

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

Between the two extremes, represented by Mr. Sherman and Mr. Read, there was a variety of opinion. But in general it seems to have been considered wise, if not essential, to have one branch of the National legislature elected by the people—and the other by the States—in order, as Mr. Pierce expressed it, that the people might be represented individually and collectively. Mr. Mason stated bluntly that under the existing Confederacy, Congress represented “*States*, and not the *people* of States; their acts operate on the *States*, not on *individuals*. The case will be changed in the new plan of government. The people will be represented; they ought therefore to choose the representatives.” And Mr. Wilson, in replying to Mr. Read, said, that he saw no incompatibility between the National and State governments, provided the latter were restrained to certain local purposes. Mr. Pinckney’s motion that the State legislatures should elect the first branch of the National legislature was lost by a vote of eight to three. Coming now to the question, “How shall the second branch of the legislature be chosen? (which it will be remembered had been left undetermined when the “plan” was gone over for the first time), Mr. Dickinson—who had favored the election of the first branch by the people—at once proposed that the second branch should be chosen by the “individual legislatures”—and all through the debate which followed it seems to have been considered that the idea of proportionate representation should be carried out in this branch as well—although Mr. Pinckney suggested the dividing of the States according to size, into three classes, to be allowed, three, two, and one, representative in the second branch respectively. Mr. Mason thought the proposed method a good one—it was necessary to give to the States some voice in the National Government as a safeguard against encroachments by it. The motion was carried *nem. con.* While the members inclined, some a little in one direction, some a little in the other, there seems to

have been practical unanimity as to the desirability of a government founded upon both *State* and *people*—all apparently recognizing the wisdom of combining both; an absolutely radical departure from the underlying principle of the Articles of Confederation. A good illustration of this mental attitude is found in the apparently inconsistent motions and expressions of the individual members. As noted above, Mr. Pinckney was the mover of the resolutions giving to the *States* the power to choose the members of the second branch—the next day we find him moving to enlarge greatly the right of the National Legislature to negative State laws. His motion was “that the National Legislature should have authority to negative all laws which they shall judge to be improper.” This was certainly going pretty far—further, I imagine, than the most pronounced nationalist would go to-day. The motion was seconded by Mr. Madison, and advocated by him and Mr. Pinckney, and by Mr. Wilson and Mr. Dickinson. It was urged that experience had shown the tendency of the States to encroach on federal authority, and that they should be kept in subordination to the National Government. That either a general negative in State laws must be lodged in the National Government, or a resort to force would be the only alternative, etc. Mr. Gerry thought it would be better to resort to force than to grant such a power; and it so obviously left the smaller States at the mercy of the larger ones, that the motion was lost by a vote of seven to three.

The next question to be considered a second time, was the manner of choosing the National Executive. It will be remembered that this had been left undetermined. Mr. Gerry moved that the National Executive should be elected by the Executives of the States, whose proportion of votes should be the same with that allowed to the States in the election of the Senate.” The suggestion in the “Virginia plan” had been that the Executive should be chosen by the National legislature. Mr. Gerry’s idea was that the first branch of the National legislature being chosen by the *people*, the second by the *legislatures* of the *States*, the Executive might appropriately be chosen by the State Executives. But this was opposed by Mr. Randolph upon the ground that such an Executive

would not command the confidence of the people, and would not be likely to defend the National Government from State encroachments—and also that the small States would have little chance of the appointment being made “from within themselves.” The motion was unanimously defeated—it is impossible to say upon what grounds—as there were objections to it from both the Nationalistic and “State rights” points of view. The consideration of the clause relating to the rule of suffrage in the National legislature was then resumed on motion of Mr. Patterson. This was one of the most serious and important questions before the Convention. It must be remembered that there were three large States—Virginia, Pennsylvania and Massachusetts—and nine small ones, excluding Rhode Island. Were nine small States, under the “unit rule,” to have the power utterly to overwhelm three large ones, with a population nearly if not quite equal to their own? On the other hand, were three large States, *i. e.*, three collectivities in fixed geographical positions, to control, or at least easily hold the balance of power over, nine differently situated smaller collectivities? The second alternative was so abhorrent to Delaware, at least, that she instructed her delegation not to assent to any plan denying equal representation to each and every State.

Of course, as a matter of fact, it would be most unlikely that the three large States or the nine smaller ones, should always be grouped together. And it really would seem that in its last analysis the real question was whether the new “government” should be a league (instead of a government in any true sense), wherein of course the co-equality of its members would be preserved—or a real government wherein the people should be represented *as such*—no matter how absolutely the right of local self-government in various communities should be secured.

The apparent unfairness of either plan of suffrage led to the radical suggestion by Mr. Brearly, of New Jersey, that the map of the United States be made over again, old boundaries erased, and thirteen equal States created. But this was of course impracticable. Mr. Patterson squarely insisted on lack of power in the Convention to do more than recommend alterations of or amendments to the Articles of Confederation,

and that nothing inconsistent with the principles of those articles could with propriety be considered. New Jersey would never consent to the plan proposed—she would be “swallowed up.” Issue was squarely joined with him by Mr. Wilson, who hoped that at least some of the States would combine for their safety in a government founded on the people. “If New Jersey will not give up her sovereignty, it is vain to talk of government.” And Mr. Williamson likened States to counties within the same State, arguing that proportionate representation being admittedly proper in the case of counties, it was equally so in the case of States. Mr. King and Mr. Wilson moved “that the right of suffrage in the first branch of the National Legislature ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation.” And this motion finally prevailed by a vote of seven to three—Maryland being divided. The “noes” were: New York, New Jersey and Delaware. Now, this grouping I consider quite significant. New York had been a troublesome member of the confederation; had shown a most “unfederal” disposition, as before noted, and two of her delegates, Yates and Lansing, were pronounced and determined anti-nationalists; they could outvote Hamilton, and generally did so. New Jersey was represented by Mr. Patterson, of the same stamp, and Delaware, as we know, was from the first opposed to any scheme for proportionate representation. Never was an issue more squarely put before a convention than was this one, and yet the decided majority was found to be against the views of Mr. Patterson, *and it continued to be so to the end*. Having determined that there should be some equitable basis, the question was, what should that basis be? In answer to this question Mr. Rutledge, seconded by Mr. Butler, moved that the representation be “according to the quotas of contribution.” This was postponed in order to consider a motion by Mr. Wilson, seconded by Mr. Pinckney, that it be “in proportion to the whole number of white and other free citizens and inhabitants of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description,

except Indians not paying taxes, in each State." It was explained that this was the existing rule for apportioning quotas of revenue in the States.

This motion prevailed in spite of a suggestion by Mr. Gerry, that you might as well make horses and cattle the basis of representation in the North as slaves in the South. The vote was ten to two, New Jersey and Delaware, of course, declining to countenance proportionate representation of every kind. It was now moved by Mr. Sherman that in the second branch each State should have one vote, and Connecticut, Maryland and New York joined Delaware and New Jersey in voting for this motion; but the other six States were "contrary-minded" and the motion was lost, and immediately afterwards a motion that the representation in the second branch should be according to the same ratio as in the first branch was carried, the States dividing as before.

The next two days were consumed in considering again the remaining resolutions in the "plan," without anything of especial interest in our immediate inquiry being said or done, and on June 13 the committee of the whole was ready to report to the Convention. I propose now, to juxtapose the various resolutions as originally drawn in the "Virginia plan" and the corresponding resolutions in this report, calling the former "A" and the latter "B."

1. A. *Resolved*, That the articles of confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution, namely, "common defence, security of liberty and general welfare."

B. *Resolved*, That a National government ought to be established, consisting of a supreme legislature, executive and judiciary.

2. A. *Resolved*, That the National Legislature ought to consist of two branches.

B. The same.

3. A. *Resolved*, That the members of the first branch of the National Legislature ought to be elected by the people of the several States every _____, for the term of _____; to be of the age of _____ years at least; to receive liberal stipends, by which they may be compensated for the devotion

of their time to the public service ; to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch during the term of service, and for the space of ———— after its expiration ; to be incapable of re-election for the space of ————, after the expiration of their term of service, and to be subject to recall.

B. *Resolved*, That the members of the first branch of the National Legislature ought to be elected by the people of the several States for the term of three years ; to receive fixed stipends by which they may be compensated for the devotion of their time to the public service, to be paid out of the National Treasury ; to be ineligible to any office established by a particular State, or under the authority of the United States (except those peculiarly belonging to the functions of the first branch), during the term of service, and, under the National Government, for the space of one year after its expiration.

4. A. *Resolved*, That the members of the second branch of the National Legislature ought to be elected, by those of the first, out of a proper number of persons nominated by the individual legislatures ; to be of the age of ——— years at least ; to hold their offices for a term sufficient to insure their independency ; to receive liberal stipends, by which they may be compensated for the devotion of their time to the public service ; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the second branch, during the term of service, and for the space of ———— after the expiration thereof.

B. *Resolved*, That the members of the second branch of the National Legislature ought to be chosen by the individual legislatures ; to be of the age of thirty years at least ; to hold their offices for a term sufficient to insure their independence, namely, seven years ; to receive fixed stipends by which they may be compensated for the devotion of their time to the public service, to be paid out of the National Treasury ; to be ineligible to any office established by a particular State, or under the authority of the United States (except those pecu-

liarily belonging to the function of the second branch), during the term of service, and, under the National Government, for the space of one year after its expiration.

5. A. *Resolved*, That each branch ought to possess the right of originating acts.

B. The same.

6. A. (In the "plan" this is a continuation of the last resolution.) That the National Legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States contravening, in the opinion of the National Legislature, the Articles of Union, or any treaty subsisting under the authority of the Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.

B. *Resolved*, That the National Legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation; and moreover, to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States, contravening, in the opinion of the National Legislature, the Articles of Union or any treaty subsisting under the authority of the Union.

7. A. *Resolved*, That the rights of suffrage in the National Legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as one or the other rule may seem best in different cases.

B. *Resolved*, That the rights of suffrage in the first branch of the National Legislature ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation; namely, in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all

other persons, not comprehended in the foregoing description, except Indians not paying taxes, in each State.

Resolved, That the right of suffrage in the second branch of the National Legislature ought to be according to the rule established for the first.

8. A. *Resolved*, That a National Executive be instituted; to be chosen by the National Legislature for the term of—; to receive punctually, at stated times, a fixed compensation for the service rendered, in which no increase or diminution shall be made so as to affect the magistracy existing at the time of increase or diminution; 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.

B. *Resolved*, That a National Executive be instituted, to consist of a single person, to be chosen by the National Legislature, for the term of seven years, with power to carry into execution the national laws, to appoint to offices in cases not otherwise provided for, to be ineligible a second time, and to be removable on impeachment and conviction of malpractices or neglect of duty; to receive a fixed stipend by which he may be compensated for the devotion of his time to the public service, to be paid out of the National Treasury.

9. A. *Resolved*, That the Executive, and a convenient number of the national judiciary, ought to compose a council of revision, with authority to examine every act of the National Legislature before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the National Legislature be again passed, or that of a particular legislature be again negated by — of the members of each branch.

B. *Resolved*, That the National Executive shall have a right to negative any legislative act which shall not be afterward passed by two-thirds of each branch of the National Legislature.

10. A. *Resolved*, That a national judiciary be established, to consist of one or more supreme tribunals and of inferior tribunals, to be chosen by the National Legislature, to hold

their offices during good behavior, and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine, in the first instance, and of the supreme tribunal to hear and determine in the *dernier resort*, all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners, or citizens of other States, applying to such jurisdictions, may be interested, or which respect the collection of the national revenue, impeachment of any national officer, and questions which may involve the national peace and harmony.

B. *Resolved*, That a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the National Legislature, to hold their offices during good behavior, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution.

Resolved, That the National Legislature be empowered to appoint inferior tribunals.

Resolved, That the jurisdiction of the national tribunals shall extend to all cases with respect to the collection of the national revenue, impeachments of any national officer and questions which involve the national peace and harmony.

11. A. *Resolved*, That provision 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.

B. The same.

12. A. *Resolved*, That provision ought to be made for the continuance of Congress, and their authorities and privileges, until a given day after the reform of the articles of union shall be adopted, and for the completion of all their engagements.

B. The same.

13. A. *Resolved*, That a republican government, and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State.

B. *Resolved*, That a republican constitution, and its existing laws, ought to be guaranteed to each State by the United States.

14. A. *Resolved*, That provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary; and that the assent of the National Legislature ought not to be required thereto.

B. *Resolved*, That provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary.

15. A. *Resolved*, That the legislative, executive, and judiciary powers, within the several States, ought to be bound by oath to support the Articles of Union.

B. The same.

16. A. *Resolved*, That the amendments which shall be offered to the Confederation by the Convention, ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the general legislatures, to be expressly chosen by the people, to consider and decide thereon.

B. The same.

This juxtaposition brings out very clearly the result of the deliberations of the Convention in Committee of the Whole, during the three weeks which had elapsed since its organization. It is at once apparent that the Report is in complete accord with the general thought of the Virginia plan. The general scheme for the formation of an actual as well as nominal national government, with its component parts, is retained in its entirety. In six instances the provisions of the "Plan" and of the Report are identical. Many of the changes are simply the filling of blanks in the Plan. There are, however, several important changes, which are worthy of remark.

First. The initial resolution of the Report comes out strongly in favor of the institution of a National Government—not so that of the plan.

Second. The Plan provides that the members of the National Legislature shall be subject to recall. The Report omits this provision.

Third. There is a radical difference between the provisions of the Plan and of the Report as to the manner in which the members of the second branch of the National Legislature shall be chosen.

Fourth. The Report omits the provision of the Plan giving the National Legislature power to use force against a member of the Union failing to do its duty.

Fifth. An important blank in the Plan as to the "unity or plurality" of the National Executive is filled in the Report by a provision for "unity."

Sixth. The veto power given by the Plan to the executive and a part of the judiciary is given by the Report to the executive alone.

Seventh. The Plan provides for supreme and inferior tribunals. The Report for one Supreme Court, with *power* in the National Legislature to appoint inferior tribunals. And it curtails the jurisdiction of the judiciary as set forth in the plan.

Eighth. The Plan provides for a guarantee by the United States of the territory of a State; the Report does not.

Ninth. The Plan provides that the consent of the National Legislature shall not be required to an amendment of the Articles of Union. The Report omits this provision.

Of course the Report is merely the conclusions of the Committee of the Whole, as to the general lines upon which the new government or constitution should be founded. It would not have served as a constitution, and was not suggested as such; in fact much of its language directly points to further action. But even as a general scheme it was utterly abhorrent to certain members of the Convention, and by no means satisfactory to quite a number of them. At the time the Report was presented it was known that a plan on entirely different lines was in preparation; and its consideration was postponed in order that this new plan might be submitted for consideration.

Mr. Patterson, of New Jersey, who submitted the plan, generally known as the "New Jersey" plan, stated at the outset that it was different in principle from the Virginia plan.

The new plan was presented in the form of nine resolutions. I regret the necessity of setting them out *verbatim*; but only in this way can the debates which followed be made fully intelligible, and a satisfactory comparison of the two "Plans" and the "Report" be made. The New Jersey plan was as follows:

1. *Resolved*, That the Articles of Confederation ought to be so revised, corrected and enlarged, as to render the Federal Constitution adequate to the exigencies of government and the preservation of the Union.

2. *Resolved*, That, in addition to the powers vested in the United States in Congress by the present existing Articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandise of foreign growth or manufacture, imported into any part of the United States; by stamps on paper, vellum or parchment; and by a postage on all letters or packages passing through the general postoffice, to be applied to such federal purposes as they shall deem proper and expedient; to make rules and regulations for the collection thereof, and the same, from time to time, to alter and amend in such manner as they shall think proper; to pass acts for the regulation of trade and commerce, as well with foreign nations as with each other, provided that all punishments, fines, forfeitures and penalties to be incurred for contravening such acts, rules and regulations, shall be adjudged by the common law judiciaries of the State in which any offence contrary to the true intent and meaning of such acts, rules and regulations shall have been committed or perpetrated, with liberty of commencing in the first instance all suits and prosecutions for that purpose in the superior common law judiciary in such State, subject, nevertheless, for the correction of all errors, both in law and fact, in rendering judgment to an appeal to the judiciary of the United States.

3. *Resolved*, That whenever requisitions shall be necessary, instead of the rule for making requisitions mentioned in the Articles of Confederation, the United States in Congress be authorized to make such requisitions in proportion to the whole number of white and other free citizens and inhabit-

ants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; that, if such requisitions be not complied with in the time specified therein, to direct the collections thereof in the non-complying States [this sentence is faulty, but is thus given in Elliot's Debates], and for that purpose to devise and pass acts directing and authorizing the same; provided, that none of the powers hereby vested in the United States in Congress shall be exercised without the consent of at least — States; and in that proportion, if the number of confederated States should hereafter be increased or diminished.

4. *Resolved*, That the United States in Congress be authorized to elect a Federal Executive, to consist of — persons; to continue in office for the term of — years; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made, so as to affect the persons composing the Executive at the time of such increase or diminution; to be paid out of the Federal Treasury; to be incapable of holding any other office or appointment during their term of service, and for — years thereafter; to be ineligible a second time, and removable by Congress, on application by a majority of the Executives of the several States; that the Executives, besides their general authority to execute the federal acts, ought to appoint all federal officers not otherwise provided for, and to direct all military operations; provided, that none of the persons composing the Federal Executive shall, on any occasion, take command of any troop, so as personally to conduct any military enterprise, as general, or in any other capacity.

5. *Resolved*, That a Federal Judiciary be established, to consist of a Supreme Tribunal, the judges of which to be appointed by the Executive, and to hold their offices during good behavior; to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the judiciary so established shall have authority to hear and

determine, in the first instance, on all impeachments of federal officers, and, by way of appeal, in the *dernier resort*, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise in any of the acts for the regulation of trade, or the collection of the federal revenue: that none of the judiciary shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during the term of their service, or for — thereafter.

6. *Resolved*, That all the Acts of the United States in Congress, made by virtue and in pursuance of the powers hereby, and by the Articles of Confederation, vested in them, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, so far forth as those acts or treaties shall relate to the said States or their citizens; and that the judiciary of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding; and that if any State, or any body of men in any State, shall oppose or prevent the carrying into execution such acts or treaties, the Federal Executive shall be authorized to call forth the powers of the confederated States, or so much thereof as may be necessary, to enforce and compel an obedience to such acts, or an observance of such treaties.

7. *Resolved*, That provision be made for the admission of new States into the Union.

8. *Resolved*, That the rule for naturalization ought to be the same in every State.

9. *Resolved*, That a citizen of one State, committing an offence in another State of the Union, shall be deemed guilty of the same offence as if it had been committed by a citizen of the State in which the offence was committed.

The submission of this plan may be said to begin the second period of the Convention's work. It was submitted in Convention on June 15, and an immediate adjournment followed upon the reading of it.

Lucius S. Landreth.