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The Appointing and Removal Powers of the President Under the Constitution of the United States

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BULLETIN

The COLLEGE *of*
WILLIAM *and* MARY
in VIRGINIA



The Appointing and Removal Powers of the President Under the Constitution of the United States

GUY DESPARD GOFF

Member United States Senate,

March 4th, 1925—March 3rd, 1931

FOURTH LECTURE ON THE
CUTLER FOUNDATION

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THE CUTLER LECTURES

*Established at the College of William and Mary
in Virginia by James Goold Cutler
of Rochester, N. Y.*


The late James Goold Cutler of Rochester, New York, in making his generous gift to the endowment of the Marshall-Wythe School of Government and Citizenship in the College of William and Mary provided, among other things, that one lecture should be given at the College in each calendar year by some person "who is an outstanding authority on the Constitution of the United States." Mr. Cutler wisely said that it appeared to him that the most useful contribution he could make to promote the making of democracy safe for the world (to invert President Wilson's aphorism) was to promote serious consideration by as many people as possible of certain points fundamental and therefore vital to the permanency of constitutional government in the United States. Mr. Cutler declared as a basic proposition that our political system breaks down, when and where it fails, because of the lack of sound education of the people for whom and by whom it was intended to be carried on.

Mr. Cutler was one of the few eminently successful business men who took time from his busy life to study constitutional government. As a

result of his study, he recognized with unusual clearness the magnitude of our debt to the makers, interpreters and defenders of the Constitution of the United States.

He was deeply interested in the College of William and Mary because he was a student of history and knew what great contributions were made to the cause of constitutional government by men who taught and studied here—Wythe and Randolph, Jefferson and Marshall, Monroe and Tyler, and a host of others who made this country great. He, therefore, thought it peculiarly fitting to endow a chair of government here and to provide for a popular “lecture each year by some outstanding authority on the Constitution of the United States.”

The fourth lecturer in the course was Senator Guy Despard Goff, former member of the U. S. Senate from West Virginia.



THE APPOINTING AND REMOVAL
POWERS OF THE PRESIDENT
UNDER THE CONSTITUTION
OF THE UNITED STATES

GUY DESPARD GOFF
Member U. S. Senate from West Virginia
March 4th, 1925—March 3rd, 1931

It is a privilege as rare as it is inspiring to discuss in these halls of learning the Constitution of the United States. It was amid these surroundings that many of the master minds responsible for the adoption of this immortal instrument were trained in the ways of human discipline and guided toward mental and moral progress. They had faith in God and, with the ability to perceive, they besought counsel and advice in every step forward. They realized that loyalty, service and enterprise must be infused into all human activities if liberty, order, prosperity and happiness were to be eternal. Governments "of the people, for the people, and by the people" are not created; they are the creatures of Constitutions, and they grow out of the past. Constitutions "whose just powers are derived from the consent of the governed" are not struck off in a single convention; they are the acts of the

people, and they are the slow deliberate work of the ages. They are the means by which "a sovereign nation of many sovereign states" expresses itself and is exercised. The fabric of human institutions is a texture that can be woven only in the loom of time. Thought is the most potent and active force in all the world. As Carlisle has so graphically phrased it: "Man carries under his hat a private theatre wherein a greater drama is acted than is ever performed on the mimic stage, beginning and ending in eternity." In short, all the great accomplishments in mortal endeavor are simply the offsprings of great and divine ideas. They are the intellectual vision of those who can see, with accuracy and safety, beyond the outposts of experience. It has been truly said that:

While the defense of the Constitution in Pennsylvania and Massachusetts was able, and in New York most brilliant, that the attack upon it in the Virginia convention was nowhere equaled in argument or discussion, or approached in power, scholarship, learning, and impressive dignity. That the Virginia contest, with its gifted and accomplished statesmen, was the only real debate over the whole Constitution. It far surpassed in reasoning, argument, and oratory the discussion in the Federal convention itself.

Yes, from the tongue of Henry, the pen of Jefferson, the sword of Washington, and the brain of Marshall, whose natal day we now observe with pride and reverence, has come constitutional liberty, the palladium of all the civil, political, and religious rights of Mankind. Yes, these Fathers, and they will live forever, above all fame, tell us to love, respect, obey, support and defend this charter against all attacks. They were great because they could serve and they have never been excelled in learning, ability or patriotic power.

I borrow from that most able address by Judge Alton B. Parker, delivered here January 14, 1922, the following expressive reflections and most accurate meditations:

Virginia was in that day the greatest of the states. She had one-fifth of the population of all the States and at least one-fifth of the wealth. Moreover, only 18 years before her House of Burgesses had passed an act prohibiting slavery, which failed to become a law only because of King George's direction to the colonial governor to withhold his signature from the enactment, which was obeyed. The letter of protest to the King from the House of Burgesses was a brilliant paper, which at the same time bore a sad prophecy of that which later happened. I quote a single sentence from it: "We are sensible that some of Your Majesty's subjects in

Great Britain may reap emoluments from this sort of traffic; but when we consider that it greatly retards the settlement of the colonies with more useful inhabitants, and may in time have the most destructive influence, we presume to hope that the interest of a few will be disregarded when placed in competition with the security and happiness of such numbers of Your Majesty's dutiful and loyal subjects."

That letter in its entirety should be known to all men that they may realize that slavery in the great State of Virginia did not meet with the approval of her patriotic people when, with magnificent hope, they conceived and consented to those immortal principles which preserve and sustain our liberties, but was due to the King and the profiteers of that day, who were not at all different from the profiteers at any subsequent period.

Thomas Jefferson, as it has been proudly observed, wrote the Declaration of Independence, and when first presented it contained a stinging indictment of the King for enforcing slavery upon this country. The convention did not accept this indictment and it was the only change of any moment made in that famous document. Jefferson later became the governor of Virginia, minister to France, Vice-President of the United States, and President for two

terms. George Washington, another of Virginia's sons, had been commander-in-chief of our armies. His great ability, his matchless skill and valor, demanded—yes, made necessary—his selection as chairman of the Philadelphia convention. He was not a member of the Virginia convention chosen to pass upon the Constitution, for it was his act, in common with his associates, which was considered by that assembly. But his striking influence was there, for he had not hesitated to make it known how vital it was that the new national government should be ratified as "a perfect union" by the several states. The people trusted him, because they believed he always understood them. They knew he stood "for those principles of freedom, equality, justice and humanity for which American patriots sacrificed their lives for their country." In the meeting at Philadelphia, with the heart to conceive, and the understanding to direct and execute—he was the Soul of America. And at a crucial crisis in the proceedings, he arose, and in tones of suppressed emotion, reflecting the courage, the hope and the obedience of Virginia, said:

It is too probable that no plan we propose will be adopted; perhaps another dreadful conflict is to be sustained. If to please the people we offer what we ourselves disapprove, how can

we afterward defend our work? Let us raise a standard to which the wise and the honest can repair. The event is in the hands of God.

And so it was, because out of that conference, the attempt and the combined wisdom of the many there came "a democracy in a republic," "one and inseparable," with centuries of Anglo-Saxon law and liberty behind it, the largest and the best scheme of popular free government that the world has yet seen tried—the Constitution of the United States—the Supreme law of the land.

The Constitution of the United States in the words of Judge Story: "Was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the wants of which were locked in the inscrutable purposes of Providence." The instrument in its broad general scope did in fact reflect the wisdom, a moderation and a patience that was as providential as it has proved beneficial to the advancement of mankind. It did, with the consent of the people, divide this government into three separate and distinct departments: The legislative, the executive, and the judicial. The object sought was security through the equipoise of restraining checks and mutual balances. And then of necessity, it vested absolute and unrestricted power in each

that there might be in such a division an impregnable safeguard for life, liberty and the pursuit of happiness for ourselves and our posterity. It wisely provided that each department should be independent of the decrees and the edicts of the other, and that each should be given a free and untrammelled hand in their respective fields, if they were, with obedience and respect for authority, to perform the duties and discharge the obligations committed to them by the people. It intended by such divisions to strengthen our institutions and stimulate our patriotism. Fortunately for the Constitution and the people, the Supreme Court of the United States, discussing this subject through the great John Marshall, said:

The powers of the legislature are defined and limited, and that these limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing if these limits may at any time be passed by those intended to be restrained. The distinction between a government with limited and unlimited powers is abolished if these limits do not confine the persons on whom they are imposed. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the legislature may alter the Constitution by any ordinary act.

Obviously, such reasoning is conclusive in its finality. If the Constitution is not superior to an Act of Congress, it becomes a mere scrap of paper—an instrument “more honored in the breach than in its observance.”

Actual sovereignty resides in the people as the source of all political power; and they can alter or change completely at any time the government to which they have entrusted only certain express and necessarily implied powers. But such powers as are given to the government as a fiduciary body are named in the Constitution, and such powers as are not there delegated either expressly or by implication are reserved to the people, and can be exercised by them only or upon further grant from them. The appointing and the removal power under the Constitution will now be considered legislatively as the Congress has construed it; executively as the Presidents have maintained it; and judicially as the courts have interpreted and enforced it. It is well always to bear in mind that the Federal government has no inherent powers, but only those derived from the Constitution as expressly delegated or granted by necessary implication. And that all powers not thus granted are reserved to the States or to the people.

In Section 2, clause 2, of Art. 2 of the Consti-

tution, the President of the United States as the sole vestee of any and all executive power was authorized to nominate and, by and with the advice and consent of the Senate, to appoint ambassadors, public ministers, consuls, judges of the Supreme Court, and all other officers of the United States whose appointments were not expressly provided for; and the President was further empowered to commission all such officers of the United States. The President's powers are in no sense statutory. They are constitutional, such as they are, as will clearly appear in the discussion to follow: In the grant of legislative power, the Constitution in Art. I, Sec. 1, provides: "All legislative power herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives"; and nowhere is there a suggestion, express or implied, in any of the powers so granted, of a power to remove. In the grant of Executive power, it should be recalled that it is to the President, and not to an Executive department. It is provided in Art. II, Sec. 1, "That the Executive power shall be vested in a President of the United States of America." And in Art. II, Section 3, it is also provided: That the President "shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."

At the first session of the first Congress, in 1789, the question directly arose whether the appointing power should include the removing power, or whether such power should be in the executive by and with the advice and consent of the Senate. Mr. Madison and his supporters contended most reasonably and logically, that the power of removal should be in the President alone, and that since he was expressly responsible under the Constitution for the faithful execution of the laws, he should not be interfered with or embarrassed by any other branch of the government. It was then said, to quote the language used,

Vest this power in the Senate jointly with the President and you abolish at once that great principle of unity and responsibility in the executive department which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community.

It is sufficient to say that at the very beginning of our government it was clearly and distinctly established:

1st—That the appointing power includes the removing power.

2nd—That both of these powers belong to the President, the Senate having simply a negative on appointments.

3rd—And that where the tenure of office has not been provided for by the Constitution, the office is held at the pleasure of the appointing power.

The Supreme Court of the United States whenever called upon to decide this question, has repeatedly approved these conclusions; and many of our Presidents in their various contentions with the legislative branch have insistently upheld and maintained this view. It has been unequivocally shown that the people in making these respective delegations, intended to intrust their interests and general welfare to these different agencies and that they fully realized and appreciated that to make each independent of the other and strictly responsible for the execution of each and every act fairly within the scope and aim of their respective fields was the only way the rights, the liberty and the freedom of the people could be secured and protected. That the executive and the legislative departments have not always been free from contention and strife in their interpretations of where the power of removal resides is

clearly reflected in an examination of their respective differences and decisions.

In 1833 President Jackson directed his Secretary of the Treasury, William J. Duane, to deposit all government funds in specified State banks instead of the Bank of the United States. Duane evaded such instructions, whereupon President Jackson dismissed him. A heated controversy arose in Congress relative to presidential removals, and in the Senate a resolution was passed censuring the President for removing the deposits from the United States Bank, and declaring he had exceeded his constitutional authority.

In 1835 John C. Calhoun, who was opposed to giving the President the power of appointment and removal of public officers, introduced a bill to reduce the Executive patronage. A very impressive debate ensued between Mr. Webster and Charles Francis Adams, resulting in favor of Mr. Adams, who insisted that the power of removal belonged to the President because it is inseparably connected with the power of appointment.

On August 12, 1867, President Johnson suspended Mr. Stanton, his Secretary of War, and immediately appointed General Grant to succeed him. This action so embittered the Senate that it led directly to impeachment proceedings

against him. In the course of the trial, the removal power was thoroughly reviewed. On May 26, 1868, the vote on the impeachment was taken and resulted in Johnson's acquittal by a vote of guilty 35, not guilty 19—only one vote short of conviction.

President Grant in his first message strenuously opposed the Congress having anything to do with the power of removal. He said: "It could not have been the intention of the framers of the Constitution when providing that appointments made by the President should receive the consent of the Senate, that the latter should have the power to retain in office persons placed there against the will of the President. The law is inconsistent with a faithful and efficient administration of the government. What faith can an executive put in officials forced upon him, and those, too, whom he has suspended for reason?"

In the winter of 1885-86, an acrimonious controversy arose between President Cleveland and the Senate. Upon his accession to the Presidency, Mr. Cleveland was besieged by such an army of office seekers that 643 office-holders under the preceding administration were removed and a like number appointed. These recess appointments were sent to the Senate within 30 days after its opening in December, 1885.

One of these recess nominations was the district attorneyship for the southern district of Alabama. President Cleveland removed the incumbent and appointed his successor July 17, 1885. The Judiciary Committee, December 26, 1885, requested the transmission of all papers and information in the possession of the Attorney General, regarding the nomination and "the suspension and proposed removal from office" of the former incumbent. The Attorney General partially complied but refused to transmit any papers relative to the removal of the prior incumbent, stating that he was directed by the President to say "that it was not considered that the public interest will be promoted by a compliance." The Judiciary Committee then asserted that the Senate possessed such a right and recommended a resolution wherein the Attorney General was censured and it further declared it to be the duty of the Senate "to refuse its advice and consent to proposed removals of officers" when papers relating to them "are withheld by the Executive or any head of a department." This issue was met by the President in his defiance of the Senate. He took the stand that all presidential removals were unencumbered by any restriction of the Senate, and that all papers in connection with Executive appointments and removals were the

property of the Executive and not subject to inspection by the Senate.

The Senate showed its hostility toward President Cleveland in its prolonged delay in confirming Mr. Lamar as Associate Justice of the Supreme Court and also Melville W. Fuller as Chief Justice of the Supreme Court, as well as several other important appointments.

President Wilson, on June 4, 1920, vetoed the budget and accounting bill. He disapproved of section 303 which provided, in part, that the Comptroller General and the Assistant Comptroller General "may be removed at any time by concurrent resolution of Congress." The President based his disapproval on the grounds, first, that the power of appointment of officers of the United States carried with it as an incident the power to remove, and that Congress was without any constitutional power whatsoever to limit the appointing power and its incidental power of removal derived from the Constitution; and, second, that Congress has no constitutional power to remove an officer of the United States from office by a concurrent resolution. When the bill finally became law it provided that the Comptroller General was to be removable only by joint resolution of Congress. Just before his retirement, President Wilson experienced great difficulty in securing

the consent of the Senate to his nominations, numbering more than 10,000.

President Harding, likewise, encountered the ire of the Senate by removing 28 officials of the Bureau of Engraving and Printing, including the director of the Bureau. The Senate, however, took no action, except to bring pressure upon the President for the reinstatement of certain of these officials.

President Coolidge, in one of his messages to Congress, in response to a resolution of the Senate that it was the sense of that body that the President should immediately request the resignation of the then Secretary of the Navy, replied:

No official recognition can be given to the Senate resolution relative to their opinion concerning members of the Cabinet or other officers under Executive control. * * * The dismissal of an officer of the Government, such as involved in this case, other than by impeachment, is exclusively an Executive function. I regard this as a vital principle of our Government.

At the last session of the 71st Congress, there was under consideration a question involving the application of this great and far-reaching constitutional principle. The President of the United States sought, as he was required to do under Article 2, Sec. 2 of the Constitution of

the United States, the advice and consent of the Senate in the appointment of five members to what is known as the Federal Power Commission. Such nominations were sent to the Senate and after a thorough and exhaustive consideration the men so nominated were on the 19th and 20th of December, 1930, confirmed by the Senate in open Executive Session and the President, being duly notified of such action proceeded on Monday, December 22nd, to issue commissions to such nominees, three of whom on the same day forthwith duly qualified as such appointees by taking the oath of office, after first consulting with the Secretary of State as to whether it was permissible and proper for them so to do. The Power Commission so denominated was appointed under the Act of June 23rd, 1930. It was provided in section 3 of that law that the existing old Federal Power Commission should continue to function until the date of the reorganization of the new commission and that when three of such commissioners should qualify under the law that the new Commission should be deemed reorganized. After three of the commissioners had qualified as stated on the 22nd of December, 1930, the Chairman of such Commission was instructed to issue a notice to all the Civil Service employees of the old Commission that

their services automatically terminated with the going out of existence on the 22nd of December, 1930, of the old Commission under which they had been employed. Such a notice was duly given and it is important to note that this interpretation of the legal effect of such reorganization was set forth in the report the Committee on Interstate Commerce filed April 11, 1930, in which the Chairman formally stated, in reporting the Bill as an emergency matter, that it was the sense of the Committee that a competent and full time staff should be organized and that it should be permanently under the control of the new Commission to the end that certain disabilities should be eliminated under which the old Commission, consisting of the Secretaries of War, the Interior, and the Department of Agriculture, had been forced to assume and carry. The old existing staff had disagreed on matters of policy and in advancing separate and dissenting views had impaired their official efficiency. The entire Commission of five, having duly qualified, on the second of January, 1931, however, resolved that each and every employee of the old Commission should without exception be invited to file their applications for reappointment and that all such old employees as were not reappointed should be given, if lawful, a reasonable leave of absence with pay. This

action on the part of the Commission did not meet with the approval of certain members of the Senate, and a motion to reconsider their confirmations was made and the President was requested to return such nominations to the Senate that it might reconsider its consent and approval heretofore duly given. These steps were taken under a rule of the Senate known as Senate Rule 38. Paragraph 3 of said rule provides that when a nomination is confirmed, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken or on either of the next two days of actual executive session of the Senate; and that if a notification of the confirmation has been sent to the President before the expiration of the time within which such a motion to reconsider may be made, such motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate.

The reason underlying the request that the President return such notification to the Senate is that if the Senate does not have such documents before it as a record, it is without jurisdiction to proceed. This was determined by the Senate in 1830 in the Hill case. In paragraph 4 of rule 38, it is expressly stated as follows:

Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same or while a motion to reconsider is pending, unless otherwise ordered by the Senate.

It is important to note, as the record of the Senate discloses, that when these five nominees were confirmed on and prior to December 20, 1930, the Vice-President and the President *pro tempore* of the Senate announced in each instance: "The nomination is confirmed and the President will be notified." The Secretary of the Senate, as the record discloses, duly notified the President and the Commissions were issued on Monday, December 22nd, 1930, and three of the duly confirmed nominees, as stated, qualified by taking the oath of office under their respective commissions. It is proper to state that the Congress, at this time, adjourned for the holidays and did not reconvene until the fifth day of January, 1931. And on the fifth day of January, 1931, a motion to reconsider was duly made, which was more than two weeks from and after the 22nd of December, 1930, when three of the commissioners had duly qualified. The President refused to return the notifications of the nominations, stating among other things the following:

I am advised that these appointments were constitutionally made, with the consent of the Senate, formally communicated to me, and that the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I cannot admit the power in the Senate to encroach upon the Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination. I regret that I must refuse to accede to the requests.

In the controversy, thus precipitated, it was uniformly insisted by such Senators as endorsed the motion that the reorganization of the new Commission did not automatically eliminate certain staff members of the old Commission; and it was just as insistently answered that the language in section 3 of the Act had the effect of completely disorganizing the old Commission upon such date as three of the newly appointed commissioners duly qualified. It was further expressly provided that no regulations, actions, investigations or other proceedings taken by the old Commission should be affected by the reorganization here provided. That is, the reorganization should not be considered as in any way affecting or disturbing any existing rules, procedure, process, research or any consummated right giving rise to a present enjoy-

ment, even though it be of a defeasible character. The applicable language in section 3 is: "The Commission shall be deemed to be reorganized upon such date as three of the commissioners appointed as provided in such section have taken office, and no such commissioner shall be paid salary for any period prior to such date." That is, the old Commission functioned until the new Commission organized. Then the old organization ceased to exist by act and operation of law. The new Commission did not put anyone out of office. They passed out mechanically, automatically, as the new Commission "came in." Yet, regardless of how these certain staff officers were removed, whether by act and operation of law or by the affirmative action of the new commissioners, the fact that they were removed was and is the sole motive prompting the motion to reconsider the nominations. However, it should be borne in mind that the Senate records do not disclose any resolution or affirmative action by the new commissioners removing any of these men.

Paragraph 3 of rule 38 provides:

When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate;

but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

It is important to observe that none of these men constituting the "executive staff" could have been legally removed unless the new Commission was duly organized. If it were not, because the President had prematurely appointed and commissioned it, then were not all of its acts the merest nullities, and did not the old Commission obviously still continue with its executive staff intact? . However, by holding the new Commission responsible for such removals, since the motion to reconsider of necessity admits the due reorganization of the new Commission and the validity of its assumed acts, does not the situation therefore resolve itself as follows: The Senate determines it will reconsider and recall its consent to the appointment of these commissioners because it disapproves of their conduct subsequent to their due qualification as officials of the government.

That is, in a word, reconsideration by the Senate under rule 38 is the Constitutional synonym of removal as that power is exercised by the Executive.

When the nominations were voted upon and the Vice-President at the close of each vote then and there forthwith directed and ordered in open executive session, and in the hearing of the Senate that the President should be notified of the action so taken, namely, that the nominations had been confirmed, the Senate was in exactly this position: It had advised and consented to the nominations and the President had been duly notified as expressly ordered and no objection was made to such notification. The question therefore is squarely presented: Can the Senate with knowledge sit silently and idly by and permit the making of a statement which clearly involves its consent to a situation palpably inconsistent with its right subsequently to move to reconsider. By consenting and agreeing to the President being so notified, did it not waive its right to invoke the provisions of rule 38? That is, did not the Senate by such intelligent silence estop itself to move to reconsider the confirmation of these commissioners? The argument is seriously advanced that the Senate could only waive its authority under paragraph 3 of rule 38 by an affirmative

vote to that effect. This argument is advanced in reply to the assertion that when the Vice-President announced in effect: The Senate has confirmed the nominations and the President will be notified, that it undoubtedly agreed that since it had discharged its constitutional duty by advising and consenting to the nominations, there was no reason why the executive should not proceed to execute and fully perform his executive functions in the premises. It is difficult to appreciate how the Senate could have waived the rule, if it is subject to waiver, more directly, explicitly and intentionally than it did by sitting silently by in the hearing of the general statement such as the Vice-President made and offering no protest or objection whatsoever.

Those who favor the motion to reconsider contend most strenuously: That there are two rules: First, the one in Paragraph 3 of rule 38, which relates to motions to reconsider; and second, the provision in Paragraph 4 of the same rule which provides: That the Secretary of the Senate shall not return a confirmed or rejected nomination to the President within the time limited for a motion to reconsider, or while such motion is pending, unless otherwise ordered by the Senate. The argument is then made, that a return, with the knowledge and consent

of the Senate, of any confirmed nomination by the Secretary of the Senate acting under the directions of the Vice-President given in open Executive Session is a waiver merely of the time limit, and not of the right to reconsider. And it is then of necessity contended, that the Senate having knowingly surrendered all jurisdiction, that the President is charged with constructive notice that it yet reserves the power to entertain a motion to reconsider everything it has thought, said and done. Such is the contention, even admitting that the nomination involves an emergency appointment. Yes, it is seriously insisted that the only way the Senate could waive its authority to move to reconsider would be by an affirmative or unanimous vote. This would mean, in the construction of this rule, that the Senate must have its action construed by a motion or clarifying resolution. Obviously, this contention involves and embraces such an absurdity as to refute its premise and disprove its conclusion. It is a *reductio ad absurdum*.

The situation admits reasonably of this analysis. The President nominated the five commissioners. The Senate advised and consented to their appointment. The Vice-President thereupon immediately in open Executive Session, two-thirds of the Senate being present, ordered

that the President be notified of the action so taken, and that in effect all matters in any way appertaining to such nominations be returned to him as the Chief Executive. Thereupon, the President, possessing the final executive authority, and being required to commission such appointees, waives his *locus penitentiae*, the power to withhold the commissions evidencing the appointments, signs and seals them and duly vests by delivery to such appointees the offices to which the Senate had confirmed them. And such appointees having duly qualified, how could they be separated from their offices except by being removed or impeached? Most obviously they could not be ousted by a legislative motion which under the Constitution cannot divest a fixed right. Such a motion would involve and interfere with the faithful execution of the laws over which the President has supreme and unrestricted jurisdiction and authority under Section 3, Art. II of the Constitution.

Therefore, the question again recurs, why should rule 38 provide in Paragraph 4 that the Senate can order that the President be notified of its advice and consent to a nomination, but if within two executive session days thereafter a motion to reconsider should be made, that the President must be requested in such motion to return the nomination papers that the Senate

may have jurisdiction to proceed? Did the Senate in adopting rule 38 purpose the doing legislatively an unnecessary and futile act? If the Senate did not intend to waive the motion to reconsider, when it clearly provided that it would lose jurisdiction of the subject matter, if it ordered the nominations returned to the President with its advice and consent, then why did it expressly provide for such a waiver in Paragraph 4 of this very important rule? If it had omitted the words, "unless otherwise ordered by the Senate" then all doubt would have been removed and all confusion avoided. These words mean, if they mean anything, that when the Senate views its connection with a nomination as *functus officio* and so agrees and orders that the President be notified, that it has openly and intentionally waived all further right and control over the subject matter. But it is argued that paragraphs 3 and 4 must be read together and that so considered they admit of the following construction: That even after the Senate has expressly and directly notified the President that it has advised and consented to a nomination and surrendered jurisdiction thereof by ordering the return of the documents relating thereto, that it can then, regardless of such action and the rights of the executive demand a return of the nomination and recon-

sider and revoke its action because of something done by the nominee if he has qualified as a duly nominated, confirmed, appointed and commissioned official. In a word, such a step essentially involves the power of removal, and if this is the meaning, application and intent of the rule as so construed, its constitutionality becomes at once a matter of serious consideration.

The President, after receiving such direct and formal notice, may have duly executed the appointment as he clearly did do in the instant matter, and as he was constitutionally authorized so to do. If, however, the President, after he has commissioned the nominee, should return the papers containing the name of the nominee to the Senate, and it being once again reinvested with jurisdiction of the subject matter, should recall its advice and consent by virtue of the motion to reconsider, it would clearly invade the executive field and by a process similar to impeachment exercise the removal power which resides solely in the President of the United States. Such action would be contrary to the meaning and intent of the Constitution, and not within the performance of any power, express or implied, conferred by the Constitution on the legislative branch. That the legislature does not possess such a right has been recently

decided by the Supreme Court of the United States in *Myers v. U. S.*, 272 U. S., pp. 52-295. There, after clearly holding that each of the three departments of the government are separate and distinct and not interdependent, the court, speaking through Chief Justice Taft, delivered a most exhaustive opinion involving the direct issue, whether the Executive without the approval of the Legislative could remove a Postmaster of the first class. The opinion consisted of 71 pages and discussed minutely every phase of the question. It is impregnable in its logic, and irresistible in its convictions. It defies destruction, because it is based on truth and reason. The Chief Justice displayed a profound knowledge of the principles of our government and recognized that the Constitution is a rigid document which can be modified only by such processes as it ordains. He made among others the following pertinent references and comments:

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in

the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible. Fisher Ames, 1 Annals of Congress, 474. It was urged that the natural meaning of the term "executive power" granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood.

The history of the clause by which the Senate was given a check upon the President's power of appointment makes it clear that it was not prompted by any desire to limit removals. As already pointed out, the important purpose of those who brought about the restriction was to lodge in the Senate, where the small States had equal representation with the larger States, power to prevent the President from making too many appointments from the larger States.

A veto by the Senate—a part of the legislative branch of the Government—upon removals is a much greater limitation upon the executive branch and a much more serious blending of the legislative with the executive than a rejection of

a proposed appointment. It is not to be implied. The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men. The Senate has full power to reject newly proposed appointees whenever the President shall remove the incumbents. Such a check enables the Senate to prevent the filling of offices with bad or incompetent men or with those against whom there is tenable objection.

The power to prevent the removal of an officer who has served under the President is different from the authority to consent to or reject his appointment. When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee as the President, but in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President, are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may, therefore, be regarded as confined, for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, and when the grant of the executive power is enforced by the express mandate to take care that the

laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

The attitude of Presidents on this subject has been unchanged and uniform to the present day whenever an issue has clearly been raised.

In March, 1886, President Cleveland, in discussing the requests which the Senate had made for his reasons for removing officials, and the assumption that the Senate had the right to pass upon those removals and thus to limit the power of the President, said:

“I believe the power to remove or suspend such officials is vested in the President alone by the Constitution, which in express terms provides that ‘The executive power shall be vested in a President of the United States of America,’ and that ‘he shall take care that the laws be faithfully executed.’

“The Senate belongs to the legislative branch of the Government. When the Constitution by express provision super-added to its legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment, it conferred upon that body all the control and regulation of Executive action supposed to be necessary for the safety of the people; and this express and special grant of such extraordinary powers, not in any way related to or growing out of general Senatorial duties, and in itself a departure from the general plan of our Government, should be held, under

a familiar maxim of construction, to exclude every other right of interference with Executive functions.”

In a message withholding his approval of an act which he thought infringed upon the Executive power of removal, President Wilson said (on the 4th of June, 1920):

“It has, I think, always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it as an incident the power to remove. I am convinced that the Congress is without constitutional power to limit the appointing power and its incident the power of removal, derived from the Constitution.”

Mr. Boudinot, of New Jersey, said upon the same point (in the debate in the First Congress):

“The supreme Executive officer against his assistant; and the Senate are to sit as judges to determine whether sufficient cause of removal exists. Does not this set the Senate over the head of the President? But suppose they shall decide in favor of the officer, what a situation is the President then in, surrounded by officers with whom, by his situation, he is compelled to act, but in whom he can have no confidence, reversing the privilege given him by the Constitution, to prevent his having officers imposed upon him who do not meet his approbation?”

Mr. Sedgwick, of Massachusetts, asked the question (in the same debate):

“Shall a man under these circumstances be saddled upon the President, who has been appointed for no other purpose but to aid the President in performing certain duties? Shall he be continued, I ask again, against the will of the President? If he is, where is the responsibility? Are you to look for it in the President, who has no control over the officer, no power to remove him if he acts unfeelingly or unfaithfully? Without you make him responsible, you weaken and destroy the strength and beauty of your system.”

What then, are the elements that enter into our decision of this case? We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the Government in accord with the Constitution which had just then been adopted, and in which there were, as representatives and senators, a considerable number of those who had been members of the Convention that framed the Constitution and presented it for ratification. It was the Congress that launched the Government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the Government under it. It was a Congress whose constitutional decisions have always been regarded,

as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument. This construction was followed by the legislative department and the executive department continuously for seventy-three years, and this although the matter, in the heat of political differences between the Executive and the Senate in President Jackson's time, was the subject of bitter controversy, as we have seen. This Court has repeatedly laid down the principles that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.

The Court's decision also embodied the further very applicable observations, that

* * * He must place in each member of his official family and his chief executive subordinates implicit faith. The moment that he loses confidence in the intelligence, ability, judgment, or loyalty of any one of them he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action. * * * Finding such officers to be negligent and inefficient, the President should have power to remove them. * * * The imperative reasons requiring an unrestricted power to remove the

most important of his subordinates * * * must, therefore, control the interpretation of the Constitution as to all appointed by him.

While this court has studiously avoided deciding the issue until it was presented in such a way that it could not be avoided, in the reference it has made to the history of a statutory construction not inconsistent with the legislative decision of 1789, it has indicated a trend of view that we should not and cannot ignore. When on the merits we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct; and it therefore follows that the tenure of office act of 1867, insofar as it attempted to prevent the President from removing executive officers who had been appointed by him and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so. For the reasons given we must therefore hold that the provision of the law of 1876 by which the unrestricted power of removal of first-class postmasters is denied to the President is in violation of the Constitution and invalid.

In view of this decision, appealing as it does to the reason and conscience of the judicial mind, the President has the exclusive power of removing any and all officers whom he has appointed by and with the advice and the consent of the Senate. He has this power, not only

because it is incidental to the power of appointment, but also because of his constitutional duty to see that the laws are faithfully executed. He has this power because our institutions are founded on justice, and justice involves and requires the prompt, equal, and uniform enforcement of the law. To hold otherwise would be to deny what is implicit in our fundamental law and make it impossible, in case of political or other differences with Congress, for the President "to take care that the laws be faithfully executed." If he cannot direct the way or select and control the instruments, how can he enforce the laws or be justly held responsible for not adhering to his covenant if he must meet the additional and possibly unyielding resistance and obstruction of an unfriendly Senate. To divide responsibility is practically to destroy it. Our forefathers so concluded when they made the President solely responsible for the faithful execution of every edict, decree or order, whether it be legislative, judicial, or executive.

This issue between the executive and the Senate is now in the courts awaiting judicial determination. It is destined to take its place as one of the milestone decisions in our constitutional history. If it should be decided favorably to the contention of the Senate, it would

materially add to its power and control over federal appointments. If the contention of the President is upheld, then there will be no change from the established practice except to confirm it and make it freer, greater and stronger.

The temporary political atmosphere surrounding a question of this magnitude and importance should not weigh at all in its ultimate consideration and determination. The fact that political exigencies were present and possibly influenced to a marked degree the position which the Senate took, will be and must be omitted hereafter from any constitutional consideration of this controversy. That which was done, whether wise or unwise, whether animated by politics or not, has made necessary an important expression by the judicial branch of our government.

Therefore, since these commissioners were nominated and appointed and duly commissioned with the consent of the Senate and with the full approval of the President, their nominations cannot now be reconsidered by the United States Senate in order that its advice and its consent may be withdrawn—without invading and exercising the power of removal which is exclusively an executive function. The President cannot under the Constitution surrender this fundamental power to the legislative

department. He can not as President allow the Senate to have possession again of these nominations regardless of what action it may determine to take. The Senate cannot in the performance of any of its granted rights employ and use a power that belongs distinctively and exclusively to either the executive or the judiciary. Every department of this government must be kept separate and distinct in all cases in which they are not interdependent, and it is the duty of each so to construe and interpret the Constitution to the end that the departmental integrity of our government shall always continue and be preserved, as one of the abiding virtues of universal liberty.

Obviously the provisions of rule 38 which permit such a motion after a nominee has been duly confirmed and appointed, as evidenced by a commission duly delivered, is in violation of the Constitution and invalid. In conclusion, to use again the language of the Supreme Court, it should not be forgotten:

The Constitution is a written instrument. As such its meaning does not alter, and what it meant when adopted, it means now. Being a grant of powers to a government, its language is general, and as changes come in our social and political life, it embraces within its grasp all new conditions which are within the scope

of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable.

Yes, the Constitution has not outlived its usefulness. Its protecting and watchful care was never more needed than today. It represents to us our history, our tradition, and our race. It rests on the will of the people. It is dictated by common sense and obeyed by universal consent. It is the duty of every citizen to withstand every assault upon it, from whatever source the assault may come. It is the rock upon which our government is builded, let him beware who would seek to shatter it.