Paymaster John D. Gibson.

Isaac V. Fowler, postmaster at New York; Samuel F. Marks, Postmaster at New Orleans, and Mitchell Stever, postmaster at Milwaukee, all of whom had previously ben appointed by and with the advice and consent of the Senate, were severally removed by the President during the sessions of the senate in 1860 and 1861, the offices placed temporarily in charge of special agents, and it was not till some time after the removals that nominations were made to fill the vacancies.

Other cases, during other administrations, might be referred to, but these are sufficient to show that removals from office by the President during the session of the Senate have been no unusual thing in the history of the Government.

Of the power of Congress to define the tenure of the offices it establishes and make them determinable, either at the will of the President alone, of the President and Senate together, or at the expiration of a fixed period, I entertain no doubt. The Constitution is silent on the subject of removals except by impeachment, which it must be admitted only applies to removals for crimes and misdemeanors, and if the Constitution admits of removals in no other way, then a person once in office would hold for life unless impeached, a construction which all would admit to be inadmissible under our form of government. The right of removal must, then, exist somewhere. The first Congress, in the creation of the Department of War, in 1789, recognized it as existing in the President, by providing that the chief clerk should perform the duties of the principal officer, called a Secretary, "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy." Under this act the power of the President to remove the Secretary of War, either during the recess or session of the Senate, is manifest. The law makes no distinction in that respect, and whether it was an inherent power belonging to the President, under the Constitution as President, or was derived from the statute creating the office, is not material so far as relates to the power of the President to remove that officer.

This continued to be the law until the passage of the tenure of office act, March 2, 1867; and had the President issued the order for the removal of the Secretary of war prior to the passage of that act, it would hardly be contended by any one that, in so doing, he violated any law, constitutional or statutory. The act of March 2, 1867, was passed to correct the previous practice, and had there been no such practice there would have been no occasion for such a law. Did that act, constitutional and valid, as it is believed to be, change the law so far as it related to a Secretary then in office by virtue of an appointment made by a former president during a Presidential term which ended March 4, 1865?

The language of the first section of the act is:

"That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified except as herein otherwise provided: *Provided*, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed and one month thereafter, subject to removal by and with the advice and consent of the Senate."

Mr. Lincoln, by and with the advice and consent of the Senate, appointed Mr. Stanton Secretary of War on the 15th of January, 1862, and commissioned him to hold the office "during the pleasure of the President of the United States for the time being." He was never reappointed, either by Mr. Lincoln after his re election, or by Mr. Johnson since Mr. Lincoln's death. The continuance of Mr. Stanton in office by Mr. Lincoln after his second term commenced, and by Mr. Johnson after Mr. Lincoln's death, cannot be construed as a re appointment during that term, because the word "appointed" in the tenure of office act must be construed to mean a legal appointment, which could only be made by and with the advice and consent of the Senate. The term of the President by whom Mr. Stanton was appointed, and the one month thereafter, expired nearly two years before the passage of the tenure of office act. It will not do to say that because Mr. Lincoln was elected for a second term that therefore the term of the President by whom Mr. Stanton was appointed has not expired. The fact that Mr. Lincoln was his own successor in 1865 did not make the two terms one any more than if any other person had succeeded him, and were he now alive the Presidential term during which he appointed Mr. Stanton, would long since have expired. But Mr. Lincoln in fact, deceased soon after his second term commenced, and was succeeded by the Vice President, elected for the same term, on whom the office of President was by the Constitution devolved.

It has been argued that this is Mr. Lincoln's term. If this be so, it is his second term, and not the term during which Mr. Stanton was appointed; but if this be Mr. Lincoln's and not Mr. Johnson's term, when will the "term of the President" by whom Mr. Browning and the other Cabinet officers appointed since Mr. Lincoln's death expire? Mr. Lincoln never appointed them, and if they are to hold "during the term of the President by whom they were appointed and for one month thereafter" they hold indefinitely, because, according to this theory, Mr. Johnson, the President by whom they were appointed, never had a term, and we have the anomaly of a person on whom the office of President is devolved, and who is impeached as President, and whom the Senate is asked to convict as President, who has no term of office. The clause of the Constitution which declares that the President "shall hold his office during the term of four years" does not mean that the person holding the office shall not die, resign, or be removed during that period, but to fix a term or limit during which he may, but beyond which he cannot hold the office. If he die, resign, or be removed in the meantime, manifestly the term, so far as he is concerned, has come to an end. The term of the Presidential office is four years, but the Constitution expressly provides that different persons may fill the office during that period, and in popular language it is called the term of the person who happens for the time being to be in the office. It is just as impossible for Mr. Stanton to now serve as Secretary of War for the term of the President by whom he was appointed as it is for Mr. Lincoln to serve out the second term for which he was elected. Both the presidential term of the President who appointed Mr. Stanton and the person who made the appointment have passed away, never to return; but the Presidential office remains, filled, however, by another person, and not Mr. Lincoln.

It being apparent that so much of the proviso to the first section of the tenure of civil office act of March 2, 1867, as authorizes the Secretary of war to hold the office for and during the term of the President by whom he was appointed is inapplicable to the case of Mr. Stanton, by what tenure did he hold the office on the 21st of February last, when the President issued the order for his removal?

Originally appointed to hold office during the pleasure of the President for the time being, and as has already been shown removable at the will of the President, according to the act of 1789, there would seem to be no escape from the conclusion that the President had the right to issue the order for his removal. It has, however, been insisted that if the proviso which secures to the Secretaries the right to hold their respective offices during the term of the President by whom they may have been appointed and for one month thereafter does not embrace Mr. Stanton, because Mr. Johnson did not appoint him, that then, as a civil officer, he is within the body of the first section of the act, and entitled to hold his office until by and with the advice and consent of the Senate a successor shall have been appointed and duly qualified. Not so; for the reason that the body of the first section can have no reference to the teure of an office expressly excepted from it by the words, "except as herein otherwise provided," and the provision which follows, fixing a different tenure for the Secretary of war. Can any one doubt that the law was intended to make, and does make a distinction between the tenure of office given to the sectaries and that given to other civil officers? How, then, can it be said that the tenures are the same, or the same as to any particular Secretaries?

The meaning of the section is not different from what it would be if instead of the words "every person holding any civil office," there had been inserted the words marshal, district attorney, postter, and so on, enumerating and fixing the tenure of all other civil officers except the Secretaries, and then had proceeded to enumerate the different Secretaries and fix for them a different tenure from that given to the other enumerated officers. Had the section been thus written, would any one think, in case a particular Secretary for some personal reason was unable to avail himself of the benefit of the law securing to Secretaries a certain tenure of office, that he would therefore have the right to the benefit of the law in which Secretaries were not mentioned, securing to marshals and others a different tenure of office? The object of an exception or proviso in a statute is to limit or take something out of the body of the act, and is usually resorted to for convenience, as a briefer mode of declaring the object than to enumerate everything embraced in the general terms of the act, and then provide for the excepted matter. The fact that the terms of the proviso which fix the tenure of office of all Secretaries are such that a particular Secretary for reasons personal to himself, cannot take advantage of them, does not operate to take from the proviso the office of a Secretary, and the tenure attached to it, and transfer them to the body of the section which provides a tenure for holding office from which the office of Secretary is expressly excepted.

Laying out of view what was said at the time of the passage of the tenure of office act, as to its not interfering with Mr. Johnson's right to remove the Secretaries appointed by his predecessor, and the unreasonableness of a construction of the act which would secure them in office longer than the Secretaries he had himself appointed, and fasten them for life on all future Presidents, unless the Senate consented to the appointment of successors, the conclusion seems inevitable, from the terms of the tenure of office act itself that the President's right to remove Stanton, the Secretary of war appointed by his predecessor, is not affected by it, and that, having the authority to remove that officer under the act of 1789, he did not violate either the constitution or any statute in issuing the order for that purpose. But even if a different construction could be put upon the law, I could never consent to convict the Chief Magistrate of a great people of a high misdemeanor, and remove him from office for a misconstruction of what must be admitted to be a doubtful statute, and particularly when the misconstruction was the same put upon it by the authors of the law at the time of its passage.

The second article charges that the President, in violation of the Constitution and contrary to the tenure of office act, and with intent to violate the same issued to Lorenzo Thomas a letter of authority empowering him to act as Secretary of war *ad interim*, there being no vacancy in the office of Secretary of war. There is nothing in the tenure of office act, or any other statute, prohibiting the issuing of such letter, much less making it a crime or misdemeanor. The most that can be said is that it was issued without authority of law.

The Senate is required to pass judgment upon each article separately, and each must stand or fall by itself. There is no allegation in this article of any design or attempt to use the letter of authority, or that any harm came from it; and any Senator might well hesitate to find the President guilty of a high misdemeanor for simply issuing such a letter, although issued without authority of law. The proof, however, shows that the letter was issued by the President in connection with the order for the removal of Mr. Stanton, which, as has already been shown, was a valid order. The question, then, arises whether the President was guilty of a high misdemeanor in issuing to the Adjutant General of the Army a letter authorizing him, in view of the contemplated vacancy, temporarily to discharge the duties of Secretary of war.

Mr. Trumbull here quoted the several statutes providing for the temporary discharge of the duties of an office by some other person in case of a vacancy, or when the officer himself is unable to perform them.

These statutes contain all the legislation of Congress, on the subject to which they relate. It has been insisted that, inasmuch as under the act of 1863 the President had no authority to designate any other person to perform the duties of secretary of war than an officer in that or some of the other executive departments, and then in case of vacancy to supply such only as are occasioned by death or resignation, his designation of the Adjutant General of the army to supply temporarily a vacancy occasioned by *removal* was without authority. If the act of 1863 repealed the act of 1795 this would doubtless be so; but if it did not repeal it, then the President clearly had the right, under that act, which provides for the temporary discharge of the duties of secretary of war in *any* vacancy by *any* person, to authorize General Thomas temporarily to discharge those duties. The law of 1863, embracing as it does all the departments, and containing provisions from both the previous statutes, may, however, be construed to embrace the whole subject on which it treats, and operate as a repeal of all prior laws on the same subject. It must, however, be admitted that it is by no means clear that the act of 1863 does repeal so much of the act of 1795 as authorizes the President to provide for the temporary discharge of the duties of an office from which an incumbent has been removed, or whose term of office has expired by limitation before the regular appointment of a successor.

It has been argued that the tenure of office act of March 2, 1867, repealed both the act of 1795 and that of 1863, authorizing the temporary supplying of vacancies in the Departments. This is an entire misapprehension. The eighth section of the tenure of office act recognizes that authority by making it the duty of the President, when such designations are made, to notify the Secretary of the Treasury thereof; and if any one of the Secretaries were to die or resign to morrow, the authority of the President to detail an officer in one of the Departments to temporarily perform the duties of the vacant office, under the act of 1863, would be unquestioned. This would not be the appointment of an officer while the Senate was in session without its consent, but simply directing a person already in office to discharge temporarily, in no one case exceeding six months, the duties of another office not then filled.

It is the issuing of a letter of authority in respect to a removal, appointment, or employment, "*contrary to the provisions" of the tenure of office act* that is made a high misdemeanor. As the order for the removal of Mr. Stanton has already been shown not to have been "contrary to the provisions of this act" any letter of authority in regard to it is not forbidden by the sixth section thereof.

Admitting, however, that there was no statute in existence expressly authorizing the President to designate the Adjutant General of the Army temporarily to discharge the duties of the office of Secretary of war, made vacant by removal, till a successor, whose nomination was proposed the next day, could be confirmed, does it follow that he was guilty of a high misdemeanor in making such temporary designation when there was no law making it a penal offense or prohibiting it? Prior to 1863, as Mr. Lincoln's message shows, there was no law authorizing these temporary designations in any other than the three Departments of State, Treasury, and war; and yet President Lincoln himself, on the 22d of September 1862, prior to any law authorizing it, issued the following letter of authority appointing a Postmaster General *ad interim*:

I hereby appoint St. John B. L. Skinner, now acting First Assistant Postmaster General, to be acting Postmaster General *ad interim*, in place of Hon. Montgomery Blair, now temporarily absent.

ABRAHAM LINCOLN.

Washington, September 22, 1862.

To provide for temporary disabilities of vacancies in the Navy Department, and for which no law at the time existed, President Jackson, during his administration, made ten different designations or appointments of Secretaries of the Navy *ad interim*. Similar *ad interim* designations in the Navy Department were made by Presidents Van Buren, Harrison, Tyler, Polk, Fillmore, and others; and these appointments were made indiscriminately during the sessions of the Senate as well as during its recess. As no law authorizing them existed at the time these *ad interim* appointments were made in the Navy and Post office Departments, it must be admitted that they were made without authority of law; and yet, who then tho't or would now think, of impeaching for high crimes and misdemeandors the Presidents who made them?

Importance is sought to be given to the passage by the Senate, before the impeachment articles were found by the House of Representatives, of the following resolution:

"*Resolved, by the Senate of the United States*, That under the Constitution and laws of the United States, the President has no power to remove the Secretary of War and designate any other officer to perform the duties of that office, *ad interim*"—

as if Senators sitting as a Court on the trial of the President for high crimes and misdemeanors would feel bound or influenced in any degree by a resolution introduced and hastily passed before an adjournment on the very day the orders to Stanton and Thomas were issued. Let him who would be governed by such considerations in passing on the guilt or innocence of the accused, and not by the law and the facts as they have been developed on the trial, shelter himself under such a resolution. I am sure no honest man could. It is known however, that the resolution coupled the two things, the removal of the Secretary of war and the designation of an officer *ad interim*, together, so that those who believed either without authority were compelled to vote for the resolution.

My understanding at the time was, that the act of 1863 repealed that of 1795 authorising the designation of a Secretary of War *ad interim* in the place of a Secretary *removed*, but I never entertained the opinion that the President had not power to remove the Secretary of War appointed by Mr. Lincoln during his first term. Believing the act of 1795 to have been repealed, I was bound to vote that the President had no power under the law to designate a Secretary of War *ad interim* to fill a vacancy caused by removal, just as I would feel bound to vote for a resolution that neither President Jackson nor any of his successors had the power, under the law, to designate *ad interim* Postmasters General or Secretaries of the Navy and Interior prior to the act of 1863; but it by no means follows that they were guilty of high crimes and misdemeanors in making such temporary designations. They acted without the shadow of statutary authority in making such appointments.

Johnson claims, and not without plausibility, that he had authority under the act of 1795 to authorize the adjutant general to perform temporarily the duties of Secretary of War; but if that act was repealed, even then he simply acted as his predecessors had done with the acquiescence of the nation for forty years before. Considering that the facts charged against the President in the second article are in no respect contrary to any provisions of the tenure of office act, that they do not constitute a misdemeanor, and are not forbidden by any statute; that it is a matter of grave doubt whether so much of the act of 1795 as would expressly authorize the issuing of the letter of authority to General Thomas is not in force, and if it is not, that President Johnson still had the same authority for issuing it as his predecessors had exercised for many years without objection in the Navy, Interior and Postoffice departments, it is impossible for me to hold him guilty of a high misdemeanor under that article. To do so would in my opinion be to disregard, rather than recognize, that impartial justice I am sworn to administer.

What has been said in regard to the second article applies with equal force to the third and eighth articles; there being no proof of an unlawful intent to control the disbursements of the moneys appropriated for the military service, as charged in the eighth article.

Articles four, five, six and seven, taken together, charge in substance that the President conspired with Lorenzo Thomas and other persons with intent, by intimidation and threats, to prevent Edwin M. Stanton from holding the office of Secretary of War, and by force to seize and possess the property of the United States in the department of war; also that he conspired to do the same things contrary to the tenure of office act, without any allegation of force or threats. The record contains no sufficient proof of the intimidation, threats, or force charged; and as the President had, in my opinion, a right to remove Mr. Stanton, his order for that purpose, as also to General Thomas to take possession, both peacefully issued, have in my judgment none of the elements of a conspiracy about them.

The ninth article, known as the Emory article, is wholly unsupported by evidence.

The tenth article, relating to the speeches of the President, is substantially proven, but the speeches, although discreditable to the high office he holds, do not in my opinion afford just ground for impeachment.

So much of the eleventh article as relates to the speech of the President made August 18, 1866, is disposed of by what has been said on the tenth article.

The only proof to sustain the allegation of unlawfully devising means to prevent Edwin M. Stanton from resuming the office of Secretary of War is to be found in a letter from the President to Gen. Grant, dated Feb. 10, 1868, written long after Mr. Stanton had been restored. This letter, referring to a controversy between the President and General Grant in regard to certain communications, oral and written, which had passed between them, shows that it was the President's intent, in case the Senate did not concur in Stanton's suspension, to resort to the courts to get possession of the War Department, with a view of obtaining a judicial decision on the validity of the tenure of office act; but the intention was never carried out; and Stanton took possession by the voluntary surrender of the office by Gen. Grant. Was this intent or purpose of the President to obtain a judicial decision in the only way then practicable a high misdemeanor?

It is not necessary to inquire whether the President would have been justified in carrying his intention into effect. It was not done, and his entertaining an intention to do it, constituted, in my opinion, no offense. There is, however, to my mind another conclusive answer to this charge in the eleventh article. The President, in my view, had authority to remove Mr. Stanton, and this being so, he could by removal at any time have lawfully kept him from again taking possession of the office.

There is no proof to sustain the other charges of the article. In coming to the conclusion that the President is not guilty of any of the high crimes and misdemeanors with which he stands charged, I have endeavored to be governed by the case made without reference to any acts of his not contained in the record, and without giving the least heed to the clamor of intemperate zealots who demand the conviction of Andrew Johnson as a test of party faith, or seek to identify with or make responsible for his acts those who, from convictions of duty, feel compelled on the case made to vote for his acquittal.

His speeches, and the general course of his administration, have been as distasteful to me as to any one. If the question was, is Andrew Johnson a fit person for President? I should answer no; but it is not a party question, nor upon Andrew Johnson's deeds and acts, except so far as they are made to appear in the record, that I am to decide.

Painful as it is to disagree with so many political associates and friends whose conscientious convictions have led them to a different result, I must, nevertheless, in the discharge of the high responsibility under which I act, be governed by what my reason and judgment tell me is the

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