Gazette of the United States.

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

[No. 131 of Vol. IV.] SATURDAY, AUGUST 31, 1793. [Whole No. 453.]

FOR THE GAZETTE.

No. II.

THE doctrine which has been examined, is pregnant with inferences and conſequences againſt which no ramparts in the conſtitution could defend the public liberty, or ſcarcely the forms of Republican government. Were it once eſtabliſhed that the powers of war and treaty are in their nature executive; that ſo far as they are not by ſtrict conſtruction transferred to the legiſlature, they actually belong to the executive; that of courſe all powers not leſs executive in their nature than thoſe powers, if not granted to the legiſlature may be claimed by the executive: if granted, are to be taken *ſtrictly*, with a reſiduary right in the executive; or, as will hereafter appear, perhaps claimed as a concurrent right by the executive; and no citizen could any longer gueſs at the character of the government under which he lives; the moſt penetrating juriſt would be unable to ſcan the extent of conſtructive prerogative.

Leaving however to the leiſure of the reader deductions which the author having omitted might not chuſe to own, I proceed to the examination of one, with which that liberty cannot be taken.

"However true it may be (ſays he) that the right of the legiſlature to declare war *includes the right of judging* whether the legiſlature be under obligations to make war or not, it will not follow that the executive is *in any caſe* excluded from a *ſimilar right* of judging in the execution of its own functions."

A material error of the writer in this application of his doctrine lies in his ſhrinking from its regular conſequences. Had he ſtuck to his principle in its full extent, and reaſoned from it without reſtraint, he would only have had to defend himſelf againſt his opponents. By yielding the great point, that the right to declare war, *tho' to be taken ſtrictly*, includes the right to judge whether the nation be under obligation to make war or not, he is compelled to defend his argument not only againſt others but againſt himſelf alſo. Obſerve how he ſtruggles in his own toils.

He had before admitted that the right to declare war is veſted in the legiſlature. He here admits that the right to declare war includes the right to judge whether the United States be obliged to declare war or not. Can the inference be avoided, that the executive inſtead of having a ſimilar right to judge, is as much excluded from the right to judge as from the right to declare?

If the right to declare war be an exception out of the general grant to the executive power; every thing included in the right muſt be included in the exception; and being included in the exception, is excluded from the grant.

He cannot diſentangle himſelf by conſidering the right of the executive to judge as *concurrent* with that of the legiſlature. For if the executive have a concurrent right to judge, and the right to judge be included in (it is in fact the very eſſence of) the right to declare, he muſt go on and ſay that the executive has a concurrent right alſo to declare. And then what will he do with his other admiſſion, that the power to declare is an exception out of the executive power.

Perhaps an attempt may be made to creep out of the difficulty through the words "in the execution of its functions." Here again he muſt equally fail.

Whatever difficulties may ariſe in defining the executive authority in particular caſes, there can be none in deciding on an authority clearly placed by the conſtitution in another department. In this caſe the conſtitution has decided what ſhall not be deemed an executive authority; tho' it may not have clearly decided in every caſe what ſhall be ſo deemed. The declaring of war is expreſsly made a legiſlative function. The judging of the obligations to make war, is admitted to be included as a legiſlative function. Whenever then a queſtion occurs whether war ſhall be declared, or whether public ſtipulations require it, the queſtion neceſſarily belongs to the department to which thoſe functions belong—And no other department can be *in the execution of its proper functions*, if it ſhould undertake to decide ſuch a queſtion.

There can be no refuge againſt this concluſion, but in the pretext of a *concurrent* right in both departments to judge of the obligations to declare war, and this muſt be intended by the writer when he ſays, "it will not follow that the executive is excluded *in any caſe* from a *ſimilar right* of judging &c."

As this is the ground on which the ultimate defence is to be made, and which muſt either be maintained, or the works erected on it, demoliſhed; it will be proper to give its ſtrength a fair trial.

It has been ſeen that the idea of a *concurrent* right is at variance with other ideas advanced or admitted by the writer. Laying aſide for the preſent that conſideration, it ſeems impoſſible to avoid concluding that if the executive has a concurrent right with the legiſlature to judge of obligations to declare war, and the right to judge be eſſentially included in the right to declare, it muſt have the ſame right to declare as it has to judge; & by another analogy, the ſame right to judge of other cauſes of war, as of the particular cauſe found in a public ſtipulation. So that whenever the executive *in the courſe of its functions* ſhall meet with theſe caſes, it muſt either infer an equal authority in all, or acknowledge its want of authority in any.

If any doubt can remain, or rather if any doubt could ever have ariſen, which ſide of the alternative ought to be embraced, it can be with thoſe only who overlook or reject ſome of the moſt obvious and eſſential truths in political ſcience.

The power to judge of the cauſes of war as involved in the power to declare war, is expreſsly veſted where all other legiſlative powers are veſted, that is, in the Congreſs of the United States. It is conſequently determined by the conſtitution to be a *Legiſlative power*. Now omitting the enquiry here in what reſpects a compound power may be partly legiſlative, and partly executive, and accordingly veſted *partly* in the one, and *partly* in the other department, or *jointly* in both; a remark uſed on another occaſion is equally concluſive on this, that the ſame power, cannot belong *in the whole*, to *both* departments, or be properly ſo veſted as to operate *ſeparately* in *each*. Still more evident is it, that the ſame *ſpecific function or act*, cannot poſſibly belong to the *two* departments and be *ſeperately* exerciſeable by *each*.

Legiſlative power may be *concurrently* veſted in different legiſlative bodies. Executive powers may be concurrently veſted in different executive magiſtrates. In legiſlative acts the executive may have a participation, as in the qualified negative on the laws. In executive acts, the legiſlature, or at leaſt a branch of it, may participate, as in the appointment to offices.—Arrangements of this ſort are familiar in theory, as well as in practice. But an independent exerciſe of an *executive act*, by the legiſlature *alone*, or of a *legiſlative act* by the executive *alone*, one or other of which muſt happen in every caſe where the ſame act is exerciſeable by each, and the latter of which would happen in the caſe urged by the writer, is contrary to one of the firſt and beſt maxims of a well organized government, and ought never to be founded in a forced conſtruction, much leſs in oppoſition to a fair one. Inſtances, it is true, may be diſcovered among ourſelves where this maxim, has not been faithfully purſued; but being generally acknowledged to be errors, they confirm, rather than impeach the truth and value of the maxim.

It may happen alſo that different independent departments, the legiſlative and executive, for example, may in the exerciſe of their functions, interpret the conſtitution differently, and thence lay claim each to the ſame power. This difference of opinion is an inconvenience not entirely to be avoided. It reſults from what may be called, if it be thought fit, a *concurrent* right to expound the conſtitution. But *this ſpecies* of concurrence is obviouſly and radically different from that in queſtion. The former ſuppoſes the conſtitution to have given the power to one department only; and the doubt to be to which it has been given. The latter ſuppoſes it to belong to both; and that it may be exerciſed by either or both, according to the courſe of exigencies.

A concurrent authority in two independent departments to perform the ſame function with reſpect to the ſame thing, would be as awkward in practice, as it is unnatural in theory.

If the legiſlature and executive have both a right to judge of the obligations to make war or not, it muſt ſometimes happen, though not at preſent, that they will judge differently.—The executive may proceed to conſider the queſtion to-day, may determine that the United States are not bound to take part in a war, and *in the execution of its functions* proclaim that determination to all the world. To-morrow, the legiſlature may follow in the conſideration of the ſame ſubject, may determine that the obligations impoſe war on the United States, and *in the execution of its functions*, enter into a *conſtitutional declaration*, expreſsly contradicting the *conſtitutional proclamation*.

In what light does this preſent the conſtitution to the people who eſtabliſhed it? In what light would it preſent to the world, a nation, thus ſpeaking, thro' two different organs, equally conſtitutional and authentic, two oppoſite languages, on the ſame ſubject and under the ſame exiſting circumſtances?

But it is not with the legiſlative rights alone that this doctrine interferes. The rights of the judiciary may be equally invaded. For it is clear that if a right declared by the conſtitution to be legiſlative, and actually veſted by it in the legiſlature, leaves, notwithſtanding, a ſimilar right in the executive whenever a caſe for exerciſing it occurs, *in the courſe of its functions*; a right declared to be judiciary and veſted in that department may, on the ſame principle, be aſſumed and exerciſed by the executive *in the courſe of its functions*; and it is evident that occaſions and pretexts for the latter interference may be as frequent as for the former. So again the judiciary department may find equal occaſions in the execution of *its* functions, for uſurping the authorities of the executive: and the legiſlature for ſtepping into the juriſdiction of both. And thus all the powers of government, of which a partition is ſo carefully made among the ſeveral branches, would be thrown into abſolute hotchpot, and expoſed to a general ſcramble.

It is time however for the writer himſelf to be heard, in defence of his text. His comment is in the words following:

"If the legiſlature have a right to make war on the one hand, it is on the other the duty of the executive to preſerve peace, till war is declared; and in fulfilling that duty, it muſt neceſſarily poſſeſs a right of judging what is the nature of the obligations which the treaties of the country impoſe on the government; and when in purſuance of this right it has concluded that there is nothing inconſiſtent with a ſtate of neutrality, it becomes both its province and its duty to enforce the laws incident to that ſtate of the nation. The executive is charged with the execution of all laws, the laws of nations, as well as the municipal law which recognizes and adopts thoſe laws. It is conſequently bound, by faithfully executing the laws of neutrality, when that is the ſtate of the nation, to avoid giving a cauſe of war to foreign powers."

To do full juſtice to this maſter piece of logic, the reader muſt have the patience to follow it ſtep by ſtep.

If the legiſlature have a right to make war on the one hand, it is on the other, the duty of the executive to preſerve peace till war is declared.

It will be obſerved that here is an explicit and peremptory aſſertion, that it is the *duty* of the executive *to preſerve peace*, till *war is declared*.

And in fulfilling that duty it muſt neceſſarily poſſeſs a right of judging what is the nature of the obligations which the treaties of the country impoſe on the government: That is to ſay, in fulfilling *the duty to preſerve peace*, it muſt neceſſarily poſſeſs the right to judge whether *peace ought to be preſerved;* in other words *whether its duty ſhould be performed.* Can words expreſs a flatter contradiction? It is ſelf evident that the *duty* in this caſe is ſo far from *neceſſarily implying the right*, that it *neceſſarily excludes it*.

And when in purſuance of this right it has concluded that there is nothing in them [obligations] inconſiſtent with a ſtate of neutrality, IT BECOMES *both its province and its duty to enforce the laws incident to that ſtate of the nation.*

And what if it ſhould conclude that there is ſomething inconſiſtent? Is it or is it not the province and duty of the executive to enforce the ſame laws? Say it is, you deſtroy the right to judge. Say it is not, you cancel the duty to obey.

Take this ſentence in connection with the preceeding and the contradictions are multiplied. Take it by itſelf, and it makes the right to judge and conclude whether war be obligatory, abſolute, and operative; and the duty to preſerve peace, ſubordinate and conditional.

It will have been remarked by the attentive reader that the term *peace* in the firſt clauſe has been ſilently exchanged in the preſent one, for the term *neutrality*. Nothing however is gained by ſhifting the terms. Neutrality means peace, with an alluſion to the circumſtance of other nations being at war. The term has no reference to the exiſtence or non-exiſtence of treaties or alliances between the nation at peace and the nations at war. The laws incident to a ſtate of neutrality, are the laws incident to a ſtate of peace, with ſuch circumſtantial modifications only as are required by the new relation of the nations at war: Until war therefore be duly authoriſed by the United States they are as *actually* neutral when other nations are at war, as they are at peace, (if ſuch a diſtinction in the terms is to be kept up) when other nations are not at war. The exiſtence of *eventual* engagements which can only take effect on the declaration of the legiſlature, cannot, without that declaration, change the *actual* ſtate of the country, any more in the eye of the executive than in the eye of the judiciary department. The laws to be the guide of both, remain the ſame to each, and the ſame to both.

Nor would more be gained by allowing the writer to define than toſhift the term neutrality. For ſuppoſe, if you pleaſe, the exiſtence of obligations to join in war to be inconſiſtent with neutrality, the queſtion returns upon him, what laws are to be inforced by the executive until effect ſhall be given to thoſe obligations by the declaration of the legiſlature? Are they to be the laws incident to thoſe obligations, that is incident to war? However ſtrongly the doctrines or deductions of the writer may tend to this point, it will not be avowed. Are the laws to be enforced by the executive, then, in ſuch a ſtate of things, to be the *ſame* as if no ſuch obligations exiſted? Admit this, which you muſt admit if you reject the other alternative, and the argument lands preciſely where it embarked—in the poſition, that it is the abſolute duty of the executive in all caſes to preſerve peace till war is declared, not that it is "*to become* the province and duty of the executive" after it has concluded that there is nothing in thoſe obligations inconſiſtent with a ſtate of peace and neutrality. The right to judge and conclude therefore ſo ſolemnly maintained in the text is loſt in the comment.

We ſhall ſee whether it can be reinſtated by what follows—

The executive is charged with the execution of all laws, the laws of nations as well as the municipal law which recognizes and adopts thoſe laws. It is conſequently bound, by faithfully executing the laws of neutrality when that is the ſtate of the nation, to avoid giving cauſe of war to foreign powers.

The firſt ſentence is a truth, but nothing to the point in queſtion. The laſt is *partly true* in its proper meaning, but *totally untrue* in the meaning of the writer. That the executive is bound faithfully to execute the laws of neutrality, whilſt thoſe laws continue unaltered by the competent authority, is true; but not for the reaſon here given, to wit, to avoid giving cauſe of war to foreign powers. It is bound to the faithful execution of theſe as of all other laws internal and external, by the nature of its truſt and the ſanction of its oath, even if turbulent citizens ſhould conſider its ſo doing as a cauſe of war at home, or unfriendly nations ſhould conſider its ſo doing, as a cauſe of war abroad. The duty of the executive to preſerve external peace, can no more ſuſpend the force of external laws, than its duty to preſerve internal peace can ſuſpend the force of municipal laws.

It is certain that a faithful execution of the laws of neutrality may tend as much in ſome caſes, to incur war from one quarter, as in others to avoid war from other quarters. The executive muſt nevertheleſs execute the laws of neutrality whilſt in force, and leave it to the legiſlature to decide whether they ought to be altered or not. The executive has no other diſcretion than to convene and give information to the legiſlature on occaſions that may demand it; and whilſt this diſcretion is duly exerciſed the truſt of the executive is ſatisfied, and that department is not reſponſible for the conſequences. It could not be made reſponſible for them without veſting it with the legiſlative as well as with the executive truſt.

Theſe remarks are obvious and concluſive, on the ſuppoſition that the expreſſion "laws of neutrality" means ſimply what the words import, and what alone they can mean, to give force or colour to the inference of the writer from his own premiſes. As the inference itſelf however in its proper meaning, does not approach towards his avowed object, which is to work out a prerogative for the executive to judge, in common with the legiſlature, whether therebe cauſe of war or not ina public obligation, it is to be preſumed that "in faithfully executing the laws of neutrality" an exerciſe of that prerogative was meant to be included. On this ſuppoſition the inference, as will have been ſeen, does not reſult from his own premiſes, and has been already ſo amply diſcuſſed, and, it is conceived, ſo clearly diſproved, that not a word more can be neceſſary on this branch of his argument.

HELVIDIUS.

From the AMERICAN DAILY ADVERTISER.

MR. DUNLAP,

TWO Letters have juſt made their appearance reſpecting the threatened appeal from the Preſident of the United States to the people, one from Mr. Genet to the Preſident—Another in anſwer to that from the Secretary of State.

It is underſtood, that theſe letters have come to the public eye, through the channel of Mr. Genet,

What he could have meant by the promulgation, is truly a matter of curious ſpeculation.

Did he intend by it to have it believed, that he had not made the declaration which is aſcribed to him?

If this was his object, he has totally failed in it. His letter contains no direct denial of his having made ſuch a declaration; though by an affected circumlocution, he endeavors to have the air of doing ſo—And his appeal to the Preſident is artfully confined to the queſtion, "whether he had ever intimated *to him* an intention to appeal to the People?"—He may never have expreſſed ſuch a threat to the Preſident—and yet he may have done it more exceptionably to others. Indeed it has not been aſſerted, that it was addreſſed immediately to the Preſident—The contrary has been a matter of notoriety from the beginning.

What anſwer does the Secretary of State on behalf of the Preſident give to his enquiry?

One certainly the reverſe of confirming what Mr. Genet endeavors to have believed. The Preſident declines giving evidence againſt the declaration imputed to Mr. Genet—with this reaſon for it, that *whether made to him or others was perhaps immaterial*; a clear indication of his belief that it was made to ſome body. Whoever knows the circumſpection and delicacy, which are characteriſtic of the Preſident, will conclude, without heſitation, that he would neither have entertained nor intimated ſuch a belief without ſufficient ground for it.

Did Mr. Genet intend by his communication to remove all doubt from the public mind, about the reality of a ſerious miſunderſtand-