

Marcus II, *Norfolk and Portsmouth Journal*, 27 February 1788

Answers to Mr. Mason's Objections to the New Constitution, Recommended by the late Convention at Philadelphia.

IVth. Objection.

"The Judiciary of the United States is so constructed and extended, as to absorb and destroy the Judiciaries of the several States; thereby rendering law as tedious, intricate and expensive; and justice as unattainable by a great part of the community as in England; and enabling the rich to oppress and ruin the poor."

Answer.

Mr. Mason has here asserted, "That the Judiciary of the United States is so constructed and extended, as to absorb and destroy the Judiciaries of the several States." How is this the case? Are not the State Judiciaries left uncontroled as to all the affairs of *that State only*? In this, as in all other cases, where there is a wise distribution, power is commensurate to its object. With the mere internal concerns of a State, Congress are to have nothing to do. In no case but where the Union is in some measure concerned, are the Fœderal Courts to have any jurisdiction. The State Judiciary will be a satellite waiting upon its proper planet: That of the Union like the sun, cherishing and preserving a whole planetary system.

In regard to a possible ill construction of this authority, we must depend upon our future Legislature in this case, as well as others, in respect to which it is impracticable to define every thing; that it will be provided for so as to occasion as little expence and distress to individuals as can be. In parting with the coercive authority over the States, as States, there must be a coercion allowed as to individuals. The former power no man of common sense can any longer seriously contend for: The latter is the only alternative. Suppose an objection should be made, that the future Legislature should not ascertain salaries, because they might divide among themselves and their officers all the revenue of the Union:(a) Will not every man see how irrational it is to expect that any government can exist, which is to be fettered in its most necessary operations, for fear of abuse?

Vth. Objection.

"The President of the United States, has no Constitutional Council (a thing unknown in any safe and regular government), he will therefore be unsupported by proper information and advice; and will generally be directed by minions and favorites-or he will become a tool to the Senate-or a Council of State will grow out of the principal officers of the great departments; the worst and most dangerous of all ingredients for such a Council in a free country; for they may be induced to join in any dangerous or oppressive measures; to shelter themselves, and prevent an enquiry into their own misconduct in office: Whereas, had a Constitutional Council been formed (as was proposed) of six Members, viz. two from the eastern, two from the middle, and

two from the southern States; to be appointed by vote of the States in the House of Representatives, with the same duration and rotation of office as the Senate, the Executive would always have had safe and proper information and advice. The President of such a Council might have acted as Vice-President of the United States, *pro tempore*, upon any vacancy or disability of the Chief Magistrate; and long-continued Sessions of the Senate would, in a great measure have been prevented. From this fatal defect of a Constitutional Council, has arisen the improper power of the Senate, in the appointment of public officers, and the alarming dependence and connexion between that branch of the Legislature and the Supreme Executive. Hence also sprung that unnecessary and dangerous officer, the Vice-President; who, for want of other employment, is made President of the Senate; thereby dangerously blending the Executive and Legislative powers; besides always giving to some of the States an unnecessary and unjust pre-eminence over the others.”

Answer.

Mr. Mason here reprobates the omission of a particular Council for the President, as a thing contrary to the example of all safe and regular governments. Perhaps there are very few governments now in being, deserving of that character, if under the idea of safety, he means to include safety for a proper share of personal freedom, without which their safety and regularity in other respects would be of little consequence to a people so justly jealous of liberty as I hope the people in America ever will be. Since however Mr. Mason refers us to such authority, I think I cannot do better than to select for the subject of our enquiry in this particular, a government which must be universally acknowledged to be the most safe and regular of any considerable government now in being (though I hope, America will soon be able to dispute that pre-eminence). Every body must know I speak of Great-Britain; and in this I think I give Mr. Mason all possible advantage; since, in my opinion, it is most probable he had Great-Britain principally in his eye when he made this remark. And in the very height of our quarrel with that country, so wedded were our ideas to the institution of a Council, that the practice was generally, if not universally followed, at the formation of our governments, though we instituted councils of a quite different nature; and so far as the little experience of the writer goes, have very little benefited by it. My enquiry into this subject shall not be confined to the actual present practice of Great-Britain. I shall take the liberty to state the constitutional ideas of Councils in England, as derived from their ancient laws subsisting long before the Union, not omitting however to shew what the present practice really is.—By the laws of England (b) the King is said to have four Councils. 1. The High Court of Parliament. 2. The Peers of the Realm. 3. His Judges. 4. His Privy Council.—By the first, I presume, is meant in regard to the making of laws; because the usual introductory expressions in most acts of Parliament, viz. “By the King’s Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, &c.” shew, that in a constitutional sense, they are deemed the King’s laws, after a ratification in Parliament. The Peers of the Realm are, by their birth hereditary Counsellors of the Crown, and may be called upon for their advice either in time of Parliament, or when no Parliament is in being. They are called in some law books, *Magnum Concilium Regis*. (The King’s Great Council). It is also considered the privilege of every particular Peer, to demand an audience of the King, and to lay before him any thing he may deem of public importance. The Judges, I presume, are

called "A Council of the King," upon the same principle that the Parliament is, because the administration of justice is in his name, and the Judges are considered as his instruments in the distribution of it. We come now to the Privy Council, which I imagine, if Mr. Mason had any particular view towards England when he made this objection, was the one he intended as an example of a *Constitutional Council* in that kingdom. The Privy Council in that country is undoubtedly of very ancient institution; but it has one fixed property invariably annexed to it, that it is a mere creature of the Crown, dependent on its will both for number and duration, since the King may, whenever he thinks proper, discharge any particular Member, or the whole of it, and appoint another. (c) If this precedent is of moment to us, merely as a precedent, it should be followed in all its parts; and then what would there be in the regulation to prevent the President from being governed by "minions and favorites?" It would only be the means of rivetting them on constitutional ground. So far as precedents in England apply, the Peers being constitutionally the *Great Council of the King*, tho' also a part of the Legislature, we have reason to hope, that there is by no means, such gross impropriety as has been suggested, in giving the Senate, tho' a branch of the Legislature, a strong controul over the Executive. The only difference in the two cases is, that the Crown may or may not give this consequence to the Peers at its own pleasure; and accordingly we find, that for a long time past, this Great Council has been very seldom consulted: Under our Constitution, the President is allowed no option in respect to certain points, wherein he cannot act without the Senate's concurrence. But we cannot infer from any example in England, that a concurrence between the Executive and a part of the Legislature is contrary to the maxims of their government, since their government allows of such a concurrence whenever the Executive pleases. The rule therefore from the example of the freest government in Europe, that the Legislative and Executive powers must be altogether distinct, is liable to exceptions. It does not mean that the Executive shall not form a part of the Legislature (for the King who has the whole Executive authority, is one entire branch of the Legislature; and this, Montesquieu,² who recognizes the general principle, declares is necessary): Neither can it mean (as the example above evinces) that the Crown must consult neither house as to any exercise of its Executive power: But its meaning must be, that one power shall not include *both authorities*: The King, for instance, shall not have the sole Executive, and sole Legislative authority also. He may have the former, but must participate the latter with the two Houses of Parliament. The rule also would be infringed were the three branches of the Legislature to share jointly the Executive power. But so long as the people's Representatives are altogether distinct from the Executive authority, the liberties of the people may be deemed secure. And in this point, surely there can be no manner of comparison between the provisions by which the independence of our House of Representatives is guarded, and the condition in which the British House of Commons is left exposed to every species of corruption.—But Mr. Mason says, for want of a Council, the President may become "a tool to the Senate." Why?—Because he cannot act without their concurrence. Would not the same reason hold for his being "a tool to the Council," if he could not act without their concurrence, supposing a Council was to be imposed upon him without his own nomination (according to Mr. Mason's plan)? As great care is taken to make him independent of the Senate; as I believe human precaution can provide. Whether the President will be a tool to any persons, will depend upon the man; and the same weakness of mind which would make him pliable to one body of controul, would certainly attend him with another. But Mr. Mason

objects, if he is not directed by minions and favorites, nor becomes a tool of the Senate, "A Council of State will grow out of the principal officers of the great department[s], the worst and most dangerous of all ingredients for such a Council, in a free country; for they may be induced to join in any dangerous or oppressive measures to shelter themselves, and prevent an inquiry into their own misconduct in office." I beg leave again to carry him to my old authority, England, and ask him what efficient Council they have there, but one formed of their great officers? Notwithstanding their important *constitutional Council*, every body knows that the whole movements of their government, where a Council is consulted at all, are directed by their *Cabinet Council*, composed entirely of the principal officers of the great departments: That when a Privy Council is called, it is scarcely ever for any other purpose than to give a formal sanction to the previous determinations of the other; so much so that it is notorious that not one time in a thousand one Member of the Privy Council, except a known adherent of administration, is summoned to it. But though the President, under our Constitution, may have the aid of the "principal officers of the great departments," he is to have this aid, I think, in the most unexceptionable manner possible. He is not to be assisted by a Council, summoned to a jovial dinner perhaps, and giving their opinions according to the nod of the President-but the opinion is to be given with the utmost solemnity, *in writing*.³ No after equivocation can explain it away. It must for ever afterwards speak for itself, and commit the character of the writer, in lasting colours either of fame or infamy, or neutral insignificance, to future ages, as well as the present. From those written reasons, weighed with care, surely the President can form as good a judgment as if they had been given by a dozen formal characters, carelessly met together on a slight appointment. And this further advantage would be derived from the proposed system (which would be wanting if he had constitutional advice to screen him) that the President must be *personally responsible* for every thing. For though an ingenious gentleman has proposed, that a Council should be formed, who should be responsible for *their opinions*; and the same sentiment of justice might be applied to these opinions of the great officers, I am persuaded it will in general be thought infinitely more *safe*, as well as more *just*, that the President who acts should be responsible for his *conduct*, following advice at his peril, than that there should be a danger of punishing any man for an erroneous opinion which might possibly be sincere. Besides the morality of this scheme, which may well be questioned, its inexpediency is glaring, since it would be so plausible an excuse, and the insincerity of it so difficult to detect; the hopes of impunity this avenue to escape, would afford, would nearly take away all dread of punishment. As to the temptations mentioned to the officers joining in dangerous or oppressive measures to shelter themselves, and prevent an enquiry into their own misconduct in office, this proceeds upon a supposition that the President and the great officers may form a very wicked combination to injure their country; a combination that in the first place it is utterly improbable, in a strong respectable government, should be formed for that purpose; and in the next, with such a government as this Constitution would give us, could have little chance of being successful, on account of the great superior strength, and natural and jealous vigilance of one at least, if not both the two weighty branches of Legislation. This evil however, of the possible depravity of *all public officers*, is one that can admit of no cure, since in every institution of government, the same danger in some degree or other must be risked; it can only be guarded against by strong checks, and I believe it would be difficult for the objectors to our new Constitution, to provide stronger ones against any abuse of the Executive authority,

than will exist in that. As to the Vice-President, it appears to me very proper he should be chosen much in the same manner as the President, in order that the States may be secure, upon any accidental loss by death or otherwise, of the President's service; of the services in the same important station of the man in whom they repose their second confidence. The complicated manner of election wisely prescribed, would necessarily occasion a considerable delay in the choice of another; and in the mean time the President of the Council, tho' very fit for the purpose of advising, might be very ill qualified, especially in a critical period, for an active executive department. I am concerned to see among Mr. Mason's other reasons, so trivial a one as the little advantage one State might accidentally gain by a Vice-President of their country having a seat, with merely a casting vote in the Senate. Such a reason is utterly unworthy that spirit of amity, and rejection of local views, which can alone save us from destruction. It was the glory of the late Convention, that by discarding such, they formed a general government upon principles that did as much honor to their hearts as to their understandings. God grant, that in all our deliberations, we may consider America as one body, and not divert our attention from so noble a prospect, to small considerations of partial jealousy and distrust. It is in vain to expect upon any system to secure an exact equilibrium of power for all the States. Some will occasionally have an advantage from the superior abilities of its Members; the field of emulation is however open to all. Suppose any one should now object to the superior influence of Virginia (and the writer of this is not a citizen of that State) on account of the high character of General Washington, confessedly the greatest man of the present age, and perhaps equal to any that has existed in any period of time: Would this be a reason for refusing a union with her, though the other States can scarcely hope for the consolation of ever producing his equal?

(To be continued.)

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