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MARYLAND GAZETTE.

THURSDAY, MAY 19, 1803.

A CIVIL OFFICER OF MARYLAND.—CONTINUED.

IN the course of the foregoing argument, we have been constrained to refer to the express letter of the constitution, to disprove the gross misstatements of this Friend to Candour; although his errors are not of that class which claim our pity, yet the Civil Officer disdains a triumph over vulgar malevolence and vapid nonsense; conscious of the rectitude of his motives, and in pursuit only of truth, he scorns the paltry gratifications of personal resentment, and nothing shall escape him intentionally to offend an individual, unless public information or public justice require it.

The Friend to Candour having, as we observed, erected a constitutional system on a foundation of his own creation, instead of stating cases that would flow from the principles of his adversary, and shewing them to be inconsistent with the constitution, modestly proceeds to propound questions, that wholly arise out of, and depend upon, his own fictions; consequently, like baby-houses which children erect out of cards, we shall see them tumble at the first breath directed against them: "It is (says he) irreconcileable, that the governor can only vote when the council are equally divided, and yet can reject, when all five are united against him;" and again, "In the late appointment of a judge of the general court, when the governor gave the casting vote, *will the Civil Officer say he did not advise as one of the council?* If so the judge was appointed without the advice and consent of council."—If this writer had recollected the constitution when he wrote, all his irreconcileability and his wonder would have vanished—he would there have found, that the act of the board of council is expressly advice and consent to an act of the governor, and nothing more or less—the words of the constitution would solve all his difficulties; but as his illustrations tend to establish every position of the Civil Officer, we will examine them minutely.

If the Civil Officer should indeed say that the governor, in the last case, had advised as *one of the council to the governor*, which that body are expressly declared to be by the constitution, he would undoubtedly say what is very great nonsense. It is equally certain that the governor did not advise as one of the council—that he did vote as governor on that particular occasion, and that he was authorised to do so by an express provision of the constitution—which rendered his vote equivalent to that of one of the board, and enabled him, by deciding that advice and consent agreeably to his proposal and judgment, to appoint the judge, and he accordingly did appoint him.

That he did not vote as a member of the council, nor as a member of the board, we have already seen: the mode of his election, the former laws of Maryland recognized and considered part of the constitution, the various duties of his office, the express language of the constitution in all its parts, and the cautious separation of himself and his powers from the members and duties of the board by this very section 34, even where he is directed to preside in council—are incontrovertible evidence, that the convention never intended that the chief magistrate, or his powers, should be confounded or mixed with the members and duties of a board, *constituted solely to advise him*—In fact, without preserving that separation, the very theory and language of the constitution which require a *concurrence*, where the governor acts by the advice and consent of council; and that mutual check which is the favourite principle of freedom, would be wholly destroyed and perverted. But how the special authority of the governor, to decide by a casting vote the advice and consent of council in favour of those two who agree with him, is irreconcileable with his sole power of proposal, or with his ultimate power of rejecting the advice and consent of council, if the whole five or any other majority should be united in opinion against him, is utterly unintelligible to the Civil Officer, and will be equally so to the Friend to Candour if he will confine himself to the express constitutional powers of the council.

It is not probable, that if the governor should have occasion, by this special authority to decide the advice and consent of council, that he would ultimately reject what was determined agreeably to his proposal or opinion; and although such an event was possibly not in contemplation by the convention, and will very rarely if ever happen; yet we may conceive cases, and one had nearly occurred under the British treaty, where the executive magistrate might be induced ultimately to reject advice and consent to what he proposed himself—There is nothing in reason or the constitution of Maryland to forbid it. But we conceive it to be utterly irreconcileable, not only with the constitution but common sense, that the convention intended to destroy the general independent power of the governor, in every case where he acted with the council, because they authorised him on a possible contingency to decide where they were divided, without which decision his judgment would avail nothing, although an equal number of the council agreed with him; more especially when, by his retaining his powers, the theory and language of the constitution are preserved without inconvenience; and by their being merged or destroyed, the whole constitution becomes a mass of absurdity and inconsistency.

For admitting the governor has the sole right of proposal, or of ultimate rejection, or both those rights, yet this power of deciding in the special case of a division is equally wise and necessary: For if both those powers are vested in him, still, if five members of the council, or four, or even three, refuse to concur with him by their advice and consent, there is an end of the business, he cannot act; but surely if two concur, and only two refuse, it is reasonable and proper that he should act. It is neither presumed that the Friend of Candour will deny, that the convention, intending that the governor should possess the sole right of proposal, and the ultimate right of rejecting the advice of council, *could not also give him* the special power of deciding the act of the council when the members were divided; nor is it believed that he will assert, that such special power was not a prudent and wise provision, even in addition to those other powers.

Let us now turn our attention to the consequences—Under the constitution, as the Civil Officer contends it is, the governor and council are each left with their separate powers, in short the full faculties of discreet rational beings, who alone can be worthy of being intrusted with public authority, independently deliberating, and finally, either freely concurring, or refusing to concur in some executive act, which the governor is to execute with their advice and consent; thus mutually checking each other, and preventing an abuse of power by either. But under the construction, or rather the system created by the Friend to Candour, on no other pretence than some irregular proceedings in council, that were kept secret from the public, we must suppose that the convention intended, that when the governor should proceed to deliberate in council, he should be instantly struck with a political dead palsy, and remain in council only half alive; that if the board should by *accident* consist of four, and those four should by *accident* divide, the palsied half, on that contingency, on a contingency might *revive* only for the moment to give a casting vote, and sink again into lifeless insensibility; and that when he should come to act, he should be a mere mechanical instrument—an hollow tube—either a pen or a trumpet, to promulgate their *imperative advice and consent*; or that if he should be out of the way, or not so alert as they might, with the attestation of their clerk *to their acts*, would answer the same purpose.

We would now in our turn propound a short question or two to this sage casuist, the Friend to Candour; If the governor did advise as one of the council on the appointment of the judge, as he supposes, pray whom did he advise? for where advice is given, a person to be advised is as absolutely necessary as an adviser. Did he then, as counsellor, advise himself as governor? There is perhaps but one case in point that can be produced, and that is recorded by the inimitable Cervantes, to the following effect: When Sancho Panca became governor of Barataria, doctor Pedro Positive de Bode-ill was his chief counsellor, and advised his excellency to conform to the *usages and customs* of other governors, especially in eating only what he should advise, it being found by experience that the same food would be improper for him that would suit counsellors, &c. the governor bore with patience, whilst dish after dish disappeared, until a favourite pudding was on the move, when in spite of all doctor Pedro Positive could say, he turned counsellor himself and advised his excellency to eat a little of that *pudding*.

The constitution of Maryland admits of no such foolery or absurdity, it is the work of wisdom, patriotism and experience. Let its language, without addition or diminution, speak for itself, and it will dispel the fogs that arise from dulness or design. Its words are, "the governor, by the advice and consent of council, may embody the militia—may call the assembly," &c. It is to be remarked, that the word *may* is not *here* imperative, as there is no absolute official duty prescribed: it is precisely equivalent here to that clause of the constitution that directs that the governor alone *may*, (which word is understood having before been repeated in the same sentence,) grant pardons and reprieves for any crime, &c. It confers a power, which from its nature, must be exercised under a responsible discretion, as circumstances may require. In pardons and reprieves the governor's sole discretion is confided in; in embodying the militia, and calling the assembly, &c. the discretion and responsibility attach both on the governor and council; but as the governor is the executive agent to do the act, the responsibility rests first on him; if it becomes necessary to do either, he must require the concurrence of council, and then they become responsible for their advice and consent. The governor requires the concurrence of council to embody the militia or call the assembly, &c. five members will not advise and consent, four will not—three will not, the business is at an end, the governor can do nothing; but if they concur he can act; and if four members are present and two advise and consent, and two will not, the governor, by special provision of the constitution, in that case votes, and decides an act of council, equivalent to the advice and consent of all, or a majority of the board, and he may act constitutionally. Again if there is a vacancy, as was lately the case, the governor, with the advice and consent of council, *may* appoint a judge of the general court; here is an absolute duty prescribed, and *may* is imperative; he cannot therefore require the advice and consent of council merely to appoint; the only act to which he can require their advice and consent, is to appoint some particular person judge; if so happened that a majority of the council did not concur, but the board being divided, the governor, by his special power, decided, and then appointed a judge.

We shall now examine the A. B. C. argument of the Friend to Candour, and possibly prove that he is not yet master of his political alphabet. The case he states is, that if the council are divided between A. and B. the governor cannot vote for C. although in his judgment and conscience he believes him most fit for the office, because C. was not the cause of division in the council. We might finish this business by this simple question; if the governor is to appoint; and in order to appoint must propose, and believes C. is the best man, why did he not propose C.? by what possible chance were the council divided between A. and B.? But as this A. B. C. business furnishes new and conclusive argument against any such possible construction of the constitution as that contended for by the Friend to Candour, it will be treated more at large. According to his doctrine, the unfortunate governor is never to vote but when the council permit, and he *must* vote *when* they please, and finally he must vote *as* they please, although to do so he must violate an express and particular oath. But in this the Friend to Candour is at least consistent; according to his system, the governor of Maryland never takes an oath but to break it. Let this candid writer examine section 50, he will there find, that the governor, and every member of the council, and every judge and justice, shall, before they act as such, *respectively* take an oath, *that he will vote for such person as in his judgment and conscience he believes most fit and best qualified for the office.* Now, according to the case stated by the Friend to Candour, although the governor in his judgment and conscience believes C. most fit and best qualified for the office, and therefore is sworn to vote for him if he does vote, yet says the Friend to Candour, as C. was not the cause of division in council, he shall not vote for him, but shall either vote for A. or B. How strangely, how cruelly partial must the convention have been! so indulgent to the consciences of the council, and so regardless of that of their chief magistrate! Is it possible that the constitution of Maryland can bear such a construction? Let it speak for itself, and how plain and consistent is its meaning; and how prudent and clear is every provision. The governor, authorised and directed, with the advice and consent of council, to appoint, asks their advice and consent to appoint C. whom he believes in his conscience to be most fit for the office; the council are divided, and he to decide votes according to his oath for C. but if the members of the council, in their consciences, believe A. and B. more fit for this office than C. they of course will not advise nor consent to the appointment of C. there is nothing to oblige them to vote for C. against their oaths, they may refuse to concur, until the governor may be obliged to propose A. or B. And this shews the great and prudent foresight of the constitution. This oath of the governor is restricted to the possible case of his giving a casting vote, and there it is not only proper, as every person takes it, (even a judge, who cannot possibly vote for any officer but a clerk,) *but it is also necessary*—If the governor has proposed so doubtful a person, that after full discussion the council are divided whether they will concur, it is proper that the governor, before he gives a casting vote, should test his proposal by the same oath the council have taken; and if, after full discussion, he cannot on his oath vote for the man he proposed, he must necessarily propose some one else, and may probably find it necessary to turn his attention to such persons as the council in discussion have brought into view. And the governor has taken *no oath to prevent what he may so often find it absolutely necessary to do*—He has taken *no oath to appoint the man he thinks most fit for the office*, for as he is to appoint with the advice and consent of council, if they will not concur in the appointment of the man he thinks best, he must, if the public necessities require it, appoint the man in whom the majority of the council will concur—but if the public necessities do not press, and he prefers to risk his responsibility on the man he proposes, he may reject, and in order to throw the responsibility on the council who have refused to concur, he, or any member of the board, can require the *advice* of each member to be entered on the journal, and their constituents can then decide, and render either the governor responsible for an improper proposal, or the particular members of council responsible for their unreasonably refusing to concur. But it is to be observed, that this particular provision of the constitution is absolutely incompatible with the practice of the council to vote by ballot for officers. This mode of ballot, the Civil Officer is informed, the senate of the United States adopted, but were obliged to relinquish, finding it incompatible with their duty and powers, (which on executive business, is confined to their advice and consent to the acts of the chief magistrate,) although there is no such *express provision* with respect to the advice of each member in the constitution of the United States.

Thus we see that every part of the constitution illustrates and confirms that construction which the Civil Officer has maintained, whilst every part is utterly inconsistent with the whole and every other part thereof, according to the principles of the Friend to Candour, and the conduct of the council.

The Friend to Candour seems to be at some loss to account for the council being expressly called in the constitution *The Council to the Governor*, and the reason he has laid hold of to solve his doubts is curious, and has at least the merit of originality; it amounts to this, that they are called the council to the governor, because the governor is to obey them, and promulge their acts. One would have supposed that this would be the last reason in the world that a mind ordinarily constructed could have urged; but he tells us, by way of confirmation, that the oath they take calls them Counsellors of Maryland, and that this oath was prescribed by wise men, many of them members of convention: this oath is very proper as an expression of reference or description, for they certainly are not counsellors for Pennsylvania, in whatever manner some of them may act; but surely it cannot be contended that this oath gives them any powers, or alters the constitutional style. That constitution declares them to be *the council to the governor*; and for this plain and evident reason, which we have explained, they always had been *the council to the governor*, and were so continued by constitutional provision, with curtailed powers, and a different mode of appointment, as an establishment already well known to the laws, on the same principles that an *assembly, governor* and *courts*, &c. were continued.

But it seems, according to the Friend to Candour, that the Civil Officer has glided, with wonderful dexterity, over *what is to be done in the absence of the governor.* The Civil Officer believes, that by this time he has said as much on that subject as the Friend to Candour is willing to hear, but that writer may possibly learn hereafter, if the question should ever come before a tribunal of justice competent to decide on this clause of section 34, that in the absence of the governor no one but the first named of the council, not the first named of those members who assemble and call themselves a council, can preside; *that* the first named of the council must preside as governor; *that* to act as governor he must qualify *as such*; *that* he can only qualify as such on the death, resignation or removal out of the state of the real governor; *that* he can only do this until the assembly can meet to choose a governor for the residue of the year; and *that* these are the only cases of absence of the governor in which sect. 34 provides, that the first named of the council shall preside *as such* and vote when the other *members* disagree. The Friend to Candour may also then learn, that instead of *amusing* themselves with devices of a great seal, and examining into the conduct of their clerk, the convention intended that counsellors should go home and transact their own business in the absence of the governor, as counsellors had been used to do when their advice was not required; *that* the convention expected that every man that could be elected a counsellor would have some business of his own to transact, *such as it might be*; *that* they expected the main business of annual appointments on which they are to advise the governor, would be completed in the third week of November; *that* the other extraordinary occasions that might require their concurrence could create no great interruption of their private pursuits; *that* if indeed the legislature have tacked the council to the governor in the execution of almost every trivial executive power, it