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REMARKS on the Amendments to the Federal Constitution, proposed by the Conventions of Massachusetts, New-Hampshire, New-York, Virginia, South and North-Carolina, with the minor-ities of Pennsylvania and Maryland, by a FOREIGN SPECTATOR.

NUMBER XII.

The important right of trial by jury in all criminal cases, is insured by the constitution in the clearest and most ample expressions.—*The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed*, 3d par. 2d sect. 3d art. Even the critical accusation of treason is to be judged by *double-fellow-citizens* (if I may coin a new word) by which the prisoner will receive not only full justice, but even some degree of partiality from his own state; indeed probably too much in every case when he has acted as member of a faction. If the crime is committed on the sea, rivers, or the common territory of the union, he is tried in a place previously nominated as a general seat of justice, lest the government, by a special appointment, should take a local advantage against him. The amendments proposed on this subject, appear therefore to be quite useless. *That no person shall be tried for any crime by which he may incur an infamous punishment or loss of life, until he be first indicted by a grand jury*, 6 am. by the conventions of Massachusetts and New-Hampshire, it is clearly stipulated. *That in criminal prosecutions, no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury*, 15 and 16 am. of the Virginia and North-Carolina conventions respectively. It is all implied in the above declaration. I shall only observe on this, that although in criminal or at least capital cases it is reasonable to allow an arbitrary challenge to a certain number of jurors, without shewing any cause at all, yet a boundary must be set to this privilege, otherwise the worst malefactors might elude all trial; and it is accordingly by the common law settled at 35, being nearly three full juries.^(a) *That in all capital and criminal prosecutions, a man has a right to demand the cause and nature of his accusation; to be heard by himself and his council; to be confronted with his accusers and witnesses; to call for evidence in his favour, and a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself*, 3d am. by the min. of Pennsylvania. All these particulars are included in the usual trial by jury. By the general regulations, every action will be tried in the federal court of the district. *As to treason, no person shall be convicted of it,*

unless on the testimony of two witnesses to the same open act, or on confession in open court, 3d sect. 3d art. Consider how many treasonable acts a person may commit, and still in neither one be discovered by two witnesses, and what a jury can do even against this united testimony!

The minority of Pennsylvania would explicitly enact, *that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.* All this is universally acknowledged to be necessary for civil freedom and happiness. Nothing to the contrary is even indirectly hinted at in the federal constitution. As to particular laws, we must expect a wisdom, equity, and mildness, which ought to distinguish the chosen representatives of a people fond of liberty even to enthusiasm. No stiff rules can possibly be previously contrived; who will pretend to specify the proper amount of bail, or fines in every case?^(b) As to treason, Congress will determine its punishment by a general act in the calm of domestic peace; which cannot be altered by any sanguinary party-rage, that unfortunately may arise hereafter. By the 9th sect. 1st art. *all ex post facto laws* are expressly forbidden; thus no person can ever be punished for things, which, when done, were breaches of no law; nor suffer a greater penalty for any transgression than was fixed prior to the commission of it.

The two minorities of Pennsylvania and Maryland, by the 5th and 8th amendments respectively, anxiously guard against the oppression of general warrants, and special warrants unsupported by evidence. The latter enforces the reasons for this express declaration in the language of a pompous severity: *Congress having the power of laying excises, the horror of a free people, by which our dwelling-houses, those castles considered so sacred by the English law, will be laid open to the insolence and oppression of office; there could be no constitutional check provided, that would prove so effectual a safeguard to our citizens. General warrants, too, the great engine by which power may destroy those individuals who resist usurpation, are also hereby forbid to those magistrates, who are to administer the general government.* I began this essay with a firm resolution against a single touch of satire; but in this place, the image of Don Quixot fighting the windmill forces itself irresistably on my fancy. We must be knight-errants in liberty, to imagine the dreadful giant Congress storming our domestic castles by warrants both general and special, and searching our cellars, garrets, bed-chambers and closets by a cursed host of excise-men worse than the Prussian Death-Heads, or the Emperor's Pandours. But don't be alarmed good Americans! If I know any thing at all about you after eighteen years acquaintance, you are not such gentle doves, as to let any cormorants rifle your nests, snatch the victuals from your little ones, and tear the feathers of your beloved mates. Mercy on the Congress that would attempt it. You may safely laugh (if you don't resent the degrading affront) at the ominous contrast between the mildness of English government, and the tyranny of Congress! If English law holds the dwelling of a Wilkes sacred,¹ the federal constitution will equally consecrate yours from any violation whether English, American, or any other.

This minority [i.e., Maryland] requests by the 12th am. *that the freedom of the press be inviolably preserved, adding, in prosecutions in the federal courts for libels, the constitutional preservation of this great and fundamental right, may prove invaluable.* The minority of Pennsylvania declare by the 6th am. *that the people have a right to the freedom of speech, and of writing and publishing their sentiments; therefore the freedom of the press shall not be restrained by any law of the United States.*

As the constitution is entirely silent on this matter, no vindication is necessary; I shall, however, freely express my opinion. Freedom of the press is not only a noble right of individual

citizens, but also an excellent means to enlighten, refrain, animate, and improve the government. I would rather see the press licentious than fettered; yet an absolute permission to write any thing whatever, would be very pernicious. Without going into a subject, on which a volume might be written, let me only ask these questions: In case of a dangerous invasion, may a traitor, by seditious pamphlets, inveigle numbers to join the enemy? As to personal wrongs, shall a member of Congress be given up to the poison and poignard of scribbling assassins? When every fellow-citizen may sue for defamation, shall he be held up, as a paricide who is in foreign pay, ready on the first occasion to sell the blood of his country? *The liberty of the press must then be inviolable, but not violate the dearest interests of society.* If the first part is to be inserted in the federal constitution, the other also must. Whatever laws may be enacted on this subject, either by Congress or the state governments, cannot fail of being proper, if dictated by a spirit of rational liberty: and this spirit is the ultimate safety of every republic.

(a) *Blackstone's Commentaries*, 4 vol. page 346–7.

(b) *See Blackstone*, 295–6, 4 vol.

1. A reference to John Wilkes's 1763 trial against the use of general warrants.

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