

its spirit, but letter, warrant me in the assertion, that it never was intended to give Congress, or either branch, any but specified, and those very limited, privileges indeed. They well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here. They knew that in free countries very few privileges were necessary to the undisturbed exercise of legislative duties, and those few only they determined that Congress should possess; they never meant that the body who ought to be the purest, and the least in want of shelter from the operation of laws equally affecting all their fellow citizens, should be able to avoid them; they therefore not only intended, but did confine their privileges within the narrow limits mentioned in the Constitution.

. . . Let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. . . . No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your Legislature. The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more.

. . . If the opinions of the Federal Convention ought to have weight, they so strongly insisted upon it [the separation of the three departments of government] as even to refuse after repeated trials, associating the Judges with the President in the exercise of his revisionary power.

. . . I have always been of opinion, that it was wrong to give the nomination of Judges to the President.

CCLXXXVIII. CHARLES PINCKNEY IN THE UNITED STATES SENATE.¹

March 28, 1800.

It was intended to give your President the command of your forces, the disposal of all the honors and offices of your Government, the management of your foreign concerns, and the revision of your laws. Invested with these important powers, it was easily to be seen that the honor and interest of your Government required he should execute them with firmness and impartiality; that, to do this, he must be independent of the Legislature; that they must

¹ *Annals of Congress*, Sixth Congress, 129-139.

have no control over his election; that the only mode to prevent this was to give the exclusive direction to the State Legislatures in the mode of choosing Electors, who should be obliged to vote secretly; and that the vote should be taken in such manner, and on the same day, as to make it impossible for the different States to know who the Electors are for, or for improper domestic, or, what is of much more consequence, foreign influence and gold to interfere; that by doing this the President would really hold his office independent of the Legislature; that instead of being the creature, he would be the man of the people; that he would have to look to them, and to the confidence which he felt his own meritorious actions would inspire, for applause or subsequent appointments. . . .

Knowing that it was the intention of the Constitution to make the President completely independent of the Federal Legislature, I well remember it was the object, as it is at present not only the spirit but the letter of that instrument, to give to Congress no interference in, or control over the election of a President. It is made their duty to count over the votes in a convention of both Houses, and for the President of the Senate to declare who has the majority of the votes of the Electors so transmitted. It never was intended, nor could it have been safe, in the Constitution, to have given to Congress thus assembled in convention, the right to object to any vote, or even to question whether they were constitutionally or properly given. This right of determining on the manner in which the Electors shall vote; the inquiry into the qualifications, and the guards necessary to prevent disqualified or improper men voting, and to insure the votes being legally given, rests and is exclusively vested in the State Legislatures. If it is necessary to have guards against improper elections of Electors, and to institute tribunals to inquire into their qualifications, with the State Legislatures, and with them alone, rests the power to institute them, and they must exercise it. To give to Congress, even when assembled in convention, a right to reject or admit the votes of States, would have been so gross and dangerous an absurdity, as the framers of the Constitution never could have been guilty of. How could they expect, that in deciding on the election of a President, particularly where such election was strongly contested, that party spirit would not prevail, and govern every decision? Did they not know how easy it was to raise objections against the votes of particular elections, and that in determining upon these, it was more than probable, the members would recollect their *sides*, their favorite candidate, and sometimes their own interests? Or must they not have supposed, that, in putting the ultimate and final decision of the Electors in

Congress, who were to decide irrevocably and without appeal, they would render the President their creature, and prevent his assuming and exercising that independence in the performance of his duties upon which the safety and honor of the Government must forever rest? . . .

The disqualifications against any citizen being an Elector, are very few indeed; they are two. The first, that no officer of the United States shall be an Elector; and the other, that no member of Congress shall. The first, an indispensable one, because every officer of the United States is nominated by the President, and (except Judges) removable at his pleasure. The latter, that no member of Congress shall, is a provision which goes unanswerably to prove the solidity of my objections to this bill, and to show how extremely guarded the Constitution is in preventing the members of Congress from having any agency in the election, except merely in counting the votes.

They well knew, that to give to the members of Congress a right to give votes in this election, or to decide upon them when given, was to destroy the independence of the Executive, and make him the creature of the Legislature. This therefore they have guarded against, and to insure experience and attachment to the country, they have determined that no man who is not a natural born citizen, or citizen at the adoption of the Constitution, of fourteen years residence, and thirty-five years of age, shall be eligible. . . .

In 1792, being the first time the exercise of this power was necessary, Congress passed a law, entitled "An act relative to the election of President and Vice President," &c., directing how the States should appoint Electors for the election; when they should meet and vote; that they should sign three certificates of all the votes given; directing how the votes should be disposed of; detailing the duty of the Executive of each State in certifying the lists of Electors chosen; of the Secretary of State on the non-receipt of votes; that Congress shall always be in session on the second Wednesday in February in every fourth year, for the purpose of opening and counting the votes, and declaring a President elected agreeably to the Constitution; ascertaining the duties, allowances to, and penalties on persons sent with the votes; and making provision in case of the death of both President and Vice President, or their refusal to serve, and fixing the time when their service commences.

It is very important in deciding on the bill before you, to peruse this act with great attention; to recollect by whom, and when, and under what circumstances, it was made. This law was passed in 1792, when a number of able and well informed men, who have

been since appointed to some of your most respectable situations at home and abroad, and many who have voluntarily retired with deserved and well-earned honor to private life, filled the seats of both Houses of Congress: when the Executive authority was held by Gen. WASHINGTON, for whom your whole nation at present mourns; by him who had no rival in the public affection, whose honors no man envied, and whose re-election to office as long as he pleased, he well knew, would always have been without contest; in him was placed the revision of your laws. And here, sir, let me ask, whether from a Congress thus ably formed, and from an Executive thus discerning and independent, as much knowledge of the Constitution, its precise directions, and the agency it intended Congress to have in the counting the votes and declaring the President, were not to have been expected, as from the present? Were not the then Executive, and a number of the members of both Houses, members of the Convention which framed the Constitution; and if it intended to give to Congress, or to authorize them to delegate to a committee of their body, powers contemplated by this bill, could the Congress or the President of 1792, have been so extremely uninformed, and indeed ignorant of its meaning and of their duty, as not to have known it?

. . . By viewing the 1st section of the 2d article of the Constitution, it is to be seen, that on the day fixed by law, which is the second Wednesday in February, the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes shall be President, if such number be a majority of the whole number of Electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then, the House of Representatives *shall immediately choose by ballot* one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall *in like manner* choose the President. From this part of the Constitution it is evident that no power or authority is given to Congress, even when both houses are assembled in convention, further than to open and count the votes, and declare who are the President and Vice President, if an election has been made; but that in case no election is made by the Electors, or no candidate has a majority, then the House of Representatives are (voting by States) *immediately* to choose, out of the five highest on the list, the President, &c.

In order that every man may understand what is here meant by the Constitution, and what is its express *directions* and *letter* as

to this election, let us examine what is the literal meaning of the word *immediately*, and why it was introduced here. The best and most generally admired expounders of the English language, give this explanation of the word *immediately*; they say it means “instantly”—at the present time—without delay. This is the meaning the framers of the Constitution intended to give it, and it admits of no other. The plain, express, literal direction of that instrument therefore is, that in case of no election, the House of Representatives, voting by States, are *immediately*, that is instantly, and on the spot, without leaving the House in which they are then assembled, and without adjournment, to choose, out of the five highest candidates that have been voted for by the Electors, the one who is to be the Executive.

The reasons for this immediate election are, in my judgment, unanswerable; they show very clearly the foresight and caution of the Convention, and, if not strictly attended to, may be productive of the most serious calamities to our country. The reasons are these: that from our rapidly increasing strength and commerce, from the enterprise of our citizens, and our particular maritime situation as it respects the West Indies, South America, and the Powers having possessions in both, it was easily to be seen, that in any conflict between these Powers, our friendship or hospitality must be of the greatest importance; that they therefore would never cease to interfere in our politics and endeavor to direct them in the manner most suitable to their own interests; that from the difficulty of influencing so large a body as Congress, and from the immense power of the President, not only over the laws, but foreign connexions of the Union, that their principal effort would be always to have one of their own friends chosen; and to effect this, no influence would be left untried. To prevent this therefore, and to make the Executive independent of Congress, the election has been given exclusively to the States, under the direction of the State Legislatures. If an election is made by the Electors, and subject to no future control or revision on the part of Congress, then the end intended by the Constitution, of preventing the interference of foreign influence, is completely answered: for, elected as they are, and voting as the Electors must, the interference of foreign gold, or influence, is impossible. But it was to be supposed, that instances would occur, where two candidates, having a majority, may be equal in their number of votes; or where no candidate had a majority of the whole of the Electors appointed, and an election must take place by the National Legislature, or a branch of it; the question then arose, how was this election to be guarded to prevent, as far

as human prudence could, improper domestic combinations, or, what is infinitely worse, foreign interference? It was a difficult thing, and required much deliberation. The Constitution directs that the Electors shall vote by ballot, and seal up and transmit their votes to the President of the Senate. It is expected and required by the Constitution, that the votes shall be secret and unknown, until opened in the presence of both Houses. To suffer them to be known, as heretofore, has been the practice, is unconstitutional and dangerous, and goes to defeat in some measure, the wise provisions of that instrument, in declaring, that when the House of Representatives are to elect, that it shall be done immediately. The Electors, therefore, ought never to divulge their votes. . . .

It is to be remembered, that around the seat of Congress will be placed all the open and accredited Ministers, as well as secret emissaries, of foreign Powers. Here too will be assembled the concealed leaders of domestic faction; all the arts and intrigues that have been used in Elective Governments in the Old World, will soon find their way among us; and if the Electors do not conceal their votes until the day appointed by law for opening them, and in case of no election by them, an immediate one by the House of Representatives does not take place, we shall soon have the scenes of Polish Diets and elections re-acted here, and in not many years the fate of Poland may be that of United America.

Wisely foreseeing this, the Constitution expressly orders that the Electors shall vote by ballot; and we all know, that to vote by ballot is to vote secretly; that the votes shall be sealed up, and not opened until the day appointed by law, and that if no election has been made by the Electors, an immediate one shall take place by the House of Representatives; that so far from appointing committees to receive memorials or petitions respecting the election, or decide upon it, or so far from having any right to delegate an authority on this subject, that Congress shall not themselves, even when in convention, have the smallest power to decide on a single vote; that they shall not have authority to adjourn for one moment, but shall instantly and on the spot, in case of no election by the Electors, proceed to the choice of a President, and not separate until it is determined.

CCLXXXIX. GOUVERNEUR MORRIS IN THE UNITED STATES SENATE.¹

January 8, 1802.

There are some honorable gentlemen now present, who sat in

¹ *Annals of Congress*, Seventh Congress, First Session, I, 40.