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MARYLAND GAZETTE.

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From the AMERICAN.

BY REQUEST.

Messrs. Pechin and Fraily,

PUBLIC report has aſcribed to the council the publications in your paper, under the ſignature of the "Friend to Candour;" if believed, ſtill its truth ſhould not be aſſerted without their avowal, as perſons in their ſtations ought to know, that the preſervation of decorum is a ſacred duty of office.

The Civil Officer has ſtated a well known principle of ethics as well as law, that the intereſted teſtimony of five men, in their own favour, was equally inadmiſſible with that of one man ſimilarly circumſtanced. Surely this could not be perſonally offenſive! it was unneceſſary to ſuggeſt an inquiry into the credibility of incompetent teſtimony; and if he ſtill forbears to retort, he is not leſs reſtrained by motives of private delicacy, than by the duties of public decorum. But as all men are permitted, although not compelled, to give evidence againſt themſelves, he feels himſelf juſtified now in repeating, and in ſomewhat ſtronger language, that the admiſſion of the Friend to Candour, on behalf of the council, that ſome of them were poſitive, that the governor had propoſed the evening meeting himſelf, was concluſive evidence, that they did not all agree in the ſame ſtory; and their letter to the legiſlature, although only preſumptive, was ſtill record teſtimony, that the ſtory itſelf was fabricated after the fact. This was not aſſertion reſting on perſonal credibility.

It may be recollected, that one of theſe writers, diſtinguiſhed by the ſignature of Spectator, has been already detected in four ſhameful *errors* in eight ſhort lines, by reference to the records of the aſſembly;—that the various miſrecitals from the conſtitution by his coadjutor Republicanus, have been alſo expoſed; and the public will now be enabled to form a correct eſtimate, of the *accuracy* of a third, the Friend to Candour, when they find that all his arguments are founded on a mere fabrication of his own; that the conſtitution is directly and expreſsly the reverſe of what he ſtates it to be; and that he has ſcarcely related a fact but to miſrepreſent or diſtort.

It is ſcarcely worth premiſing, that the Civil Officer has offered nothing on this ſubject, to the public, under any other ſignature—He never therefore has conceded, as is falſely inſinuated, *a concurrent right of nomination*, under the ſignature of a *Citizen*: the power or right of nomination, he has uniformly maintained to be unknown, unneceſſary and irrelative to our conſtitution and laws; and he has conſtantly derided the expreſſions as in their nature palpably abſurd. To proceed however regularly with this writer, it muſt be obſerved that he firſt ſtates, that "by the 33d ſect. of the conſtitution, the framers have *expreſsly* declared, what powers ſhall be inveſted in the governor alone." This is the entering wedge, uſed not without ſome art, to introduce an inference, which is afterwards made from the ſame ſection, and on which it will be found that all the arguments of this writer, and every pretence of the council to the controverted powers they have exerciſed, muſt wholly reſt. It is therefore proper here to refer the reader to the conſtitution itſelf, for this whole article is too long for inſertion; he will there find that this miſrecital of the candid Friend, is deſtitute of truth, and we ſhall preſently prove, that it muſt have been with a deſign, devoid of principle. The conſtitution is directly and expreſsly the reverſe of the Friend's ſtatements, in words and in ſubſtance. This article, after enumerating certain powers, which the governor ſhall exerciſe *alone*—(in the diſcharge of which duties, he is conſequently not authoriſed to require the advice and conſent of council, nor are they compelled to give it, if required; nor *can they be compelled* even though a law ſhould paſs requiring it)—proceeds to veſt all other the executive powers of government in the governor, to be exerciſed by him ſolely, unleſs the *concurrence* of council is required by law: *all other executive powers* could neither have been foreſeen, enumerated or *expreſsed* by the convention, they have been therefore granted by *general deſcription*, they muſt from the nature of things for ever remain dependant on the eventful and uncertain deſtiny, to which the fluctuating affairs of human ſociety are naturally liable: if ſuch events ſhould require legiſlative proviſion by future laws; the conſtitution permits that thoſe future laws, may direct the governor to take the advice and conſent of council, on each particular caſe that may occur, unprovided for by the conſtitution itſelf; but if ſuch laws do not *ſpecially to direct*, the conſtitution of Maryland veſts the executive power, ariſing thereon, in the governor *alone*. In *certain foreſeen, important* and *ſpecified cases*, the conſtitution directs that he ſhall take the advice and conſent of the council; but the conſtitution alſo expreſsly declares that in all ſuch caſes, this muſt be by their *concurrence* with the governor. The words uſed are, *and may* (i. e. the governor may) alone exerciſe all other the executive powers of government where the concurrence of the council is not required according to the laws of this ſtate; the caſes ſpecified by the conſtitution are here included, or the conſtitution itſelf is not a law of the ſtate, and the conſtitutional and technical meaning of the term *concurrence*, does not admit of an equivocal conſtruction, it means that both the governor and council exerciſing their independent judgment, are to concur in the act.

The Friend to Candour proceeds to obſerve that the important power of life and death, is confided to the governor alone, and ſeems to intimate that this ought to ſatisfy him, without deſiring all power. The inſinuation has been often repeated, that the governor has been actuated in this controverſy, by a deſire of power, and not by the imperative obligations of duty, created by the conſtitution, his ſolemn acceptance of the truſt, and the ſtill more ſolemn oaths he had taken: it is too contemptible to merit any other reply, than what will hereafter ariſe from the publication of an extract, from the journals of the firſt day, the preſent governor ever officially met all the members of the preſent council, in the council chamber; and which, whilſt it aſcertains the impreſſion under which he accepted the office, and the uniformity of his conduct ſince, cannot fail to illuſtrate the conduct of the council, and ſome bold aſſertions of the Friend to Candour.

It is certain that the power of iſſuing death warrants, pardons and nolle proſequi has been hitherto left undiſturbed by the council, to be exerciſed ſolely by the governor; perhaps it is the only executive authority which they have not effectually appropriated to themſelves, *to his exclusion*. God forbid that criminals ſhould ever ſo far multiply in Maryland, that this duty ſhould occupy any great proportion of a governor's time! But it muſt appear ſtrange, that the convention ſhould have intended to intruſt ſo awful a power, to the ſole diſcretion of a chief magiſtrate, who was all the reſt of the year to ſit by unconcerned, without a power of interfering—to preſide in a private room over the forms of *five men*, who from their ſmall number and concealed ſituation, would naturally obſerve little or no form at all—and to ſign whatever acts they might think proper for him to *promulgate*, as the Friend to Candour terms it: they muſt have preſumed that either of the counſellors would write their names as well as the governor, and that a clerk or rather a printer, would be a more convenient and leſs coſtly inſtrument to perform this mechanical and ſervile duty. But on this ſubject more hereafter; it is proper here only to remark, that the heart-rending anguiſh of cutting the thread of life of a fellow creature, tied perhaps to a wife and children and all the endearing connexions of nature, whilſt conſcious of a power to ſave, is the moſt painful duty an individual can ever diſcharge to ſociety; yet the Friend to Candour ſeems to look with jealouſy to this authority: how often, no doubt, would the preſent governor have been willing to reſinquiſh it to him, if in his power! How happy, perhaps, would he feel could he beſtow it *at this moment!* But he has, we believe, hitherto ſuppoſed, that the office of hangman-general of a ſtate, could be envied only by the diſciples of Robeſpierre, in the full carreer of the guillotine.

But we now reach what muſt be conſidered as the more prominent arguments of this writer—By the 48th ſection of the conſtitution, he obſerves, "the governor for the time being, with the advice and conſent of council, *may* appoint the chancellor, &c. and all officers, &c" He then ſtates, and here he cites the authority of Republicanus, that the word *may* muſt be conſidered as ſynonymous with the word *ſhall*, and then it is of courſe imperative. By this it would ſeem that five of the moſt ſenſible, diſcreet and experienced men, ſuch as the conſtitution declares the council ſhall be, cannot be the joint authors or approvers of this publication. Every boy, commonly gifted with the faculties of his ſpecies and moderately acquainted with the elements of law, muſt know that where official duties are preſcribed, the words *may and ſhall* are conſidered and conſtrued as ſynonymous or convertible terms, *may* is only more reſpectful, and ſeems better appropriated to an eventual thing, ſuch as a vacancy, but ſtill we find the word *ſhall* uſed in the conſtitution of the United States, where it is directed that the preſident ſhall nominate, and *by and with the advice and conſent of the ſenate ſhall* appoint ambaſſadors, &c.—By the conſtitution of Maryland, the governor in caſe of vacancies, muſt appoint on his reſponſibility—It is a breach of his duty if he does not—no one can be ſo abſurd as to ſuppoſe, that the conſtitution has made it diſcretionary with him, whether he *may or may not*, appoint a chancellor and other officers, when vacancies occur; or that he *may or may not leave* the ſtate without officers. In this ſenſe, the word *may* is without doubt imperative, and equivalent to the word *ſhall*, uſed in the federal conſtitution; but as to whom the governor may or ſhall appoint, that depends on other principles The firſt obvious feature in the clauſe is that the governor may appoint; if the clauſe is imperative on the governor, and he *ſhall* appoint, it is no leſs imperative on the council, and they *ſhall not appoint*. The ſecond is that the governor muſt conſtitutionally adviſe with the council, and obtain *their consent to his appointment*. And this renders the clauſe wholly dependent on the conſtitutional and legal import of the terms *advice and conſent*.

The words advice or conſent, taken diſjunctively, much leſs *together*, never have been conſidered by mankind as obligatory or imperative, either in common parlance or technical language. In the uſual tranſactions between man and man, the decencies of intercourſe require that, previous to either being given, they ſhould be aſked—In the more correct and reſpectful forms eſtabliſhed by national wiſdom and prudence, to ſupport official authority; this has been conſidered as indiſpenſably requiſite, as will be ſhewn. The governor is bound to aſk the advice of council, and obtain their conſent to his appointment—but can any thing be more abſurd than to contend that theſe words authoriſe the council to command him, as a mere mechaniceal inſtrument, to appoint againſt his own opinion; or juſtify them in appointing without his conſent, or even his knowledge.—It muſt be a monſtrous interpretation of theſe words, and the conſtitution, that none are to be commanded but the chief magiſtrate; who alone is bound to obey: and that the only man to be governed is the governor himſelf.

In exemplification of the foregoing, it may be obſerved, that the federal conſtitution renders it the duty of the ſeveral ſtates, to appoint ſenators of the United States. The clauſe is imperative and obligatory on them to appoint, but diſcretionary as to whom they ſhall appoint. In Maryland the ſenate and repreſentatives elect the ſenator by joint ballot, it being the uſual mode of election preſcribed for that body by their conſtitution—In Maſſachuſetts, they have determined that as an act of their legiſlature, requires a *concurrent* vote of both houſes: they could not act jointly, and each branch continues as in all other acts, to exerciſe its independent judgment ſeparately, and no appointment can or does take place, until they mutually agree on the man—yet this practice has not produced any of thoſe evils, ſo wiſely foretold by the Friend to Candour, and Spectator, as the inevitable conſequence here, if the governor and council ſhould each exerciſe their independent opinion, by acting *concurrently*, the mode in which every law ever has been paſſed, in theſe ſtates, from their ſettlement—the mode in which the governor and council of Maſſachuſetts, and the preſident and ſenate of the United States, have always acted, and ſtill do act, to the entire preſervation of the juſt right and independence of all the public functionaries, and the perfect ſecurity and proſperity of the people, over whom they preſide.

It is certain that no terms of organic law can be ſo well underſtood, or their legal import ſo clearly aſcertained as the *advice and conſent* which a chief magiſtrate is bound to obtain before he acts; and the true conſtruction of few terms can be more definitely fixed, than that of the *concurrence* of two deſcriptions of public functionaries, in an official act. By and with the advice and conſent has been the formulary of legiſlative and executive acts in England, time immemorial. It is well known by all who will read this, that the chief executive magiſtrate there, after obtaining the advice and conſent of both houſes of parliament, may ſtill reject a bill. In his privy or cabinet council, if the board could adviſe what he ſhould not approve of, (but which is impoſſible as the mode of procedure always preſumes and ſtates the act to be on his ſubmiſſion) ſo far from their advice being obligatory, he can turn them all out of office immediately. The ſame formulary, as far as is known to the Civil Officer, or is believed, has been introduced from the mother country and her laws, into every colonial government to which ſhe has given birth, we aſſert it of the preſent United States, although we cannot recur to the Eaſt and Weſt-Indies, to which we are prudently referred by our opponents. It is ſufficient for our purpoſes, that it was the formulary uſed in all the colonial laws of Maryland—all of which the governor could reject after the advice and conſent of both houſes were obtained. In council, the governor was alſo authoriſed to turn out the members, and it will be ſeen by extracts from the executive journals, that they gave their advice and conſent only when it was required, and that this was far from being deemed obligatory or imperative on him.

Such was the legal conſtruction of theſe words in Maryland, ſuch were the reſpective powers of the governor and council, and ſuch were the colonial laws and uſage on the firſt day of June 1774. The firſt act of the convention in 1776, the declaration of rights eſtabliſhes that, the inhabitants of Maryland, are entitled to all laws of Great-Britain uſed in this country, and all the acts of aſſembly that were in force on that ſpecified day, except ſuch as had expired and have been or may be altered by the convention, ſubject however to reviſion or repeal by future legiſlatures. By the conſtitution the convention preſcribed the office of governor, changing the ſource and mode of appointment, he was continued as the chief executive magiſtrate; but having expreſsly ſeparated the legiſlative from the executive departments, they conſequently deſtroyed his negative on the laws, and his powers as chancellor, &c. They deprived him alſo of the power of diſſolving or proroguing the aſſembly, and finally declared that he ſhould not on any pretence whatever, exerciſe any power or prerogative by virtue of any law, ſtatute or cuſtom of *England or Great-Britain*; this demonſtrates the underſtanding of the legiſlature and muſt concluſively ſhew that all the executive powers of government conferred on the governor by the colonial laws in force on the firſt of June which had not been repealed, or were not expreſsly or neceſſarily deſtroyed by the convention, remained attached to the office: this conſtruction has been practiſed under, and has been recognized by the legiſlature itſelf as ſhall be hereafter ſhewn. The convention alſo preſerved the council but expreſsly as an adviſary body to the governor on executive buſineſs; this alone would have deſtroyed their legiſlative authority, had not that been conferred on the ſenate; they rendered the council independent on the governor for their appointment, and continuance in office, but throughout the conſtitution, they direct them expreſsly to act *only by adviſing the governor* ſave in two *ſpecified* caſes, the reaſon for excepting which will alſo be explained, and this advice was the only manner in which they had ever been known to act on executive buſineſs by the laws of Maryland previous to that time, as will appear by their journals. Thus by the conſtitution it will be ſeen that the governor, and in his *legal* abſence the firſt named of the council, is the ſole executive contemplated by the laws; this had been the caſe from 1716 to the firſt of June 1774, as will be more fully obſerved. By the colonial laws in force at the laſt expreſſed period, the governor preſided in council, but the council never aſſembled on executive buſineſs except when required by him, and never gave their advice or conſent but when requeſted; and that ſuch is the conſtitution of Maryland at this day, and that it was ſo underſtood at an early period of its exiſtence, and ſo continued by the legiſlature ſhall be ſatisfactorily proved. The true inquiry now, is whether the convention have made the governor the executive of Maryland; and not whether they *ought to have done ſo*; but as the Friend to Candour has argued from the expediency and propriety of veſting in the council the powers he contends for, it may not be improper here to remark, that a preference of unity in the executive branch of government, was not only habitual from practice, but it was a predilection on the convention inherited from their Britiſh anceſtors, and which extends to all their deſcendants in every part of the globe. It is a principle which all thoſe enlightened minds, and illuſtrious ornaments of our ſpecies, who have exerciſed their intellectual powers on the theory of government, have unanimouſly conſidered as eſſential in the ſocial ſyſtem. It has perhaps never been departed from in the civilized world, unleſs in the firſt miſerable adminiſtrations of Sweden—during the horrors and diſtractions of revolutionary France, or in the firſt conſtitution of Penſylvania; all of them examples that will never encourage imitation. It is one in which the American mind is now more univerſally and firmly united, than in any other principle of government whatever; this is evident from the rejection of a council in ſome of the ſtates *originally*; its abolition in every ſtate but one, that has had an opportunity of reforming its conſtitution and its utter rejection in all thoſe conſtitutions, that have been created ſince the revolution. At the head of theſe is the conſtitution of the United States, on which the deliberate opinion of United America was taken. In Great-Britain where an hereditary monarch might be an hereditary fool, whoſe perſon is held ſacred, and who cannot by law do wrong, to produce ſome reſponſibility, known adviſers are neceſſary; but where as among us, a chief magiſtrate is choſen at ſtated periods by the public opinion and voice; and where he remains always reſponſible by impeachment and election; the American judgment and experience ſeem cleerly to have decided, that councils are not only uſeleſs and expenſive; but that they