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ACTION: Remarks

The SPEAKER. The gentleman from Iowa is recognized for five minutes.

Mr. GOOD. Mr. Speaker, during the brief time allotted to me I only want to speak briefly in regard to the budget and to answer what was said by the gentleman from Ohio [Mr. Fess] regarding the postponing of that very important legislation. I realize the objections to passing budgetary legislation at this Congress, but I wonder if the gentleman has realized that Congress at this session will make appropriations for the Government for the fiscal year ending June 30, 1922? In the next Congress, when we meet, it will take at least two weeks to organize. A new committee on the budget would be appointed. It would be compelled to hold hearings and go into the matter, because there will be a great many new Members who will want to consider this matter and who will have a right to consider it. That will take another month. Then to get the machinery into operation and put the budget bill through the House will take considerable time. In the case of the last budget bill, notwithstanding the fact that both political parties four years before had promised budgetary legislation, after the bill passed the House and went to the Senate it lay in the Senate seven months without action, and it was not until the Committee on Appropriations brought back the budget bill as a part of the sundry civil bill that we got some action on the part of the Senate.

At present the persons who make up the budget commence work in April and May and do some work all during the summer, and unless the incoming President is permitted right at the start to create his budget staff he will not have the machinery with which to formulate a budget for the appropriations for the year ending June 30, 1923. In other words, the appropriations for the first two and a half years will be made in the old way.

Now, I want to submit this to the gentleman from Ohio [Mr. Fess], that if the present bill that the House passed and that is now pending in the Senate can be passed with an amendment, so that its provisions may be available on the 4th of March, 1921, that will permit the President to organize his budget staff immediately, and then Congress at its next session can immediately amend the law, which amendment only has to do with the removal of one of the officials. Then we will have a working organization. Then we can commence to save the money that the gentleman has talked about. If we fail to do that, the estimates for the year ending June 30, 1923, will be made in the same old way.

Mr. BARKLEY. Will the gentleman yield for a question?

Mr. GOOD. I yield to the gentleman from Kentucky.

Mr. BARKLEY. Did I understand the gentleman to mean by his first remark that budget legislation will not be enacted at this session?

Mr. GOOD. I hope it will be enacted at this session.

Mr. GARNER. Will the gentleman yield?

Mr. GOOD. I yield to the gentleman from Texas.

Mr. GARNER. Did I understand the gentleman to say that if passed in its present form, making it effective on the 4th of March, his side of the House would undertake to amend it later and make an independent auditor who would indeed be an independent auditor?

Mr. GOOD. I think so. I have not talked with very many Members, but I think that would be the desire of this side of the House. After the President vetoed the measure, I asked Mr. Collins, in the legislative reference library, to make a brief for me on the President's veto, saying that I would like to know what the law was with regard to the right of Congress to provide for the removal of inferior officers when the appointing power was vested in the President.

Mr. Collins has prepared a brief of a considerable investigation. It is a splendid legal document, and I want to put it in the RECORD as a part of my remarks, because it justifies the position taken by this side of the House, and it is written by one who has no interest politically in the question. I ask, therefore, Mr. Speaker, leave to extend my remarks by printing this document.

The SPEAKER. The gentleman asks unanimous consent to extend his remarks in the manner indicated. Is there objection?

There was no objection.

The document referred to is as follows:

CONSTITUTIONAL AND LEGAL PHASES OF THE PRESIDENT'S VETO OF THE BUDGET BILL.

On June 4, 1920, the President returned the budget and accounting bill to Congress with his veto. The President disapproved of section 303 of the bill, which provided, in part, that the comptroller general and the assistant comptroller general "may be removed at any time by concurrent resolution of Congress, after notice and hearing, when, in their judgment, the comptroller general or assistant comptroller general is incompetent or inefficient or has been guilty of neglect of duty or of malfeasance in office or of felony or conduct involving moral

turpitude, and for no other cause and in no other manner, except by impeachment."

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 constitutional power 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.

The constitutional provision relating to the appointing power of the President is found in paragraph 2, section 2, of Article II of the Constitution, which reads as follows:

"And he shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments."

The Supreme Court has defined the term "officers of the United States" in the case of *United States v. Germaine* (99 U. S. 509, 510). Mr. Justice Miller, in delivering the opinion of the court, said:

"The Constitution, for purposes of appointment, very clearly divides all of its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous and sudden removals necessary this mode might be inconvenient, it was provided that in regard to officers inferior to those specially mentioned Congress might by law invest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."

This doctrine was confirmed in *United States v. Mouat* (124 U. S. 307). Mr. Justice Miller again delivering the opinion of the court in the following language:

"What is necessary to constitute a person an officer of the United States in any of the various branches of its service has been very fully considered by this court in *United States v. Germaine*. In that case it was distinctly pointed out that under the Constitution of the United States all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law or the head of a department, and the heads of the departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President or of one of the courts of justice or heads of departments authorized to make such an appointment, he is not, strictly speaking, an officer of the United States."

The comptroller general provided for in the budget bill is no doubt an officer of the United States within the intention of the Constitution. But to which class does he belong? Does he belong to the primary class which requires that he be appointed by the President, by and with the advice and consent of the Senate, coming under the category of "all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law," or is he one of the inferior officers of the United States whose appointment Congress may by law vest "in the President alone, in the courts of law, or in the heads of departments"?

The Constitution does not specifically define the term "inferior officers," nor has the Supreme Court formulated a definition. The nearest approach to a definition is in the *Germaine* case, cited above, in which the court said that inferior officers of the United States were those officers inferior to those specially mentioned in the Constitution as requiring nomination by the President and confirmation by the Senate. A distinguished authority on constitutional law, in discussion this question, says:

"The point has never been squarely passed upon by the court, since Congress has never attempted to regulate the appointment to any but distinctively subordinate and inferior positions. Should it attempt to determine by law the appointment of heads of the great departments, or even of the heads of bureaus and divisions and commissions, or even of important local officers, such as revenue officers or postmasters in the larger cities, the constitutionality of the law would undoubtedly be subjected to judicial examination." (Willoughby on the Constitution, Vol. II, pp. 1175-1176.)

Now, the comptroller general is designed to be a great officer of state, who is at the head of an independent establishment of the Government. He would hold office practically for life. The dignity, power, and influence of his office would perhaps be second to none of the appointed officers of the Government. In the ordinary meaning of the word it can not be said that he is "inferior" to consuls "and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law." (Constitution, Art. II, sec. 2.) In considering the comptroller general as an "inferior" officer of the United States it is necessary to give a technical meaning to the word "inferior" as used in the Constitution.

It was no doubt the intention of the House Select Committee on the Budget in drafting the bill that the comptroller general should be classed as an "inferior officer" under the Constitution. This is made evident by the fact that when the bill was sent back with the President's veto the committee brought in an amendment vesting the appointment of the comptroller general in the Supreme Court of the United States. (CONGRESSIONAL RECORD, 66th Cong., 2d sess., p. 8647.)

In fact, the President's veto message assumed that the comptroller general and his assistant would be regarded as inferior officers when he said: "It would have been within the constitutional power of Congress, in creating these offices, to have vested the power of appointment in the President alone, in the President, with the advice and consent of the Senate, or even in the head of a department."

In view of the fact that there are so few decisions of the Supreme Court on the question of appointments and removals, and none directly defining the respective powers of the President and Congress, the fact may be emphasized that Congress is in a stronger position with reference to the appointment and removal of inferior officers than with the officers of the primary class. Over the former they can control both the method and conditions of appointment and removal as they may see fit. If the President is given power by Congress to appoint such an officer, he receives this grant of power with the conditions and limitations upon which it is made. He has not the same inherent and constitutional rights relative to these offices that he has to those specially provided for in the primary class in the Constitution.

The following extracts give a review of the opinions of the Supreme Court on the power of Congress to limit and condition the power of

removal of an officer of the United States, in so far as this court has considered the subject.

In *Ex parte Heuven* (13 Pet. 230) the court said: "All offices the tenure of which is not fixed by the Constitution or limited by law must be held during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent, or must be held at the will and discretion of some department of the Government, and subject to removal at pleasure. In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment" (p. 239).

The implication is clear that Congress has the power to limit or abolish the power of removal which inheres in the power to appoint. This case related to that of a clerk of a district court of the United States who had been removed by the judge. He comes, without doubt, within the class of "inferior" officers.

In *United States v. Perkins* (116 U. S. 483) the court said: "Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President, by and with the advice and consent of the Senate, under the authority of the Constitution, does not arise in this case and need not be considered."

"We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed."

"The head of a department has no constitutional prerogative of appointment to officers independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto."

Assuming that the comptroller general is an "inferior officer" of the United States, as was assumed in the President's veto, does not the same argument applied in this case to heads of departments apply also to the President? The President has no constitutional prerogatives of appointment to officers inferior to those in the primary class mentioned in the Constitution, independently of the legislation of Congress, and therefore so far as these officers are concerned he comes clearly within the rule laid down in this case.

In *Parsons v. United States* (167 U. S. 324) the facts were that the President had removed from office a district attorney before the expiration of the latter's four-year term of office, and the Senate confirmed the new appointee. Parsons contended that this action was illegal. The court took the view that this would leave impeachment as the only remedy, and further said:

"This could never have been the intention of Congress. On the contrary, we are satisfied that its intention in the repeal of the tenure of office section of the Revised Statutes was again to concede to the President the power of removal if taken away from him by the original tenure of office act, and by reason of the repeal to thereby enable him to remove an officer when, in his discretion, he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office. This purpose is accomplished by the construction we give to section 769, while the other construction turns a statute meant to enlarge the power of the President into one circumscribing and limiting it more than it was under the law which was repealed for the very purpose of enlarging it" (p. 343).

Is there not here an implication that Congress has the power to limit the power of removal even as to those officers of the United States whose appointment must be confirmed by the Senate?

In *Reagan v. United States* (182 U. S. 419) the court in classifying United States commissioners, appointed under act of Congress by the United States Court for Indian Territory as "inferior" officers, said:

"The commissioners hold office neither for life nor for any specified time, and are within the rule which treats the power of removal as incident to the power of appointment, unless otherwise provided. The court also said that 'where causes of removal are specified by Constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such causes as it deemed sufficient'" (pp. 425, 426).

This rule that notice and hearing must be had before an officer can be removed for causes specified in the statute was confirmed in the case of *Shurtleff v. United States* (159 U. S. 311), in which were cited seven opinions of the State courts upholding this practice.

The most important case on this subject is that of *Shurtleff v. United States* (159 U. S. 311). *Shurtleff* held the office of general appraiser of merchandise, and although the statute specified certain causes for which he might be removed from office he was nevertheless removed from office by the President without reference to these causes. The court, among other things, said:

"We assume, for the purposes of this case only, that Congress could attach such conditions to the removal of an officer appointed under this statute as it might seem proper, and therefore that it could provide that the officer should only be removed for the causes stated, and for no other, and after notice and an opportunity for a hearing" (p. 314).

"It can not now be doubted that in the absence of constitutional or statutory provision the President can by virtue of his general power of appointment remove an officer, even though appointed by and with the advice and consent of the Senate" (p. 315).

In referring to the opinion in the case of *Blake v. United States* (103 U. S. 227), in which, although there may have been some doubt, the power of the President to remove, under a certain act, was upheld, the court said:

"This indicated the tendency of the court to require explicit language to that effect before holding the power of the President to have been taken away by an act of Congress" (p. 315).

And further:

"The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by Constitution or statute. It requires plain language to take it away" (p. 316). "The right of removal, as we have already remarked, would exist as inherent in the power of appointment unless taken away in plain and unambiguous language" (p. 318).

And where the statute specifies the causes of removal, "A removal for any of those causes can only be made after notice and an opportunity to defend" (p. 317).

The above-mentioned cases thoroughly establish the doctrine that Congress has the constitutional power to limit and condition the power

of removal from office of "inferior" officers of the United States even in those cases where the appointing power has been vested by Congress in the President. The President acquires no greater authority to remove than do the courts of law or the heads of departments. The power of removal is derivative only. The source of the grant is Congress. In Congress alone is there the inherent constitutional right to create the office, to authorize the appointment, to condition the appointment, and to provide the manner of removal. Assuming that the comptroller general and the assistant comptroller general are "inferior" officers of the United States, as no doubt Congress assumed and as the President assumed in his veto message, the President's contention that Congress could not limit his incidental right of removal of these officers is not well taken.

II.

The second phase of the President's veto raises the question whether Congress itself could by concurrent resolution remove the comptroller general and the assistant comptroller general from office. It would seem that there is nothing in the Constitution nor in the decisions of the Supreme Court to imply that Congress did not have this power as to "inferior" officers. The Supreme Court has fairly decided that Congress is in complete control of the conditions and methods of removal and there seems to be no reason why removal could not be made by Congress itself. The Constitution itself is silent on the question of removal. It does provide that each House of Congress may appoint and remove its own officers, but no provision is made for a joint officer or officers of Congress.

The question has been raised as to the effectiveness of this method of removal. It has been contended that a concurrent resolution of this character would have to be submitted to the President for his approval, and be subject to his veto. The Constitution says:

"Every order or resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on the question of adjournment) shall be presented to the President of the United States, and before the same shall take effect shall be approved by him, or on being disapproved by him shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of the bill."

The Supreme Court has never had occasion to interpret this clause, but Congress itself has, as the data below will show, put its own interpretation upon it.

On February 20, 1896, the Senate directed its Committee on the Judiciary to report to the Senate "whether concurrent resolutions generally are required to be submitted to the President of the United States." On January 26, 1897, Senator David B. Hill, of New York, presented an exhaustive and learned report which is to-day the outstanding authoritative discussion of this problem. (S. Rept. 1333, 54th Cong., 2d sess.) His committee found that for over a hundred years it had been the settled practice of Congress not to present concurrent resolutions to the President.

"They have uniformly been regarded by all the departments of the Government as matters peculiarly within the province of Congress alone. They have never embraced legislative provisions proper and hence have never been deemed to require Executive approval" (p. 6).

"This practical construction of the Constitution, thus acquiesced in for a century, must be deemed the true construction, with which no act will interfere."

"It has been the uniform practice of Congress since the organization of the Government not to present concurrent resolutions to the President for his approval and to avoid incorporating in any such resolutions any matter of strict legislation requiring such presentation. As a matter of propriety and expediency it is believed to be wise to continue that course in the future" (p. 6).

"Whether concurrent resolutions are required to be submitted to the President must depend, not upon their mere form but upon the fact whether they contain matter which is properly to be regarded as legislative in its character and effect. If they do they must be presented for his approval; otherwise, they need not be. In other words, we hold that the clause in the Constitution which declares that every order, resolution, or vote must be presented to the President, to which the concurrence of the Senate and House of Representatives may be necessary, refers to the necessity occasioned by the requirements of the other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two Houses; and every resolution not requiring such action, to wit, not involving the exercise of legislative powers, need not be presented to the President. In brief, the nature or substance of the resolution, and not its form, control the question of its disposition" (p. 8).

The committee took the point of view that the spirit rather than the letter of the Constitution should control. That certain actions could be taken by Congress in which the President had no concern and which did not involve a legislative act. The settled traditions of Congress extending over a period from the foundation of the Government to the present time would seem to be a controlling factor in the interpretation in this clause of the Constitution.

Congress has, however, never attempted to remove an officer by concurrent resolution. This is a new departure. Does such a removal partake of a legislative character? In other words would the concurrent resolution removing him be legislation and require the approval of the President? In that case the concurrent resolution would defeat its own purpose and the President by disapproving it might prevent the removal of the officer in question. Legislation implies either a new act of Congress, or the amendment or repeal of an existing act or acts. The concurrent resolution of removal would not come within these categories. The budget bill, if passed, with this provision would become basic law, requiring a certain method of removal, to wit, removal by concurrent resolution. When Congress in conformity to the provisions of this act passed the concurrent resolution of removal it would be simply complying with the administrative provisions of existing law. This would not be legislation at all and would come within the category of the traditional practice of Congress relative to concurrent resolutions.

The proper interpretation of this clause of the budget bill involves a careful consideration of the necessities of the occasion. It is an admitted fact that the Government is now called upon to spend through its executive agencies billions of dollars yearly out of the Public Treasury necessitating the imposition of high and burdensome taxes upon the people as a whole. It is also an admitted fact that the machinery for the examination, audit, control, and payment of these expenditures fails to give an adequate protection to the taxpayer. Congress is creating a new office—the general accounting office of the United States—to be under the direction of a comptroller general who

shall be absolutely independent of the Executive and at the same time occupy a very close and intimate relationship to Congress itself. The purpose of this action is to provide an official who will be able without fear of Executive control or Executive removal to go into the executive departments where the money is being spent and to investigate and report his finding to the Congress. Congress is responsible to the people under the Constitution for the appropriation of all money from the Treasury.

The President has no proper concern either in the appointment or in the removal of this officer. The fact that he is appointed by the President in the budget bill is a concession to the constitutional necessities of the occasion. If Congress could constitutionally appoint such an officer he would be so appointed. But as to his removal it is absolutely vital that it should rest with Congress if this officer is to have any great independence to report what he finds. Congress should have the initiative in the removal. The concurrent resolution preceded by notice and hearing before the appropriate committee, as a method of removal appears to be justifiable both in fact and in law. If there are constitutional doubts they should be resolved in favor of Congress.

The fathers in making the Constitution were very zealous of the preservation of the legislative branch of the Government from encroachments by the Executive. They were careful to give Congress the fullest control over public finance. But they could not foresee these days of stupendous expenditures nor the modern methods necessary for their proper control. And, although the letter of the Constitution appears adverse to the establishment by Congress of an independent audit, yet the spirit is in favor of it. The idea embodied in this section of the budget bill is in harmony with the purposes and aims which the fathers had in mind in framing the financial clauses of the Constitution. They desired to protect the taxpayer from the irregular expenditures of public funds by the Executive. Looking beyond the form to the substance, the second phase of the President's veto rests also on an insecure foundation.

Rather than give the President the power to remove this officer it would be wiser to provide that he can be removed only by impeachment. This would put him in the same category as that of the judges. It would not, however, meet the needs of the occasion as would the removal by concurrent resolution. Civil officers can be impeached only for "treason, bribery, or other high crimes and misdemeanors." (Constitution, Article II, section 4). They can not be removed from office by this method for incapacity, inefficiency, and such other minor matters as might unfit a man for the practical affairs of a public office. Yet, on the whole, the service of this officer would be more effective if he could be removed only by impeachment than if he could be removed by the President. The President should not have the initiative in the removal even though stringent conditions were made in the act.

LIST OF CASES WHEREIN IS DISCUSSED THE POWER TO APPOINT AND REMOVE OFFICERS OF THE UNITED STATES.

- Marbury v. Madison* (1 Cranch, 137 (1803)). Appointment of a justice of the peace for the District of Columbia.
Ex Parte Hen (13 Pet., 230 (1839)). Removal of a clerk of a circuit court.
United States v. Holtwell (6 Wall., 385 (1867)). Discusses meaning of "officers of the United States."
United States v. Germaline (69 U. S., 508 (1878)). Removal of a civil surgeon of the Pension Office.
Blake v. United States (103 U. S., 227 (1880)). Removal of an Army chaplain.
United States v. Perkins (110 U. S., 483 (1880)). Removal of a cadet engineer.
United States v. Mout (124 U. S., 303 (1886)). Removal of a paymaster's clerk in the Navy.
McAllister v. United States (141 U. S., 174 (1901)). Removal of a judge of the district court for the Territory of Alaska.
Parsons v. United States (107 U. S., 324 (1897)). Removal of a district attorney.
Morgan v. United States (182 U. S., 419 (1901)). Removal of a United States commissioner for Indian Territory.
Shurtlett v. United States (189 U. S., 311 (1903)). Removal of a general appraiser of merchandise.