

A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART VI.

The convention was now a week old. Let us see what progress had been made. It had been expressed as the sense of the convention that a National Government, consisting of a Supreme Legislative, Executive, and Judiciary, ought to be established; and that in the legislature there should be proportionate representation of some kind, for, although this resolution was not passed, in deference to the delegation from Delaware, it was clearly the view entertained by a majority. Also, that the legislature should consist of two branches. How the members of the second or upper branch were to be chosen was not determined. Either branch of the legislature was to have power to originate acts, and all the powers of existing Congress, with the further power of legislating whenever the state legislatures were incompetent to do so, and also the power to negative state enactments contravening the articles of Union, etc.

The question as whether the National Legislature should have the right to authorize the use of force against a delinquent state was postponed. Of course, the definite action—the settling upon the exact phraseology of, and adoption of, parts of a *Constitution*—had not begun. But the general principles upon which the constitution was to be framed were laid down—in part, at least—in the very first week, and no thoughtful observer can fail to note the immediate and radical departure from the lines on which the articles of confederation were drawn; it would have been idle to attempt to incorporate sections embodying the principles laid down as amendments to these articles—the whole scheme was generically different.

The second week began with the consideration, in Committee of the Whole, of the seventh resolution in the plan, viz. :

“That a National Executive be instituted, to be chosen by the National Legislature for the term of ——— . . . , and to be ineligible a second time; and that, besides a general

authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the confederation."

It will be noticed that the resolution calls the Executive "It," leaving the question as to whether the Executive should be one man or a dozen entirely open. There was no disagreement as to the necessity for such an Executive, and the first clause, viz. : "That a National Executive be instituted," was quickly passed. The remaining important questions in the resolution, were : 1. Should the Executive be a "unity or a plurality?" 2. By whom should it be chosen? 3. How long should it serve? 4. Should it be ineligible a second time? 5. What should be its powers? The first discussions were as to its "unity or plurality," but no immediate action was taken. Mr. Madison then introduced the subject of its powers. He moved to substitute for the words of the resolution, after "instituted," the following : "with power to carry into effect the national laws, to appoint officers in cases not otherwise provided for, and to execute such other powers not legislative nor judiciary in their nature, as may from time to time be delegated by the National Legislature." The words "and to execute such other powers," etc., were stricken out as unnecessary, leaving the office in the strictest sense an Executive one for the purpose of carrying out national laws, with no participation in the making of those laws, still less any veto upon them.

Up to this point, there is evident a realization of the necessity for an Executive, but an unwillingness to make it a strong one; the horror of monarchy, or any semblance of it, was still present in people's minds. With regard to the manner in which the Executive should be chosen—the number of its members being still undetermined—Mr. Wilson started the debate by expressing a wish that it might be by the people—a sentiment with which Mr. Sherman was not at all in sympathy. He wanted the Executive to be appointed by the National Legislature, and absolutely dependent on it. Independence of it would be "the very essence of tyranny."

Pausing for a moment to fix upon seven years as the term of service of the Executive, and to make it ineligible a second

time, the question as to how it should be chosen was resumed, and a definite proposition was submitted by Mr. Wilson. (Thus early, but unconsciously, suggesting practically the method later adopted finally :) "That the states be divided into _____ districts and that the persons qualified to vote in each district for members of the first branch of the National Legislature elect _____ members of their respective districts to be electors of the Executive Magistracy; that the said electors of the Executive Magistracy meet at _____ and they, or any _____ of them, so met, shall proceed to elect by ballot, but not out of their own body, _____ person, in whom the executive authority of the National Government shall be vested. He advocated openly and squarely the derivation of both legislative and executive from the people, so that they might be independent of each other and of the states. In other words, he was for a National Government of, for; and by, the people as a whole. And Mr. Gerry agreed with him in principle, but thought that the community was not yet ripe for so unified a government, and did not yet realize the necessity for it. Mr. Wilson's motion was lost by a vote of eight to two—only Pennsylvania and Maryland favoring it—but the suggestion to elect by state legislatures was passed over also, and the elections by the National Legislature was determined on by the same vote. A question of great importance in this connection, upon which the original resolution was silent, was now brought forward by Mr. Dickinson, viz. : the removability of the Executive. His suggestion was—and he so moved—that it should be "removable by the National Legislature, on the request of a majority of the legislatures of the different states." This brought the states as such once more upon the scene, and was expressly intended to do so, Mr. Dickinson declaring that he had no mind to abolish the state government, as some gentlemen seemed inclined to do. Messrs. Sherman and Mason crossed swords over the former's suggestion that the Executive should be removable at pleasure by the National Legislature—a monstrous proposition, justly characterized by Mason as "a violation of the fundamental principle of good government." An objection to Mr. Dickinson's idea was clearly pointed out by

Mr. Madison and Mr. Wilson, viz. : that it would give the small states the power to keep in office an unfit Executive against the wish of a great majority of the people. The mover of the resolution, representing a small state, was not terrified by his prospect, and proceeded to lay down unreservedly and fully the anti-national position. His remarks are very instructive, as summarized by Madison. He admitted the desirableness of mutual independence in the branches of the government, but declared that a "*firm executive*," could only exist in a limited monarchy. It was not compatible with republican institutions—one source of the stability of which in America, was the double-branched legislature, and the other the division into distinct states, which ought to be maintained and considerable power left to the states; "without this, and in case of a consolidation of the states into one great republic, we might read its fate in the history of smaller ones.

In other words, he favored practically the formation of a new league, and considered a republican form of government impossible for a consolidated community. But his own state alone voted for his resolution, and, instead of it, the Executive was made, as before stated, ineligible a second time "and removable on impeachment and conviction of mal-practice or neglect of duty."

Upon the question of "unity or plurality," which was now taken up, Messrs. Rutledge and C. Pinckney moved that the blank for the number should be filled with the words "one person," adding that the reasons for a single person as Executive were so conclusive that they supposed that no one would oppose the motion, whereupon Mr. Randolph at once arose and combatted it "*totis viribus*"—it savored of monarchy and of centralism. However, after a little discussion, a single Executive was decided upon, by a vote of seven to three. Realizing that it would hardly do to leave the National Legislature free to pass laws without any check, the drawers of the Virginia resolutions had provided for a "council of revision," to be composed of the Executive and a convenient number of the National Judiciary, who should have power to negative

any act of the National Legislature or a negative thereby of the act of a particular legislature. And to overcome this dissent, the act or negative must be again passed by a vote of—— members of each branch of the National Legislature. The consideration of this proposition occasioned a warm debate, precipitated by Mr. Gerry's proposed amendment leaving the judiciary out, and giving the negative, qualified as above, to the executive alone. Again the spectre of monarchy rose upon the vision of some of the delegates—the more clearly as Mr Hamilton moved to strike out the restrictions upon the negative and make it absolute. The proposition conjured up in the mind of Mr. Butler the image of an American Catiline or Cromwell. And Mr. Mason was so utterly opposed to the idea that he wanted the legislature to be wholly unrestrained, and the suggestion of Mr. Hamilton was unanimously voted down. It was now proposed to give the Executive the power to *suspend* a legislative enactment for the term of——; but this, though proposed by Mr. Butler, and seconded by Dr. Franklin, was also unanimously negatived. The blank in Mr. Gerry's motion was now filled by inserting "two-thirds," and the motion of Mr. Gerry was passed, eight to two. The subject was postponed for a day or two upon notice by Mr. Wilson and Mr. Madison that they proposed to move to reconsider and to amend Mr. Gerry's motion by restoring the provision of the Virginia resolution as to joining with the Executive a convenient number of the National Judiciary, and as such a judiciary had not as yet been determined on, it was resolved, *nem. con.*, that it be established. Two days later, on Wednesday, June 6th, Mr. Wilson accordingly moved to reconsider and amend. The advocates of the joinder of the judiciary with the Executive argued that it would be at once a support to and a check upon the Executive, and would bring to bear upon the passage of laws the wisdom of the judiciary. On the other hand, Mr. Gerry thought the duty properly executive, and that if alone he would better perform the duty, than he could if "*seduced by the sophistry (1) of the judges,*" and it seemed to a majority that the function was not properly exercisable by the judiciary, so the amendment was rejected

by a vote of eight to three. The Virginia resolutions provided that the judiciary—one supreme tribunal and one or more inferior tribunals—should be chosen by the National Legislature. This was opposed as unwise, leading to intrigue, etc. Mr. Wilson thought the executive should have the appointment, not so Mr. Rutledge, who brought the “King” upon the scene once more. The question being important, and not one to be decided off-hand, the convention contented itself with merely striking out the provision for choice by the legislature, leaving a blank to be filled subsequently.

They then agreed, apparently without debate, to the resolution “that provisions ought to be made for the admission of states, lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the National Legislature less than the whole.” Before agreeing to guarantee them a republican form of government, Mr. Patterson, of New Jersey, thought the question of representation should be decided, and moved to postpone, which was agreed to. There remained but four of the Virginia resolutions: providing respectively for the continuance of the present Congress, “until a given day after the reform of the articles of union shall be adopted;” for a provision for amending the articles of union *without the assent of the National Legislature*; for the binding of the state officials by oath to support the said articles, and for the submission of the articles to assemblies recommended by the several legislatures, to be expressly chosen by the people for the purpose of passing upon them. The first of these passed without debate, the second and third were postponed for consideration later, and the latter occasioning some debate, Mr. Madison strenuously urging the necessity of resting the new Constitution upon the “supreme authority of the people themselves.” The resolution was postponed. The convention—I use the term for convenience, though all these proceedings were in Committee of the Whole—had now entirely gone over the Virginia resolutions once, and had passed upon, or at least discussed, the whole scheme of new government as therein laid down. The debates up to

this point had been participated in by comparatively few members—less than one-third of them—and not more than a dozen had taken a really active part. Mr. Rutledge, indeed, called attention to the “shyness” about giving expression to their views, on the part of a majority of the members. All sections of the country, however, had participated, and a very fair idea of the general thought of the people can thus be gathered from the debates. It is interesting to note the changed attitude toward important questions and principles which the upheaval of the years just passed had produced. It will be remembered that in the Congress of 74–75, there were frequent protests of loyalty to the king, and of devotion to the empire—indignant denials in Congress and out of it of a design to establish an independent government. As late as July, 1775, in an address to the king, before quoted, the delegates say, that the colonists are “attached to your majesty’s person, family, and government, with all the devotion that principle and affection can inspire, connected with Great Britain by the strongest ties,” etc., etc. All their reprobation was reserved for and bestowed upon the ministry and parliament! Now, twelve years later, the very idea of monarchy is abhorrent to them; they are ludicrously afraid of any thing savoring of it in the remotest degree. One would suppose that they had become convinced that all their former woes flowed from the form of government of Great Britain—*i. e.*, a monarchy. They seem to forget that they had previously attributed them to the *Cabinet* and *Parliament*, and take no account of the personality of George III., but only of his kingship. Since their severance from Great Britain, they had suffered, as was freely stated on the floor of the convention, from an over-dose of Democracy—witness occurrences in Massachusetts and Rhode Island—and altogether they were between “the devil and the deep sea,” in endeavoring to construct a government that would embody the principle of “liberty,” of which the people at large were so greatly enamored, with that of “order,” so dear to the minds of statesmen, so essential to any government deserving the name. When we consider the different spirit in which the whole task of the convention

was approached, by its various members, not only as to the relative importance of "order" and "liberty," but as to the degree of union—oneness—it was desirable to bring about (perhaps, after all, only another phase of the same question), it is little short of marvellous that a practical agreement as to the general nature of the new government should have been reached so early; why, the convention was not yet two weeks old, and yet a whole suggested plan had been gone over, and its more important and leading features determined on! This is not the less surprising because much that was done was afterwards undone; some of it—much of it—remained practically to the end. We can all see more than traces of the "Virginia plan" in the Constitution.

Having gone over all the resolutions once, the convention proceeded to take up anew some of the provisions, with a view to their modification or omission. Mr. Rutledge moved a reconsideration of the vote by which a national judiciary of *inferior* tribunals in addition of the Supreme Court had been determined on. He argued that the state courts could perform all the functions of these tribunals, and that the establishment of inferior national tribunals would be an encroachment upon the jurisdictions of the states; let appeals be taken from the state courts to the National Supreme Court. It was answered that if there was to be a National Executive and Legislature there should be a National Judiciary, and that admiralty jurisdiction should be wholly confined to it. Of the necessity of such a judiciary, Mr. Dickinson—*mirabile dictu!*—was as strongly convinced as was Mr. Madison. But the majority was against them, and the motion of Mr. Rutledge prevailed; but in spite of a warning by Mr. Butler that the people would not accept such an innovation, and that the convention must give them the best government they would *take*—not the best it could devise—a motion was carried giving the National Legislature the *power* to appoint such tribunals without directing it to do so.

They now returned to the question of the manner in which the members of the first or lower house of the National Legislature should be chosen; and Mr. Pinckney started the ball

rolling by moving that it should be chosen by the state legislatures instead of by the people. He did not consider the people fit to choose the best men, and also thought, in line with Mr. Butler's warning, that the legislatures would hardly be likely to "promote the adoption of the new government if they were excluded from it." The interesting debate which followed gives a very clear idea of the views of the general subject which prevailed at the time, and they are less divergent than one would suppose. The two extremes which were, it must be confessed, pretty far apart, were represented by Mr. Sherman on the one hand and Mr. Read on the other. Mr. Sherman thought that unless it were proposed to abolish the state governments, election by these governments was necessary to preserve harmony between them and the National Government. He declared that the objects of the Union were few: defence against danger from abroad; against internal disputes and resort to force; treaties with foreign nations; and the regulation of commerce. These and a few lesser objects alone rendered a confederation of the states necessary. In Mr. Read's opinion, too much attachment was manifested to the state governments, and the members must look beyond their continuance. They would, of necessity, be eventually "swallowed up" by the National Government, and reduced to the mere office of electing the senate. It was worse than useless to try to patch up the old federal system. "If we do not establish a good government on new principles, we must either go to ruin or have the work to do over again." And he added his conviction that the people were not averse to a general government.

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(To be Continued.)