54TH CONGRESS, 2D SESSION. } S. _____

Rufus L. B. Clarke

Protest on Removal

from Patent Office.

[illegible] REPORT [illegible]

9—128

Petition + papers referred to Senator Mitchell

PETITION OF RUFUS L. B. CLARKE, ASKING THE SENATE TO INVESTIGATE THE MATTER OF HIS REMOVAL FROM THE OFFICE OF ~~CHIEF~~ EXAMINER IN CHIEF OF THE PATENT OFFICE; ALSO PROTESTING AGAINST THE POWER OF THE PRESIDENT TO MAKE SUCH REMOVAL.

[Presented to the Senate by Mr. Gear, of Iowa, and referred to the Committee on the Judiciary, February 19, 1896, with petitioner's brief.]

To the Fifty-fourth Congress of the United States:

Your petitioner, Rufus L. B. Clarke, represents and states that he is a citizen of the United States, and was appointed an examiner in chief in the Patent Office by the President, by and with the advice and consent of the Senate, April 21, 1869, and continued faithfully to discharge the duties of the office until the 31st of March, 1895.

That on the 28th day of February, 1895, and during the session of Congress, an order was signed by Grover Cleveland for his removal from said office, without any cause assigned or existing, which order has been enforced.

But your petitioner avers that the said office of examiner in chief is purely judicial, and has been so recognized in the Patent Office and Interior Department and by the Supreme Court of the United States, and so decided by the district court of the District of Columbia, and has ever been considered and held to be independent and free from Executive control.

And your petitioner claims and holds that there exists no constitutional power in the President to summarily remove an examiner in chief from office, but the tenure of the office is, as it ought and was designed to be, during good behavior; that, at all events, the removal can not legally be effected except by the joint action of the President and Senate.

That although the practice has prevailed, and been acquiesced in to a great extent, of removal by the President of executive officers for whose acts he is responsible, yet the reasons relied upon for such removals do not apply to examiners in chief, and never before has such a removal been attempted during the existence of the office since 1861, but it has been free from place hunters and spoilsmen.

That the examiners in chief have no executive functions and perform no acts for which the President is responsible, but that their duties are purely judicial is manifest by the terms of the act creating them, and is established by the evidence of ex-Commissioners and experts appended hereto.

Your petitioner therefore prays that this matter relating to the constitutional power of the President to remove him as examiner in chief without the concurrence of the Senate may be inquired into and acted upon by your honorable body.

And to this end he asks that the accompanying brief and statements of experts and other papers be made a part of this petition.

The question in relation to the office is small, but that in regard to the arbitrary exercise of executive power, as not sanctioned by the Constitution, is momentous, and demands serious and deliberate attention, and as an American citizen I ask it, and will ever pray.

RUFUS L. B. CLARKE.

BRIEF.

To the Senate of the United States:

Supplemental to the brief heretofore presented with the protest of Rufus L. B. Clarke against his removal by the President as examiner in chief in the Patent Office, appointed by the President and Senate.

In such brief I have shown that no express power is conferred by the Constitution on the President to remove any officer so appointed.

I have shown that Alexander Hamilton, before the adoption of the Constitution, in a published article, declared that as a check upon the possible assumption of such power by the President "the consent of the Senate would be necessary to displace as well as to appoint."

I have shown that this view was held by Calhoun, and Webster, and Clay, and Benton, and Gerry, and Smith of South Carolina, and Jackson, and Roger Sherman, and many others of their contemporaries; and Kent, and Story, as commentators on the Constitution; and of more recent statesmen, Senators Edmunds, and Trumbull, and Harlan, and Sherman, and Ferris, and Williams, and Sumner, and Boutwell, and Howard, and Patterson, and others; in fact, a majority of the Senate of the United States held the same opinion.

I have shown that all the discussions, all the opinions, all the legislative actions touching this power of removal by the President related exclusively to "executive officers for whose acts the President was supposed to be responsible."

I have shown that the practice of removal by the President in every instance was wholly based upon the ground that as "Chief Executive he is required by the Constitution to see that the laws are faithfully executed," and therefore should be held impliedly to have the power to control and remove all "executive officers for whose conduct and acts he is responsible."

No argument ever urged in any discussion, no reason ever given in any opinion, no ground ever taken in support of any act, can be cited to sustain the holding of implied power in the President to remove any officer appointed by him and the Senate other than such executive officer for whose acts he is responsible.

And, of course, there is no authority, however weak and questionable, for his removal of officers not executive and for whose acts he is not responsible.

And on this point I wish to enlarge and make my premises, if possible, more clear, and conclusion more irresistible.

This doctrine of "implied power" in the President to remove such executive officers grew by degrees out of what was first said by Mr. Madison in the debates to which I have referred in my brief. And yet Mr. Madison made his first arguments in favor of granting the power to the President by law and in opposition to striking out from a pro-

vision appointing the head of an executive department the words "to be removed by the President."

Mr. Madison held distinctly that it was "discretionary in the legislature to give or refuse the privilege to the President," and said he "thought it absolutely necessary that the President should have the power of removal from office;" and, "It will make him in a peculiar manner responsible for their conduct."

Again, "The Constitution demands that there should be the highest possible degree of responsibility in all the executive officers. * * * Now, if the heads of the Executive Departments are subject to removal by the President alone, we have in him security for the good behavior of the officer. If he does not conform to the judgment of the President in doing the executive duties in his office he can be displaced, and this makes him responsible to the great executive power, and makes the President responsible to the public for the conduct of the person he has appointed to aid him in the administration of his Department."

Again, "If the President should possess alone the power of removal from office those who are employed in the execution of the law, they will be in their proper situation, * * * and I conceive that the President is sufficiently accountable to the community, and if this power is vested in him, it will be vested when its nature requires it should be vested."

"If anything in its nature is executive, it must be that power which is employed in superintending and seeing that the laws are faithfully executed, but by officers appointed for that purpose; therefore, those who are over such officers naturally possess the executive power."

Now, though this argument was made with the distinct understanding that the power of the President to remove was not found in the Constitution, either express or implied, but that he of right and necessity ought to have such power in regard to the executive officers for whose acts he is responsible to the community, and, therefore, it should be granted to him as a "privilege" by legislative enactment; yet, subsequently, in following out this argument as to the propriety and necessity of this power being lodged with the Chief Executive, it seems to have been brought to a conclusion that this power over all executive officers must rest by implication where of right and necessity it ought to rest—in the President.

I have gone thus fully into the original argument made by Mr. Madison, from which all subsequent arguments for this Presidential power and action drew inspiration, in order to emphasize the position that the exercise of such power has been wholly urged and sustained in relation to "executive officers for whose acts he is supposed to be responsible," and to none other are the reasons applicable.

I have shown that though this doctrine of implied power in the President to remove such officers has been questioned from the beginning, and has never had any legislative or judicial sanction, yet from the time of President Jackson it has been extensively practiced, but never in regard to other than "executive officers for whose acts the President was responsible."

Thus, President Jackson himself, as quoted by Senator Boutwell on the Johnson trial, "only claimed the right to remove executive officers for whose acts he was responsible."

What is the distinction between executive and judicial officers?

Webster, under the word "executive," says, "Having the quality of executing or performing—as executive power or authority; an executive officer. Hence, in government, executive is used in distinction

from legislative and judicial. The body that deliberates and enacts law legislation; the body that judges and applies the law to particular cases is judicial; the body or person who carries the laws into effect or superintends the enforcement of them is executive."

The examiners in chief come clearly within this definition of a "judicial" officer, and not within that of an "executive," and thus I think it is a fact established beyond controversy, that this supposed implied power of the President to remove officers appointed by him, by and with the advice and consent of the Senate, is limited, in theory as it is in practice, to such executive officers as above stated, and I defy anyone to show a single case where it has been exercised outside of such offices.

We have it, then, that there is no express constitutional power in the President to make removals; that there is no authority, by opinion, enactment, precedent, nor practice, that he has the power, by implication, to remove any officer so appointed who is not an "executive officer for whose conduct and acts he is responsible."

But an examiner in chief or judge in the Patent Office is not, in any sense, an "executive officer for whose conduct and acts he is in any sense responsible;" therefore, the President has no power, expressed or implied, to make such removal.

That an examiner in chief is not an executive officer, but purely a judicial officer, conclusively appears from the law creating the office and prescribing its sole duties. As the law now stands it provides that the examiners in chief, three in number, forming the board of appeals, "shall be persons of competent legal knowlege and scientific ability, whose duty it shall be, on the written petition of the appellant, to revise and determine upon the validity of the adverse decision of examiners upon application for patent, and for reissue of patents, and in interference cases; and when required by the Commissioner, they shall hear and report upon claims for extensions and perform such other like duties as he may assign them."

By the rules of practice the appellant is required to file with the board a brief of authorities and argument on which he relies, and a day of hearing is fixed and notice given him, "and the examiners in chief will affirm or reverse the decision of the primary examiner brought before them."

In contested or interference cases, briefs and arguments are also required to be filed before the day of hearing; and, as before stated in my brief, the examiners in chief compose the board of appeals and sit as a tribunal and have no duties to perform as individuals, but only as members of such tribunal having a calendar and giving written decisions and opinions in each case heard, which are duly recorded on the record books of the board.

They make no searches or examinations, but merely pass judicially upon cases brought before them on appeal without going outside of the record.

They constitute, in fact, a board of appeals in the Patent Office.

What is there in their duties prescribed, or functions performed, that partakes in any degree of the nature of an executive officer? What conduct or act is there required of them for which the President is in any degree responsible?

I have shown that by declarations in Congress, and by judicial decisions, they are "independent judicial officers" for whose conduct and acts even the Commissioner is not responsible, and has no control over them whatever. If precedents are to have weight in determining

this case, what is to be said of the universal concession on all hands, since the creation of the office, that the examiners in chief are judges, and as such have ever been considered as free from Executive control and interference?

What President has ever before set up the right to control their judicial judgments, or strike off their heads if they did not submit to such control, or render judgments in submission to or sympathy with his ideas and wishes, or those of the Secretary of the Interior, or the Commissioner?

Once conceding the fact that examiners in chief are not such executive officers aforesaid, it "must follow as the night the day" that the President has no power, express or implied, to remove them from office.

But it may possibly be urged that, being in an Executive Department, they may be considered as executive officers for the purposes of removal. This can not be seriously urged as constituting the officer per se an executive officer, within the premises and reasoning of those who have heretofore attempted to sustain the power and practice of removal by the President. Is a lamb born in a pig sty a pig?

The fact that the examiners in chief were created and constituted a "tribunal," as expressed by Senator Trumbull, cited in my brief, to discharge judicial duties, and none other, "in the Patent Office," does not make them in any sense executive officers for whose conduct and judgments the President or anyone else is responsible, and they can not be brought under the reasoning of the rule upon which the President has hitherto acted in making removals.

When the reason of a rule fails, the rule fails.

But it is most weakly said that the long practice of removals by the President of executive officers has ingrained it in our system of government and made it a sort of common law.

Now, I will venture the assertion that if this was an original case of the removal of even an executive officer, not one out of ten of our well-equipped lawyers in the Congress would sustain the doctrine of inherent or implied power in the President under the Constitution to remove such officers appointed by him conjointly with the Senate. And it should make us tremble with anxiety when we find the trusted servants of the people high in position urging the fact that long continued action in contravention of our Constitution can constitute a "higher law" than the Constitution itself.

And when this action and practice especially is on the part of the Executive—expressed by Mr. Story as a "vast reach of authority," a practice which Calhoun denounces as a "corrupting and loathsome disease"—under which patronage and corruption has steadily increased until the American President wields a greater power than any potentate in Europe, are Senators willing to see this "vast reach of authority" still further extended, as an encroachment of the Executive upon the legislative branch?

But I do not wish to thrash over old straw.

I do not find it necessary to contend against the exercise of power by the President in removing executive officers for whose conduct and acts he is responsible in order to sustain my case. Nor do I find it necessary to maintain that the board of appeals is a tribunal or court whose members hold a constitutional tenure during good behavior. But though I believe that both contentions should be sustained, I will pass them by for the sake of the argument and stand on the ground that the office of examiner in chief is purely judicial and not executive, and that, therefore, the President was wholly without constitu-

tional or legal authority, express or implied, for his action in attempting to remove me from the office of examiner in chief of the Patent Office, and that his action is not supported or sanctioned by any legislative act, judicial decision, legal opinion, precedent, or practice.

And I ask a patient and serious consideration of this constitutional question.

RUFUS L. B. CLARKE.

To the Senate of the United States:

We see by publications that Rufus L. B. Clarke has submitted to your honorable body a protest against his removal by the President from the office of examiner in chief, with a brief in which he takes the ground that such office is purely judicial and not in any sense executive, and that, therefore, neither by express or implied authority in the Constitution nor by legal enactment or decision, nor by precedent or practice was such removal authorized.

The undersigned, having had long experience in patent law and practice and being intimately acquainted with the Patent Office and its working, are of the opinion that the office of examiner in chief is, without question, a purely judicial office, having no executive duties or functions whatever, and that Judge Clarke's contention is just and tenable.

WM. C. MCINTRE.
MARCELLUS SAILER.

During a practice before the Patent Office of thirty years I have never known the examiners in chief as such to exercise any function other than judicial.

R. G. DARENFORTH,
For many years an Examiner in the office,
and subsequently Examiner in Chief,
Assistant Commissioner, and Commissioner of Patents.

During my practice of twenty-five years before the Patent Office the functions of the examiner in chief have been purely judicial, without the exercise of any executive duties.

F. C. SOMES.

For over thirty years having had extensive practice before the Patent Office and other tribunals before whom questions of patent law have come, our firm conviction and opinion is that the examiners in chief of the United States Patent Office are judicial officers; and this question was settled in the matter of Pierce *v.* Snowden, by Judge Dunlop in June, 1861, in which we were employed as counsel.

MASON, FENWICK & LAWRENCE.

I am of opinion that the examiners in chief of the United States Patent Office are judicial officers by intent of the statutes constituting that tribunal.

J. H. WHITAKER,
Attorney and Commissioner in Patent Causes.

FEBRUARY 4, 1896.

I concur in the above opinion.

FEBRUARY 4, 1896. F. T. F. JOHNSON.

We fully concur in the above opinions.

FEBRUARY 11, 1896. JOHNSON & JOHNSON.
A. E. H. JOHNSON.

To the Senate of the United States:

We see by publications that Rufus L. B. Clarke has submitted to your honorable body a protest against his removal by the President from the office of examiner in chief, with a brief, in which he takes the ground that such office is purely judicial, and not in any sense executive and that therefore neither by express or implied authority in the Constitution, nor by legal enactment or decision, nor by precedent or practice, was such removal authorized.

The undersigned, having had long experience in patent law and practice, and being intimately acquainted with the Patent Office and its working, are of the opinion that the office of examiner in chief is without question a purely judicial office, having no executive duties or functions whatever, and that Judge Clarke's contention is just and tenable.

JOHN J. HALSTED,
McGill Building.
J. R. LITTELL,
15 years' practice.
W. A. REDMOND,
McGill Building.
G. H. & W. T. HOWARD,
25 years' practice.
F. W. RITTER, JR.,
McGill Building, 30 years—8 in corps and 22 years before office.
E. B. CLARK,
McGill Building, 15 years in examining corps, 10 years in practice.
JOHN S. DUFFIE,
16 years' practice.
J. R. NOTTINGHAM & CO.,
639 F street N.W., 19 years' practice before Patent Office.
WM. C. WOOD,
Upward of 25 years' practice before Patent Office.
H. B. WILLSON,
WALLACE A. BARTLETT,
639 F street, 13 years in practice.
ALEXANDER & DOWELL,
Established 1857.
BENJ. G. COWL.
CHURCH & CHURCH.
C. A. SNOW & CO.,
20 years' practice.
F. A. SPENCER.
KNIGHT BROS.
L. DEANE & SON.

IN THE MATTER OF THE PETITION OF RUFUS L. B. CLARKE, TOUCHING HIS REMOVAL FROM OFFICE, AND NOW BEFORE THE JUDICIARY COMMITTEE OF THE SENATE.

In addition to my brief and supplemental brief, I wish to give more in detail the proceedings in Congress regarding the power of the President to make removals from office, and give extracts from the opinions of Senators and Members of the House—premising that the arguments of those favoring Presidential power were based almost exclusively on the debates and acts of the First Congress and the practice growing out of them. I shall quote only from those denying such power.

In reporting the tenure of office bill, passed March 2, 1867, Senator Williams stated: "It rests upon the hypothesis that the power of removal does not rightfully belong to the President." And he made a most exhaustive argument based on the provisions of the Constitution, and going over the whole ground, from the debates of the First Congress, said: "This doctrine of implied power found no favor anywhere on the score of reason. This bill is aimed at a giant vice. The exercise of the power is an executive usurpation of despotic will and must be abridged."

Senator Edmunds: "Madison had reasoned himself to the opinion that Congress had no authority as the removals, but his opinion outside that was the other way. As to practice, I do not believe that in the face of a Constitution as clear as ours it would make law," * * * "but while the debates and early acts demonstrated nothing as acknowledging constitutional power, yet the acts granted power as to the specific officers being heads of Departments."

Senator Howe: "By the Constitution the President has no more right to remove such an officer than he has to butcher him." And he demonstrated it by quoting from the Constitution. But the "dishonest statute creating the Department of State had been used to debauch politics, but its worst effect was on the President himself."

Senator Sherman sustained the bill and offered an additional section: "There was no power conferred by the Constitution and no one questions but Congress may regulate tenure, and no doubt of the power of Congress to pass the bill."

Senator Frelinghuysen said: "It was held before and for some time after the Constitution was adopted that the President had no power of removal without consent of the Senate."

Senator Henderson: "Notwithstanding the contrary practice, I have my opinion clear that the President has no power in the vacation of the Senate to remove one officer and substitute another in his place." Such power of removal "never was intended by the Constitution or those who founded it," but "Congress may confer the power."

Senator Willey: "I have long been of the opinion that the exercise of the power of removal was a very dangerous power and liable to abuse, and should be regulated."

Senator Sumner supported "the bill which Senator Edmunds has shaped with so much care and opposed the removal by the President." And he vindicated "the exercise of the constitutional power in the Senate."

Senator Trumbull, in regard to the amendment which would include the members of the Cabinet in the operation of the bill, said: "I hope that we shall agree to the amendment. I think there is no reason in the world why the members of the Cabinet should not be included. The act is to correct an evil. It is turning men out of office on caprice or for political ends."

Others participated in the opinions thus expressed and the positions assumed by the supporters of the bill, and if they were correct then they are now.

The bill passed both Houses and was vetoed by the President on the sole and precise ground that it was unconstitutional as infringing on his right to remove at any and all times, etc.

So the question was again squarely presented and every man who voted for the bill committed himself to the position that the President had no constitutional power of removal, and the following Senators so voted:

Anthony, Cattell, Chandler, Conness, Cragin, Edmunds, Fessenden, Fogg, Foster, Fowler, Frelinghuysen, Grimes, Harris, Henderson, Howard, Kirkwood, Lane, Morgan, Morrill, Nye, Poland, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Trumbull, Van Winkle, Wade, Willey, Williams, Wilson, and Yates; and Howe and Creswell also supported the bill—presenting an array of the very highest legal minds and statesmen of the country.

In the House the bill was also discussed solely on this constitutional question, and Williams, Jenks, Woodbridge, Donnelly, Boutwell, Stevens, Baker, Hale, and others made exhaustive arguments to demonstrate that the President had no constitutional power to remove without concurrence of the Senate, and the following committed themselves fully to that position by voting for the bill:

Allison, Blaine, Boutwell, Conkling, Ferry, Garfield, Hayes, Hooper, Julian, Kelley, Lawrence, Morrill, O'Neil, Paine, Rice, Rollins, Shellebarger, Spaulding, Washburn, Wilson, Windom, and Cullom and Davis and Hale, Ingersoll, Jenks, Kasson, Maynard, Pomeroy, Schink, and Wentworth, and others—111 in all.

Of the above named, two became Presidents and nine Senators—very respectable authorities to refer to.

But when the bill came up for consideration on the veto, the vote was even more emphatic, and 133 committed themselves to the position that the President had no such constitutional power to remove as he set up in his veto, and thus over two-thirds of both Houses a second time decided that the President had no such constitutional power of removal.

But anterior to this, other bills of like import had been reported and discussed in Congress.

Thus, Stevens introduced a bill in the House in February, 1866, and Price in June; and on June 11 Williams reported a bill from the Judiciary Committee and stated: "It rests on the hypothesis that the power does not rightfully belong to the President alone." Williams made a most exhaustive argument on this constitutional question, concluding: "This great power must be abridged if our peace is to be maintained and our liberties made sure."

Garfield supported the bill and offered an amendment. Hale, Stevens, Donnelly, and others participated in the constitutional debate supporting the bill.

No question was ever more fully and thoroughly discussed and clearly understood in the American Congress and so conclusively settled than this: "That the President has no constitutional power to remove officers appointed by himself and the Senate without the concurrence of the Senate."

Then followed in 1868 the proceedings in the impeachment of President Johnson, in which the constitutional power of the President was made a direct issue.

To commence with, after many debates in which the constitutional

question was fully considered, a resolution was reported from a committee of the House "that the President should be impeached."

This passed by a vote of 126 to 17. Of those voting yea, appear Allison, Blaine, Boutwell, Cullom, Dawes, Ferry, Logan, Morrill, Poland, Van Wyck, Washburn, Wilson, Windom, all afterwards in the Senate, and others of high note, as Banks, Butler, Covode, Hooper, Ingersoll, Jenks, Julian, Lawrence, Paine, Raum, Schenck, Sterns, Scofield, Williams, and others.

Of course every man voting for impeachment must have decided that the President had no constitutional power to remove Secretary Stanton.

Of the proceedings which followed before the Senate I make short extracts from opinions expressed by those favoring impeachment, again premising that those opposing took the ground that the President had the power of removal, not arguing from the Constitution itself on constitutional law but from the debates and acts of the First Congress and practice following. It was a battle of giants.

General Bulter said: "He has usurped power which does not belong to him. If he has such power it is a question whether the Presidential office ought to exist in the government of a free people." He cited a report made by Benton, Macon, Van Buren, Dickinson, and others to the Senate, in 1826, on the subject of such power, setting forth the evils of the practice and that it was counter to the Constitution and advising a statute to secure faithful officers, and declaring "such removals by the President to be a dangerous violation of the Constitution."

Logan: "The President has no power of removal except such as given by the Constitution and law—no inherent or implied power." And citing the Constitution granting specific powers to the President, and the provisions for removal by impeachment, etc., quoted: "Expressio unius est exclusio alterius," and exclaimed "Will gentlemen consider for a moment the tremendous consequences of the doctrine claimed by the President? If, sirs, the power arrogated by the President be his, he is henceforth the Government."

Stevens: "Under the Constitution and law the President has no power to remove."

Williams also argued from the Constitution: "No provision for removal except by impeachment," or through laws to be made by Congress under the grant to make all needful laws, etc. He quoted from Justice McLean that "there is no such power given in the Constitution, and that if power is to be inferred, it is in the President and Senate, and this, I have never doubted, was the true construction of the Constitution, and, I am able to say, it was the opinion of the late Supreme Court, with Marshall at its head."

Also from Webster: "After considering the question again and again * * * the original decision was wrong, and those who denied the power in 1789 had the best of the argument, and I have a clear conviction that they (the framers of the Constitution) looked to no other mode of displacing an officer than by impeachment, or the regular appointment of another person to the same place, and I believe it to be within the just power of Congress to reverse the decision of 1789, and I mean to hold myself at liberty to act upon that question, if the safety of the Government and of the Constitution may require." (And yet the advocates of the Presidential power presume to cite Marshall, and the Supreme Court, and McLean, and Webster as authorities.)

And, after citing other authorities, he said: "There has been an unbroken current of opinion from sources such as these through all history against the existence of this power. All contrary opinions rest on debates and acts of 1789 and practice of Executives," etc.

Bingham also argued from the Constitution, and found no such power in the President: "If he has such power, in the words of Marshall, the Constitution is but a splendid bauble.

Quoting Webster as replying to the claim of power by implication as belonging to the Executive office: "It is perfectly plain and manifest that although the framers of the Constitution meant to confer executive power on the President, yet they meant to define and limit that power and conferred no more than they did thus define and limit, * * * they meant that he shall hold this authority according to the grants and limitations of the Constitution itself."

Senator Sherman: "The power of removal is not conferred on the President by the Constitution and is not a necessary part of his executive authority. The tenure of office act is constitutional. The debates and acts of 1789 regarded heads of Departments, as to whom there are peculiar reasons why they should hold their office at the pleasure of the President. The Government was new; the President commanded the entire confidence of all classes and parties. * * * Who can believe that if all the great men who were then willing that Washington should remove the heads of Departments at pleasure could have foreseen the dangerous growth of executive power they would have been willing by mere inference to extend his power so as to remove at pleasure all executive officers? This power unrestricted and unlimited by law is greater and more dangerous than all the executive authority conferred upon the President by express grant of the Constitution. Surely, when the expressed powers far less important are so carefully limited by the Constitution, an implied power to remove at pleasure the multitude of offices created by law can not be inferred from that instrument."

The judgment that the head of a Department should be removable by the President may be wise, but the power is not conferred by the Constitution, but like the office itself is to be conferred, created, controlled, limited, and enforced by law. And such was the judgment of Marshall, Kent, Story, McLean, Webster, Calhoun, and other eminent jurists and statesmen.

Senator Fessenden did not discuss the constitutional question any further than to say that he "was not convinced that the tenure of office act, for which he voted, was unconstitutional."

Senator Howard made a very strong argument against the power. He said: "The doctrine asserted by Mr. Johnson that he has a separate and independent power under the Constitution, the power of removal, leads to the most fatal consequences. It directly subverts the popular character of our Government."

Speaking of the claim of implied power, he says "such a mode of interpreting the Constitution, a mode that annuls and destroys one part in order to give a favorite meaning to another, is contrary to all the established rules of interpretation, and is suicidal and absurd to the last degree. It is indeed a total overthrowing of the system of government under which we live. It seeks by cunning glosses and jesuitical constructions to establish and maintain absolutism, the one-man power, when the fathers of the Constitution fondly imagined they had put up firm barriers against it."

Senator Howe, also made a very strong and exhaustive argument against the Presidential power under the Constitution. He cited the passage of a bill in the Senate in 1835 which "denied the power of the President to remove," and in the discussion the debates of 1789 were thoroughly reviewed, and on which bill, Benton, Bibb, Block, Calhoun,

Clay, Clayton, Ewing, Frelinghuysen, Goldsborough, Kent, King, Leigh, McLean, Mangum, Moore, Naudain, Poindexter, Porter, Prentiss, Preston, Tyler, Waggaman, Webster, and White voted for the bill.

After considering all the acts of Congress, he said: "The power can not be proved by decisions of the Congress. On the contrary, it has, as I have shown, denied it repeatedly and explicitly. This power of removal is then not vested in the President by anything said in the Constitution, nor by anything properly implied from what is said. My conclusion is that the President derives no authority from the Constitution. A lawyer is not warranted in asserting it. A member of the Thirty-ninth Congress who assented to the act of July 12, 1866 (the tenure of office act), can not be justified in asserting it."

Senator Edmunds also found no authority in the Constitution for the exercise of the power by the President. He analyzed the debates of 1789 and found that 'the construction there claimed to be derived from this source ceases to have any foundation in point of fact."

But he held that the act of that Congress was a grant of power as to the Cabinet officers, and not a recognition of such power in the Constitution.

Senator Yates: "My conclusion of the whole matter is that if the President issued an order for the removal of Mr. Stanton and the appointment of Thomas, without the advice and consent of the Senate, it being then in session, he acted in palpable violation of the plain letter of the Constitution."

Senator Ferry: "The Constitution is silent on the power of removal. But this is a power that may be needful for the well ordering of the State."

To Congress the Constitution confided the power of making all needful laws to carry into effect its provisions, and he found "the tenure-of-office law therefore valid and proper."

Senator Morrill, of Maine: "The question arises is the tenure-of-office act in conflict with the Constitution? This was considered when the act was passed and again when vetoed by the President with the objection fully stated. The act of Congress of 1789 was not authoritative. It affords only a precedent. The Congress of 1867 had all the power over the subject that the Congress of 1789 is supposed to have had." And he considered the tenure-of-office law constitutional and valid.

Senator Morrill, of Vermont: "The power to remove, if an implied power, is not in the President alone, but in the President and Senate. The power claimed by President Johnson to create vacancies at will would blot out one of the most important functions of the Senate designed to be one of the highest safeguards of the Constitution against Executive indiscretion and usurpations. All stability would be lost and all officers of the Government would hold their places at the will and caprice of the President. It would enthrone the one-man power against all else. Such a power in a free government would be neither prudent nor safe, though placed in the most scrupulous hands, and if, by chance, in other hands it would be dangerous." (If this was true then it is now.)

Senator Stewart declined to discuss the constitutional question "after the repeated votes of the Senators affirming the constitutional validity of such a law."

Senator Cattell: "All the implications of the Constitution are against the idea that this power is in the President. The President thus derives no power from the Constitution of vacating by removal, except by the nomination, confirmation, and appointment of a successor."

Reviewing the Constitution and laws and making a strong argument against Presidential power and finding the tenure of office act constitutional, and referring also to the discussion and votes on the passage of the tenure of office act on the repassage by a more than two-thirds vote over the veto as conclusive on the constitutional question, he said: "If the power be conceded the ruler will no longer be the servant of the people, but the people will be the servant of the ruler."

Senator Frelinghuysen: "For eighty years the removal from office has been regulated by law. The Constitution nowhere gives the President the right to remove from office, and to hold that he has the power against the will of the Senate is virtually to destroy that provision of the Constitution which makes the advice and consent of the Senate necessary to an appointment."

Senator Wilson: "The framers of the Constitution well knew the seductive grasp and aggressive nature of executive power. In the words of Daniel Webster, 'That for ages the contest had been to rescue liberty from the grasp of executive and our security was in the watchfulness, etc.' He claims the right to remove civil officers and appoint others during the session of the Senate, * * * and thus nullify that provision of the Constitution which empowers the Senate to give its advice and consent."

Senator Harlan: "The Constitution nowhere in terms confers on the President the authority to make removals, nor does it anywhere confer on him this right by necessary implication."

But it does confer the right on the Senate by means of impeachment including even judges.

"I can not bring myself to believe that the framers of the Constitution could have intended to vest in the President a purely discretionery power so vast and far reaching in its consequences, which, if exercised by a bad or weak President, would enable him to bring to his feet all the officers of the Government, military and civil, judicial and executive, and to strike down the republican character of our institutions and establish all the characteristics of a monarchy."

Senator Sumner: "The constitutionality of the tenure of office act was settled by the passage of the act over the veto. It was further established by the vote of the Senate—35 to 6—restoring Secretary Stanton to office. Then by the resolution, after protracted debate, of February 21, by a vote of 27 to 6 declared that under the Constitution and laws the President had no power to remove, etc.

"There is no instance in our history where there has been such a succession of votes with such large majorities declaring the conclusions of the Senate and putting them beyond recall."

Senator Patterson: "If the President has the right to remove and appoint at pleasure the coordinate functions of the Senate in appointments may become a nullity, and the purpose of the Constitution be defeated, and it destroys at one blow this great safeguard against executive usurpation—maladministration."

Senator Trumbull: "The power of removal was recognized by the First Congress as in the President, but whether as a constitutional right alone which Congress might confer was left an open question. I believe in the constitutionality of the tenure of office act and stand ready to punish its violators."

(But he held with several other Republicans and all the Democrats that the removal of Stanton did not violate the act of March 2, 1867.)

Senator Grimes: "I shall not deny the constitutional validity of the act of March 2, 1867."

Senator Pomeroy: "Finally, the claim set up in Mr. Johnson's answer of power at any and all times to remove executive officers for cause to be judged of by him alone, effectually abrogates the constitutional authority of the Senate in respect to official appointments, subverts the principles of republican Government, and usurps the unlimited authority of an autocrat."

Senator Williams: "But now it is proposed by building one inference upon another to include a session (removal) as well as a recess and to abrogate the authority of the Senate and invest the Executive with absolute and despotic power."

And he made a strong and exhaustive argument, reviewing all the matters and cases cited to show power in the President and counter authorities and concluding that the President had no power of removal under the Constitution. Referred to the several votes of the Senate, especially that of February 21, 1868, of 27 to 6 on resolutions declaring that the President had no such power.

The first article charging violation of the law and Constitution in removing Mr. Stanton did not come to vote, it being evident from votes on other articles that though a large majority, 35 to 19, favored impeachment, the requisite two-thirds could not be secured.

If the opinions of these distinguished statesmen, from which broken extracts have been given, sustained by the repeated votes of both Houses of Congress were true, and good law then, they are now.

But anterior to the passage of the Senate tenure of office bill it was called up in the House on an amendment to include the Cabinet in its provisions, and after most thorough debate on this constitutional question the amendment after having gone to conference and been discussed in the Senate, was passed by an immense majority and was concurred in by the Senate.

Other bills of similar purport were introduced by Mr. Stevens and by Mr. Price in the House in 1866, and the same year the Judiciary Committee reported a bill which prohibited removal by the President alone, but provided for suspension by him during recess. And it was stated by Mr. Williams in reporting the bill that it rested on the hypothesis that the power of removal does not rightfully belong to the President alone. This bill was also fully discussed by Williams, Stevens, Hale, and others, and Garfield supported the bill, offering an amendment.

In February, 1886, Senator Edmunds reported a resolution in the Senate that under the Constitution and laws the President had no power to remove Secretary Stanton, etc. The subject was fully debated and finally passed by an almost unanimous vote.

If the matter and law set up in that resolution was then true, it is now. In March of the same year Senator Dolph submitted a resolution "that the Constitution of the United States does not vest in the President the power to remove at his pleasure officers under the Government of the United States where offices have been established by law." And he discussed it in a most complete and convincing argument, reviewing all the matters and authorities referred to and cited pro and con, in the discussion of this constitutional question.

With all this vast array of authority and Congressional enactments and extracts of opinions going to establish and fix beyond change the legal fact that the President has no constitutional power to remove a public officer appointed by the President and Senate without the cooperation of the Senate. It should not be surprising that I should submit to that same Congress, with perfect confidence, my petition and protest against the action of the President in ordering my removal without

cause, and during the session of the Senate, from the office of Examiner in Chief in the Patent Office—a judicial office—to which I was appointed by the President by and with the advice and consent of the Senate.

But it may be urged that the repeal of the tenure of office act should be considered an offset against the reiterated opinions, holdings, and acts of Congress and its members.

Not so. This repeal was brought about by the persistent efforts of politicians, commencing with the administration of President Grant, but was not successfully disturbed until the advent of Mr. Cleveland, when a bill was finally worked through the House to repeal the act, but failed in the Senate, and another was reported by Mr. Cox, of New York, and passed in the House in 1886, and was called up in the Senate by Senator Hoar, December 13 of that year, who advocated its passage and declared that the practice under the sanction of the acts of the first Congress and the construction given to the Constitution, removals by the President have become an established practice, though strongly contested "that the Senate had always been worsted and would always be." "That Grant had urged the repeal," and if passed "it would leave the law as it was from the beginning of the Government until the passage of this act."

Senator Edmunds strongly opposed the repeal but expressed little hope of success "with a solid Democratic vote against him and with support from people not so democratic." He said that the act had been "in force for twenty years without being opposed as unconstitutional, and recognized as a guide, Mr. Johnson obeying it," and he went over the old, constitutional ground and dwelt upon the evils of former practice.

The yeas were 30; all Democrats, except Senators Hoar and Ingalls.

The nays 22; all Republicans, as follows: Aldrich, Allison, Blaine, Cameron, Cheney, Conger, Dolph, Edmunds, Frye, Hale, Hawley, McMillan, Manderson, Mitchell, Morrill, Platt, Sawyer, Sherman, Spooner, Stanford, Williams, Wilson.

Some ten or twelve Republicans were "absent," most of whom had fully committed themselves to the constitutionality of the act, and consequently held that the President had no power, under the Constitution, of removal.

The result, then, that this repeal effected was "to leave the question as it was before the passage of the act," but without detracting one iota from the immense weight of authority given to the doctrine of no constitutional power of removal by the President, as claimed by Hamilton, Calhoun, and others, and by the repeated actions of Congress and by the opinions of Senators and members of the House as given above.

In the House the bill passed by 172 to 67—80 not voting. Among those voting against repeal were: Bayne, Burrows, Cannon, Conger, Goff, Grosvenor, Henderson, Houk, McKinley, Plumb, Perkins, Reed, etc.

If the foes to the usurpation and encroachment of executive power were defeated, they went out of the fight with their colors nailed to the mast and flying.

The vote did not turn on the unconstitutionality of the act so much as on its being impolitic and unnecessary.

Considering my case, then, as governed by the law and Constitution prior to the repeal, and in the light of the opinions of the distinguished men quoted, and of the acts of Congress, it will be found that the President had no constitutional power to order my removal.

The debates and acts of 1789 had reference and applied only to the heads of Departments.

The grounds urged invariably in favor of the Presidential power were:

As Chief Executive he should, under the constitutional provision that he shall "see the laws faithfully executed," have authority to control and remove executive officers for whose conducts and acts he is responsible.

That especially should he have this power to exercise when the Senate is not in session and is not accessible to be conferred with.

This reasoning has little, if any, force to others than the members of his Cabinet. And no reason has been given for his exercise of such power in regard to any officer other than an executive officer for whose executive acts he is responsible.

An examiner in chief is not such an officer in any sense.

No argument or reasoning ever urged from Madison down to Sunset Cox for implied power of removal in the President would apply to, sanction, or justify his removal of an examiner in chief.

First. As I have before urged, he is a judge or member of a tribunal created under the constitutional power granted to Congress to create such tribunals inferior to the Supreme Court, and has a tenure during good behavior.

And on this point I wish to be a little more explicit at the risk of repeating myself.

The duties of the Commissioner are mixed, executive, and judicial. With the greatly augmented business Commissioners prayed for relief as to judicial duties alone.

In obedience to these repeated suggestions, the board of appeals was created in 1860.

It was declared by Senator Bigler, in charge of the bill, to be "a board to hear appeals from primary examiners, with appeal from it to the Commissioner."

Senator Hale, while approving of the object, said: "The bill provides for the appointment of a board of three examiners in chief, at an annual salary of $3,000, and assigns to them very important duties, and they are to be appointed by the Commissioner, and are to stand between the examiners and the Commissioner, and are an independent board, and, I think, should be appointed by the President, by and with the advice and consent of the Senate." As it was he feared the offices would become political. And the bill was accordingly amended to make the appointment as suggested.

Senator Trumbull explained the bill, and said: "There used to be a board composed of the Secretary of State and some other officers (Senator Hale suggests, 'The Chief Justice was one of them') that had a revisionary power over the Commissioner, and now it is proposed to create an 'inferior tribunal.'"

The act itself explained the duties of the tribunal, giving it only appellate jurisdiction over cases appealed from examiners "to revise and determine upon the validity of their decisions in patent applications and in interference cases."

Now, from these decisions appeals lay to the Commissioner and the courts.

No case can be cited where the courts take jurisdiction by appeals from executive officers.

The board of appeals, then, was designedly created a court with appellate jurisdiction and to become a tribunal connected with the Judicial Department of the Government through provisions for appeals, with no other functions or duties, but purely judicial.

And immediately after the passage of the act this very question as to the character of the board was brought up in Snowden *v.* Pierce before Judge Dunlap in the district court, and he decided, June 25, 1861, "the examiners in chief are by the terms of the act recognized as judicial officers, acting independently of the Commissioner," etc. "He can only revise and overrule them when their judgment comes regularly before him on appeal."

And this has never been questioned, but the fact that the board is a purely judicial tribunal has been universally conceded and acted upon.

The practice before it was established and conducted precisely as that before other judicial tribunals of like character.

Its members were given the title of judges, and they performed no other duties except as a tribunal in hearing and deciding appeals in ex parte cases on the record, or in contested or interference cases on the records and printed or written evidence. Many of these cases are of great importance, and are contested and argued by counsel of the highest standing.

It has its calendar and clerk, and its decisions are all formulated in writing and recorded.

And what is conclusive as to the judicial character of the tribunal, appeals go indirectly from it up to the courts and to the Supreme Court.

And the Supreme Court, in Butterworth *v.* Hoe (112 U. S. Reports, p. 50), distinctly held that "the duties of the examiners in chief are essentially judicial," and that "the board of examiners in chief are constituted a tribunal," and again, "Congress provided the board as a tribunal."

In the face of all this evidence and of the decisions and holdings of the courts, am I to be told that the board of appeals is not a judiciary tribunal because it is in the Patent Office? How does this fact of the duties being confined to patent adjudication, and consequently of its being attached to that office for mere harmony and convenience in appropriation and payment of salaries from the patent fund, detract from the true character of the board as a tribunal inferior to the Supreme Court, which Congress is expressly authorized to constitute and establish?

But I understand that it is urged that it lacks one of the supposed essential attributes of a court, in that there is no provision for the enforcement of its judgments. But this is erroneous, for its judgments rendered in favor of the applicant are invariably executed in ex parte cases by the issue of the patent applied for, and in interference cases if not appealed from by the issue of a patent to the successful party, as specifically provided by law.

With no executive duties whatever, but clothed with all the powers and having all the functions and characteristics of any other court of appeals, how can it be truthfully said it is an executive office, within the reasoning of Madison and Jackson, both holding only that the President has implied power to remove executive officers, for whose executive acts he is supposed to be responsible?

If there was a positive provision in the Constitution and law granting him power to remove all executive officers, there might be some ground, but little sense, in construing the grant as covering all officers in the Executive Departments.

But there is no such positive grant, and we can not logically go one hair's breadth beyond the reason given for the questionable holding of implied power to sustain its exercise in any given case.

To hold that because this tribunal is attached to the Patent Office,

and therefore becomes an executive office, subject to the arbitrary power of the President to control and remove as contemplated by those who participated in the debates and enactments of the First Congress or have defended the exercise of the power since, seems illogical and absurd.

For we must bear in mind that the whole strength of reasoning lies in the claim that as Chief Executive, enjoined to see the laws faithfully executed, he should have power to control and remove such executive officers as act under him and for whose acts he is responsible.

Of course this relates exclusively to executive acts, as who would pretend that he is responsible for judicial acts? It has never been held that he had power to dominate and control and dismiss every officer in every Executive Department because they belonged to such Department.

The test, therefore, under the reasons and rules of those advocating such Presidential power is not as to whether the officer is in an Executive Department, but whether he is in fact an executive officer for whose executive acts the President is responsible.

Consequently he has never presumed to exercise the power on the ground that because the officer belonged to an Executive Department he was subject to his will.

But he has confined his operations to the higher offices such as were appointed by himself conjointly with the Senate. All others have been considered as free from the supposed power of removal.

And nowhere in all the discussions and holdings and enactments relating to this claim for Presidential power, or in all the practice growing up under it, can a case be found where the doctrine was applied to other than executive officers, whose duties were wholly or partly executive and to not one whose duties were purely judicial.

Thus President Jackson, under whom the exercise of such power first became effective, only claimed, in his own language, "the right to remove officers for whose acts I am responsible."

What act of an examiner in chief can be pointed out or suggested for which the President is in any way responsible?

Independent and free to form and express their true and honest judicial opinions, no other person, not even the Commissioner or the President, is in any degree responsible for such opinions.

If there be any constitutional or legal cause for removal they can be removed by due process of law.

There is no reason why the President should, without even pretended cause, resort to this implied power—questionable even when applied to heads of Executive Departments—to arbitrarily remove an examiner in chief, and especially with the Senate in session. For nearly half a century the board has been considered and treated as such tribunal, free from the dirty traffic of politicians and beyond the power of Executive control or disposal.

Shall its members now be scourged and turned over to the headsman by the Senate of the United States?

If the board be a tribunal, as contemplated by the Constitution, the tenure of its members is during good behavior, and I think I have fully established that such is the character of the board.

But considering it has been made a question of fact, I have filed in the case the opinions of many gentlemen of the legal profession of long practice before the office, and of the ex-Commissioners and examiners in chief in full support of such fact.

C

216 New Jersey Avenue
South East
Washington D.C

Hon. George H. Howe

Dear Sir

Some time since, I placed in the hands of Senator Lane Petition & Brief and Supplemental Brief & other papers, Challenging the power of the President to remove an Officer appointed by him & the Senate - & Especially during the Session of the Senate - & Especially an Officer having no Executive duties, but only purely judicial. I understand it was duly presented to the Senate & referred to the Judiciary Committee, of which you are Chairman.

I doubt if during this Executive Term & with the Crowded of Which would seem to be more important Matters than the right & power of the President to remove and Examine in Chief of the Patent Office, this Case has been brought to your Attention

Of Course you are aware that the Republican Party by repeated acts of Congress & Especially by the Tenure of Office Act & the Impeachment Trial of Andrew Johnson & the Written Opinions of its ablest Expounders - is fully Committed to the doctrine held & practiced by me, & as the Oldest record

Republicans. I ask a full &
careful consideration

Will it be agreeable to you to
designate time & place where I can
call & have a 15 minutes interview, in
order that I may learn what steps are
proposed, & what I may do to prepare
the case properly by furnishing a brief
synopsis of authority &c &c

Fearing that your attention has
not been called to the case, I enclose
a copy of original Brief

Respectfully
Your Obt. Servt.
R. L. B. Clarke

216 New Jersey Avenue
South East
Washington D.C

Hon. George S. Houston

Dear Sir

Some time since, I placed in the hands of Senator Lane Petition & Brief and Supplemental Brief & other papers, Challenging the power of the President to remove an Officer appointed by him & the Senate - & Especially during the Session of the Senate - & Especially an Officer having no Executive duties, but only purely judicial. I understand it was duly presented to the Senate & referred to the Judiciary Committee of which you are Chairman.

I desire at this time Respectfully to bring to the Notice of which would seem to be more important Matter than the right & power of the President to remove and Examiner in Chief of the Patent Office, this Case has been brought to your Attention

Of Course you are aware that the Republican Party by repeated acts of Congress & Especially by the Tenure of Office Act & the Impeachment Trial of Andrew Johnson & the Written Opinion of the Attorney Genl - is fully Committed to the doctrine held & promulgated by me, & as the Official record

Republicans. I ask a full &
Carefull Consideration
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call & have a 15 Minutes interview, in
order that I may learn what steps are
necessary, & what I may do to prepare
the Case properly, by furnishing a brief
Synopsis of Authority &c &c
Hoping that your attention has
not been Called to the Case, I enclose
a Copy of Orizba's Brief
Respectfully
Your Obt. Svt.
R L & R Leland

156

Before the U. S. Senate.

BRIEF.

On the Power of Removal of Officers Appointed by and with the Advice and Consent of the Senate.

Presented with Protest of Rufus L. B. Clarke, against his removal as Examiner in Chief in the Patent Office to the appointment of John H. Brickenstein, as his successor.

To the Senate of the United States.

I make the following statement to be considered by the Senate Committee on Patents before acting upon any nomination referred to them to fill a supposed vacancy caused by the removal of Rufus L. B. Clarke, an Examiner-in-Chief and a member of the Board of Appeals in the United States Patent Office.

I, said Rufus L. B. Clarke, was appointed by the President, by and with the advice and consent of the Senate, as such Examiner in Chief, April 21, 1869, and served until February 19, 1895, when I was requested by the Commissioner of Patents to resign, the request being coupled with the assurance that it was by the request of the Secretary of the Interior, and with the approval of the President, and to take effect on the 31st of March, 1895.

No intimation had been given that such resignation was desired, no grounds stated, and none given on oral request.

That no good grounds existed might be inferred from the fact that when the request became known, nearly all the attorneys doing business before the Office in Washington, Boston, New York, Chicago, and other places, forwarded to the President or Secretary of the Interior indorsements of ability and remonstrances against removal, some of which I am permitted to append by copy.

But prior to the said 31st day of March, having neglected to answer the polite invitation to resign, an order was delivered to me, of which the following is a copy:

EXECUTIVE MANSION,
WASHINGTON, D. C., *February 28, 1895.*

Mr. Rufus L. B. Clarke, Present.

SIR: You are hereby *removed* from the office of Examiner-in-Chief in the Patent Office, to take effect upon the appointment and qualification of your successor.

Respectfully,
GROVER CLEVELAND.

Through the Commissioner of Patents.

It is appropriate that this order should have been thus signed, "Cæsar," without the useless appendage of "Emperor."

It will be observed that this was during the *session of the Senate.*

On the same day the name of John H. Brickenstein, a young examiner in the Patent Office, was placed in nomination before the Senate, and referred to the Committee on Patents.

I have no knowledge of what action was taken by the committee, but the following appeared in a morning paper, and its truthfulness was never questioned:

WILL NOT BE CONFIRMED.

A VIGOROUS AND SUCCESSFUL FIGHT AGAINST THE NEW CHIEF PATENT EXAMINER.

A fight, vigorous in the extreme, has been begun against the confirmation of Arthur P. Greely, of New Hampshire, and John H. Brickenstein, of Pennsylvania, whose names were sent to the Senate February 28, as appointees to the offices of Examiners-in-Chief in the Patent Office, in the place of Henry H. Bates, resigned, and Rufus L. B. Clarke, removed. Bates and Clarke have held the positions for many years, and immediately upon the nomination of their successors the Senate Committee on Patents and individual Senators were flooded with telegrams and letters protesting against not only the confirmation of the new men, but the removal of the old officials.

Senator Call, chairman of the committee, has consulted with his associates, and finds that owing to the

fact that these protests come from the leading patent attorneys and men all over the country doing business with the Patent Office, the nominations cannot be acted upon without a thorough investigation. The time is too short for this, and the committee has informally decided that it will not make any report on the nominations, and they consequently go over unacted upon. The members of the committee, talking privately, express their regret at the action of the Department in removing men of experience, and whose work is really that of a court of last resort in patent matters. They express the belief that the President will not give these men a recess appointment in view of the deliberate failure of the Senate to consider their nomination.

The Senate adjourned March 4th, and early on March 5th Mr. Cleveland, before starting on his fishing excursion, appointed the same Mr. Brickenstein to fill the supposed vacancy, caused by my supposed removal during the session of the Senate.

The removal, if valid, had not taken effect, according to its express terms.

It will be noticed that this appointment of a successor was sought at first to be made through the supposed only regular course—"by and with the advice and consent of the Senate."

I held the position on the Board until the 1st of April, 1895, when Mr. Brickenstein took my place, and I immediately filed with the Secretary of the Interior and of the Treasury a protest, of which the following is a copy:

BOARD OF APPEALS,
U. S. PATENT OFFICE, *April 1, 1895.*

To the Hon. Hoke Smith,
Secretary of the Interior.

SIR: I hereby protest against all action taken to effect my removal as Examiner-in-Chief in the Patent Office, and to appoint another as my successor, as being irregular and without sanction of law.

Without waiving any legal or equitable right or claim, but claiming to be still legally such Examiner-

in-Chief, I am willing, and able, and ready to continue in the discharge of the duties of the position, as heretofore, and hereby tender my services to that end.

But so it is, I find Mr. John H. Brickenstein claiming to be my successor, and as such appointee occupying my position and place on the Board of Appeals, to my exclusion.

To all which acts and assumptions I make objection and file this, my protest, and shall hereafter assert my claim of right to the salary of the position.

Respectfully your ob't serv't,

R. L. B. CLARKE,
Examiner-in-Chief.

The only authority conferred upon the President in relation to offices is contained in the 2d Section, Article 2d, of the Constitution. In enumerating powers granted him, it states: "He shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions, which shall expire at the end of the next session."

But it omits granting him any power of *making* vacancies, and by so doing negatives the existence of such power, as he is only authorized to fill such vacancies as may *happen* during the *recess* without his instrumentality being suggested.

But no vacancy had happened during the recess, either by the action of the President, under the operation of such order, or by any of those causes alone recognized by law as causing such vacancies to "happen," as *death*, *absence*, *resignation*, or *sickness*.

Thus, in Sections 177, 178, 179, provision is made to fill vacancies, and in all the only recognized causes for vacancies are as above stated.

Nowhere in the Constitution or laws can be found any authority for the President to force such vacancies to "happen" by autocratic removal; but, as before stated, granting that he has such power, no such vacancy happened during the recess of the Senate, under and by virtue of such order, a copy of which is given, even

admitting that the act of "Grover Cleveland" must be considered as the official act of the President, which is not conceded.

But the most interesting and important question presented in this matter, and one which should receive the careful and exhaustive consideration of Senators sworn to support the Constitution, is whether the President has the power under such Constitution to remove public officers appointed "by and with the advice and consent of the Senate," when no positive provision has been made by Congress impowering him to make such removals.

In "Loyds Debates," pages 355 to 366, and 480 to 600, will be found a discussion of the question which arose in the First Congress during the consideration of a bill to organize the Departments, and it was proposed to strike out the words "to be removable by the President." A motion was made to add the words "by and with the advice and consent of the Senate."

The former words were stricken out and the latter rejected in the House, by a vote of some thirty-four to twenty, and in the Senate by the casting vote of the Vice-President.

Mr. Madison, and others who thought with him, held that the power of removing all *Executive* officers was inherent in the Chief Executive, and reasoned wholly upon the grounds of expediency, propriety, and necessity—that being responsible for the *Executive* acts of all his subordinates, he should have the power to remove them if they did not conform to his policy and dictation. And having the Senate associated with him was thought to be cumbersome and inexpedient.

The arguments went rather to show the propriety of having some provision by Constitution or law for the proper exercise of such a power, than that it really existed without any such provision. (At first Mr. Madison held a contrary opinion.)

On the other hand, Mr. Smith, of South Carolina; Mr. Jackson, Mr. Gerry, Mr. Bland, Mr. Roger Sherman, Mr. Stone, and others, thought that the exercise of such a power by the President was unconstitutional, autocratic, undemocratic, and dangerous.

That if he exercised it at all, it should be in association with the Senate, as the power to create should be the power to remove. That for the President to remove without the co-action of the Senate would render nugatory the provision for such co-action of the Senate in appointing, as on the adjournment of the Senate he could remove all the *Executive* officers and appoint his own favorites, even though once rejected.

As Mr. Jackson expressed it: "Are we to have all the officers the mere creatures of the President?"

In the Senate the matter was debated, but not so fully considered as in the House; and the idea of *implied* power in the President was controverted by Benton and others, and was determined in favor of the power in the President over *Executive* officers for *whose acts* he is *responsible*, by the casting vote of the Vice-President.

Subsequently, in the same session, an Act was passed which seemed to recognize this power. It provided: "That when the Secretary should be removed from office *by the President of the United States*, or in any other case of vacancy in the Office, the Assistant shall act."

Now, on this debate and vote, and on this Act, all subsequent writers and speakers have relied as the sole authority for recognizing the constitutional power of the President to remove subordinate *Executive* officers, whenever the power has been assumed and exercised.

Yet nothing of positive legislative sanction appears, and the whole question is left to inference and to individual opinion, and is as undetermined as before the debate occurred.

As regards the Act which seems to recognize a power in the President to remove, etc., it may have been in-

serted under the impression that *Congress would confer* the power under the Section 8 of Article 1 of the Constitution, and under which the Congress has frequently acted in fixing and regulating tenure of office, wholly precluding Executive interference.

If we are to come to conclusions on the question from inferences drawn from legislative action, what shall be said of amendments which wipe from the statute book this suggestion in regard to removal by the President, and the filling of vacancies, and positively recognized as the only power or causes for creating such vacancies, "death, resignation, absence, and sickness?" (U. S. R. S., Sections 177, 178, 179, 180, 181.)

Besides the Act of March 2, 1867, requiring the consent of the Senate for the removal of any officer appointed by the President by and with its advice and consent, there have been many other Acts regulating and fixing tenure in office.

Subsequent to this debate and Act of 1789, commentators and speakers, in considering the questoin of the Constitutional power of the President to remove officers appointed by the President and Senate, have almost invariably recorded their own opinion as against such power.

Mr. Kent, in Section 14, speaking on this question, and setting forth the grounds given for holding that it is an implied power in the Chief Executive, because he is responsible for the faithful *execution* of the law, and that the power of removal of subordinate *Executive* officers was incidental, as they should be subject in *Executive* action to the Executive head; and after referring to the Act mentioned, establishing the Treasury and the construction given conceding by implication that the power of removal was in the President, adds: "This was never made a subject of *judicial* decision, and this construction rested on the loose incidental opinion of Congress and the sense and practice of Government

since." And he speaks of it as "a striking fact that such a determination should rest upon a mere *inference* in opposition to that high authority of the Federalist (Hamilton), and should have been acquiesced in by distinguished men who even questioned and desired the power of Congress to incorporate a National bank."

Story, in his Commentaries (Sec. 1543), speaking of this action in Congress of 1789, and the acquiescence of the public, says: "It constitutes the most extraordinary thing in the history of the Government, of a power conferred by implication on the President by the assent of a bare majority of Congress, which was not questioned on many other occasions. Even the most jealous advocates of State's rights seem to have slumbered over this *vast reach* of *authority*," etc.

This *slumbering* during the terms of the earlier Presidents he accounts for on the ground that but very few removals were made, and those in cases such as had their own vindication." And not until the advent of President Jackson was the exercise of the power greatly extended;

"Many of the most eminent statesmen of the country have a deliberate opinion that it is utterly indefensible, and that the only sound interpretation of the Constitution is that avowed upon its adoption, that is to say, that the power of removal belongs to that of appointing."

In a note—"Calhoun was among those who denied to the President the power of removal except with the "advice and consent of the Senate."

Now, as to Mr. Calhoun. In Vol. I., page 344, of his works, he says, in relation to the debate and Act of 1789: "The argument rested mainly on the ground that it (the power of removal) belonged to the class of Executive powers, and was indispensable to the performance of the duty to take care that the laws be faithfully *executed*." Then "both parties agree that it was not ex-

pressly vested in him, and overlooked a provision of the Constitution which expressly provides for the case —that empowering Congress to make all laws necessary and proper to carry its own powers into execution, and also whatever power is vested in the Government or any of its departments or officers."

"And what makes the fact more striking, the very argument used by those who contended that he had the power independently of Congress, conclusively showed that *it could not be exercised without its authority*, and that the latter Department had the right to determine the mode and manner in which it should be executed."

"For if it be not expressly vested in the President, and only results as necessary and proper to carry into execution a power vested in him, it irresistably follows under the provisions of the clause referred to, *that it cannot be exercised without the authority of Congress*."

After referring to the great changes in the practice and operations of the Government induced by this debate and decision in Congress, he denounces in no measured terms "the practice which still remains in the *face* of *this express* and *important provision* of the *Constitution*." And after setting forth the object and purposes of these provisions, he adds: "But it has been defeated in practice, and the corrupting and loathsome disease called 'the spoils' has been introduced."

And the evils following this *usurped power* of the President are dwelt upon and scathingly denounced.

Webster, before coming in sight of the throne, was of the same opinion as Calhoun and Benton, Gerry and Smith, and Jackson and Kent, and Story and Clay, and Hamilton and Roger Sherman, and a host of others.

The love of power is an attribute of human nature, and it is not to be wondered at that ambitious individuals having dim hopes that at some time, however distant, they might be enabled to employ this tremend-

ous power of removal, should at least acquiesce in its exercise by the Chief Executive.

Senator Sumner, in an opinion filed on the impeachment trial of President Johnson, speaking of Vice-President Adams giving the casting vote favoring the power in the President, says: "The vote was given by one who, from *position* as well as principle, was not inclined to shear the President of any prerogatives."

Alexander Hamilton, in No. 74 of the "Federalist," prior to the adoption of the Constitution, and to secure the confidence of the people in it, speaking of the provision providing for the concurrence of the Senate in Presidential appointments as a check upon the assumption of autocratic powers by the Executive, says: "The consent of that body (the Senate) would *be necessary to displace as well as to appoint.* A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the offices of the Government as might be expected if he *were* the *sole disposer* of the *offices.* When a man in any station had given satisfactory evidence of his fitness, a new President would be restricted by this power conferred upon the Senate, and the result would be stability in our Government."

Nor did Hamilton stand alone in this view of the case. No one would have had the hardihood, prior to the adoption of the Constitution, unless opposed to it, to have contended for such inherent and implied power in the Chief Executive.

The Constitution was drawn up to guard against just such doctrines of unlimited, indefinite, and undefined, inherent, and implied powers. It is the doctrine of kings, autocrats, and feudal lords, the most dangerous to the liberties of the people and the rights of communities.

The doctrine that has made Bills of Rights and Magna Chartas and Constitutions necessary to guard

against the usurpations of tyrants, ruling under the claim of Divine Authority, and assuming powers as inherent, inalienable, expedient, and necessary, and for the exercise of which they were not answerable to the people, ignoble-vulgar, and serfs.

This matter of the power of the President came up for discussion in the impeachment trial of President Johnson, the principal article resting on the removal of the Secretary of War in the face of the Tenure of Office Act, before referred to.

But though many of the counsel and Senators contending against conviction, argued in favor of the power of removal in the President, and against the right of Congress to limit and curtail it, yet none of them reasoned from first premises, but drew inspiration second hand from the said debates and Acts of 1789, and practices of Government subsequently. While a large majority of Senators held that nothing was concluded by such debate and Act, and that Congress had full power to regulate and fix the tenure of office, Senator Trumbull claimed that Congress had the power to "define the terms of office and make them determinable, either at the will of the President or of the President and Senate," and cited Acts of Congress in which the power had been exercised.

Senator Edmunds held that the regulation of the tenure of office was not confided to the President, but left to the legislature. In this he agreed with Mr. Calhoun. He took strong ground against the Constitutional power of the President, and said the effect and construction given by those favoring such power to the debates and Acts of 1789 had "no foundation in fact," and demonstrated it in a review of the debates.

Harlan held, even conceding that the practice was justifiable in some cases to remove *during recess*, yet it was of doubtful constitutionality, and "could not be

practiced during the session, except by appointment and confirmation."

Sherman: "That the President only had the power in connection with the Senate," and gave strong reasons against the assumption by the President alone.

Ferris: "The Constitution did not confer the power upon the President, but on Congress," as held by Mr. Calhoun.

Williams, afterwards Attorney-General, made perhaps the most exhaustive argument against the power in the President.

Sumner, also reviewing the debate and Act of 1789, held that it was "of little or no force as recognizing the power in the President alone," and referred to Kent, Story, and Webster, Clay, Calhoun, and Benton, as opposed to the Constitution conceding such power.

Morrill argued very strongly against the assumption of such power by the President, and denied its existence.

Yates also made a strong argument against the power. Hendricks placed his opinion in favor of the power on the debates and Acts of 1789, and practiced subsequently. Boutwell referred to Hamilton as authority against the power, and mentions the fact that General Jackson, in his protest, only claimed the right to remove "*Executive* officers *for whose acts he was responsible.*"

Howe held that the President had not the power, but that Congress had the power to fix tenures, and cited many cases where they had done so, and stated that "in 1835 Calhoun, as chairman of a Senate Committee, had reported a bill which *denies the Constitutional power* of the President," and that *31* voted for the bill to *16* against.

Howard took strong ground against the power being in the President—that if it was incident to the power

of appointment, then it resided in President and Senate jointly.

Patterson: That no such power was conferred upon the President, and if the power of removal existed by implication, it was in the President and Senate.

Others expressed similar opinions, and nearly every one who expressed contrary opinions predicated their holding on the debate and Act of 1789 and practice of the Executives since, as before stated.

Although a two-thirds vote was not obtained sustaining the articles of impeachment, yet the vote stood *35* for to *19* against, and was much more unanimous than that of 1789; and considering that the House in finding, and the Senate as a court of impeachment, were exercising the highest powers and functions conferred upon any body by the Constitution, the sanction of their Acts in giving construction to that instrument would seem to be deserving of greater consideration and weight than those of the Congress of 1789.

Thus we see that in the absence of all constitutional authority, as expressed in the grant of powers, and without any express legal enactment granting such powers, and without any judicial decision on the question, but upon the dangerous doctrine of implied and inherent powers as the Chief Executive, and on the grounds of the propriety, expediency, and necessity of its exercise by him, in all cases of his subordinate *executive* officers, discharging *executive duties*, for which, under the theory of our Government, he is *responsible*, the Presidents have gone on wider and farther, extending the reach and exercise of this usurped power, until directly, or through his chiefs in the Executive Departments, he holds absolute control of the tenure of *executive* offices, down to the little cross-roads postmaster, and including even those who receive their appointments "by and with the consent of the Senate."

But, until now, the exercise of this power has never been attempted in regard to officers whose duties were *not executive* and of a character for which the Chief Executive might be held *responsible*.

All judicial offices are protected from his raids by the express provisions of the Constitution.

Article 3, Sec. 1 provides: "The judicial power of the United States shall be vested in one Supreme Court and in such *inferior courts* as the Congress may *from time to time ordain and establish*. The judges of the Supreme and *inferior courts* shall hold their offices during good behavior," &c.

And by Art. 1, Sec. 8, it grants to Congress the power "To constitute *tribunals inferior* to the Supreme Court." Thus, "Courts" and "tribunals" are employed as synonomous.

Under this express power, Congress, in 1861, enacted as follows, Chap. 8, Sec. 2:

"That, for the purpose of securing greater uniformity in the grant and refusal of letters patent, there shall be appointed by the President, by and with the advice and consent of the Senate, three examiners-in-chief, at an annual salary of three thousand dollars each, to be *composed* of persons of competent legal knowledge and scientific ability, whose duty it shall be, on written petition of the applicant, for that purpose being filed, *to revise and determine* on *the validity* of *decisions made by examiners*, when adverse to the grant of letters patent. And also to *revise and determine in like manner* upon *the validity* of the decisions of examiners in interference cases, and when requested by the Commissioner, in applications for the extension of patents, and to perform such other duties as may be assigned to them by the Commissioner. That from their decisions appeal may be taken to the Commissioner of Patents, in person, on payment of the fee hereinafter prescribed; that the said examiner-in-chiefs shall be governed by the rules to be prescribed by the Commissioner of Patents."

At the time of this enactment there was in the Patent Office a Board of Appeals, and when the above Act employs the words "to be composed" reference was undoubtedly had to these three Examiners-in-Chief composing a Board of Appeals.

The Act has been amended from time to time, and now the law provides, "That there shall be in the Patent Office three Examiners in-Chief," who shall be appointed by the President, "by and with the advice and consent of the Senate," and their duties are "to revise and determine upon the validity of the adverse decisions of Examiners upon application for patents, and for re-issue of patents, and in interference cases, and when required by the Commissioner, they shall hear and report on claims for extensions, and prepare such other LIKE duties as he may assign them."

It will be seen at once that the duties and functions of the Examiners-in-Chief are purely judicial. No executive power is conferred. Under this law of 1861 the Examiners-in-Chief composed the Board of Appeals and sit as a tribunal to hear arguments and decide cases brought before them under the law, and they never acted singly or in any other way than such tribunal, having clerks and messengers appointed by the Commissioner and Secretary of the Interior, and a regular calendar in which cases are set down for hearing, and books in which all their decisions are recorded. From the first they were given the title of "judges." They never exercised any administrative or executive function or duty whatever.

When the patent laws were before the Forty-first Congress, 1869–70, Section 480, giving power to the Commissioner to make regulations, with the approval of the Secretary, being under consideration, Mr. Butler of Massachusetts, in offering an amendment, said: "Now, he has under him a *Board of Examiners-in-Chief*, who are nominated by the President and confirmed by

the Senate, and who are quite his equals in every respect, &c. I am willing that his clerks and laborers and all who hold under him shall be subject to his rules, &c., but I am not willing that he shall have the power of annoying and disturbing if he chooses the men who are appointed by the same power that he is and with the same rank."

To which Mr. Jenks, the chairman having the bill in charge, replied:

"I think I can show that the amendment is not needed. The power to make rules and regulations applies to the *proceedings* and not to *persons*."

But the word "*like*" was inserted before duties in the section defining the duties of the Examiners-in-Chief, so as to preclude the idea that the Commissioner could call upon them to perform any other than *judicial* duties. (See Congressional Globe, 2d Session, 41st Congress, page 2855.) Here we find a legislative—recognition of the Board of Appeals as constituted by the Examiners-in-Chief." When the Act of 1861 was up in the Senate, Senator Trumbull, the chairman of the Committee, stated in regard to the Examiners-in-Chief as a Board: "It is here proposed to create an *inferior tribunal*, using the very words of the Constitution authorizing Congress to create such tribunals whose judges "should hold during good behavior," as by Sec. 1, Art. 3.

But we are not left alone to this Act for the recognition of the judicial character of the office and tribunal by Congress for a determination of such character, for we have a judicial decision right in point. It is cited by Law in his work on Copyright and Patent Laws, page 197, as decisive of the question.:

District Court, D. C, June 25, 1861.—Snowden vs. Pierce.—Judge Dunlop.

(Decision on record in the Patent Office.)

Held, Under the Act of 2d March, 1861 (creating

the Examiners-in-Chief as a Board of Appeals) the Examiners-in-Chief are by the terms of the Act recognized as *judicial officers*, acting independently of the Commissioner, who can only control them when their *judgments* in due course come before the Commissioner on appeal." * * "Under the new law of 1861 * * the Examiners-in-Chief are by the Act of 1861 treated as *judicial officers* having power, without control, within the option of their duty, to the exercise of their independent judgment. Their acts, under the new law, are not, as under the old system, the acts of the Commissioner, but their own acts. They are no longer the mere organs of the Commissioner, but are independent officers. He can only reach and overrule them when their judgments come regularly on appeal.

This is conclusive of the fact that the Examiners-in-Chief are purely judicial officers. But the U. S. Supreme Court has distinctly held that the duties of Examiners-in-Chief are "essentially judicial," and that ~~appoint~~ appeals ~~ments~~ from Principal Examiners are to "the Board of Examiners-in-Chief *Constitute a Tribunal* for that purpose," &c., and that ~~*the Board*~~. "Congress provided the Board as *a Tribunal*, &c.

See Butterworth vs. Hoe, U. S. Reports 112, p. 50.

I also append to this brief the opinion of gentlemen who have held the position of Examiners-in-Chief and Commissioner of Patents, which should be considered authoritive and of great weight on this point. (I will furnish, if desired, a certified copy of Judge Dunlop's decision.) Amidst all this "slaughter of the innocents in *Executive* offices, never before has the executioner swung his ax over this judicial tribunal.

Once a suspension was ordered on the ground of insubordination during a recess of the Senate, but was abandoned before the following session.

I therefore make this contention—

That the President has no Constitutional power expressed or implied to remove any officer appointed by him with the advice and consent of the Senate.

If such power exists, it is in the President and the Senate jointly.

That Congress has the only Constitutional power to regulate and fix the tenure of office.

That I was appointed Examiner-in-Chief without any limitation, expressed or implied.

That the supposed order for my removal was invalid, being the act of "Grover Cleveland" and not of "the President."

That if such order was otherwise valid, it was issued during the session of the Senate, and was unauthorized by the Constitution, and cannot be sustained by any rule of construction or reasoning adopted for employing such power, growing out of expediency or necessity.

That even if said order was valid, no vacancy had happened under it at the time he assumed to appoint my successor.

That the vast weight of authority from expressions of statesmen and from Congressional action and opinions of legislators is against the possession of said power by the President.

That there existed no good ground for my removal, as is evidenced by the fact that none have ever been urged or specified while the great majority of those doing business before the Office, and being cognizant of the proposed removal protested against it and certified to "good behavior."

That even conceding that the President has such power, which is in doubt, and contested, it only relates, according to the most ardent supporters of that position, to

"*Executive* officers, acting as his subordinates and performing *Executive* duties, and for whose acts and conduct he is responsible.

That the office of Examiner-in-Chief is purely *judicial*, and in no respect Executive.

That these officers constitute a "tribunal," of which each is a judge, and their tenure of office is fixed by the Constitution as during good behavior.

I therefore protest, as I have before so formally protested from the beginning, that I have not been legally removed from the said office, and that there is no vacancy in the position held by me, and the comfirmation of the appointment of Mr. Brickenstein or any other person as my successor would be illegal, unjust to me, and a public wrong.

RUFUS L. B. CLARKE.

APPENDIX.

The Hon. GROVER CLEVELAND,
President of the United States.

SIR: Having learned of the demand for the resignations of Judge R. L. B. Clarke and Judge H. H. Bates, members of the Board of Examiners-in-Chief of the United States Patent Office, we respectfully and urgently petition you for a recall of the demand, and respectfully ask your consideration of the following:

It is of the highest importance to inventors and the public generally that the Examiners-in-Chief shall be men of sound judgment and of experience in all matters relating to patents. The Examiners-in-Chief of the Patent Office have presented to them and have constantly to solve as intricate problems of patent law and practice as ever come before any of the Federal courts, in addition to which they must be experts in science and the mechanic arts.

The Board of Examiners-in-Chief is, if we may so express ourselves, generally considered by those interested in patents, as the balance-wheel of the Patent Office, and it is of the greatest moment—a matter of the highest interest to all concerned—that this Board should be properly constituted and that its weight and importance should not be broken.

Judge Clarke has served upon this Board for many years, and during a long and honorable service, which has met with recognition and the highest appreciation of the inventors throughout the country, and those practicing before the Patent Office and the courts in patent cases, and of the public generally, has gained an experience and facility in the correct discharge of his duties which could not be supplied by any man of less experience, no matter how great might be his mental qualifications, his habits of industry being marked; while Judge Bates has also served as an Examiner-in-Chief for many years, and is a man of the highest order of learning and of the most marked and incisive practical sense in the ready application of his great and profound knowledge and commanding abilities, whose uniform judiciousness and judicial mind, with his habits of thought and indefatigable industry, are matters of common knowledge and universal appreciation; it being also to be noted that Judge Bates acquired his present position in conformity with the true principle of Civil Service Rules, namely, by competitive examination.

Well knowing, with the majority of your fellow citizens, and being impressed with your desire for the best interest and constitution of the Civil Service, we submit the above for your consideration, and earnestly and most respectfully ask your attention thereto, sincerely believing, as we do, that the severance of either Judge Clarke or Judge Bates from his position in the Patent Office, would be a great detriment and loss to the public service, as their continuance in the position, as long as they can be kept, is of great advantage.

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In addition, similar petitions were presented from Hartford and New Haven and Philadelphia and Baltimore and Cleveland, &c., and remonstrances by letter from individuals all over the country.

To Judge Elis Spear, V. D. Stockbridge, R. S. Dyrenforth, Hon. H. E. Paine, Robert Fisher, formerly connected with the Patent Office as Examiners-in-Chief and Commissioner:

It being important to determine the character of the office of Examiner-in-Chief in the Patent Office—whether it be Executive or judicial, or both—will you kindly give an expression of your opinion?

It appears clear to me that the office of Examiner-in-Chief is and ought to be purely a judicial one.

ELIS SPEAR,
Formerly Ex.-in-Chief, Ex. Com'r of Patents.

I concur in the above, and, having been Examiner-in-Chief, Assistant Commissioner, and Acting Commissioner, I add that the Examiners-in-Chief have and exercise no function or duty save as judges acting as a Board of Appeals.

V. D. STOCKBRIDGE.

I occupied the same positions as those mentioned by Judge Stockbridge, and am clearly of the opinion that the office of Examiner-in-Chief is purely and solely judicial.

R. G. DYRENFORTH.

I concur in the opinions expressed above.

H. E. PAINE

I think the office of Examiner-in-Chief is purely judicial.

ROBERT J. FISHER.
Formerly Examiner-in-Chief,
Asst. Com'r of Patents.

MEMORANDUM

In the matter of the Confirmation of J. H. Brickenstein as Examiner-in-Chief in the U. S. Patent Office.

In the matter of the confirmation of a successor to Mr. R. L. B. Clarke, removed from the position of Examiner-in-Chief in the United States Patent Office, it has been urged on his behalf that his successor should not be confirmed for the reasons—

(1) That the President has no right to remove an Examiner-in-Chief, except by and with the consent of the Senate, and

(2) That the board of Examiners-in-Chief in the United States Patent Office is an inferior court or tribunal under Art. III, Sec. 1 of the Constitution, and therefore these Examiners-in-Chief hold office during good behavior.

Neither of these reasons is thought to be valid.

No discussion of the first ground seems necessary.

As to the second, the following considerations are presented, and it may be well at the outset to call attention to the character and duties of this board of Examiners-in-Chief.

The important sections of the statute having reference to this board are the following:

"SEC. 476. There shall be *in the Patent Office* a Commissioner of Patents, one Assistant Commissioner, and *three examiners-in-chief*, who shall be appointed by the President, by and with the advice and consent of the Senate. All other officers, clerks, and employés authorized by law for the Office shall be appointed by the Secretary of the Interior, upon the nomination of the Commissioner of Patents.

"SEC. 482. The examiners-in-chief shall be persons of competent legal knowledge and scientific ability, whose duty it shall be, on the written petition of the appellant, to *revise and determine upon* the validity of the adverse decisions of examiners upon applications for patents, and for re-issues of patents, and in interference cases: and, when required by the Commissioner, they shall hear and

report upon claims for extensions, and perform such other like duties as he may assign them.

"SEC. 4909. Every applicant for a patent or for the re-issue of a patent, *any of the claims of which have been twice rejected, and every party to an interference, may appeal from the decision of the primary examiner, or of the examiner in charge of interferences in such case, to the board of examiners-in-chief; having once paid the fee for such appeal.*

"SEC. 4910. If such party is dissatisfied with the decision of the examiners-in chief, he may, on payment of the fee prescribed, appeal to the Commissioner in person."

It will be noted that the main and practically the only duty of this board is to revise and determine upon the validity of the adverse decisions of the primary examiners.

Though this function of revising the decision of the primary examiners is necessarily exercised in a judicial way, it is at once apparent that the powers of this tribunal are not those of a court.

Nowhere does the statute so refer to it. It is a tribunal IN THE PATENT OFFICE, has no jurisdiction outside of it, has no seal, issues no process, is not a court of record; it can not punish for contempt, can not summon witnesses, can not require evidence to be produced before it, can not and does not issue any judgments or decrees. Its decisions take effect only through the Commissioner of Patents. Even if it decides that an applicant is entitled to a patent, and the patent is granted, it is signed by the *Commissioner of Patents*, and the patent is, when granted, only the evidence of a *prima facie* right whose validity has subsequently to be determined by the Federal courts.

In the conduct of its proceedings it is governed by rules established with the approval of the Secretary of the Interior by the Commissioner. Its decisions are appealable to him and his decisions are binding upon the Examiners-in-Chief.

The Commissioner has had occasion to insist upon this point with reference to the very Mr. Clarke above referred to.

In the case of Clymer *v.* Riley, C. D. 1874, p. 73, General Legget, the then Commissioner, said:

"The question * * * has been twice before the Acting Commissioner, and in both instances clearly and positively decided in the affirmative, and that should be so considered by the Examiner. In the second decision the Acting Commissioner takes occasion to suggest the impropriety of the Examiner or Examiner-in-Chief having revived this question in the further examination of the case.

"Yet in the final action of the board, one member (Mr. Clarke), with both of the Acting Commissioners before him, and in full view of said suggestion, takes occasion again to revive and discuss the question, in a manner, too, not altogether courteous. In doing this he has been guilty of an official impropriety that can not be passed in silence. The official decisions and directions of the Commissioner and Acting Commissioner are *binding upon all in the office, including the Examiners-in-Chief*, until reversed by the Secretary. There is but one course open to officers and employes in the Patent Office who deny this relation between the head of the office and the subordinates."

The case of Snowden *v.* Pearce, MS. (App. Cases) Dunlop, J., decided in 1861 is relied upon as authority for the contention that the board of Examiners-in-Chief is a tribunal independent of the Commissioner of Patents.

The statements made by the judge in that case were not necessary to the decision of the case and were purely *obiter dicta.* Moreover, in Hull *v.* Commissioner of Patents, 7 O. G. 559, decided in 1875, it was expressly decided by the majority of the Supreme Court of the District of Columbia, that the Commissioner had the right to revise even the favorable decisions of the Examiners-in-Chief.

It thus appears that surrounding and controlling transactions of this board with its limited jurisdiction, is the authority of the Commissioner of Patents and the Secretary of the Interior.

Yet it is seriously contended that this board of Examiners-in-Chief is a United States Court under Art. III, Section 1, of the Constitution.

The provision of the Constitution referred to is Art. III, Section 1.

"The judicial power of the United States shall be vested in one Supreme Court, and in such *inferior Courts* as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior," etc.

Article I, Section VIII, provides:

The Congress shall have power—

"9. To constitute *tribunals* inferior to the Supreme Court."

The authority alleged to support this contention is Butterworth *v.* Hoe, 112 U. S., 50.

In Butterworth *v.* Hoe, the court was considering the relative powers of the Commissioner of Patents and the Secretary of the Interior, and in stating summarily the various sections of the statute relating to the procedure to be followed in the Patent Office, used the following language:

"The claim is examined in the first instance by a primary examiner assigned to the class to which it belongs; if twice rejected by him, the applicant is entitled (R. S. Sec. 4409) to appeal from his decision to that of the board of Examiners-in-Chief, *constituted a tribunal for that purpose;* and from their decision if adverse, he may appeal to the Commissioner in person. R. S. 4910."

The word "tribunal" is used in its ordinary descriptive

sense, and its use does not necessarily mean that the Supreme Court regarded this board as a court, much less as a United States Court under Art. III of the Constitution.

The character of this board of Examiners-in-Chief was not under consideration, and there was nothing in the case to remotely suggest that there was any necessity for defining its status. It certainly never occurred to the judges to imagine that this appeal board in an executive bureau of an executive department of the Government was a United States Court.

The whole argument of Mr. Clarke is based upon the assumption that because a *tribunal*, having duties judicial or quasi-judicial in character is created by act of Congress, that it thereby becomes a United States Court, whose judges shall hold their offices during good behavior.

That this is an entirely erroneous assumption is shown by the fact that actual courts of justice having all the powers of courts in the legal sense of the term, have been created by Congress, and have been expressly decided by the Supreme Court, not to be United States Courts, or within the 3d Art. of the Constitution.

Thus, in McAllister *v.* U. S., 141 U. S., 174, the question arose as to whether the Territorial Courts came under this provision of the Constitution and the Supreme Court expressly held that they did not, and that a judge of such court was not excepted from that provision in the Tenure of Office Act (now repealed) authorizing the President to suspend or remove civil officers "except judges of the Courts of the United States."

A number of cases are referred to by the court.

In American Ins. Co. *v.* Canter, 1 Pet., 511, 546, the court said:

"We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares that 'the

judges, both of the Supreme and inferior courts, shall hold their offices during good behavior.' The judges of the Superior Courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is *not a part of that judicial power, which is defined in the third article of the Constitution*, but is conferred by Congress, in the execution of those general powers which that body possesses over the Territories of the United States."

And in Benner *v.* Porter, 9 How., 235, 242, 243:

"Congress must not only ordain and establish courts within a State, and prescribe their jurisdiction, but the judges appointed to administer them *must possess the constitutional tenure of office* before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution."

No terms through which the Examiners-in-Chief shall hold office is specified in the Statute.

The correct inference from the omission in the statute of any statement defining the term of office is, therefore, that this board of Examiners-in-Chief is *not* a Federal Court, *because it does not possess the constitutional tenure of office.*

If the Congress had intended to make this board of appeals an inferior court in the constitutional sense, they would have expressly made it so, and would have specified that the Examiners-in-Chief should hold office during good behavior.

As it is, the statute provides only that the Examiners-

in-Chief shall, like the Commissioner of Patents and his Assistant, be appointed by the President by and with the consent of the Senate, and shall have certain specifically defined duties.

And it is to be noted that the commissions of those persons appointed to be Examiners-in-Chief now state, and have for many years stated, that they are to hold office "during the pleasure of the President for the time being."

There is, however, a more fundamental reason for not regarding this board as a U. S. Court.

It was the express purpose of the Constitution to keep as distinct as possible the judicial and executive branches of the Government.

If this appeal board is a Federal Court we have the curious anomaly of a United States Court inserted into an executive bureau of an executive department between an executive subordinate and an executive head, the latter having authority to review the court's decisions.

If Congress had intended to create or had been aware that they were creating any such judicial monstrosity, they would have taken great care definitely so to enact.

No authorities are necessary to show that the executive and judicial branches of the Government have always been kept rigidly apart. The following citations may however be interesting.

The Supreme Court in the case of Gordon *v.* U. S., 2 Wall., 561, refused to entertain an appeal from the Court of Claims as then constituted, because its decisions were reviewable by the Secretary of the Treasury, an executive officer, and that fact denied to it the judicial power from the exercise of which alone appeal could be taken to the Supreme Court.

So also in U. S. *v.* Ritchie, 17 Howard, 525, it seems to have been assumed that no appeal could be taken from a board of executive officers (land commissioners) to a

court, and the jurisdiction was sustained only on the ground that the actions were independent suits in which the questions were heard *de novo*, and both parties had full right to introduce evidence.

If a tribunal from which appeal lies to an executive officer is not an inferior court under Art. III of the Constitution, then this board of Examiners-in-Chief is not a Federal court.

It is, therefore, apparent that if this tribunal is a court at all it certainly is not an inferior court under Art. III of the Constitution, since no tenure of office during good behavior is specified in the statute creating it; that this board is entirely within the executive, not the judicial, branch of the Government; and that its members are therefore subject to removal by the President as are other executive officers.

J. A. Bickenstein,
Exr-in-Chief. U.S. Patent Off.

Columbus Junction, Iowa.
Febuary 10, 1896.

Hon.R.L.B.Clarke,
Washington, D. C.

My Dear Sir: Please accept my thanks for a copy of your brief and Protest presented to the Senate in the matter of your attempted removal by the President.....

The controlling question is seen to be as to whether the office is judicial or not. If it is that ends it. That the office is judicial to all intents and purposes the showing of the Brief goes to establish the fact beyond a doubt and makes your position in this regard invincible.

With all confidence in the result of your case before the Senate,

I am truly yours,
Francis Springer.

Judge Springer for many years Judge of the 1st Judicial District Iowa, and no man stands higher in the judiciary of the State.

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An opinion is asked as to the character of the Board of Appeals in the Patent Office.

We have always considered the Board of Appeals in the Patent Office as purely a judicial Tribunal, without a single executive function, and wholly independent of the Commissioner or Secretary of the Interior.

There can be no question about this and never has been.

H.E.Paine, Ex.Com,of Pats;
Ellis Spear " " "
R.Dyrenforth" " " & Ex.Mem ofBoard.
W.H.Doolittle Ex. Asst.Com.of Pats.
R.J.Fisher Ex.of Brd. Ex.Asst.Com,Pats.
V.D.Stockridge " " " " " "
H.A.Seymour.

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OFFICES: 602 F ST., NEAR U. S. PATENT OFFICE.

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HOOD BUILDING,
TELEPHONE 440.

ORIGINAL MEMBERS OF THE FIRM:
CHARLES MASON,
Former Commissioner of Patents.
ROBERT W. FENWICK,
Patent Counselor and Expert.
DEWITT C. LAWRENCE,
ATTORNEY AND COUNSELOR AT LAW,
Nine years an officer in Patent Office in capacity of Chief Clerk and Acting Commissioner of Patents, Examiner and member of "Board of Appeals."
EDWARD T. FENWICK,
Patent Lawyer.

Washington, D. C., April 30 1896

Judge R. L. B. Clarke

Dear Sir.

From the following

Expressed Opinion of Judge Charles Mason,
Former Commissioner of Patents, it will
be seen that he held firmly to
the view that the Examiners in Chief of the
Patent Office, were Judicial Officers, and
that the Commissioner of Patents could
not control their decisions when made
in cases appealed to them, unless

an appeal was regularly taken
to him as a Judicial Officer

Yours Truly—
Marm Hemwick Lawrence

Extract from argument of Ex-Commissioner of Patents,
Chas. Mason--in the Gordon Ocean Telegraph Cable.

"A wide distinction is to be observed in relation to the authority of the Commissioner in different circumstances. In matters of administration his is the paramount controlling authority. But the granting of a patent is a judicial act. In reference to such cases the law has provided a series of appellate tribunals, of which he is one. When acting in that capacity, he can reverse the action of the Examiners-in-Chief. But like all other appellate tribunals, he must wait in that capacity till a case is duly presented to him, before he can intermeddle with it. He cannot decide beforehand in matters of that nature.

The adjudication of difficult legal questions was, in fact, one of the prime purposes for which this board was organized, and in these adjudications their power was left unrestricted. If doubts exist in any mind upon this subject, they will be dissipated by examining the debate in the House of Representatives (where this act of 1870 originated) while this subject was under discussion there. (See Cong. Globe for 1869, part 4, p. 2855.)"