

Gazette of the United States.

A NATIONAL PAPER, PUBLISHED WEDNESDAYS AND SATURDAYS BY JOHN FENNO, No. 34, NORTH FIFTH-STREET, PHILADELPHIA.

[No. 130 of Vol. IV.]

WEDNESDAY, AUGUST 28, 1793.

[Whole No. 452.]

FOR THE GAZETTE.

MR. FENNO,

Please to give a place in your Gazette to the following observations. The Printers who may have republished the pieces, signed PACIFICUS, are also requested to re-publish these, and will no doubt be candid enough to do so.

NUMBER I.

[Concluded, from our last.]

ANOTHER important inference to be noted is, that the powers of making war and treaty being substantially of a legislative, not an executive nature, the rule of interpreting exceptions strictly, must narrow instead of enlarging executive pretensions on those subjects.

3. It remains to be enquired whether there be any thing in the constitution itself which shews that the powers of making war and peace are considered as of an executive nature, and as comprehended within a general grant of executive power.

It will not be pretended that this appears from any direct position to be found in the instrument. If it were deducible from any particular expressions it may be presumed that the publication would have saved us the trouble of the research.

Does the doctrine then result from the actual distribution of powers among the several branches of the government? Or from any fair analogy between the powers of war and treaty and the enumerated powers vested in the executive alone?

Let us examine. In the general distribution of powers, we find that of declaring war expressly vested in the Congress, where every other legislative power is declared to be vested, and without any other qualification than what is common to every other legislative act. The constitutional idea of this power would seem then clearly to be, that it is of a legislative and not an executive nature.

This conclusion becomes irresistible, when it is recollected, that the constitution cannot be supposed to have placed either any power legislative in its nature, entirely among executive powers, or any power executive in its nature, entirely among legislative powers, without changing the constitution, with that kind of intermixture and consolidation of different powers, which would violate a fundamental principle in the organization of free governments. If it were not unnecessary to enlarge on this topic here, it could be shewn, that the constitution was originally vindicated, and has been constantly expounded, with a disavowal of any such intermixture.

The power of treaties is vested jointly in the President and the Senate, which is a branch of the legislature. From this arrangement merely, there can be no inference that would necessarily exclude the power from the executive class: since the senate is joined with the President in another power, that of appointing to offices, which as far as relate to executive offices at least, is considered as of an executive nature. Yet on the other hand, there are sufficient indications that the power of treaties is regarded by the constitution as material-ly different from mere executive power, and as having more affinity to the legislative than to the executive character.

One circumstance indicating this, is the constitutional regulation under which the senate give their consent in the case of treaties. In all other cases the consent of the body is expressed by a majority of voices. In this particular case, a concurrence of two thirds at least is made necessary, as a substitute or compensation for the other branch of the legislature, which on certain occasions, could not be conveniently a party to the transaction.

But the conclusive circumstance is, that treaties when formed according to the constitutional mode, are considered to have the force and operation of laws, and are to be a rule for the courts in controversies between man and man, as much as any other laws. They are even emphatically declared by the constitution to be "the supreme law of the land."

So far the argument from the constitution is precisely in opposition to the doctrine. As little will be gained in its favour from a comparison of the two powers, with those particularly vested in the President alone.

As there are but few it will be most satisfactory to review them one by one.

"The President shall be commander in chief of the army and navy of the United States, and of the militia when called into the actual service of the United States."

There can be no relation worth examining between this power and the general power of making treaties. And instead of being analogous to the power of declaring war, it affords a striking illustration of the incompatibility of the two powers in the same hands. Those who are to conduct a war cannot in the nature of things, be proper or safe judges, who heretofore ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the

purse, or the power of executing from the power of enacting laws.

"He may require the opinion in writing of the principal officers in each of the executive departments upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in case of impeachment" these powers can have nothing to do with the subject.

"The President shall have power to fill up vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of the next session" The same remark is applicable to this power, as also to that of "receiving ambassadors, other public ministers and consuls" the particular use attempted to be made of this last power will be considered in another place.

"He shall take care that the laws shall be faithfully executed and shall commission all officers of the United States." To see the laws faithfully executed constitutes the essence of the executive authority. But what relation has it to the power of making treaties and war, that is, of determining what the laws shall be with regard to other nations? No other certainly than what subsists between the powers of executing and enacting laws; no other, consequently, than what forbids a coalition of the powers in the same department.

I pass over the few other specified functions assigned to the President, such as that of convening of the legislature, &c. &c. which cannot be drawn into the present question.

It may be proper however to take notice of the power of removal from office, which appears to have been adjudged to the President by the laws establishing the executive departments; and which the writer has endeavoured to press into his service. To justify any favourable inference from this case, it must be shewn, that the powers of war and treaties are of a kindred nature to the power of removal, or at least are equally within a grant of executive power. Nothing of this sort has been attempted, nor probably will be attempted. Nothing can in truth be clearer, than that no analogy, or shade of analogy, can be traced between a power in the supreme officer responsible for the faithful execution of the laws, to displace a subaltern officer employed in the execution of the laws; and a power to make treaties, and to declare war, such as these have been found to be in their nature, their operation, and their consequences.

Thus it appears that by whatever standard we try this doctrine, it must be condemned as no less vicious in theory than it would be dangerous in practice. It is countenanced neither by the writers on law; nor by the nature of the powers themselves; nor by any general arrangements or particular expressions, or plausible analogies, to be found in the constitution.

Whence then can the writer have borrowed it?

There is but one answer to this question. The power of making treaties and the power of declaring war, are royal prerogatives in the British government, and are accordingly treated as Executive prerogatives by British commentators.

We shall be the more confirmed in the necessity of this solution of the problem, by looking back to the era of the constitution, and satisfying ourselves that the writer could not have been misled by the doctrines maintained by our own commentators on our own government. That I may not ramble beyond prescribed limits, I shall content myself with an extract from a work which entered into a systematic explanation and defence of the constitution, and to which there has frequently been ascribed some influence in conciliating the public assent to the government in the form proposed. Three circumstances conspire in giving weight to this contemporary exposition. It was made at a time when no application to persons or measures could bias: The opinion given was not transiently mentioned, but formally and critically elucidated: It related to a point in the constitution which must consequently have been viewed as of importance in the public mind. The passage relates to the power of making treaties; that of declaring war, being arranged with such obvious propriety among the legislative powers, as to be passed over without particular discussion.

"Tho' several writers on the subject of government place that power of making treaties in the class of Executive authorities, yet this is evidently an arbitrary disposition. For if we attend carefully, to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority, is to enact laws; or in other words, to prescribe rules for the regulation of the society. While the execution of the laws and the employment of the common strength, either for this purpose, or for the common defence, seem to comprize all the functions of the Executive magistrature. The power of making treaties is plainly neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enactment of new ones, and still less to an

exercise of the common strength. Its objects are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong properly neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the executive as the most fit agent in those transactions; whilst the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a part of the legislative body, in the office of making them." Federalist vol. 2. p. 273.

It will not fail to be remarked on this commentary, that whatever doubts may be started as to the correctness of its reasoning against the legislative nature of the power to make treaties: it is clear consistent and confident, in deciding that the power is plainly and evidently not an executive power.

HELVIDIUS.

FOR THE GAZETTE.

To Mr. J. D. W. member of the Literary Society in this city, and author of an essay published in the National Gazette, of 23d. August 1793.

SIR, HAVING perceived in the National Gazette of the 21st inst. an essay, said to have been read in this city, before a certain society, calling itself literary, I was much induced to give it an attentive perusal, not for the purpose of criticising on its merit, but for the sake of deriving instruction and entertainment.

When a political essay is handed to the public, through the channel of a gazette, we have a right to expect that the author has maturely considered all the opinions of which he thus publicly avows himself the patron; and he must expect that sentiments sent forth in this way, will meet less indulgence than when delivered before an assembly of inmates and companions. Observing, however, a degree of "republican moderation," (as the author seems to recommend) I shall examine a few of his doctrines.— Indeed from the manner in which this essay meets the public eye, the author will not, it is hoped, be displeas'd with a few strictures upon the propriety of his composition, and the accuracy of his language. This society, of which he is a member, is an institution designed for the acquisition of literature in general—in particular for improvement in composition.

Whether this essay is intended as a specimen of the author's talent in writing, or as an evidence of his acquisitions in political knowledge and information, I am at a loss to decide. Nor am I less incapable of accounting for the motives, which could induce the editor of the National Gazette to admit it to the honors of his press. Better far had it been for him to have exercised a parental tenderness towards this child of a misguided judgment, by refusing it a public exposure, than to have cast it forth, with all its nakedness and poverty, to meet the looks of an insulted public.

The introductory sentences to this notable essay are, perhaps, as worthy of remark as any in the whole production. We are told that "It must afford singular satisfaction to the friends of freedom to contemplate the havoc, which, since the American revolution, has been made amongst those numerous customs and prejudices, which swayed the scepter over our aristocratic and oppressed ancestors."

That the "contemplation of havoc" by the friends of freedom in any country and upon any occasion, can "afford matter of singular satisfaction" is a suggestion which may be novel, but is not therefore the less absurd. To make havoc among "customs and prejudices" too, is a manner of getting rid of this class of enemies which never before occurred to my mind. It is a new invention in the art of political warfare, for which the discoverer doubtless deserves credit, supposing him perfectly competent to explain its utility; but why should we suspect the author's ability to define the operations of his new invented engine, since he tells us it is to extirpate tyrants and despots, who long swayed the scepter over our aristocratic and oppressed ancestors. Dear departed shades, we will weep for the wrongs ye suffered while here on earth, but we will also execrate your memories, that ye were aristocrats!

Our author proceeds—"It is however an equal cause of regret, that so many opinions, usages and laws still exist in our country, which can be justified only by the circumcribed reasonings of a Burke, and which suffered to remain unhandl'd, may gather increasing strength, and ultimately open the sluices for an inlet of political heresies, that may inundate our country, and involve our citizens in ruin."

Now let me ask this profound, erudite, member of the literary society, whose discriminative faculties seem so acute—What opinions, usages and laws, still exist in our country, that are so replete with error, mischief, and ruin? Since when have they existed—and when ought they to have been exploded? whether Mr. Burke has lately confined himself to any particular limits of reasoning? and whether lastly, a pert unlettered boy is more capable of defining the nature of laws than the most accomplished scholar, Europe now can boast? I shall hardly attempt to follow our author through his lengthy

essay, but shall only subjoin a reflection or two, that must naturally suggest themselves, upon a consideration of the scope and execution of the whole piece. It appears to have been first exhibited before a society of young men in this city;—had it gone no farther, there would have been no complaint of the author's arrogance, however his brethren might have judged of his merit as a scholar. But to exhibit a motley collection of newfangled commonplaces, and I may add thoughtless opinions upon political principles under the assumed importance of modern truth and orthodoxy, discovers no small deficiency of judgment in a youth; one too, who comes forward as a censor of manners, a reprover of customs, a corrector of political heresies—and finally, an improver of laws, politics, and jurisprudence in general. It has become fashionable of late for young men to have a complete system of political faith, long before they are initiated into the first principles of law and government; an intire set of canonical articles, as a kind of preface to their political testament. The essay that occasions these strictures is in the hackneyed style of modern declamation; is incorrect in its language, and possesses few beauties of composition. The terms aristocracy, monarchy, despotism, as contradistinguished from democracy, which in the writer's interpretation is but another name for republicanism, are perfectly at command when he wishes to vent an execration, and he often makes use of them for no other apparent reason, than because he has heard they are frightful things.

These remarks may have the appearance of illiberal severity; but their sole intention is to induce the author of the essay that gave rise to them, to re-examine his opinions, and in future to be more careful how he hazards a publication upon political subjects, which if not the most difficult are at least the most important themes, which can engage the pen of the best informed statesmen. A youth therefore should enter the lists with timidity and diffidence, endeavoring rather to persuade his readers, than impose his sentiments upon the public.

S E N E X.

Philadelphia, 23d August.

FROM THE WESTERN STAR.

IT has often been observed, and for a long time not doubted, by many, that the object of that horde (whose employment has been ever since the adoption of the federal Government, to abuse and vilify its officers, and all acting in authority under it, and whose slander has at length been vented even against the exalted virtues and unfeigned patriotism of a WASHINGTON) was to involve this country in distress and confusion.—If there are yet those whose candor may have led them to believe that the Fraternity of American Jacobins are incited by honest motives, to prefer their incendiary clamours and complaints, weekly, to the public, the decision of a Pennsylvania jury, published in our paper of this week, under the Philadelphia head, must remove the veil, and convince them that their candor has been extended towards objects in every sense highly unworthy of it.—Contrary to the unanimous opinion of the Judges, and directly in opposition to the clearly defined, and particularly pointed out, true intent and meaning of the laws of the land, an inhabitant of the United States, who had voluntarily transgressed by enlisting on board an armed privateer, and against whom a bill of indictment had been found, for the offence, has been declared not guilty, by a jury.—The right of trial by jury, is a privilege that will be always held dear by all who wish to hold their lives, their liberties, and their possessions, upon a foundation more safe and secure than the precarious tenure of assumptive and arbitrary power. But of what avail is this sacred bulwark of freedom, if law and evidence, which should ever be the ground-work of a jury's verdict, are made to give place to caprice and will? 'Tis a bubble, 'tis a shadow, 'tis nothing but a name, the sound of which, though it be grateful to the ear, yet the thing itself, in its operation, may be made an engine more destructive to the sacred rights of the community, than letters de cachet and a Bastille.— But the door is now opened, we shall probably be told, for the exercise of gratitude to France—Piracy upon the high seas, we may hear, will secure and establish Gallic freedom:—this will be animating doctrine to the pilferers of private property, who may now enlist under the banners of a King, and traverse the ocean in search of plunder, and be dignified with the appellation of defenders of the rights of mankind—patriotic freemen, fighting in the cause of France and human nature. But whatever degree of patriotism may actuate such patriots in their patriotic pursuits, it is most probable that a large majority of the community will wish them the patriotic punishment of a halter.—Let those who really wish to risk their lives in defence of that heaven-born principle which first roused the enlightened sons of America to oppose the strides of unjust power, take passage for the invaded territory of our allies, and, under the heroes of France, gather laurels in fighting the battles of freedom: but let not the name of defenders of liberty be bestowed on those who seek protection under the shadow of pretended right, for the purpose of robbing industry of