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

VIIIth. Objection.

“Under their own construction of the general clause at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce, constitute new crimes, inflict unusual and severe punishments, and extend their power as far as they shall think proper; so that the State Legislatures have no security for the powers now presumed to remain to them, or the people for their rights. There is no declaration of any kind for preserving the Liberty of the Press—the Trial by Jury in civil cases—nor against the danger of standing armies in time of peace.”

Answer.

The general clause at the end of the enumerated powers is as follows:—

“To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the United States, or in any department or office thereof.”

Those powers would be useless, except acts of Legislation could be exercised upon them. It was not possible for the Convention, nor is it for any human body, to foresee and provide for all contingent cases that may arise. Such cases must therefore be left to be provided for by the general Legislature, as they shall happen to come into existence. If Congress, under pretence of exercising the power delegated to them, should, in fact, by the exercise of any other power, usurp upon the rights of the different Legislatures, or of any private citizens, the people will be exactly in the same situation as if there had been an express provision against such power in particular, and yet they had presumed to exercise it. It would be an act of tyranny, against which no parchment stipulations can guard; and the Convention surely can be only answerable for the propriety of the powers given, not for the future virtues of all with whom those powers may be entrusted. It does not therefore appear to me, that there is any weight in this objection more than in others—but, that I may give it every fair advantage, I will take notice of every particular injurious act of power which Mr. Mason points out as exerciseable by the authority of Congress, under this general clause.

The first mentioned is, “That the Congress may grant monopolies in trade and commerce.” Upon examining the Constitution, I find it expressly provided, “That no preference shall be given to the ports of one State over those of another;” and that “Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.” These provisions appear to me to be calculated for the very purpose Mr. Mason wishes to secure. Can they be consistent with any monopoly in trade and commerce? I apprehend therefore, under this

expression must be intended more than is expressed; and if I may conjecture from another publication of a gentleman of the same State and in the same party of opposition, I should suppose it arose from a jealousy of the Eastern States, very well known to be often expressed by some gentlemen of Virginia. They fear, that a majority of the States may establish regulations of commerce which will give great advantage to the carrying trade of America, and be a means of encouraging New England vessels rather than old England.—Be it so.—No regulations can give such advantage to New England vessels, which will not be enjoyed by all other American vessels, and many States can build as well as New England, tho' not at present perhaps in equal proportion. And what could conduce more to the preservation of the union, than allowing to every kind of industry in America a peculiar preference! Each State exerting itself in its own way, but the exertions of all contributing to the common security, and increasing the rising greatness of our country! Is it not the aim of every wise country to be as much the carriers of their own produce as can be? And would not this be the means in our own of producing a new source of activity among the people, giving to our own fellow citizens what otherwise must be given to strangers, and laying the foundation of an independent trade among ourselves, and of gradually raising a navy in America, which, however distant the prospect, ought certainly not to be out of our sight. There is no great probability however that our country is likely soon to enjoy so glorious an advantage. We must have treaties of commerce, because without them we cannot trade to other countries. We already have such with some nations—we have none with Great-Britain; which can be imputed to no other cause but our not having a strong respectable government to bring that nation to terms. And surely no man who feels for the honor of his country, but must view our present degrading commerce with that country with the highest indignation, and the most ardent wish to extricate ourselves from so disgraceful a situation. This only can be done by a powerful government, which can dictate conditions of advantage to ourselves, as an equivalent for advantages to them; and this could undoubtedly be easily done by such a government, without diminishing the value of any articles of our own produce; or if there was any diminution it would be too slight to be felt by any patriot in competition with the honor and interest of his country.

As to the constituting new crimes, and inflicting unusual and severe punishment, certainly the cases enumerated wherein the Congress are empowered either to define offences, or prescribe punishments, are such as are proper for the exercise of such authority in the general Legislature of the union. They only relate to “counterfeiting the securities and current coin of the United States; to piracies and felonies committed on the high seas, and offences against the law of nations, and to treason against the United States.” These are offences immediately affecting the security, the honor or the interest of the United States at large, and of course must come within the sphere of the Legislative authority which is entrusted with their protection. Beyond these authorities Congress can exercise no other power of this kind, except in the enacting of penalties to enforce their acts of Legislation in the cases where express authority is delegated to them, and if they could not enforce such acts by the enacting of penalties, those powers would be altogether useless, since a legislative regulation without some sanction would be an absurd thing indeed. The Congress having, for these reasons, a just right to authority in the above particulars, the question is, whether it is practicable and proper to prescribe the limits to its exercise, for fear that they should inflict punishments unusual and severe? It may be

observed in the first place, that a declaration against “cruel and unusual punishments,” formed part of an article in the Bill of Rights at the Revolution in England, in 1688. The prerogative of the Crown having been grossly abused in some preceding reigns, it was thought proper to notice every grievance they had endured, and those declarations went to an abuse of power in the crown only, but were never intended to limit the authority of Parliament. Many of these articles of the Bill of Rights in England, without a due attention to the difference of the cases, were eagerly adopted when our Constitutions were formed, the minds of men then being so warmed with their exertions in the cause of liberty, as to lean too much perhaps towards a jealousy of power to repose a proper confidence in their own government. From these articles in the State Constitutions, many things were attempted to be transplanted into our new Constitution, which would either have been nugatory or improper: This is one of them. The expressions “unusual and severe,” or “cruel and unusual,” surely would have been too vague to have been of any consequence, since they admit of no clear and precise signification. If to guard against punishments being too severe, the Convention had enumerated a vast variety of cruel punishments, and prohibited the use of any of them, let the number have been ever so great, an inexhaustible fund must have been unmentioned, and if our government had been disposed to be cruel, their invention would only have been put to a little more trouble. If to avoid this difficulty, they had determined, not negatively, what punishments should not be exercised, but positively what punishments should, this must have led them into a labyrinth of detail which in the original constitution of a government would have appeared perfectly ridiculous, and not left a room for such changes according to circumstances, as must be in the power of every Legislature that is rationally formed. Thus, when we enter into particulars, we must be convinced that the proposition of such a restriction would have led to nothing useful, or to something dangerous, and therefore that its omission is not chargeable as a fault in the new Constitution. Let us also remember, that as those who are to make those laws must, themselves be subject to them, their own interest and feelings will dictate to them not to make them unnecessarily severe; and that in the case of treason, which usually in every country exposes men most to the avarice and rapacity of government, care is taken that the innocent family of the offender shall not suffer for the treason of their relation. This is the crime with respect to which a jealousy is of the most importance, and accordingly it is defined with great plainness and accuracy, and the temptations to abusive prosecutions guarded against as much as possible. I now proceed to the three great cases:—The Liberty of the Press—The Trial by Jury in civil cases, and a Standing Army in time of peace.

The Liberty of the Press is always a grand topic for declamation; but the future Congress will have no other authority over this than to secure to authors for a limited time the exclusive privilege of publishing their works. This authority has long been exercised in England, where the press is as free as among ourselves, or in any country in the world, and surely such an encouragement to genius is no restraint on the liberty of the press, since men are allowed to publish what they please of their own; and so far as this may be deemed a restraint upon others it is certainly a reasonable one, and can be attended with no danger of copies not being sufficiently multiplied, because the interest of the proprietor will always induce him to publish a quantity fully equal to the demand—besides, that such encouragement may give birth to many excellent writings which would otherwise have never appeared. If the Congress should exercise

any other power over the press than this, they will do it without any warrant from this Constitution, and must answer for it as for any other act of tyranny.

In respect to the trial by jury in civil cases, it must be observed, it is a mistake to suppose, that such a trial takes place in all civil cases now. Even in the common law Courts, such a trial is only had where facts are disputed between the parties, and there are even some facts triable by other methods. In the Chancery and Admiralty Courts, in many of the States, I am told, they have no Juries at all. The States in these particulars differ very much in their practice from each other: A general declaration therefore to preserve the trial by Jury in all civil cases, would only have produced confusion, so that the Courts afterwards in a thousand instances would not have known how to have proceeded. If they had added "as heretofore accustomed," that would not have answered the purpose, because there has been no uniform custom about it. If therefore the Convention had interfered, it must have been by entering into a detail highly unsuitable to a fundamental constitution of government: If they had pleased some States, they must have displeased others, by innovating upon modes of administering justice perhaps endeared to them by habit, and agreeable to their settled conviction of propriety. As this was the case it appears to me it was infinitely better, rather than endanger every thing by attempting too much, to leave this complicated business of detail, to the regulation of the future Legislature, where it can be adjusted coolly and at ease, and upon full and exact information.—There is no danger of the trial by Jury being rejected, when so justly a favorite of the whole people. The Representatives of the people surely can have no interest in making themselves odious for the mere pleasure of being hated; and when a Member of the House of Representatives is only sure of being so for two years, but must continue a citizen all his life, his interest as a citizen, if he is a man of common sense, to say nothing of his being a man of common honesty, must ever be uppermost in his mind. We know the great influence of the monarchy in the British government, and upon what a different tenure the Commons there have their seats in Parliament, from that prescribed to our Representatives. We know also, they have a large standing army. It is in the power of the Parliament if they dare to exercise it, to abolish the trial by jury altogether—but woe be to the man who should dare to attempt it—it would undoubtedly produce an insurrection that would hurl every tyrant to the ground who attempted to destroy that great and just favorite of the English nation. We certainly shall be always sure of this guard at least, upon any such act of folly or insanity in our Representatives: They soon would be taught the consequence of sporting with the feelings of a free people. But when it is evident that such an attempt cannot be rationally apprehended, we have no reason to anticipate displeasing emotions of that nature. There is indeed little probability, that any degree of tyranny which can be figured to the most discoloured imagination, as likely to arise out of our government, could find an interest in attacking the trial by Jury in civil cases; and in criminal ones, where no such difficulties intervened as in the other, and where there might be supposed temptations to violate the personal security of a citizen, it is sacredly preserved.

The subject of a standing army has been exhausted in so masterly a manner in two or three numbers of the *Fœderalist* (a work which I hope will soon be in every body's hands)⁵ that, but for the sake of regularity in answering Mr. Mason's objections, I should not venture upon the same topic; and shall only presume to do so, with a reference for fuller satisfaction to that able

performance. It is certainly one of the most delicate and proper cases for the consideration of a free people, and so far as a jealousy of this kind leads to any degree of caution not incompatible with the public safety, it is undoubtedly to be commended. Our jealousy of this danger has descended to us from our British ancestors: In that country they have a monarch, whose power being limited, and at the same time his prerogatives very considerable, a constant jealousy of him is both natural and proper. The two last of the Stuarts having kept up a considerable body of standing forces in time of peace, for the clear and almost avowed purpose of subduing the liberties of the people, it was made an article of the Bill of Rights at the Revolution, "That the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law;" but no attempt was made, or I dare say, ever thought of, to restrain the Parliament from the exercise of that right. An army has been since kept on foot annually by authority of Parliament, and I believe ever since the Revolution they have had some standing troops; disputes have frequently happened about the number, but I don't recollect any objection by the most zealous patriot, to the keeping up of any at all. At the same time, notwithstanding the above practice of an annual vote (arising from a very judicious caution) it is still in the power of Parliament to authorise the keeping up of any number of troops for any indefinite time, and to provide for their subsistence for any number of years: Considerations of prudence, not constitutional limits to their authority, alone restrain such an exercise of it. Our Legislature however will be strongly guarded, though that of Great Britain is without any check at all. No appropriations of money for military service can continue longer than two years. Considering the extensive services the general government may have to provide for upon this vast continent, no forces with any serious prospect of success, could be attempted to be raised for a shorter time. Its being done for so short a period, if there were any appearances of ill designs in the government, would afford time enough for the real friends of their country to sound an alarm; and when we know how easy it is to excite jealousy of any government, how difficult for the people to distinguish from their real friends, those factious men, who in every country are ready to disturb its peace for personal gratifications of their own, and those desperate ones to whom every change is welcome, we shall have much more reason to fear that the government may be overawed by groundless discontents, than that it should be able, if contrary to every probability such a government could be supposed willing, to effect any designs for the destruction of their own liberties, as well as those of their constituents: For surely we ought ever to remember, that there will not be a man in the government but who has been either mediately or immediately recently chosen by the people, and that for too limited a time to make any arbitrary designs, consistent with common sense, when every two years a new body of Representatives, with all the energy of popular feelings, will come to carry the strong force of a severe national controul, into every department of government; to say nothing of the one-third to compose the Senate, coming at the same time warm with popular sentiments from their respective Assemblies. Men may, to be sure, suggest dangers from any thing; but it may truly be said, that those who can seriously suggest the danger of a premeditated attack on the liberties of the people from such a government as this, could with ease assign reasons equally plausible for distrusting the integrity of any government formed in any manner whatever; and really it does seem to me, that all their reasons may be fairly carried to this position,—that in as much as any confidence in any men would be unwise, as we can give no power but what may be grossly abused, we had better give none at all, but continue as we

are, or resolve into total anarchy at once, of which indeed, our present condition falls very little short. What sort of a government must that be, which, upon the most certain intelligence that hostilities were meditated against it, could take no method for its defence, till after a formal declaration, of war, or the enemy's standard was actually fixed upon the shore. The first has for some time been out of fashion; but if it had not, the restraint these gentlemen recommend, would certainly have brought it into disuse with every Power who meant to make war upon America. They would not be such fools as to give us the only warning we had informed them we would accept of, before we would take any steps to counteract their designs. The absurdity of our being prohibited from preparing to resist an invasion till after it had actually taken place, is so glaring that no man can consider it for a moment without being struck with astonishment, to see how rashly, and with how little consideration gentlemen, whose characters are certainly respectable, have suffered themselves to be led away by so delusive an idea. The example of other countries, so far from warranting any such limitation of power, is directly against it. That of England is particularly noticed. In our present articles of Confederation there is no such restriction. It has been observed by the Fœderalist, that Pennsylvania and North-Carolina appear to be the only States in the union, which have attempted any restraint of the Legislative authority in this particular, and that their restraint appears rather in the light of a caution than a prohibition; but, that notwithstanding that, Pennsylvania had been obliged to raise forces in the very face of that article of her Bill of Rights. That great writer, from the remoteness of his situation, did not know that North-Carolina had equally violated her Bill of Rights in a similar manner. The Legislature of that State, in November 1786, passed an act for raising 201 men for the protection of a County called Davidson County, against hostilities from the Indians; they were to continue for *two years* from the time of their first rendezvous, unless sooner disbanded by the Assembly; and were to be "subject to the same rules with respect to their government as were established in the time of the late war by the Congress of the United States, for the government of the Continental army:" These are the very words of the act. Thus, for the example of the only two countries in the world, that I believe ever attempted such a restriction, it appears to be a thing incompatible with the safety of government. Whether their restriction is to be considered as a caution or a prohibition, in less than five years after peace the caution has been disregarded, or the prohibition disobeyed. Can the most credulous or suspicious man, require stronger proof of the weakness and impolicy of such restraints?

(To be concluded in our next.)

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