Documents Regarding the Nominations, Confirmations, Recess Appointments, Commissions, Oaths of Office, Removals, and Terms of the Ten Justices who Served on the Supreme Court of Minnesota Territory, 1849-1858

PART THREE - B

Legislation Withholding Salaries of Justices who are Absent from the Territory

and

Opinions of the Attorney General Regarding the Authority of the President to Remove Territorial Justices

with

Meeker's Manifesto

Compiled

by

Douglas A. Hedin
Editor, MLHP

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PART THREE - B

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I. LEGISLATION WITHHOLDING COMPENSATION TO A TERRITORIAL JUSTICE DURING HIS ABSENCE FROM TERRITORY

Four laws were enacted by Congress between 1851 and 1853 which had the purpose of denying salaries to territorial officers, including judges, who were absent from their assigned territory for sixty days or more. These laws applied to all territories.

The first, passed in 1851, simply barred the payment of salaries of territorial officers who were absent for a period "greater than sixty days." The second, passed on June 15th of the following year, permitted the payment of the salary to an officer whose absence was deemed for good cause by the President. The third, passed less than three months later, removed that discretion from the President. The fourth, passed in 1853, repealed the third law, thereby restoring discretion to the President to permit officers absent from their assigned territories for a good reason to be paid.

General Cushing chronicled these laws in an the official opinion rendered in the case of Associate Justice David Cooper who claimed to have been absent for a period of three months for good cause at the end of his term in 1852-1853. It is posted in E below.

A. 9 Stat. Ch. 32 (1851), 31st Congress, 2nd Session.

March 3, 1851. Chap. XXXII.—*An Act making Appropriations for the Civil and Diplomatic Expenses of the Government for the Year ending the thirtieth of June, eighteen hundred and fifty-two, and for other purposes*.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and are herby appropriated, out of any money in the treasury not otherwise appropriated, for the objects hereafter expressed, for the fiscal year ending the thirtieth of June, eighteen hundred and fifty-two, namely:—

. . . .

Government in the Territories.—

Territory of Oregon:

. . . .

Territory of Minnesota:

For salaries of governor, three judges, and secretary, eight thousand seven hundred dollars.

For salary of superintendent of Indian affairs, one thousand dollars.
For contingent expenses of said Territory, one thousand dollars.
For compensation and mileage of members of the legislative assembly, officers clerks, and contingent expenses of the assembly, twenty-four thousand dollars.

Territory of New Mexico:

. . . .

Territory of Utah:

. . . .

Provided: That the salaries specified above, for any of the officers of any of the Territories of the United States, shall not be paid in any case where any of the said officers shall absent themselves from said Territories and their official duties for a period of time greater than sixty days.

B. 10 Stat. Ch. 49 (1852), 32nd Congress, 1st Session.

June 15, 1852. Chap. XLIX. —*An Act relating to the Officers of the Territories of the Untied States.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever any officer of either of the Territories of the United States shall be absent therefrom, and from the duties of his office, no salary shall be paid him during the year in which such absence shall occur, unless good cause therefore shall be shown to the President of the United States, who shall officially certify his opinion of such cause to the proper accounting officer of the treasury, to be filed in his office.

C. 10 Stat. Ch. 108 (1852), 32nd Congress, 1st Session.

August 31, 1852. Chap. CVIII.—*An Act making Appropriations for the Civil and Diplomatic Expenses of the Government for the Year ending the thirtieth of June, eighteen hundred and fifty-three, and for other purposes*.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be and are hereby appropriated, out of any money in the treasury not otherwise appropriated for the objects hereafter expressed, for the fiscal year ending the thirtieth of June, eighteen hundred and fifty-three, namely:—

. . . .

Territory of Minnesota:

For salaries of governor, superintendent of Indian affairs, three judges, and secretary, nine thousand seven hundred dollars.
For contingent expenses of said Territory, one thousand dollars.
For compensation and mileage of the members of the Legislative Assembly, officers, clerks, and contingent expenses of the Assembly, twenty thousand dollars.

….

Sec. 7. *And be it further enacted*, That if either of the officers of the Territories of the United States shall absent himself from the Territory of which he is an officer, for a period of time greater than sixty days, he shall not receive compensation for the time he may have been absent**.**

D. 32nd Congress, 2nd Session: 10 Stat. Ch. 96 (1853).

March 3, 1853. Chap. XCVI. *An Act to Supply Deficiencies in the Appropriations for the Service of the Fiscal Year ending the thirtieth of June, one thousand eight hundred and fifty-three*.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are herby, appropriated to supply deficiencies in the Appropriations for the service of the fiscal year ending the thirtieth of June, eighteen hundred fifty-three, out of any money in the Treasury not otherwise appropriated, namely:—

. . . .

Sec. 2. *And be it further enacted*, That the seventh section of the act entitled "An act making appropriations for the civil and diplomatic expenses of the Government for the year ending the thirteenth of June, eighteen hundred and fifty-three, and for other purposes," approved August thirty-first, eighteen hundred and fifty-two, be and the same is herby repealed.

E. "Compensation of Territorial Judges"

Opinion of General Caleb Cushing
6 Op. Att'y Gen. 57 (June 18, 1853)

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"Compensation of Territorial Judges"

Territorial Judges, absent from the Territory for a period of three months, can obtain their salaries only on certificate of the President that the absence was for good cause.

ATTORNEY GENERAL'S OFFICE,
June 18, 1853.

SIR: I have examined the case presented by the letter of the Hon. D. Cooper, of the 1st of May last, which you were pleased to refer to me, and find that Mr. Cooper, one of the judges of the Territory of Minnesota, having been absent from that territory for a period of three months, is unable to obtain his salary for that period without a certificate of the President that the absence was for good cause, such being the provision of the act of June 15th, 1852. (Session Laws, p. 10.)

The discretion thus given to the President was, it is true, taken away by the 7th section of the act of August 31st, 1852, (Session Laws, p. 98,) which made the forfeiture of salary absolute on an absence of the party, for sixty days, from the territory of which he might be an officer; but that provision of law has been repealed by the 2d section of March 3d, 1853, (Session Laws, p. 188,) the effect of which is to leave unimpaired the authority previously conferred on the President in the premises.

Mr. Cooper states that he was absent on account of ill health, and without neglect of any official duty; and I therefore advise a certificate to the accounting officers, which may enable him to receive the balance of his salary.

It appears from this and other cases, which have come to my knowledge, that officers of Territories occasionally absent themselves from the place of their duties for a considerable time, under circumstances in which the President may have reason to doubt of the sufficiency of the cause, and to the prejudice of the public service. To avoid which in future, I advise that a circular be addressed from the Treasury Department to all the officers of Territories, notifying them that the President will not, in any case hereafter, certify the sufficiency of the alleged cause of any absence of the officer from

his Territory unless such absence shall have been communicated to and sanctioned by the proper head of Department, according to the analogy practised in other branches of the Government.

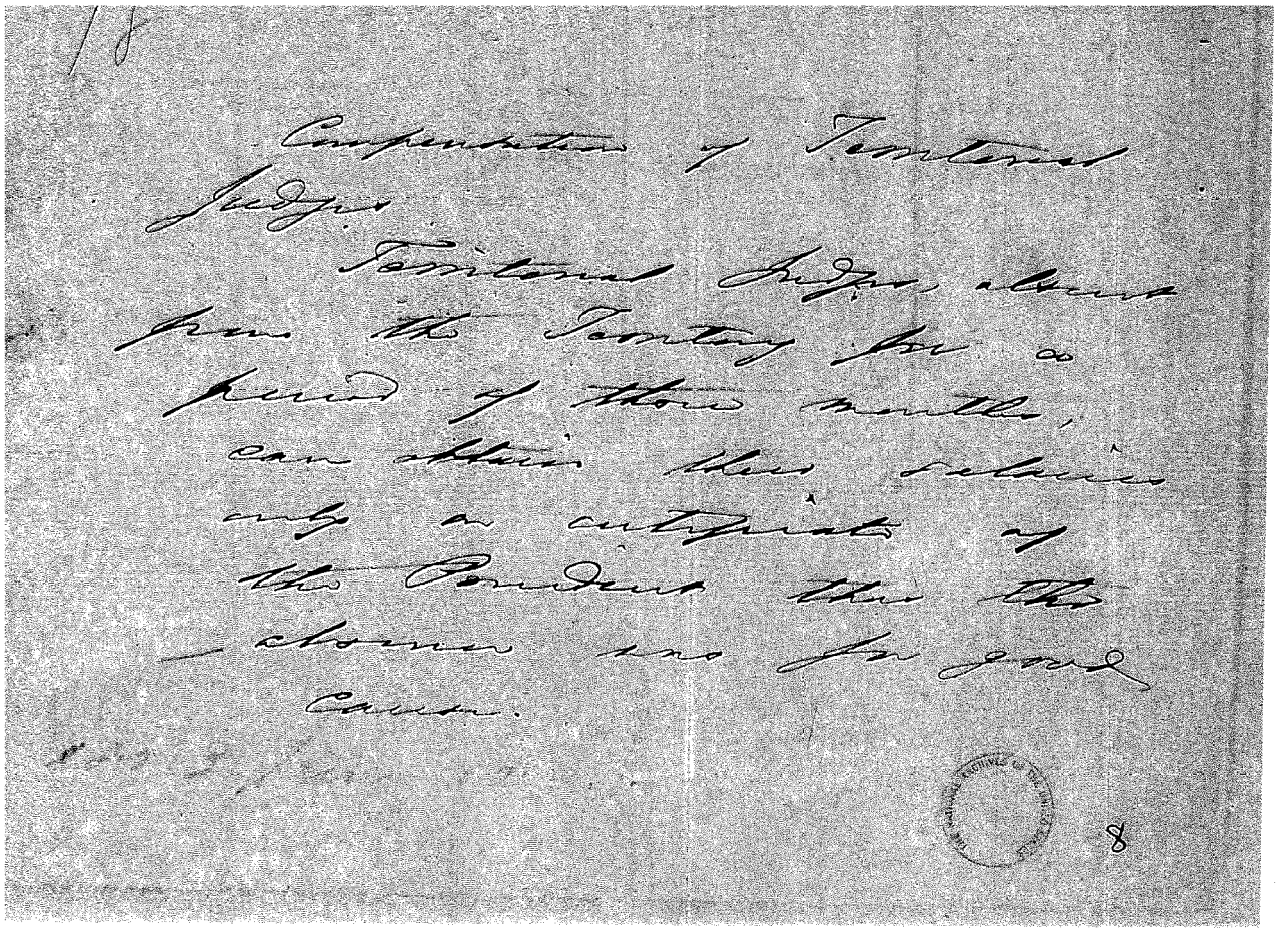
I have the honor to be, your obedient servant,

C. CUSHING.

The PRESIDENT.

Justice Department Memorandum: June 10, 1853.

A handwritten, unsigned memorandum dated "1853 June 10" written probably by an official in the Justice Department can be found on Roll 7, U. S. Territorial Records for Minnesota Territory at the Historical Society. It appears to be a draft of the more formal opinion of General Cushing dated June 18, 1853, that is posted above.



F. "Territorial Officers"

Opinion of General Jeremiah S. Black
9 Op. Att'y Gen. 23 (May 2, 1857)

"Territorial Officers."

The judges, district attorneys, and marshals of the Territories are not required by law to have their residence at any particular place in the Territories.

ATTORNEY GENERAL'S OFFICE,
May 2, 1857.

Sir: There is no act of Congress, nor other law of the United States, which requires the marshal of any district or Territory to reside at the places where the courts are held. The marshals are as free as the judges and attorneys to live where they please. The act of 1853 (10 Stat. at Large, 165) contemplates that a marshal may not reside at the place where the courts arc held, by giving him a fee for travelling from his residence to the court.

The act of March 3, 1849, organizing the Department of the Interior, (9 Stat. at Large, 395,) gives you a supervisory power over the accounts of marshals, clerks. &c., but no authority to dictate where they shall live. If a marshal should keep his office at a place so remote and inaccessible as to produce public inconvenience, the President would no doubt remove him; and this would be the only remedy.

Entertaining these views on the subject, I, of course, cannot advise you to issue any instructions to the marshal of Minnesota which would require him to change his residence. The law passed by the territorial legislature can add nothing to the obligations you were placed under by those of Congress. The representatives of the Territory cannot define the duties of the federal officers, or take away from them any privilege or immunity given by the law of Congress.

I am, most respectfully, yours, &c.,
J. S. BLACK.

Hon. Jacob Thompson,
Secretary of the Interior.

II. OPINIONS OF THE ATTORNEY GENERAL REGARDING THE AUTHORITY OF PRESIDENTS TO REMOVE TERRIORIAL JUSTICES

A. "Territorial Judges Not Liable to Impeachment"

Opinion of General Felix Grundy
3 Op. Att'y. Gen. 409 (February 1, 1839)

"Territorial Judges Not Liable to Impeachment"

Territorial judges, not being constitutional but legislative officers only, and not civil officers within the meaning of the constitution, are not subject to impeachment and trial before the Senate of the United States.

ATTORNEY GENERAL'S OFFICE,
February 1, 1839.

SIR: Since you referred the letter of Judge Doty to this office, that gentleman has called on me, and stated that he wished to withdraw his application to you, and only desired my opinion upon a single point—that is, whether Territorial judges were, under the constitution of the United States, liable to, and subject to removal by, impeachment? This point is raised by his letter which was referred to me, and I therefore proceed to give my opinion on it.

The provision in the constitution which relates most directly to this subject is contained in the 1st section of the 3d article, which declares that "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, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

The construction of this part of the constitution has been settled, it seems to me, by the opinion of Congress, expressed by various acts, and also by the decisions of the Supreme Court of the United States.

By the article of the constitution referred to, the judges are to hold their offices during good behavior. Congress cannot, consistently with this provision, provide any other or different tenure of office within the States.

Congress has, in most cases, limited the tenure of office of Territorial judges to four years. This could not be done, were they judges under, or provided for by, the constitution; because, by that instrument, the tenure is during good behavior. It should be noticed, that Congress has imposed this limitation of four years, not in a single instance only, but in many. It has been imposed in the Territories embraced within the limits of the original States, where the territory has been ceded to the general government, and Territorial governments have been created therein. It has also been done in the territories purchased by the United States from foreign nations. I think these acts clearly prove the sense of Congress to be, that Territorial judges cannot be judges under the constitution, but are mere creatures of legislation.

I have said that the Supreme Court of the United States have also decided this point. In the case of the American Insurance Company and others *vs*. Canter, reported in 1 Peters, the court very distinctly recognise the opinion above expressed, and convey their views in the following strong language:

"These courts, [meaning Territorial 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 rights of sovereignty," &c.

The only remaining inquiry is, as to the liability of Territorial judges to impeachment under the constitution.

The fourth section of the second article of the constitution is in these words: "The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

If the construction of the constitution be correct, (as I suppose it is,) that these judges are not constitutional but legislative judges, I see nothing in the constitution which would warrant their being embraced by the expression—"and all civil officers of the United States." They are not civil officers of the United States, in the constitutional meaning of the phrase; they are merely Territorial officers, and therefore; in my opinion, not subject to impeachment and trial before the Senate of the United States.

I have the honor, &c., &c.,

FELIX GRUNDY.

To the President of the United States.

B. "Executive Power to Remove the Chief Justice of Minnesota"

Opinion of General John J. Crittenden
5 Op. Att'y. Gen. 288 (January 23, 1851)

"Executive Power to Remove the
Chief Justice of Minnesota"

The President of the United States is not only invested with authority to remove the Chief Justice of the Territory of Minnesota from office, but it is his duty to do so if it appear that he is incompetent and unfit for the place.

That the President has the constitutional power to remove civil officers appointed and commissioned by him, by and with the advice and consent of the Senate, where the constitution has not otherwise provided by fixing the tenure during good behavior, has been long since settled, and the same has ceased to be a subject of controversy or doubt.

The power is reposed in the President in order that he may enforce the execution of the public laws of the country through the agency of competent and faithful subordinate officers.

ATTORNEY GENERAL'S OFFICE,
January 23, 1851.

SIR: Application having been made to you to remove from office the chief justice of the Territory of Minnesota, erected by the act of 3d March, 1849, for establishing that territorial government, for very serious charges of incapacity, unfitness, and want of moral character, you have been pleased to refer to me the question whether you have the rightful power to do so.

The act of Congress under which he was appointed enacts, in section 9, "that the judicial power of the said Territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace. The supreme court shall consist of a chief justice and two associate justices, * * * and they shall hold their offices during the period of four years." And in section 11, it is further enacted "that the governor, secretary, chief justice, and associate justices, attorney, and marshal, shall be nominated, and, by and with the advice and consent of the Senate, appointed by the President of the United States." Upon the face of this statute, the appointment of these territorial judges were not for life, nor during good behaviour, but for the term of four years only. The decision of the Supreme Court of the United States, in the case of the American Insurance Company and others *vs*. Canter, (1 *Peters*, 546,) is pertinent to the present inquiry. Chief Justice Marshall, in delivering the opinion of the court in that case, defines what territorial courts are not, and what they are, in these words: "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."

Not being constitutional courts, and the judges not coming within the third article of the constitution respecting the judicial power and the tenure during good behavior, the question is, by what tenure of office do these territorial judges hold? Is there no mode of removing them from office but by impeachment by the House of Representatives for, and conviction by the Senate of treason, bribery, or other high crimes and misdemeanors? Being civil officers, appointed by the President, by and with the advice and consent of the Senate, and commissioned by the President, they are not exempted from that executive power which, by the constitution, is vested in the President of the United States over all civil officers appointed by him; and

whose tenures of office are not made by the constitution itself more stable than during the pleasure of the President of the United States.

That the President has, by the constitution of the United States, the power of removing civil officers appointed and commissioned by him, by and with the advice and consent of the Senate, where the constitution itself has not otherwise provided, by fixing the tenure during good behavior, has been long since settled, and has ceased to be a subject of controversy or doubt.

In the great debate which arose upon that question in the House of Representatives, shortly after the adoption of the constitution, Mr. Madison is reported to have said: "It is absolutely necessary that the President should have the power of removing from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself if he suffers them to perpetrate, with impunity, high crimes or misdemeanors against the United States, or neglects to superintend their conduct so as to check their excesses. On the constitutionality of the declaration, I have no manner of doubt."

And the determination of Congress was in accordance with his views, and has been since invariably followed in practice by every President of the United States. From this power the judges appointed for the Territories of the United States are not excepted. That these territorial judges were appointed under a law which limited their commissions to the term of four years, does by no means imply that they shall continue in office during that term, howsoever they may misbehave. An express declaration in the statute that they should not, during the term, be removed from office, would have been in conflict with the constitution, and would have precluded either the House of Representatives or the President from the exercise of their respective powers of impeachment or removal. The law intended no more than that these officers should certainly, at the end of that term, be either out of office, or subjected again to the scrutiny of the Senate upon a re-nomination.

When it is proposed that this power of removal shall be exerted upon a judge appointed for the administration of justice to the people of a territorial government, it must be admitted that caution and circumspection should be used. But the power of removal is vested by the constitution in the President of the United States to promote the public welfare, to enable him to take care that the laws be faithfully executed, to make him responsible if he suffers

those to remain in office who are manifestly unfit and unworthy of public confidence.

To answer your inquiry specifically, I have only, in conclusion, to add that, in my opinion, you, as President of the United States, have the power to remove from office the chief justice of the Territory of Minnesota, for any cause that may, in your judgment, require it.

With very high regard, I have the honor to be, sir, your obedient servant,

J. J. CRITTENDEN.

To the President of the United States.

C. "Term of Judicial Salaries."

Opinion of General Caleb Cushing
7 Op. Att'y Gen. 303 (June 30, 1855)

"Term of Judicial Salaries."

The practice having grown up in Congress of late years to insert matters of general legislation, including allowances for private claims, the regulation of salaries, and many other objects, in the appropriations for the service of a future fiscal year, it becomes necessary now to disregard wholly the title and general tenor of such acts, and to scan and scrutinize each separate clause, and to construe each according to its own separate merits, and to give it immediate effect if such be its natural signification.

Hence, where, in any such act, there is provision in general terms of the present tense, either for the addition to or the diminution of a salary, it takes effect from the approval of the act by the President.

The Commissioners for the adjudication of private land claims in California are a quasi court.

The salaries of all judges of courts of the United States are due from the date of appointment; but the party does not become entitled to draw pay until he has entered on the duties of his office, or at least taken his official with for, until then,

though under commission, he is not actually in office; and in some cases, as that of the territorial judges of Oregon, Washington, Kansas, and Nebraska, salary, though due from date of appointment, cannot be drawn until the judge enters on duty in the Territory.

In the case of appointments and removals by the President, when the removal is not by direct discharge or an express vacating of the office by way of independent fact, but merely by the operation of a new commission or appointment, then the virtue of the old commission ceases only when notice of tile new commission is given to the outgoing officer, either by the President, or by the new officer exhibiting his commission to the old one, or by other sufficient notice; and the old officer continues to be entitled to compensation, down to the time of his ceasing to perform the duties of his office.

ATTORNEY GENERAL'S OFFICE,
June 30, 1855.

SIR: On the 19th of April, 1853, you referred to me a series of questions from the office of the First Comptroller, in regard to the compensation of the commissioners for the settlement of private land claims in California, including incidental reference on some points to the salaries of certain public officers in the Territories.

Such of those questions as required immediate action, and were of practical importance at the moment, were answered by me then, either verbally, or by brief memorandum, there not having been opportunity, in the press of other business, to prepare a reasoned opinion on the whole subject.

Your communication of the 29th inst. presents another question appertaining to the same class.

Instead of merely answering that single question, it seems to me convenient that my views of all the material questions propounded by the Comptroller should now be placed on record, as well for your justification in the premises as for my own.

By the act of March 3d, 1851, (ix Stat. at Large, p. 631,) a commission was constituted to settle private land claims in California, to consist of three commissioners, and to continue for three years, unless sooner discontinued by the President.

By the same act it was provided that "each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum * * the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board."

By the same act, the commissioners were authorized to appoint a secretary and not more than five clerks, the salary of whom was fixed at four thousand dollars per annum for the secretary and fifteen hundred dollars for each of the clerks.

By the act of August, 31st, 1852, (x Stat. at Large, p. 94,) Congress, in making appropriation for the salaries and incidental expenses of this commission, added a proviso in the following words:

"Provided, that said board be authorized to appoint and employ one secretary and three clerks, in lieu of the number provided for in the above recited act, whose annual compensation shall be two thousand dollars each."

By the act of March 3d, 1853, making in title appropriations for the next ensuing fiscal year, (x Stat. at Large, p. 288,) while enacting an appropriation for the salaries and incidental expenses of the commission, Congress added this proviso:

"And that the proviso to the appropriation for this object, contained in the act approved 31st August, 1852, shall not be so construed as to reduce the salary of the secretary of said commission as fixed by the second section of the said recited act; and provided further, that out of the said sum herein appropriated, there shall be paid to each commissioner appointed under the act of the 3d of March, 1851, the sum of eight thousand dollars, in lieu of the compensation heretofore allowed."

The commission was extended for one year by the act of January 18th, 1854, (x Stat. at Large, p. 265;) and again for another year by the act of January 10th, 1855, (Ibid. p. 603;), and it is still engaged in the discharge of the duties imposed on it by the various acts of Congress.

Commissioners lawfully appointed met in due time at San Francisco and organized the board; and they, or successors of theirs, so continued until the 3d of March, 1853. On that day, Messrs. Alpheus Felch, Robert A.

Thompson, and T. Campbell, were appointed in the place of the previous commissioners; and on the 29th of May, 1854, Mr. S. B. Farwell succeeded to Mr. Campbell.

In some instances, the outgoing commissioner continued to discharge the duties of the office until the arrival of a superseding commissioner.

The board now consists of Messrs. Felch, Thompson, and Farwell.

Upon these facts and provisions of law, the first question which arose was, when does the proviso, making the increase of the salary of the commissioners, take effect? I was of opinion that it took effect immediately, for the following reasons:

The proviso is contained in an act, which, by its title and general tenor, is future only in its effect, purporting to provide for the ensuing fiscal year. But that is immaterial. Congress has of late fallen into the very inconvenient practice of inserting provisions of general legislation in the acts of appropriation for a subsequent year. We have now to scan and scrutinize each separate clause or provision in those acts, and determine its legal meaning according to its particular tenor, wholly regardless of the place, or the general nature of the act, in which it is found. This doctrine applies to matters of general law contained in such acts, to allowances of private claims, to regulation of salaries by addition or diminution: in all which cases, the provision takes effect immediately, if such be its natural sense and signification.

The enactment in question is to pay the commissioners so much "in lieu of the compensation heretofore allowed." Those are words in the present, not in the future, tense. They are, separated from past time by the word "heretofore," which, as it defines the end of the old salary, must of course define the beginning of the new one. There is nothing in the phrase, on the other hand, to postpone its time, its command, its legal effect, either as to the salary of the secretary or that of the commissioners. They became severally entitled from the approval of the act by the President.

The second question is, when does the salary, whatever it may be, of a newly appointed commissioner commence? The provision in the act of 1851, enacting that the salaries of the commissioners shall commence from "the day of the notification of the first meeting of the board," has had its effect; it

is *functus officio*, exhausted and dead. We must determine the question by reference to other statutes and by general principles of law.

It is said by the court in the case of Marbury *v*. Madison, (1 Cranch, 161,) that "A commission bears date, *and the salary of the officer commences, from his appointment*." This, like nearly the whole of the opinion of the court in that case, is *dictum* only, and most certainly it is not good law in the broad generality of the proposition, even in cases where the statute is silent on the subject.

Thus, it has been the established rule of the Government to pay foreign ministers, not from the date of their appointment, but from the time when they begin to devote themselves to the public service, that time being fixed by acts performed, as by leaving home to come to the seat of Government for instructions, or by understanding between them and the Secretary of State.

Heads of Bureaux, Marshals, District Attorneys, Land Officers, have usually been paid from the time when they actually entered upon duty. And so it has been with some officers of Territories. In many cases, there is definite provision by statute on this point, sometimes fixing the commencement of salary at a day future, as the recent provision regarding diplomatic and consular salaries, which do not commence until the arrival of the officer at his post of duty; and sometimes fixing it to commence at the date of appointment, as in several provisions concerning judges of the courts of the United States. I ask particular attention to the latter class of enactments.

The first act making provision for the compensation of the judges of the Supreme Court and other courts of the United States, enacts expressly that they shall receive pay from the time of their appointment. (Act of September 23, 1789, i Stat. at Large, p. 72.)

Sometimes, in subsequent acts of this class, the same enactment is repealed. (See for example, v Stat. at Large, p. 51; Ibid. p. 62; Ibid. p. 788; ix Stat at Large, p. 522.) In other cases, the law says nothing on the subject. (See for example, ii Stat at Large, p. 100; Ibid. p. 421.) But all the acts on this subject, being in *pari materia*, are to be construed together as a whole; and whether the date of commencement of a judicial salary be mentioned in a statute or not, if nothing to the contrary be said, they must be held in law as commencing with the date of appointment.

I think the commissioners are entitled to be dealt with in the analogy of this class of officers.

I am aware that the commissioners are not, in the acts of Congress, expressly denominated a *court*, but a board.

I am aware, also, that the observations of the Supreme Court, in the case of the United States *v*. Ferreira, (xiii Howard, p. 40,) would tend to indicate that, in their opinion, the powers exercised by such a tribunal as this are not "judicial" in the sense in which judicial power is granted by the Constitution to the courts of the United States.

But, in the same case, the Supreme Court cannot avoid speaking of such a board as a "tribunal," and they concede that its powers are "judicial in their nature." (Ibid. p. 48.)

I suggest further, that, in so far as it is possible for an act of Congress to make a court, these commissioners are one. By the original act for constituting this board, it is invested with power to consider and determine land-titles; and its decisions, unless vacated by appeal, have all the final effect of the decisions of any court.

By the same act, it keeps a record, which record is certified by its secretary, and has legal effect thereupon. By that act, and by a series of supplemental provisions, the decisions of the board are subject to be carried to the District Courts of the United States by "appeal." (x Stat. at Large, p. 99; Ibid. p. 632.)

By the original act, and by supplemental act, they appoint a secretary, clerks, and commissioners to take depositions. (See ix Stat. at Large, p. 631; x Stat. at Large, p. 266.) How can they do this constitutionally, unless they are of the class of "courts of law ?" (Const. art. ii, sec. 2.)

By the act of January 10th, 1855, it is enacted "that the commissioners or either of them may issue the writ of subpoena requiring the attendance of witnesses before the said board, and that for any contempt in refusing obedience to such writ, the said board shall have the same power to inflict punishment now possessed by the district courts of the United States." (x Stat. at Large, p. 603.) How could this be, unless they are a court?

In the case of the United States *v*. Cruz Cervantes, (xvi Howard 619,) this point was largely argued by counsel; (see the Briefs of Mr. Jones and of the Attorney General); but the case went off on other points.

It was again argued in the case of the United States *v*. Ritchie, (not yet reported), as an objection to the whole procedure, and in effect rendering it impossible to entertain appeals from the decisions of the Board to the District Court. But, in the opinion of the Supreme Court, delivered by Mr. Justice Nelson, the lawfulness of the whole proceeding is sustained, without pronouncing on the constitutional character of the Board; it being very properly argued by the court that the filing of the transcript of the commissioners in the District Court, if not a technical appeal, is yet maintainable as a statute form for the institution of a case before the District Court.

But, whether technically or not a court, invested with a part of the federal power of the Constitution, the Board is at any rate a quasi court, and with such near approximation to, if not identity with, a court, that the analogy of payment of judicial salary from the date of appointment is, in my judgment, applicable to the case of the commissioners.

In some of the acts constituting courts for the Territories, there is a provision concerning salaries, which is worthy of note.

Thus, the judges of the United States for the Territory of Oregon are entitled to salary from the date of their appointment; but they must take their oath of office within the Territory, and cannot be actually paid before they enter on duty. (ix Stat. at Large, p. 328.)

So, the judges for the Territory of Washington are eventually entitled from the date of appointment, but cannot receive payment until they shall have entered on the duties of their office. (x Stat. at Large, p. 177.) Similar provision is made in the case of the judges of Kansas and Nebraska. (Ibid. p. 282.)

In other less recent territorial acts, as that for Minnesota, (ix Stat. at Large, p. 407,) New Mexico, (Ibid., p. 447,) and Utah, (Ibid., p. 457,) the statute is silent on the point.

The new provisions in the case of Oregon, Washington, Kansas, and Nebraska, are suggestive of a thought, which it seems reasonable to apply to all judicial or other salaries payable from the date of appointment, to wit, that the party shall have entered upon the duties of his office, or at least have taken his official oath, before he can claim payment of salary; because, until he does that, he is not actually in office.

The next question is, "Can two sets of commissioners be paid their salaries at the same time"?

Of this there is in my mind no doubt.

It is perfectly well settled in our constitutional law, that "in the case of appointments and removals by the President, when the removal is not by direct discharge or an express vacating of the office by way of independent fact, but merely by the operation of a new commission or appointment, then the virtue of the old commission ceases only when notice of the new commission is given to the outgoing officer, either by the President or by the new officer exhibiting his commission to the old one, or by other sufficient notice." (Bowerbank *v*. Morris, Wallace's Rep. 118-133.)

It is a mere truism to say that the old officer continues to be entitled to compensation down to the time of his ceasing to perform the duties of his office. (See opinion in the case of Ch. J. Baker, of New Mexico, ante, vol. vi, p. 87.)

It is true, that, as the incoming judge is entitled by statute to compensation from the date of appointment, two salaries may be paid for a time. What then? Government is to be carried on by human means. The theory of administration in the United States is that public officers are to be compensated by salary; without which the Government would immediately degenerate into *ploutocracy*, office being held by the rich only, not by the good and wise, whether rich or poor. It must occasionally happen that in fact there shall be two persons in the United States holding the same office, especially in the present magnitude of the country; because it takes time for the new officer to reach his post, inasmuch as we cannot absolutely conquer space and time, so as to bring about instantaneous intercommunication between the remote parts of the United States. It is idle to criticise the fact that for a week or a month we are paying two salaries for the same office: so we pay a plurality of salaries for plural officers constituting one authority, as

in the case of three commissioners to a board, or two, seven, or nine judges to a court. In either case, the object is to have the public business go on; not for the benefit of the officers, but for that of the people of the Union.

These observations dispose of all the important questions in the communication of the Comptroller regarding the commissioners for settling land claims in California.

To the other question in that communication, relative to the pay of certain officers of the Territories, reply will be made hereafter, if deemed requisite either by yourself or by the Comptroller.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

III . BRADLEY B. MEEKER, "LETTER TO THE PUBLIC."

St. Anthony Express, May 6, 1854, at 1-2.

S T. A N T H O N Y E X P R E S S. [1]

PRINCIPLES — NOT MEN

ST. ANTHONY FALLS, MIN. FRIDAY, MAY 6, 1854.

To The Public.

After an absence of a few months, with leave, (for this must be implied in my case,) I have returned to Minnesota to resume my duties as a Judge of the Supreme Court of this Territory. To this office I was appointed by President Fillmore, and commissioned by him for the term of four years, after serving under a temporary commission from President Taylor about eighteen months. My present commission will expire the 24th of September next, till which time I am empowered to receive the emoluments and have sworn to discharge the duties of the office. I shall neither surrender the former, which is regularly demanded from the Department, nor refuse to perform the latter, since my convictions are deep and thorough that as in the one case I am legally and fully entitled, so as in the other, I have duty to execute in the vindication of a principle guaranteed with religious care in our national and state systems of government, and which should not be deemed less essential to our liberty and rights, because we happen to be inhabitants of a Territory, and not citizens of a state. That principle is the independence of our Judiciary, by placing and keeping it upon a basis above party or power, fear or favor, fiction or fanaticism. I believe that the Organic Act of our Territory has guarded this branch of our local government in a peculiar way, by putting the Supreme and District Courts upon this time-honored

[1] *St. Anthony Express*, May 6, 1854, at 1-2. Meeker's manifesto is complete though reformatted. Italicized words appeared in the original.

footing, and I should be false to my duty, and recreant to my trust were I submissively to acquiesce in the exercise of a power wholly unauthorized and in my opinion palpably denied by the Act. Shall it be said that the President has claimed and exercised the power or removing Territorial Judges at will, and that therefore it is not to be disputed or contested? Shall American Freemen whose peculiar glory is that theirs is a Liberty, regulated by Law, alike obligatory upon all, from the President down to the humblest individual in society—shall *they* passively slide into the despotic dogma that their President like certain Oriental potentates, can do no wrong? But who is the oracle that claims for this officer the imperial power of dispensing at will with the most conservative features of our Organic Law? Was it that wise prudent and moderate President who hesitated, halted, and, at first, decided that he had no power to remove the first Chief Justice of this Territory? Or was it the Attorney General who removed all difficulty in the case by placing his official signature at the bottom of an opinion which I will not do him the injustice to suppose he had carefully examined before he signed it? Or was it a factious Senate, fresh from the field of great political battle, and flushed with victory, that resolved in indecent haste by a party vote that he who was lately their successful standard bearer, had this power, when had it subserved their purposes quite as well, they wo'd as cheerfully have resolved that Washington was a Fogy, Madison a fool, and Jackson a Traitor. Yes, it required this solemn senatorial farce, and the moral force of a resolution of such a party of men before the present Presidential incumbent *dared* attempt with one fell stroke of arbitrary power to sweep from the Bench of four Territories, all the Judges whose commissions had not expired. This lawless and unauthorized assumption of power is but one of several recent leaps over Law, by reckless majorities and irresponsible demagogues. In one of the sovereign States of the Union, we have lately seen the Legislature overriding the solemn judgment of its Supreme Court by reversing and setting aside its mandate. In another we have just witnessed the deliberate repudiation of one of the plainest requirements of a State constitution in the choice of a Governor, scorning all rebuke and voting down every effort made to sustain that sacred guide. And, again, have not all good citizens seen with irrepressible pain, the national Legislature interpose by a late act, its unadvised authority in a grave matter adjudicated upon by the Supreme Court of the United States, circumventing and effectually annulling its decree, though the rights of a sovereign state were seriously involved? These are a few of the many strides of progress and power which no man who has or feels the slightest interest in society, can look upon without misgivings and alarm. They are for the most part, willful

and iniquitous encroachments upon the independence of the Judiciary hitherto deemed by the wise and good of the land, the palladium of our liberties, the fearless efficient arbiter between majorities and minorities, between the strong and the weak, and the powerful and the poor. To this high and very responsible duty, I had almost said divine task—the American Constitutions have appointed their courts of Justice, and placed them beyond the reach of the appointing power.—Had they failed to do this, Courts of law would have become the pliant tools of the many against the few, mere hirelings of power and despotic majorities.

But conceding for the sake of illustration, that the power to remove territorial Judges at will, does exist in the President, wherefore so suddenly depart from usage and precedent established by the fathers of the Republic, and sanctioned by more than sixty years observation, in making at this at this late day their places, mere political stations to be filled with men whose views on public measures must square with theirs, who shall have the appointing power? Suppose, for instance, that the President happens to be a Freesoiler, is it necessary to have the Judges of this Territory committed to the higher law doctrine and prepared without argument to declare the Fugitive Slave Act unconstitutional? Then there are some who have thought so much, writing and spoken so much, and have contended so long and lustily for the peculiar institution as to feel an honest conviction that it is the chief good of a republican government. Should one of this creed happen to be chef magistrate, would it then speedily become necessary to have all the Judges in our Territory swept from their places to make room for those whose opinions or decisions might pave the way to slavery in Minnesota? Some think that the acts passed at different times by Congress, intended to preserve peace and friendship with the neighboring nations and to redress and punish lawless propagandism should be executed and strictly enforced—Should, however, any, regardless of all such restraints chance to succeed to the appointing power, would it be expedient at once to displace all the incumbents of the Bench to make room for men whose known opinions or antecedents render it probable that they would carry out in their official engagements the views of their patron? But why stop here? If we are to suppose that Congress ever intended to confer such power on the President when they passed our Organic Act, why should we not also suppose they likewise intended that the jurors, grand and petit, as well as witnesses, should be of the same complexion in politics? Or is it considered less important to guard against partiality and bias in a judge, whose influence is so controlling in his courts, than against the same mischief in

men far more liable to be its victims and dupes. It should be remembered that there are in the catalogue of crime many offenses of a purely political character, and many others so slightly removed from these as to render it highly important for a fair and impartial investigation of a charge, that he whose duty it is not to incline to the one more than the other side, but to hold the scales of justice with an even and a steady hand, should be above all political prejudice, if possible; at all events, as far removed from its bane as it is practicable for a man to be. How independent a man can *feel*, on the Bench, of that unhallowed influence, let him bear testimony who is conscious of holding his place during the good will or pleasure of a political *master*; or, as is more likely to be the case, during the good will and pleasure of some powerful prosecutor *who has the ear of that master*.

Whatever may be the power of the President over the Territorial Judges, it cannot be denied that this innovation upon past usage and precedent, has aimed a fatal blow at about the only stable and conservative provision in the territorial governments.—a dangerous example set to disorder and misrule in remote frontier settlements, where there is generally too much impatience of all social and municipal restraint, and too little regard to all proper authority, to need the encouraging countenance of one who is sworn to see that the laws be faithfully executed. There is in this innovation a discovery that all preceding Presidents have failed to make, or at all events, refused to carry out, from self respect or from a regard to the dignity, independence, and consequent usefulness of courts of Justice. It never once entered their minds, if they thought they had the power, to degrade and virtually destroy the efficiency and forces of the Judiciary by causing it to vacillate or fluctuate with the fluctuation and vacillation of the parties and factions of the country.

But that they did not believe they had any such power, is as evident to my mind as it is that they would never have exercised it on mere party grounds, had they known it to exist. How carefully they guarded the independence of the Judiciary and how constantly they incorporated this conservative feature in the territorial governments, let the history of more than seventy years experience and legislation bearing upon the subject be appealed to.—The first Act upon this subject, was the celebrated ordinance of 1787, organizing the Territory Northwest of the Ohio River, which provided, among other things, that the Judges should hold their office *during good behavior*. This provision in the ordinance became the basis of future legislation upon this subject. Accordingly we find in the organic Act of the Southwest Territory, of Indiana, Michigan, Illinois, Orleans, Louisiana, Wisconsin and the

District of Columbia the Judges held their offices under this independent tenure. In the Territories of Minnesota, Iowa, Utah, Florida, New Mexico, Oregon and Washington, the tenure of their office was made, if possible, more independent, though limited as to time; for in these last enumerated the Organic Acts declare, that the Judges of the Supreme Courts there in shall *hold their offices for four years*. Only the two Territories of Missouri and Arkansas had their Judges removable at the pleasure of the President; but this, however, was expressly conferred by their Organic Law, while it was expressly denied in all the others. In all the Territories, some eighteen or twenty, that Congress has ever established, the Governors, Secretaries, Marshals and Attorneys by express provision in the several Acts, held their office during the pleasure of the appointing power, whilst in each, with the exception of the above two named, the Judges either held their places during good behavior or absolutely and unconditionally for four years. In either case language could not be more direct, explicit and unequivocal, to declare the intention of Congress to place the Judiciary of the Territories beyond the reach of mere arbitrary power. If otherwise, why did the National Legislature uniformly and constantly provide one mode of tenure for the Executive and Ministerial officers, and *another* and a different one for the Judges, when fixing in the same Act, and sometimes in the same sections, the mode of holding their respective places? Why, I ask, this difference and discrimination in the phraseology used by Congress had it been their intention to place all the Territorial officers on the same footing as to tenure, equally and constantly at the mercy of the Executive? No unfeed Lawyer, it seems, to me, no scholar of ordinary attainments in his mother's language, who brings a mind unbiased by favor, unclouded and unwarped by partisan feelings, to a careful consideration of the terms made use of, can escape the conclusion that it was the design of the law-making power of the Nation to put the Judges on a distinct and different basis as to tenure, permanence and stability. And it is not quite reasonable to suppose that such was the deliberate and well advised purpose of the distinguished framers or our early Territorial Government, when it was yet fresh in the minds of all that one of the most prominent complaints, set forth in the Declaration of Independence, as an apology to the world for taking up arms against the mother-country, was that George the Third, "had made the Judges *dependent on his will alone, for the tenure of their offices*, and the amount and payment of their salaries?" They were the men who established for America a National Judiciary, and placed it upon a footing of entire independence of the Legislative and Executive departments. They had also established in the several States Courts of Justice, equally remote from mere political power

and partisan warfare. Would such men have provided for the Nation and their respective States, Courts whose very constitution enabled them to defy power in the upright and fearless discharge of their duty, and, yet, in legislating for the Territories, organize similar tribunals and make the Judges mere creatures of Executive caprice or pleasure? Can we suppose that men who proclaimed in every act of their public life, that firm and independent courts of justice were the true citadel to guard republican liberty against the constant encroachments of power, could be guilty of such inconsistency and dereliction of duty? If such were the understanding of the Fathers of the Republic, and they and those who have succeeded them in legislation, copying their laws, and adopting their language on the subject in question, have failed to make themselves understood in the use of appropriate terms, or if, as some have contend, the language they *did* use to express the independence of the Judges after all only means just the *reverse* of what they intended, the failure of Jefferson, Dane, and a host of other wretched grammarians, down to the present generation of law-makers, is a sad one indeed, and the glory of its detection and discovery belongs to the more searching optics of the present Presidential incumbent, and his immediate predecessor.

It has been said that Territorial Judges are not *Constitutional Judges* and that therefore as to them there is no necessity for impeachment, trial and conviction, and that accordingly they may be removed as well without as with cause, in the discretion of the appointing power; in other words, it has been claimed that the tenure *during good behavior* or absolutely for four years only means at last, when prescribed by a *law*, though made in the pursuance of the Constitution, that the President may remove at pleasure; but when the same mode of tenure is found in the Constitution itself; something more is meant, and the incumbent is *entitled to a hearing* before he can be displaced. This is a process of reasoning better calculated to justify the deed when done, or when a removal is a foregone conclusion, for which it seems to have been designed, than to work conviction in the minds of a profession somewhat acquainted with legal distinctions and the ordinary rights of man. With lawyers, it has always been held that a law passed not inconsistent with, nor violative of, any provision in the Constitution, express or implied, is as obligatory upon all citizens, from the President down to the humblest individual, as any portion of the Constitution; and *all*, especially officers of the government, not excepting the President, whose oath of office binds him in a pre-eminent manner to this duty, are required by every consideration of good citizenship and patriotism to obey *each*; and the same terms occurring

in the one will impose the same duties and obligations and confer the same rights which are created and bestowed in the other.

No party in this country, it is to be hoped, with all the radicalism there is throughout the land, is prepared to claim for their President the power of dispensing with laws constitutionally passed, whenever he may think they interfere with his will, ambition, or partiality for his friends; otherwise it would perhaps be well enough to remind our American Presidents, before they get too far along on this high and giddy road of prerogative, of a lesson our English ancestors once taught their royal brethren in office, the Stuarts, for similar indiscretions.

If, therefore, one holding an office under the Constitution during good behavior, or even under a more unqualified and less precarious mode, absolutely for four years, (as the words necessarily imply in our Act,) *cannot* be removed at pleasure, but must first be heard for his good or bad behavior, why should another, holding his office under the same tenure, created by *law*, be displaced *without trial*, or even without *notice*? Surely, this would be against *common right*—a wanton and base violation of one of the dearest privileges guaranteed every man who lives under the broad aegis of the American Government—the privilege of being heard before he is condemned, or deprived of that which the law has made his right and property; I mean *the honor and emoluments of his office during the period and according to the tenure created and fixed by law*, when he consents to leave, it may be, a more lucrative vocation to serve the public? Is not this a compact which the Constitution of the United States has pronounced inviolable? Or is there nothing inviolable now-a-days but blind devotion to power or party?

By the Organic Act of Minnesota, the Judges of the Supreme Court are appointed by the President, by and with the advice and consent of the American Senate; and the same Act provides that they shall *hold* their office for and during the term of four years. On the face of the law no power of removal is conferred. If any exist under which a tenure, which is to my mind extremely doubtful, it can only be reached by construction and *necessary implication*. *It will never be sought for by any respectable tribunal of law, nor will that necessity ever be implied for the exclusive purpose of sustaining arbitrary power in removing Judges at will*. In other words, a court of law, in trying the question whether any power of the kind was to be raised by implication would act, not in contravention, but in *furtherance*, of

a great public policy *peculiarly American*, and in deciding, *lean in favor of the independence of the Judiciary*. Malversation in office, high crimes and misdemeanors, want of qualification, or other total unfitness for the trust, duly established, *might*, under this tenure, by reason of the necessity of the case, justify a removal. But even this, it is respectfully submitted, is the utmost stretch of construction which the language of the Act will bear—a concession in fact, in favor of displacing a Judge by no means clear or conclusive and seems to me more like amending or qualifying a law, than construing and explaining.

The Judges of all our Territories are now commissioned for four years, the tenure of their commissions being expressed in the language of our Organic Acts.—It is not during good behavior, but absolutely for *four* years. For that period his commission confers, in terms upon the incumbent the honors and emoluments of his place without condition, and whoever accepts the trust, enters upon the discharge of the duties of his office with the just understanding, if there is any meaning in words, that he is to enjoy the rights and privileges guaranteed on the face of his commission for the period therein named. Why Congress changed the mode of tenure from that of good behavior to one so short as four years, yet without other limitation, I am not prepared to say, nor it is it necessary here to discuss. With no other guide or notice but the patent of his office in pursuance of the law that creates it, signed by the President, and countersigned by the Secretary of State with the great seal of the United States thereto attached, proclaiming and attesting to the world its solemn contents of which all within the jurisdiction of Minnesota are *bound* to take notice, a Judge of our Territory enters with confidence upon the delicate trust committed to him, and feels an inward assurance when he looks upon his parchment that he has the power as it is his duty to hear and decide causes, and to try and sentence criminals, though such decision, trial, or sentence, affect the property, liberties, or even lives, of his fellow creatures. But if notwithstanding the language of the law and his commission there *does* exist a *latent power* of removal to be called into exercise at will, caprice, or in obedience to mere party behests, how does a Judge know, in this distant Territory, or in the more remote ones of Washington and Oregon, Utah and New Mexico that he has not, or *has* been removed? If the latter, what a pretty posture the public business will be left in?—In any of these last named Territories the Judges would have time to hold all their Courts in their respective Judicial Districts, sentencing murderers and other felons to be punished, and adjudicating upon the property and liberties of citizens before it could be possible for the to

anticipate their removal. In my own case, full two thirds of the Hennepin District Court which I held last spring, was held after the date of my removal, (if removed,) and it was some two or three weeks after its adjournment, that there was even a rumor of such an event. Thus murderers may be tried without authority, and properly adjudicated upon and passed without authority, unless *two* can hold one and the same office at one and the same time. I cannot for a moment suppose that Congress ever intended to confer on the Executive any such mischievous power, and if they *did* I am quite certain they have failed to use language in the Act at all adequate to express any such purpose.

There are other views of the subject that might be taken to expose the danger and absurdity of this newly assumed power.—But I shall content myself with what is here submitted. Such being my deliberate opinion on this important subject, I now more publicly announce that my course will be in accordance therewith. I am, constrained to take this step from a sense of duty and to give what little weight my example and influence may furnish in support of a sacred principle thus stricken down. The contest it is true is a most unequal one, since one method of modern political chicanery to "crush out" incumbents that *cannot be removed*, is to withhold their salaries which they have as good a right to do, as they have to violate any other law, thus driving them to resign or vacate their office by abandoning it. Yet I am willing, nay, determined, to abide the issue, deeming it far more glorious to be right than to be rich, to be vanquished in the support of *correct* principle than to *triumph at its expense*. One thing is certain, if I *am* in an error, it is an error on the side of just principle, wholesome precedent and a well approved policy. There is surely no good reason why the people of Minnesota should not enjoy the blessings of a firm and independent Judiciary, as well as the citizens of the several States, unless indeed it be contended they forfeited this boon by emigration and have thus made themselves *bastard* sons and not full heirs of American Liberty.

In conclusion, if I am right in the construction of our Organic Act, my official orders, decrees and judgments are valid, and not the orders, decrees and judgments of *another*, commissioned in my stead. To all intents and purposes, *these must be extra judicial and void*. What will be the consequences of arrests without law, executing without authority, and punishment without power, let those see to it who have arbitrarily interfered with the course of justice and the administration of the laws in this Territory. The law, which all can read, and my commission, which all are *bound* to

obey, are my justifiers and my *shield*. In the express language of the latter, I am empowered to execute and to fulfill the duties of the office according to the Constitution and the laws of the united States, and to *have* and to *hold* the said office with all the *powers*, privileges and emoluments, to the same of right appertaining, for and during the term of four years from the date thereof.—Dated Sept. 25th, 1850.

Whether the Chief Justice and the other Associate Judge who are regularly commissioned will recognize my claims to the place in question, will of course depend upon what their opinion of the law may be. Their consciences and convictions will control and guide their actions, as mine have guided and controlled mine. Whatever *be* their course, it must be remembered that it cannot disturb the *law* of the case nor legalize an unauthorized act, even of the Chief magistrate of the nation, nor the acts of the agents any way concerned in executing what in my opinion is usurped authority. I should add that I have never been beyond the precincts of my own bosom for advice in reference to this important matter, neither have I advised or counciled with a human being as to what has long since seemed tome to be my duty to vindicate the law and the independence of the Judiciary by rescuing it, if possible, from the prostration and paralysis it ha received at the hands of arbitrary power, wielded by weak and unscrupulous politicians.

Dated St. Paul, April 24th, 1854.

B. B. MEEKER

Associate Judge of the Supreme Court of the United States, for Minnesota Territory.

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