Reply to George Mason's Objections to the Constitution*, New Jersey Journal,* 19, 26 December

[19 December] A correspondent has sent us the following answer to Mr. Mason's objections to the new Constitution, contained in our Journal of the 12th instant. First, the bill of rights. Could there have been greater solecism of politics than for a people in the undisturbed and indisputable possession of the absolute sovereignty of a country (and about to delegate a necessary portion of power to a small number of their own body, for the good of the whole) to form a declaration of rights, which they mean to retain when, at first blush, they must necessarily be still vested with all power and sovereignty not expressly given away by their act of delegation. Let us put a case. Suppose such a bill of rights formed, and the Constitution ratified and in exercise. An adventitious circumstance arises, for which no provision has been made in the Constitution, and is wholly left out of the bill of rights; from whence must the power flow to remedy or provide against the evil. By the Constitution there is no power vested in the government; by the bill of rights, the people have lamented the sovereignty retained by them. I believe every man of common sense would say that the people, or the sovereign power, cannot be affected by any such declaration of rights, they being the source of all power in the government; whatever they have not given away still remains inherent in them. Would not a private man be thought an idiot who in making a letter of attorney to another, authorizing him to sell his house in New York, should insist on a covenant that the attorney should not presume to sell his house in Philadelphia; or should insist on an express declaration that he meant to retain the fee of the residue of his estate. In England the king claims the sovereignty and supports an interest in opposition to the people. It becomes, therefore, both their interest and their duty, at every proper opportunity, to obtain a declaration and acknowledgment of those rights they should hold against their sovereign. But in America (thanks to the interposing providence of GOD!) the people hold all power, not by them expressly delegated to individuals, for the good of the whole. The governors, therefore, may call for the Constitution to show their rights and powers, but the people want no written bill of rights to prove their authority, being the only human source of power known in the empire. I therefore conclude, had a bill of rights been formed by the late Convention, the good sense of the people would universally have revolted at such a display of unjustifiable confidence, founded on a mistaken notion of the nature of our government and the source from whence all authority in the United States must necessarily flow.

The Common Law. The common law is adopted by every state in the Union, as part of the law of the land, in all cases when not contravened by the acts of the state. The Constitution, therefore, leaves it in the same situation, except as to such parts as are changed by the express words of it without otherwise abridging its authority, and so it will remain unless contradicted or superseded by the express provisions of the new government or the acts of the general legislature; and I presume the most sanguine opposer of the new Constitution would not suggest the idea that the common laws

should remain unalterable by the people, through their representatives, otherwise all government, as to law making, would be nugatory.

The common law is as highly revered in Great Britain as it ought to be in any government whatever, yet no one ever attempted to abridge the power of the legislature, as to the passing all necessary acts of Parliament, controlling and changing its power. The like superintending authority has always been claimed and exercised by all the legislatures throughout America, both before and since the Revolution.

These objections, therefore, appear to be the effect of an overstrained jealousy, and fear of arbitrary power, perhaps arising from rooted prejudices and long habits under a constitution in many instances greatly abused for want of proper checks, and from which we have been gloriously emanicipated, and to which our present intended government will bear little or no analogy.

REPRESENTATION. The House of Representatives is said to contain but the shadow of representation. I shall speak of New Jersey alone. Her quota is four members in the House of Representatives. If this is but the shadow of representation, in what situation has this state been in Congress during a most important and perilous war, in which the lives and property of every citizen have been so immediately at stake. Although our state was at liberty to send five members, it has ever been thought prudent to limit the attending number to three. Surely our legislature have been mere novices to submit to a shadow of representation for so many years. It is true we have had company, for the largest and most opulent states have been equally duped. We have found it very difficult to support even this shadow with decency and reputation without murmuring and complaints, but what would the good citizens of this state have said if, instead of four, the new Constitution had obliged us to have sent ten or fifteen Representatives. [156 ]This would have been substance indeed. I believe, Mr. Printer, the people of New Jersey are not so desirous of accumulating offices, as to multiply them for the sake of parade. They will have no objection to the Constitution because they have but six representatives in the whole,2 especially while two of these give the state an equal voice in the Senate, and they have a negative on all laws, and particularly those relative to the expenditure of the public treasure. The people of New Jersey have learned by experience that their business is better done by a sufficient number of delegates, than by an unnecessary multitude, who, from the natural frailty of human nature, are more apt to form parties, and promote confusion and ill-timed difficulties in the course of business. Besides it is much easier for the people to get six able representatives in a state, than fifteen or twenty. The objections raised against the power of the Senate to originate bills for the appropriation of money are rather calculated to alarm the fears of the inattentive, than to produce conviction on a fair examination. Is there the least impropriety in the majority of that branch of the legislature where the states are all equally represented (and therefore strictly speaking, a majority of the states) originating bills for the disposal of the public money, especially when it is considered that such disposition must be approved of and ratified by the other branch, where the states are represented according to their numbers, before they become laws. It should be also

remembered that bills for raising money can only originate in the House of Representatives. The assertion that the Senators are not the representatives of the people, nor amenable to them, is sophistry itself. It is true that the legislature of each state, elected by the people for this express purpose among others, choose the Senators. Are they therefore not the representatives of the people? If not, who do they represent? Surely not the legislature, who are but representatives themselves. Was it ever said that the people do not make their own laws or that the government of a republic is not in the people because they make the one, and execute the other, through persons delegated by them? If this was the case, the people could never govern but by every person individually interfering in government.

If the Senate are to return to the mass of the people every six years, if they are amenable to the laws of the government, if to be impeached by the Representatives and tried before judges appointed by the people, it cannot require any great degree of penetration to see that the objection is not founded in fact or the principles of the Constitution.

The judicial powers under the new Constitution are held up as dangerous to the rights of the people. A Supreme Court is appointed for the general Confederacy, who is to have original jurisdiction only in causes affecting ambassadors, or public ministers, and where a state shall be a party. Is it not absolutely necessary that there should be one court for these general purposes of government, and if so, can the original jurisdiction be more limited? Would it be prudent to make it necessary that the representative of the allies of our nation, who appear in the place of their sovereign, should be attending courts in distant states, and exposed to local customs and laws of which they cannot be supposed to have any knowledge, while their presence is necessarily required at the seat of the general government? This would be derogatory to the character of an independent people. Besides would not the general government be constantly exposed to be involved in continual quarrels and contests by every separate state in the Union. As to the remaining branch of this jurisdiction, there can be no other equal to the business. An independent state, having a demand against another, has, before the late Revolution, had no alternative but composition or arms.

This Court then is a most important improvement in the science of government, and I think absolutely necessary to be established by compact in a confederated government, as the present is proposed to be. But there are also to be inferior courts, whose original jurisdiction is extended to all general subjects and from whose judgment an appellate jurisdiction, both in law and fact, is given to the Supreme Court. In the first place, the Constitution does not make these courts absolutely necessary, but it has referred the business to the general government to use their discretion in the establishment. But, as I accede to their absolute necessity, so I will take it for granted that one will be appointed in every state. Common candor will lead us to suppose that Congress will act rationally in their constitution or appointment, so as to be least expensive and burthensome to the people, and, at the same time, to answer their desired end. I will suppose, as the most eligible mode and most satisfactory to the people, that the judges of the supreme court of each state will be appointed judges of this inferior court. By this

means, when they sit as officers of the general government, they will judge according to the general laws; and when they sit as officers of the state, they will proceed according to the municipal laws of the state. This will promote harmony between the laws of the Congress and those of the state. The expense will be greatly reduced. The judges will be rendered more independent both of Congress and the state, and the people will be better pleased with judges of their own nomination. Now, under this idea, in what instance does the judiciary of the United States absorb and destroy the judiciaries of the individual states? I answer, in none; but they will rather go hand in hand together and each be subservient with the other for the good of the whole. Another important and weighty objection brought against the Constitution is that there is no security for the right of trial by jury in civil cases. The right of trial by jury most certainly is not taken away, neither is there anything in the Constitution that looks to that point; it is altogether left to the general government to dilate the subject as they please. It is in their power, by a law to be enacted for that purpose, to suit the temper and dispositions of the different states as they please. The Constitution could only establish general principles; the extending and enlarging them to particular cases will be the business of the future Congress. The appellate jurisdiction of the Supreme Court, I acknowledge, is both of the law and fact; but this by no means excludes the idea of trial by jury. The supreme court of New Jersey has original jurisdiction on both of law and fact, but it was never yet known that they presumed to try an issue of fact without the intervention of the jury. There is nothing more common than to set verdicts aside where it appears that justice has not been fairly obtained by the losing party, and new trials are ordered in the same court for the sake of substantial justice; and can there be any solid objection in extraordinary cases to give a man an opportunity of having his cause reheard before abler judges before he is forever excluded from what he thinks his just right, especially when it is to be at his own expense if he fails. I have been well informed that in Connecticut the appellate courts constantly try the facts by juries, and that there have been instances of three jury trials in one cause. The people are terrified with the idea that by means of this constitutional plan, justice will be as unattainable here, as it is in England. If we can hope to have civil justice administered here to as great perfection and with as much integrity as it is in England, I will be content. I well know the weak and vulnerable side of the British character, but depend upon it, Mr. Printer, the honorable author of these objections will not be able to fix it in their courts of civil jurisprudence. There is no part of the world wherein the laws relating to property are more judiciously and ably administered than in the courts of Great Britain. Had their conduct in every other department been equally wise and conducted with equal integrity, the good people of America would not this day been forming a government for themselves.

The next objection is that the President has no constitutional council. I have always thought that the representatives of the people, in parliament assembled, were the most constitutional council an executive department could possibly have. This council, the President must necessarily have more than one-half his time, as they are to sit every year, and I presume this intended empire will require their attendance several months in the year. During their recess, the Senate will always be at hand and must be the next

surest assistant. Indeed it is said they may become interested, venal, and oppressive. The President will either be directed by minions and favorites, or become a tool to the Senate. Suppose anything, and anything will follow. Will the proposed amendment of a separate council secure the people one iota better? Are they not to be men of like passions? If the people cannot trust their representatives, who will be so likely to serve them faithfully? Will not the expense of government be sufficient without this unnecessary addition of a separate council? Where would the fund for support of government come from, if the honorable gentleman had been vested with the sole formation of our Constitution? Instead of sixty-five members in Congress, there would, I suppose, have been at least two hundred and fifty; and instead of twenty-six Senators, there would have been at least sixty-five; besides a dozen or twenty privy councillors. The Dominion of Virginia might, in time, have afforded this expense of government; but New Jersey would have sunk under it. Have not the legislative council of the states been the only privy councillors the governor ever had before the Revolution; and in this state since that happy period, no one ever thought of proposing a separate body as the governor's privy council here, or complained of any inconveniency in the union of the two offices.

[26 December] The granting pardons by the President in cases of treason, the power in the President and Senate of making treaties which are to be regarded as the supreme law of the land, with the possibility of the whole government misconstruing the powers vested in them, granting monopolies, establishing unusual and severe punishments, and finally extending their powers beyond their limits are all raised as substantial objections to the Constitution; although every one of them will lie with equal weight against most of the state governments and indeed any government at all. Must not these, or the like powers, be vested in some man or body of men? May not this power be abused? May not every person you appoint, probably, also become venal, wicked, and oppressive? I answer: Let the people see that they are the only source of power, that their officers of every kind return at fixed periods into the mass of the people, that the governors cannot oppress the citizens without subjecting themselves to the like oppression, and that they are amenable to the laws of the community, and I dare answer for the consequence. But should it, contrary to expectation, turn out otherwise, have not the people the staff in their hands? If we must have no government till we can get one that cannot be abused, there is an end of the business at once. If President, Senate, and Congress all conspire to abuse their trust and tyrannize over the people, and there is no other remedy, the good sense and spirit of Americans will bid them to do as they did under the tyranny of Great Britain, cast off the government and try another form more agreeable to their ideas of safety.

The provisions relative to duties and ex post facto laws are so congenial to the wishes of the citizens of New Jersey that they will scarce ever consent to a constitution that shall not form some such checks with regard to them.

The next observation concerning the countenance given to slavery comes with a very ill-grace from the honorable gentleman. Surely this must be at best but an ostensible reason and casts a dangerous complexion over all the other objections. Will any citizen

of New Jersey restrain his astonishment when he is told that this honorable objector, at this instant, with this humane exception to the Constitution in his lips, holds at least seven hundred of his fellow creatures, the workmanship of the same Divine Hand that brought him into existence, in the most abject slavery? When this worthy gentleman shall have indulged every benevolent feeling of the soul and raised his character but a little lower than an Angel of Light, by liberating this host of his fellow men and teaching them to enjoy existence as a blessing, then will I join him in every exertion to further the blessed, the god-like work, and believe his sincere and honest in an objection founded in principles of mercy and justice; and if, from the love of our fellow creatures, it should be stretched a little too far, it will be glorious to err in favor of humanity.

But I confess the prospect of putting a stop to the abominable and accursed traffic, even at the period of twenty years, fills me with inexpressible joy—especially as it does not include the continuing the diabolical trade during that period, but leaves the direction of it to the discretion and humanity of the state legislatures. This sacrifice was, perhaps, due to the very disagreeable and critical situation of our Southern brethren. I doubt not but they will, from the inextinguishable flame of liberty that glows in their breasts, which all the refined cruelty and wasting desolation of a British army could not quench, use this liberty becoming the character of freemen, who have purchased freedom for themselves at so dear a rate. On the whole, although I highly esteem the patriotism, wisdom, and amiable character of the honorable objector, yet, when I consider the objections themselves, both separately and connected together with the whole system, that this system is the effect of concession among thirteen differing interests and opposite ideas of the means of good government, each showing the spirit of conciliation and mutual forbearance, and at the same time find it combined with an easy mode for redress and amendment in case the theory should disappoint when reduced to practice, I cannot but view this unexpected union in our late Convention as the effect of a divine interposition once more to save this favored country from anarchy and confusion.

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