special proviso, that if the council are divided, the governor may decide their concurrence himself. The legislature can confer no powers on the governor and council to be executed jointly; they *might name* the governor by his name, and the counsellors individually, and then like other individuals, they would become joint commissioners; but they must then act independently of their constitutional authority.

We have remarked the great caution and care observed in the language of the constitution to avoid any inference that the governor and council are constituted into one board, and to prevent his powers from being confounded with those of the council, when he presides over that body—a separation, without which, the object and nature of *a concurrent act* of the governor and council could not possibly be maintained and preserved. He presides to be advised, and *when constitutionally and legally absent, the first named* of the council, qualified as governor, presides for the same purpose, and with the same authority, but his style is *president* of the council still. The board of council having decided on their advice and consent, either by a majority of their own votes, or in case of division, the governor, by special authority in that case, having decided, it becomes then that constitutional *advice and consent*—that *concurrence*, which the constitution and laws have prescribed in specified cases, as an indispensable requisite, to enable the governor to act, and without which duly obtained, there is no doubt but that the act of the governor, in any of those cases, would be unconstitutional, illegal and invalid—But still that advice and consent can only be one part of an executive act in these cases: it still remains for the governor to *concur and execute*; for if it has ever been one of those *few cases* in which he could *vote*—so far as he *voted* with the council he acted *jointly*, he has not even then *concurred* as governor; and if it is one of those cases on which there was no division; and *a governor may serve his term out without a division; and there never can be a division, if the constitutional number of members attend their duty*; so far from concurring as governor, unless it was on his *own nomination or proposal*, he has not acted at all: His power and duty laid down generally by the constitution remain still to be executed, *which are* express, that the governor, (with the advice and consent of the council,) *shall appoint officers*—embody the militia, &c. &c. &c. This returns us again to the constitutional and legal meaning of *advice and consent*, which we have already, and we hope satisfactorily, discussed

So far we have proceeded in explaining what we consider as the *substance* of the constitution, and it now remains to speak of those *forms* that are essential for the preserving and carrying that substance into effect. On the threshold of this inquiry, we have immediately opened to our view, how these misapprehensions have first arisen—how all these abuses have crept in—and how some *able and honest men* have gradually been led into a difference of opinion, and to imbibe prejudices that it is difficult to eradicate. Still we hope and believe that what we shall now say on this subject, must prove entirely satisfactory to every *honest and intelligent* man, however deep rooted his prejudices may have been.

We must premise, that the strongest mind that has ever applied its powers to the science of government, has never yet attempted to define by analysis, what are strictly legislative, executive and judiciary powers; separating by lines the departments distinctly from each other: the reasoning faculty seems to recoil from the tension necessary to divide them, by the application of first principles to that infinite mats and endless variety of human action, which reflection suggests and history teaches. This indeed is the great desideratum in politics; which, like longitude in navigation, when once discovered and settled, will enable those at the helm to steer clear of most of the rocks and quicksands on which the best hopes of mankind have been hitherto lost. Even those enlightened statesmen who have devised constitutions or systems of organic laws, have been forced to content themselves with some general and vague outlines; for all attempts hitherto to trace, by detail, have only ended in perplexity and confusion.

Strictly speaking, there are but two distinct branches of government, the legislative and executive; founded on the compound nature of man, who is a thinking as well as an acting being; but who has no other distinct quality to serve as the basis of that intermediate power, termed the Judiciary, which has therefore been generally considered as more properly a branch of the executive—but those powers can no more be entirely separated in government, than the qualities on which they are founded can be in the individual man; every act of government, therefore, whether termed legislative, executive or judiciary, consists necessarily of two parts, *the one legislative or deliberative, and the other executive or ministerial*, and it can only be properly referred to the one or the other department, as the duties of deliberating or acting *preponderate*; we believe that the Creator never intended man, in any situation, to become a machine, and we believe and hope, that his omnipotence has secured his intentions from lasting violation. Man must and will think, and in some measure use his reasoning faculties in judging for himself, even when compelled to act by the iron hand of power, and in spite of the guillotine, the wheel, or the bed of Procustes.

When the convention of Maryland, therefore declared that the governor should *alone* direct the land and naval forces, and *alone* grant pardons and reprieves for any crime, &c. they unquestionably intended and expected, that he should be a man capable of deliberation; and that he should deliberate before he acted. When it declared that he should, *(with the advice and consent of council,)* appoint officers, embody the militia, &c. it must have also intended, that he should not only deliberate himself, but consult and deliberate with others, and take the *advice and consent* of those who the constitution declared should be *the council to the governor* for these special purposes. If their concurrence in such cases cannot be obtained, his own deliberate judgment will not authorise him to act; but if it is obtained, then remains that executive power with which the council have nothing to do—he is then to act, and is still the sole executive agent, for such the constitution, by its express words, constitutes him in every act, whether to be performed with or without *the advice and consent of council.*

In pursuing and establishing these principles, we must repeat, that the council are *expressly* constituted a board of themselves. To preserve the system, secrecy and promptitude, of the executive character, the governor presides to be advised, and confers personally, in order to deliberate and discuss the special measures submitted by the constitution for their concurrence; but to render the advice and consent of the board a separate and distinct act, which is essential to the nature of a concurrent act, (a word of the constitution which the Friend to Candour cautiously avoids explaining or commenting on,) the governor is not allowed to interfere, unless they cannot agree, then, and then only, he decides by a vote that which is constitutionally intended as an act of the council, and for the evident reasons already enlarged on.

But here the doubts of gentlemen arise—that as his *voting* on that possible occasion necessarily implies that he shall *vote* on none other, whether his powers in such cases are not destroyed altogether, and whether he does not become only the ministerial agent of the council on those occasions, bound by their advice and consent to act as they direct; it appearing to them not the probable intention of the convention on any possible case, and that he should vote, and afterwards separately act, on the same case. It is unnecessary here to repeat, that the destruction of the general powers of the governor by implication, and that too founded on a possible case that might never happen, cannot certainly bear legal scrutiny: or that the act of the council cannot possibly amount to more than advice and consent by the constitution. But the fact is probable, and certainly has been hitherto believed by the Civil Officer, that the convention never expected that he would have to deliberate again after voting. Had the language of the constitution, and those forms corresponding therewith, and established by long experience, been known, observed and preserved, no doubt ever could have arisen, no question on the subject could ever have occurred.

The history of law has long since established that forms are essential to the preservation of substance in government: hence it is that the *Lex Parliamentaria* has been received as part of the common law of the land. The forms of executive proceedings have not been so much exposed to public view; unfortunately, those records of Maryland remained at the revolution in the hands of the officers of the old government, and were not delivered over, (as it is understood,) until sometime in the administration of governor Lee.

The convention well knew that the right of originating and proposing ever had been vested in the governor; some of them had been counsellors, and several of them, no doubt, were well acquainted with the forms—they knew that the acts of the council were in the form of *advice and consent*, to what was considered as the proposal of the chief magistrate. Hence it is that the terms *the council to the governor—the advice and consent of the council*—and *the concurrence of the council*, are the express language used by the convention—all of which terms are alone predicated on a supposed precedent act of the governor, on which the council are called to give, or not to give, at their discretion, their advice and consent, and without which he cannot act on his own judgment: *on any other principle they are neither sense nor grammar.* To admit a member to propose or give advice when not asked, destroys that unity of design so essential to executive proceedings—it destroys promptitude, by suggesting various plans—gentlemen will become attached to their own, it is not likely they will agree with the governor until the moment of *action* is lost, to seize which is the great characteristic of a wisely constituted executive power; and finally, as a governor of Virginia of great experience and sound judgment observed, more than twenty years ago, it would eventually reduce the governor to a cypher, even admitting his right, which was never then questioned, of rejecting that advice, and refusing to act by it. In fact, it would destroy the constitution, and therefore the convention have wisely guarded against it, by the expressions and terms they have used, and by continuing the governor the sole executive agent.

We have already observed, that when a power is conferred to do an act, the grant necessarily includes all the means, without which that act cannot be effected. If the governor is directed to do an act with the advice and consent of others, the responsibility, in the first instance, necessarily attaches on him; he must shew that he proposed to do the thing; and he must also shew distinctly, how and what it was he proposed to do, in order to justify himself, if the thing has not been done at all, or improperly done; and, in order to fix the responsibility on others, who have unreasonably withheld their advice and consent.

This is the rational theory of the constitution, founded on all preceding practice; but the constitutional point may be at once reduced to this: *proposal or nomination* is either an *incidental* power to the principal power of appointing or performing any other executive act, *or a separate power; if incidental*, it is vested in the governor, on whom the principal power is conferred; *if separate*, it is to be exercised by him *alone*, as one of all other the executive powers conferred on him *alone*, where the concurrence of council is not required by the laws of the state.—Sect. 33.

This sole right of proposal existing in the governor under the laws of 1774, as will appear from all the executive records prior to the convention, and not repealed by that body, but confirmed by a general grant, and indicated by every other expression of the instrument, *is and must be the constitution of Maryland at this day.* This right at once solves all the difficulties raised by the Friend to Candour and the council, and will explain every objection that can be raised, or seeming inconsistency that can be discovered, by the ingenuity of man; the construction therefore of the Civil Officer bears this indelible *characteristic* of truth, that it will suit every case that can occur, or can be imagined; which the Almighty has beneficently denied to the *fabrications* of deception and art, however consummate

Prior to an examination of the decision of the supreme court of the United States, it had been the opinion of the Civil Officer, that when the governor had proposed, and the council had given their advice and consent, there was then completed that concurrence required by the constitution, and that there remained no other discretion with the governor than what naturally attaches to every ministerial duty; he still believes that such was the idea of the convention, founded on former precedents; for it could rarely occur that a governor would have occasion to change his opinion where the council had thus concurred with his own proposal—but the opinion of the court, that the act of the executive officer is only complete when he has done the last act required of him by the constitution, which in making an appointment is the signature of the commission, must have conclusive weight: for if the governor, or other chief magistrate, on hearing the reasons of his constitutional advisers for refusing their consent, shall be satisfied that his proposal was wrong; he ought, and it will be absolutely necessary for him, to alter his proposal; it therefore seems equally proper, that if deliberation should have suggested considerations to himself that produce a change of opinion, he should be at liberty to alter his proposition, or finally refuse to execute it, when it had become contrary to his judgment; although his constitutional advisers had actually concurred with his first proposal: this was precisely the case of the British treaty negotiated by president Washington, and proposed to the senate, and which he afterwards hesitated so long to ratify, although advised and consented to by the senate.

Doubtless there have been wise and honest men who have held the opinion and acted under it, that the council being authorised to give advice were not limited to the proposal of the governor, and they have argued that *advice and consent* should be construed *advice orconsent*, the conjunctive *and* being frequently construed as a disjunctive; they have not sufficiently reflected that this is never done but in order to make sense of a clause, whereas this is sense without; and they have certainly not sufficiently examined the former laws and custom in this respect, on which the constitution was founded; the whole theory, expressions and language of the constitution throughout, and such observations as have been offered by the Civil Officer, together with the embarrassments that would necessarily occur in the execution—But still it would only render the construction of the supreme court, which establishes a deliberative right in the chief magistrate, after the advice and consent, more evidently and conclusively necessary, in order to secure that *concurrence which the constitution of Maryland contemplates and requires.* More than 20 years ago this independent right of proposal in the council was agitated in Virginia, at which time it is understood that the present governor of Maryland made up his mind fully, from the best information and reflection he could gain or bestow, and he has never varied from this opinion. When elected into his present office, and the usual manner of conducting executive business was first made known to him, he expressed his amazement, and as soon as all the members of the council could be assembled, he took occasion fully to explain himself—"That he had accepted "of the office under the constitution of Maryland, which "he had solemnly sworn to support; that the form of doing "business in council, which he was then for the first time "apprised of, although fifteen years had elapsed since he "was first elected into the Maryland legislature, was ex"pressly contrary to the undoubted sense and clear language "of the constitution, and that he would execute the constitution as he had sworn to it, or not at all"! He then prepared a form at the table, predicated on the constitution itself, and conformable to the principles laid down by the Civil Officer, who, as *evidence*, now offers the following extract from the proceedings of the board, on the 24th November, 1801, *the first day the whole board assembled*—"The governor submits to the council of the governor a "letter, &c. &c. Whereupon the council to the governor "do advise his excellency to notify, &c. &c"

This form, was adopted, having been assented to by every member present. Although the governor, as we are informed, had never then seen the forms of proceedings in council previous to the constitution, yet, on examination, that which he prepared will be found to correspond perfectly *with all the precedents which the convention could have contemplated* as in use before by the same functionaries, acting under the same formularies of executive power.

This extract must prove, that the present governor, accepted the office, and has since been actuated by one uniform principle and conviction of mind, consequently that his conduct on the Susquehanna appointment originated from the solemn impressions of constitutional duty, and religious obligation, and not from any personal motives arising from a particular occasion, as has been basely suggested. If he subsequently submitted to the irregularities of council from a strong anxiety to avoid a rupture that might be injurious to the state, and painful to himself, he did it in cases where his conscience was not grossly violated with regard to individuals, and where his own constitutional powers enabled him to confirm their acts. Let the council, or the Friend to Candour, explain and justify their principles and consistency.

With these remarks we shall now conclude our general observations on the constitution, (reserving ourselves in our next for the illustrations and *facts* of the Friend to Candour,) by stating that as the constitution protects the powers of the governor, and secures to him the exercise of his *deliberate concurrence* in those acts which require the advice and consent of council; we hope that the present governor not only understands his duty, but will have energy enough to execute it; and that he will not be deterred from refusing his signature to any commission which his conscience disapproves, by the menaces of a *civil suit*: and the council, it is presumed, will take good care that they do not subject themselves to UNCIVIL SUITS, by way of CRIMINAL PROSECUTIONS, by their usurpations of power and violations of the constitution.

A CIVIL OFFICER OF MARYLAND.

(To be continued.)

BOSTON, May 2.

RUMOUR,

With her hundred tongues has been very loquacious, for a few days past on the subject of a war in Europe.

On Saturday, she announced in the Centinel, that war had been declared. This important news was brought by the arrival of the ship Volunteer, captain Bosworth, at Portsmouth from Liverpool, who reported, that "on the 23d March, in the river, he was boarded by a lieutenant of a man of war, who informed him that the declaration of war against France had that day been received in Liverpool from the admiralty.

This intelligence, from the previous accounts of hostile preparations, created belief, and had a considerable influence on our markets, while it lasted; but on Saturday noon the Diana, capt. Wilson arrived at this port from Liverpool, which place he left 4 or 5 days after the Volunteer, and brings a contradiction of the intelligence of capt. Bosworth, that war had been actually declared.

The verbal information of captain Wilson, and letters received by him to the 27th March, states that public opinion seems to be divided, as to the event of measures adopted by the British administration; and while some are induced to believe that war is actually determined on, others are of opinion, that the arrangements will ultimately result in effecting a punctilious compliance with the articles of the treaty between the two nations, which have hitherto been delayed and left open for alterations. All intelligence, however, that has been received here from France and England indicate symptoms of actual hostility.

NEW-YORK, May 3.

We lay before the readers of the Mercantile Advertiser this morning later European intelligence than has been before received in America.

The ship Cotton Planter, Jefferies, arrived last evening within the Hook, in 37 days from Liverpool. She left Liverpool on the 26th March, and the captain has obligingly favoured us with the only paper he brought—the London Courier of the 23d.

The extracts which follow, comprize every article it contains of a political nature in which the public can have any interest:—

LONDON, March 23.

Downing-street, March 22.

By dispatches received this morning from the earl of Elgin, his majesty's ambassador extraordinary at Constantinople, dated January 15, 1803, it appears, that the differences which had subsisted between the Sublime Porte and the Beys of Egypt, have been satisfactorily arranged through the mediation of his majesty's ambassador.

(Lon. Gaz.)