2-13-1857

David Gordon

34TH CONGRESS, 3d Session. } HOUSE OF REPRESENTATIVES. { REPORT. No. 206.

DAVID GORDON.

FEBRUARY 13, 1857.—Ordered to be printed.

Mr. BARBOUR, from the Committee on the Judiciary, made the following

REPORT.

The Committee on the Judiciary, to whom was referred the memorial of David Gordon, setting forth that in consequence of the non-execution of the act of Congress, entitled "An act supplemental to an act therein mentioned," approved December 22, 1854, great injury has resulted to himself and to others represented by him, and praying such relief as may be expedient and necessary, having had the same under consideration, ask leave to report upon the following statement of facts:

The case is a plain one, but the committee will recite, as briefly as may be, the circumstances which have induced the claimants to bring it again to the notice and to invoke the interposition of Congress.

The late Colonel George Fisher, formerly of Alabama, but more recently of the State of Florida, lost a large amount of property during the war with the Creek Indians, consisting of cattle, hogs, corn, fodder, groceries, dry goods, &c. It was taken, used, or destroyed, by the troops and militia in the service of the United States.

At the first session of the thirtieth Congress an act was passed directing that the claim should be adjusted at the treasury, the Second Auditor having been specially designated to perform that duty. The committee will, at this point, recite the act, that it may be seen at a glance what its provisions are, and especially the latter clause of the second section, which has chiefly been the cause of variance between some of the officials connected with the executive branch of the government.

THIRTIETH CONGRESS—FIRST SESSION.

AN ACT for the relief of the legal representatives of George Fisher, deceased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Second Auditor of the Treasury of the United States be, and he is hereby, authorized and required to examine and adjust the claims of the legal

representatives of George Fisher, deceased, on principles of equity and justice, and having due regard to the proofs for the value of property taken or destroyed by the troops of the United States engaged in suppressing Indian hostilities in the year eighteen hundred and thirteen; and that the said legal representatives be paid for the same out of any money in the treasury not otherwise appropriated.

SEC. 2. *And be it further enacted*, That if it shall be found impracticable for the claimants to furnish distinct proof as to the specific quantity of property respectively taken or destroyed by the troops and by the Indians, it shall be lawful for the said accounting officer to apportion the losses caused by said troops and Indians, respectively, in such manner as from the proofs he may think just and equitable, *so as to afford a fair and full indemnity for all losses and injuries occasioned by said troops, and allow the claimants accordingly: Provided*, That nothing herein contained shall authorize any payment for property destroyed by Indians.

Approved April 12, 1848.

This act was approved and signed by President Polk on the 12th of April, 1848.—(See Stat. at Large, p. 712, vol. 9.)

Under the provisions of this law the then Second Auditor, McCalla, made a partial settlement of the case, predicated upon the testimony of only three of the witnesses, viz: Robert G. Hayden, Henry L. Revier, and Absalom Presnel. He estimated the amount of Fisher's property, as proven by these witnesses, as amounting to $17,946, and then deducted the one-half as all he would allow. It will thus be seen that he reduced the amount to be awarded to the claimants to the sum of $8,973; and of this last he committed an error, or blunder, in the addition of $100, *which was wholly omitted or left out* by mistake. Subtracting this $100, as herein stated, the award was less than one-half of the Auditor's own estimate of the value of the claimants' demands. The award bears date 22d April, 1848, and was for the value or principal of the debt only. The requirements of the latter clause of the second section, as to indemnity or interest, were entirely overlooked or disregarded by the accounting officer.

In the December following the Auditor's, "(Mr. McCalla's,) attention was invited to the provisions of the second section, in which he was commanded to make to the claimants a *fair and full indemnity for all losses and injuries occasioned by said troops, and allow the claimants accordingly.*"

It is proper to state that, in pursuance of this emphatical and mandatory clause in the second section, he reviewed the case again, and affected to go through it *de novo*. But it does not appear that any testimony was regarded as entitled to any consideration except Hayden's, Revier's, and Presnel's. So far as the principal was concerned, he made no variation, no augmentation. He stuck to his original award of 22d April preceding; but he allowed the interest from 1832 up to 1848. It was in this second, or December award, that the depositions of the other witnesses was affected to have been considered. But this affectation is scattered to the winds by the fact that both of these awards, so far as the principal or capital of the debt is involved, are perfectly

identical. The only difference is found in the fact that the blunder in the former award of $100 was corrected and restored, and this is the whole of the award made in December, 1848. It is pertinent to this investigation to inquire if any validity were given to any of the depositions in the December award, except Hayden's, Reveen's, and Presnel's. The committee are clearly of the opinion that no validity whatever was given to any of them except those mentioned in the April award.

If there was any doubt upon this point, it is removed by the following statement of the chief clerk, J. F. Polk, esq., whose endorsement is now upon the back of the depositions of Davis, Harrison and Turner, now on the files in the Second Auditor's office.

"In the account of the heirs and representatives of George Fisher, deceased, there were several depositions rejected by the Second Auditor on settlement of said account. On referring to them this day, I find that they were endorsed by myself—I being the chief clerk of the Second Auditor's office at that time—to this effect: 'rejected by General McCalla, for want of authentication.'"

"J. F. POLK.

"*February* 9, 1855."

In the endeavor to make the award of principal in December correspond, rather to make it coincide in amount, with his award in April, the Auditor concluded to reject the depositions of Wiley Davis, James Turner and Samuel Harrison, on the ground of not having the seal of authentication upon them, and to disregard, but not for the same cause, (as indeed he could not,) the deposition of Thomas Barry.

These depositions were of vital importance, as they contained evidence which repelled a presumption of the Auditor, and proved the direct reverse of what was assumed: "*that one half* of the claimants property might have been taken by the Indians." When this fact was brought to the notice of the Auditor, he observed: "the depositions of Davis, Harrison, and Turner, were not legally authenticated, and therefore he rejected them." See the following extract from the deposition of the Hon. George M. Bibb:

UNITED STATES OF AMERICA, } *sct:*
District of Columbia, }

CITY OF WASHINGTON, *April* 13, 1855.

This day personally appeared before me, the undersigned, one of the justices of the peace of the United States in and for the District and city aforesaid, duly commissioned and sworn, and acting as such, came George M. Bibb, in the aforesaid city, and then and there made oath, * * * * * * * * * * *

"Said Auditor, in the presence of this affiant, made the statement of the whole amount of property of said Fisher, which had been taken or destroyed, which amounted to the sum of seventeen thousand nine hundred and forty-six dollars, and then deducted the one-half thereof, reducing the sum to be allowed to said representatives, as principal, to the sum of $8,973, as aforesaid, upon which said McCalla allowed interest, commencing in February, 1832, as aforesaid.

"When said Auditor, McCalla, deducted the one-half as aforesaid, this affiant asked said Auditor why he had deducted the one-half, and thereby reducing the principal sum to be allowed to the representatives, to the sum of $8,973, only, said McCalla answered, he had so done upon the presumption that the Indians had taken and destroyed as much of Fisher's property as the troops of the United States; this affiant stated that the affidavits of Davis, Harrison, and Turner, repelled any such presumption, and proved that the property of said Fisher mentioned by them was taken by the troops for their use, and that which they did not take to themselves was destroyed by the troops of the United States, to prevent the Indians from getting it; to this said McCalla replied, that the depositions of Davis, Harrison, and Turner, were not legally authenticated, and therefore, he rejected them. * * * * * * * *

"GEORGE M. BIBB."

Sworn to before T. C. DONN, *J. P.*

But to make assurance doubly sure, it may be necessary to state, that all the material facts deposed to by Judge Bibb refer to the action of the Second Auditor, (McCalla,) in December, 1848, for the affiant had no connexion with the case previous to that time.

It remains, then, only to state that all the results of McCalla's adjudication in this case consists of an award of $8,973, made up in April, 1848, and reaffirmed, without variation, in his review of the case, in the December following, together with the allowance of interest or indemnity, from 1832 up to 1848. It is proper to state that the subsequent allowance of interest was made by McCalla's successor, under a decision of the Attorney General, the Hon. Isaac Toucey, previous to his retirement from office.

Having now traced the progress of this case up to the period at which the testimony of certain persons was rejected, and that exclusively for the want of legal authentication, including the retirement of Mr. McCalla from office, which occurred early in 1849, the committee proceed to notice, very briefly, the progress of the case since.

The claimants proceeded to perfect the rejected testimony by having it legally authenticated by the executive of Alabama. This was done under the seal of State, signed by the governor and attested by the secretary of State, under date of October 19, 1850.

It was then filed at the Auditor's office, and an allowance asked upon it, but the new Auditor, Mr. Clayton, declined to entertain the demand, on the ground that it was closed.

The claimants were again forced to apply to Congress, which, at the 2d session of the 33d Congress, passed the following act:

AN ACT supplemental to an act therein mentioned.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That it shall be the duty of the Second Auditor of the Treasury, under the provisions of the act of Congress for the relief of the legal representatives of George Fisher, deceased, approved 12th of April, 1848, to re-examine the said case, and to allow the claimants the benefit of the testimony heretofore

marked "*Rejected for the want of authentication*," provided the same is now legally authenticated by the executive of Alabama; the adjustment to be made in strict accordance with the act herein above referred to, and to which this act is barely supplemental.

Approved December 22, 1854.

This act is brief, explicit, plain, and mandatory upon the Second Auditor. Its execution cannot be legally evaded, nor the duties it imposes avoided. It excludes all intervention by any other officer, either Comptroller or Secretary, and recognizes obligation to no power at the treasury, but to Congress alone.

It is pertinent now to enquire, why has this law not been executed? It has come to the knowledge of the committee that the present Secretary of the Treasury, Mr. Guthrie, has intervened to prevents its execution.

The reasons advanced by the functionary just referred to, in relation to his intervention in this case, are, in the judgment of the committee, inconclusive, unsatisfactory, and wholly unauthorized.

The allegation in his letter to the President, that the claimants had the benefit of the testimony specified in the supplemental act, in the award or review of the case by McCalla, in December, 1848, is fallacious. The committee have already shown that this allegation is contradicted by the facts, and disproved, emphatically, by the testimony of Judge Bibb, and by the coincident identity, as to the principal, in both of McCalla's awards. The claimants never had any substantial benefits or advantage from any consideration given to the rejected testimony by the Second Auditor up to the present time. It is alleged that the claimants were not entitled to interest under the law of April 12, 1848. This is a question of law, exclusively, and is, as to the case now under consideration, absolutely settled by the decision of the accounting officer, who allowed it, and sanctioned by two successive Attorneys General—the Hon. Mr. Toucey, and the Hon. Reverdy Johnson. See extracts from their opinions, quoted in this report.

But the title to interest under the law of 1848, passed for the relief of the claimants, does not depend exclusively upon the decisions of either the Auditor who allowed it or the Attorneys General who sanctioned it. It is expressly enjoined in the 2d section of the law of 1848, that the Auditor shall afford (the claimants) "a fair and full indemnity for all losses and injuries occasioned by said troops, and allow the claimants accordingly." Now, if any words in the English language are plainer, more emphatical, or mandatory, the committee plead ignorance of their existence.

The legal signification of indemnity, as expounded by the late Attorney General, William Wirt, is to the point, conclusive, and embraces this case exactly.

The following extract from his opinion is quoted by the committee, and in their judgment settles the significancy of the language employed by Congress when it enacted the second section of the act now under review. The whole opinion will be found in the 1st volume of Opinions, pages 499 to 501, inclusive, date May 17, 1826.

"OFFICE OF THE ATTORNEY GENERAL,
"*May* 17, 1826.

* * * * * * * *

"1st. 'Is interest a part of the indemnity?'

"After the most deliberate consideration of all the arguments which have been urged *pro* and *con*, I am clearly of the opinion that interest *at least* is a necessary part of the indemnity. * * * * *

"What is a *just indemnification* for a wrong? Is it the reparation of the one half or two thirds of that wrong? Is it anything less than a reparation of the whole wrong? On these few simple ideas the whole question turns. If an injury is *justly redressed* which is only *half redressed*, then the British commissioner is right; but if an injury is only redressed when the redress is commensurate with the whole extent of the injury, then he is wrong. Let us put aside the emphatic and striking word *just*, and take the word *indemnification* alone: what does the word 'indemnification' mean? The *saving harmless from danger*. Is that man saved harmless from danger who is left to bear *one half of the damage* himself? The question seems to me too plain for discussion. * * * * * * * * *

"WM. WIRT."

The committee will now refer to the construction given by the Hon. Mr. Toucey and the Hon. Reverdy Johnson. Mr. Toucey's opinion is dated February 16, 1849, and will be found in vol. 2 "Opinions," pages 2139. Mr. Johnson's will be found in same volume, page 2005. Both of the extracts are necessarily brief. The extended opinions of all three will be found *in loc.* by reference to the volumes above indicated.

"ATTORNEY GENERAL'S OFFICE,
"*February* 16, 1849.

"The interest of the claim of the representatives of George Fisher, deceased, for property taken or destroyed by the troops of the United States, should be computed from the time of the taking or destruction.

"The rate of interest to be allowed should be six per cent. for the period of detention. * * * * * *

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"ISAAC TOUCEY.

"Hon. R. J. WALKER,
"*Secretary of the Treasury.*"

"ATTORNEY GENERAL'S OFFICE,
"*May* 8, 1849.

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"By reference to the act giving relief in this case, it will be seen that the whole subject of the claim is submitted to the exclusive judgment of the Second Auditor. No other department has any jurisdic-

tion over it. His judgment was made absolute. By the last report of that officer he did allow interest, and the interest, with the principal then allowed, has been paid the claimants. This, in my judgment, decides the question as to the title to interest under the act. The Auditor thought that such was the meaning of the law. His successor, under another rule perfectly well settled, has no right to disregard the decision. He is bound to esteem it a correct one.—(The United States *vs.* Bank of the Metropolis, 15 Pet., 377.)

"I have the honor to be, very respectfully, sir, your obedient servant,

"REVERDY JOHNSON.

"Hon. WM. M. MEREDITH,
"*Secretary of the Treasury.*"

The committee might here suspend all further exposition of this case; but, in vindication of the unquestionable privileges and power of Congress to prescribe the mode and manner of all adjustments at the treasury, to designate an appropriate arbitrator, and to enjoin the performance of a specific duty, and that these attributes of the National Legislature may not be questioned, its solemn enactments defeated and perverted, they will devote a few sentences by way of additional elucidation.

It is said, that "by the present regulations of the department, interest is not allowed, unless expressly stipulated in the law or provided for by necessary implication," &c. It is enough for the committee to say, in this connexion, and on this point, that the objector is concluded by the latter clause of the second section of the act of 12th April, 1848, which the committee have already shown, commands that a fair and full indemnity should be made to the claimants "for all losses and injuries." The act gives or commands indemnity—*fair indemnity—full indemnity*. But, as if those words were not sufficiently emphatic, the law superadds these words—"*for all losses and injuries.*" Now, will it be contended for one moment that when the Congress of the United States, by solemn enactment, concedes that persons in its service took private property in the year 1813, and appropriated the same to public use, provides that payment shall be made, and a fair and full indemnity afforded, that the bare return of the value only would come up to the requirements of such a law? It is a *solecism, in terms*, to give such an interpretation to the plain language of the second section. But these regulations of a department, what are they? To be potential, they must be in conformity, not in conflict, with the acts of Congress. But it would really seem as if these *ex parte* rules, made at a department by an individual not in all instances, perhaps, very thoroughly furnished for his appropriate duties, obliges, or compels, that acts of Congress shall bend, and be made to harmonize with these regulations, and that departmental regulations are superior to the legislative will of the nation.

It has been well said by a learned judge,* who is now reflecting dignity upon the profession—"It is Congress that is supreme in such

*C. J. Gilchrist, C. C.

matters, and not an executive department." "If an improvident or ill advised law is passed, neither we (the court) nor they (the departments) have any right to repeal it; nor any right to place obstacles in the way of its full and perfect execution." "This is the only safety of the republic; that the law, and that alone, shall be executed according to its *simple and obvious meaning*. We have no right, when Congress admits evidence of a certain kind, to decide that we will not render a judgment for a claimant unless he produces other evidence."—(McGruder *vs.* United States, per Gilchrist.) But the Supreme Court has decided in the case of the United States *vs.* Dickson, (15 Peters, 161;) "the construction given to the laws by any department of the executive government, is necessarily *ex parte*, without the benefit of opposing argument when the very matter is in controversy; and when the construction is once given there is no opportunity to question or revise it by those who are most interested in it. * * * It is not to be forgotten that ours is a government of laws and not of men."—(See the whole decision, *in loc.*)

This is the true doctrine, and whenever it is ignored or disregarded oppression must inevitably be the consequence. It is hardly neces, sary for the committee to superadd, that it is the duty of an executive officer to obey the law, not to reverse, much less to pervert or defeat it.

To insinuate that Congress was not well advised as to the facts when it passed the supplemental act, is, in the judgment of the committee, a gratuitous assumption. As before observed, it is their duty to carry out what is plainly expressed in the law; not to question the intelligence, or the motives, under the influence of which the legislative will is made manifest upon the statute book.

Whenever it can be ascertained that a purpose is in contemplation by an executive officer to defeat or to pervert the solemn enactments of the two Houses of Congress, and especially the humane intendment of remedial laws passed for the relief of private claimants, it is an unhallowed usurpation, and should not only be rebuked, but, if persisted in, the highest powers of the legislative branch of the government should be invoked to put it down.

Nor is it competent to the Second Auditor to evade the responsibility which the laws now under review have imposed upon him by "a submission of the question of interest" to the Secretary, or to any other officer. If Congress had intended to embrace the other accounting officers, including the head of the department, it would have said so. But as the claim was to be adjusted by a specific subordinate, not so much, if at all, in his capacity of Second Auditor, but as an arbitrator, somewhat analogous to a commissioner in chancery, he cannot transfer the responsibility which attaches to his position to any other officer, always excepting what may be doubtful as to a question of law, and that, as a matter of course, as well as of usage, must be submitted to the Attorney General.

The laws under which this case is to be adjusted and paid are plain, explicit, and mandatory. They speak with all the authority of the legislative power of the government, and as long as a single dollar of the claimant's demands remain unpaid and unaccounted

for, so long will these laws speak potentially to the officer upon whom Congress has devolved the duty of their execution.

The committee have considered this case chiefly as a question of law and construction, embracing, incidentally, other matters involved in it, have arrived at the following conclusions, and possessing, in their judgment, all the force of self-evident propositions:

1. That the Second Auditor, McCalla, threw away or deducted $8,973 of the claimants principal, upon a mere presumption.

2. That if he had not rejected the depositions of Harrison, Davis, and Turner he could not have done so.

3. That these depositions were rejected at the time and on the occasion of making his second or December award; and that he never gave any validity to them nor to the testimony of Thomas Berry.

4. That in estimating the amount and valuations of Fisher's loss, every item was cut down to the lowest figure possible; whereas, it was incumbent on the accounting officer to allow the claimants a credit for every item and valuation specified and fairly set out in the testimony.

5. That the testimony which was rejected by the Auditor for want of authentication is now legally authenticated by the executive of Alabama, meeting the condition, and the only condition required by the supplemental act.

6. That it is not competent to the Secretary of the Treasury to intervene in the case—both laws having confined the matter of adjustment to the Second Auditor exclusively.

7. That it is too late to raise the question of interest, as it is *res adjudicata*, settled and fixed by the officer who allowed it, and sanctioned by two successive attorneys general, Hon. Isaac Toucey, and the Hon. Reverdy Johnson.

8. That the legal signification of indemnity is truly expounded by the late Attorney General, Wm. Wirt, and embraces this case exactly, and that its application in the administration of the laws now in review cannot be resisted without a manifest infraction or evasion of the law of 1848, passed for the relief of the claimants.

9. That to repeal either of these laws while a large portion of the claimant's demands are unpaid, would be acting in bad faith, and would involve the question of repudiation—a doctrine so odious and discreditable "that to be hated has but to be seen."

10. That inasmuch as the laws already passed are sufficient, if properly administered, to secure a fair and liberal settlement of the claim—an indefinite and standing appropriation having been made in the law referred to in the supplemental act for its payment—the committee recommend that the following resolution be agreed to:

Resolved, That the Second Auditor has exclusive jurisdiction under both the enactments referred to in this report; that the laws already passed are plenary and sufficient to secure to the claimants a fair and liberal adjustment of their demands; that no additional legislation is requisite; and that the committee be discharged from the further consideration of the subject.