

Virginia Ratifying Convention

MONDAY, June 16, 1788.^[1] [Elliot misprinted this as Monday, June 14, 1788.]

The Convention, according to the order of the day, again resolved itself into a committee of the whole Convention, to take into further consideration the proposed plan of government. Mr. WYTHE in the chair.

[The 8th section still under consideration. See page 378.]

Mr. HENRY thought it necessary and proper that they should take a collective view of this whole section, and revert again to the first clause. He adverted to the clause which gives Congress the power of raising armies, and proceeded as follows: To me this appears **a very alarming power, when unlimited.** They are not only to raise, but to support, armies; and this support is to go to the utmost abilities of the United States. **If Congress shall say that the general welfare requires it, they may keep armies continually on foot.** There is no control on Congress in raising or stationing them. **They may billet them on the people at pleasure. This unlimited authority is a most dangerous power: its principles are despotic. If it be unbounded, it must lead to despotism; for the power of a people in a free government is supposed to be "paramount" to the existing power.**

We shall be told that, in England, the king, lords, and commons, have this power; that armies can be raised by the prince alone, **without the "consent" of the people.** How does this apply here? **Is this government to place us in the situation of the English?** Should we suppose this government to resemble king, lords, and commons, we of this state {411} should be like an English county. An English county Cannot control the government. Virginia cannot control the government of Congress any more than the county of Kent can control that of England. Advert to the power thoroughly. **One of our first complaints, under the former government, was the quartering of troops upon us. This was one of the principal reasons for dissolving the connection with Great Britain.** Here we may have troops in time of peace. They may be billeted in any manner to tyrannize, oppress, and crush us.

We are told, we are afraid to trust ourselves; that our own representatives Congress will not exercise their powers oppressively; **that we shall not enslave ourselves;** that **the militia cannot enslave themselves,** &c.

WHO has enslaved France, Spain, Germany, Turkey, and other countries which groan under tyranny?

They have been "ENSLAVED" by the hands of their "OWN PEOPLE".

If it will be so in America, it will be only as it has been every where else.

I am still persuaded that the power of calling forth the militia, **to execute the laws of the Union, is dangerous.** We requested the gentleman to show the cases where the militia would be wanting

to execute the laws. **Have we received a satisfactory answer?** When we consider this part, and compare it to other parts, which declare that Congress may declare war, and **that the President shall command the regular troops, militia, and navy, we shall find great danger.** Under the order of Congress, they shall suppress insurrections. Under the order of Congress, they shall be called **to execute the "laws"**. It will result, of course, that this is to be a government of force. *Look at the part which speaks of excises*, and you will recollect that those who are to collect excises and duties are to be aided by military force. They have power to call them out, and to provide for arming, organizing, disciplining, them. Consequently, they are to make militia laws for this state.

The honorable gentleman said that the militia should be called forth to quell riots. *Have we not seen* this business go on very well to-day without military force? It is a long-established principle of the common law of England, that civil force is sufficient to quell riots. **To what length may it not be carried? A law may be made that, if twelve men assemble, if they do not disperse, they may be fired upon.** {412} I think it is so in England. **Does not this part of the paper bear a strong aspect?** The honorable gentleman, from his knowledge, was called upon to show the instances, and he told us the militia may be called out to quell riots. They may make the militia travel, and act under a colonel, or perhaps under a constable. **Who are to determine whether it be a riot or not? Those who are to execute the laws of the Union? If they have power to execute their laws in this manner, in what situation are we placed!** Your men who go to Congress are not restrained by a bill of rights. They are not restrained from inflicting unusual and severe punishments, though the bill of rights of Virginia forbids it. What will be the consequence? They may inflict the most cruel and ignominious punishments on the militia, and they will tell you that it is necessary for their discipline.

Give me leave to ask another thing. **Suppose an exciseman will demand leave to enter your cellar, or house, by virtue of his office; perhaps he may call on the militia to enable him to go.** If Congress be informed of it, will they give you redress? **They will tell you that he is executing the laws under the authority of the continent at large, which must be obeyed, for that the government cannot be carried on without exercising severity.** It, without any reservation of rights or control, **"you" are contented to give up "your" rights, "I am not"**. There is no principle to guide the legislature to restrain them from inflicting the utmost severity of punishment. Will gentlemen **voluntarily** give up their liberty? With respect to calling the militia to enforce every execution indiscriminately, it is unprecedented. Have we ever seen it done in any free country? Was it ever so in the mother country? It never was so in any well-regulated country. **It is a government of force, and the genius of despotism expressly.** It is not proved that this power is necessary, and if it be unnecessary, **shall we give it up?**

Mr. MADISON. Mr. Chairman, I will endeavor to follow the rule of the house, but must pay due attention to the observations which fell from the gentleman. I should conclude, from abstracted reasoning, that they were ill founded I should think that, if there were any object which the general government ought to command, it would be the direction of the national forces. **And as the force which lies in militia is most safe,** the direction of that part ought to be {413} submitted to, **in order to render another force unnecessary.** The power objected to is necessary, because it is to be employed for **"national" purposes.** It is necessary to be given to every government. This is not opinion, but fact. The highest authority may be given, that the want of such authority in the government protracted the late war, and prolonged its calamities.

He says that one ground of complaint, at the beginning of the revolution, was, that a standing army was quartered upon us. This was not the whole complaint. We complained because it was done without the "LOCAL Authority" of this country without the CONSENT of the people of America. As to the exclusion of standing armies in the bill of rights of the states, we shall find that though, in one or two of them, there is something like a prohibition, yet, in most of them, it is only provided that no armies shall be kept without the legislative authority; that is, without the CONSENT of the community itself. Where is the impropriety of saying that we shall have all army, if necessary? Does not the notoriety of this constitute security? If inimical nations were to fall upon us when defenceless, what would be the consequence? Would it be wise to say, that we should have no defence? Give me leave to say, that the only possible way to provide against standing armies is to make them unnecessary.

The way to do this is to organize and discipline our militia, so as to render them capable of defending the country against external invasions and internal insurrections. But it is urged that abuses may happen. How is it possible to answer objections against the possibility of abuses? It must strike every logical reasoner, that these cannot be entirely provided against. I really thought that the objection in the militia was at an end. Was there ever a constitution, in which if authority was vested, it must not have been executed by force, if resisted? Was it not in the contemplation of this state, when contemptuous proceedings were expected, to recur to something of this kind? How is it possible to have a more proper resource than this? That the laws of every country ought to be executed, cannot be denied. That force must be used if necessary, cannot be denied. Can any government be established, that will answer any put, pose whatever, unless force be provided for executing its laws? The Constitution does not say that a standing army shall be called out to execute the laws. >>> Is not this a more proper way? The militia ought to be called forth to suppress smugglers. Will this be denied? The case actually happened at Alexandria. There were a number of smugglers, who were too formidable for the civil power to overcome. The military quelled the sailors, who otherwise would have perpetrated their intentions. Should a number of smugglers have a number of ships, the militia ought to be called forth to quell them. We do not know but what there may be a combination of smugglers in Virginia hereafter. We all know the use made of the Isle of Man. It was a general depository of contraband goods. The Parliament found the evil so great, as to render it necessary to wrest it out of the hands of its possessor.

The honorable gentleman says that it is a government of force. If he means military force, the clause under consideration proves the contrary. There never was a government without force. What is the meaning of government? An institution to make people do their duty (**APP warning note of how this founder perceived government - note the differences of the two Patrick Henry presents government only by consent, James Madison, an institution once established to make people do their "duty"... defined by who?**). A government leaving it to a man to do his duty or not, as he pleases, would be a new species of government (**APP note, which in the end we have in the Constitution and Bill of Rights as the division of powers are defined, and both fears even the following are resolved for the greater part from the debates**), or rather no government at all. The ingenuity of the gentleman is remarkable in introducing the riot act of Great Britain. That act has no connection, or analogy, to any regulation of the militia; NOR is there any thing in the Constitution to warrant the general government to make such an act. It never was a complaint, in Great Britain, that the militia could be called forth. If riots should happen, the

militia are proper to quell it, to prevent a resort to another mode. As to the infliction of ignominious punishments, we have no ground of alarm, if we consider the circumstances of the people at large. There will be no punishments so ignominious as have been inflicted already. The militia law of every state to the north of Maryland is less rigorous than the particular law of this state. If a change be necessary to be made by the general government, it will be in our favor. I think that the people of those states would not agree to be subjected to a more harsh punishment than their own militia laws inflict. An observation fell from a gentleman, on the same side with myself, which deserves to be attended to.*** If we be dissatisfied with the national government, if we "should >>>choose to renounce {415} it", "this is an additional safeguard to our defence". I conceive that we are peculiarly interested in giving the general government as extensive means as possible to protect us. If there be a particular discrimination between places in America, the Southern States are, from their situation and circumstances, most interested in giving the national government the power of protecting its members.

[Here Mr. Madison made some other observations, but spoke so very low, that his meaning could not be comprehended.]

APP Study Note on Madison's statement: "What is the meaning of government? An institution to make people do their duty".

This illustrates one of the major differences between federalism by a federalist, and true freedom as defined.

Madison on "this point" is **wholly incorrect** in regards to the **Absolute Rights of the Colonists 1772**, (however correct in all **tyrannical governments**) and is proven by long standing documents regarding laws on freedom and liberty. The closing statement on this page shows the dismay regarding these past rights by Mr. NICHOLAS in that such Rights "**had been frequently violated with impunity.**" A condition that had been the aim of correcting by the Declaration of Independence, and the purpose of defending the retainment of such protections by the Anti Federalists when debating the Constitution - resulting in the Bill of Rights, which in fact made us a new species of government, as spoke of by Madison, that now protects freedoms throughout the world because those Rights are not violated with impunity; and such care needs be taken to make sure that they are never treated in such a way.

1.) The Absolute Rights of the Colonists:

"The Legislative has no right to absolute arbitrary power over the lives and fortunes of the people"

All Men have a Right to remain in a State of Nature as long as they please: And in case of intollerable Oppression, Civil or Religious, to leave the Society they belong to, and enter into another.-- (this removes force and establishes CONSENT as the supreme; This coinsides with John Locke #186; #190.

"The Legislative cannot Justly assume to itself a power to rule by extempore arbitrary decrees; but it is bound to see that Justice is dispensed, and that the rights of the subjects be decided, by promulgated, standing and known laws, and authorized independent Judges;" that is independent as far as possible of Prince or People.

2.) Declaration of Independence:

That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.

That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed;

3.) The Constitution:

Amendment IX: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIII:

Section 1. Neither slavery nor involuntary servitude, "except" as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

4.) Declaration of Independence:

that, whenever any form of government becomes destructive of these ends (see), it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.

But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a DESIGN to reduce them under absolute despotism, it is their RIGHT, it is their DUTY, to throw off such government and to provide new guards for their future security.

APP: Here we have the purpose of a Free government is: (numbers corresponding)

1.) Not to make anyone do anything, **but only** to see that "**Justice**" is **dispensed.** "**Justice**" keeps one from doing something to another, or punishes one when he does do something to another, **without his consent.**

Note: Do not confuse this "**duty**" mentioned here of **arbitrary state or federal law to force service to the country,** with enforcing laws on persons who infringe against just and necessary civil law; This is a **separate issue in the second part,** when one is found taking "**inalienable**" **rights, property** and **liberty** from another, **as this has to do with crime;** **In the first part, forcing** someone to **do their duty** at the beck and call of the state **is a crime, as clearly defined in the second part.**

Justice has nothing to do with making someone **do** something, or **do** something to someone else, without their consent. That type of action is **defined as "Tyranny".**

2.) If you can be made to do anything, you have no liberty, and without the ability to consent, you have no freedom. And I guarantee if someone is "made" or forced to do "their duty" by any government, they will not be pursuing happiness.... Which is an inalienable right.

3.) Any Type of slavery (voluntary or involuntary); or Involuntary Servitude is strictly prohibited. i.e. the Draft or other forced service.

4.) There is the "**DUTY**", **and it is absolutely opposite of Madison's statement.** It is the **duty** of any free man or free state to throw out any government that attempts to "make" someone "do" anything without their "**consent**". Forcing someone to do something that he does not want to do, only seems reasonable or of great reason to the one that is doing the forcing, (whether a government or person); **And by his (anyone's) actions he defines himself as a Tyrant.**

Note: "Essential natural rights" cannot be even voluntarily given up to others (i.e. voluntary slavery).

A few years later James Madison had to change his opinion on his great optimisms (or naivety), when he came to realize the dangers spoke of by Patrick Henry and George Mason **were quite real;** To his credit, Madison left the federalists to join Thomas Jefferson not long after the Constitution was ratified; This was to write with Jefferson the **Virginia and Kentucky Resolutions(which see)** in response and opposition to the Alien and Sedition Act. These resolutions clarified the powers of the states over the federal government, and the very limited delegated power of the federal government.

A "just" war will find all the needed volunteers.

Note also, that the "**MILITIA**" was defined by James Madison as "**officered by men chosen among themselves**" not by governments; and as an **OPPOSING FORCE** against their "**own**" **standing army.** This follows George Mason's definition of "all people" and concerns of an elite military, no longer made of all citizens of the general populous.

Here is how one of James Madison's quotes describes it:

"The highest number to which a standing army can be carried in any country does not exceed one hundredth part of the souls, or one twenty-fifth (1/25th) part of the number able to bear arms This PORTION would NOT yield, in the United States, an army of more than twenty-five or thirty thousand men.

To "these" would be "OPPOSED" (APP: indicating that the "militia" is to be a "OPPOSING FORCE" to their standing army; as well as that of foreign enemies) a MILITIA amounting to near half a million "CITIZENS" with arms in their "HANDS", >>>> "officered by men chosen from "AMONG THEMSELVES"",

(APP: NOT by government or the standing army)

fighting for "their"(the citizen / militia's) common liberties and united and conducted by government"S" possessing their (the citizen / militia's) affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a "proportion" of regular troops (i.e. standing army).

Besides the advantage of being armed, it forms a barrier against the "enterprises of ambition", more insurmountable than any which a simple government of any form can admit of.

The governments of Europe are afraid to trust the "PEOPLE" with arms. If they did, the people would surely shake off the yoke of tyranny, as America did.

Let us not insult the free and gallant citizens of America with the suspicion that they would be less able to defend the rights of which they would be in actual possession than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors."

(end APP)

Madison continues:

An act passed, a few years ago, in this state, to enable the government to call forth the militia to enforce the laws when a powerful combination should take place to oppose them. This is the same power which the Constitution is to have. There is a great deal of difference between calling forth the militia, when a combination is formed to prevent the execution of the laws, and the sheriff or constable carrying with him a body of militia to execute them in the first instance; which is a construction not warranted by the clause. There is an act, also, in this state, empowering the officers of the customs to summon any persons to assist them when they meet with obstruction in executing their duty. This shows the necessity of giving the government power to call forth the militia when the laws are resisted. It is a power vested in every legislature in the Union, and which

is necessary to every government. He then moved that the clerk should read those acts which were accordingly read.

Mr. GEORGE MASON asked to what purpose the laws were read. The objection was, that too much power was given to Congress power that would finally destroy the state governments more effectually by insidious, underhanded means, than such as could be openly practiced. This, said he, is the opinion of many worthy men, not only in this Convention, but in all parts of America. These laws could only show that the legislature of this state could pass such acts. He thought they militated against the cession of this power to Congress, because the state governments could call forth the militia when necessary, so as to compel a submission to the laws; and as they were competent to it, Congress ought not to have the power. The meeting of three or four persons might be called an insurrection, and the militia might be called out to disperse them. He was not satisfied with {416} the explanation of the word "organization" by the gentleman in the military line, (Mr. Lee.)

He thought they were not confined to the technical explanation, but that Congress could inflict severe and ignominious punishments on the militia, as a necessary incident to the power of organizing and disciplining them. The gentleman had said there was no danger, because the laws respecting the militia were less rigid in the other states than this. This was no conclusive argument. His fears, as he had before expressed, were, that grievous punishments would be inflicted, in order to render the service disagreeable to the militia themselves, and induce them to wish its abolition, which would afford a PRETENCE for establishing a standing army. (APP Note: This has already happened) He was convinced the STATE GOVERNMENTS sought to have the control of the militia, except when they were absolutely necessary for general purposes. The gentleman had said that they would be only subject to martial law when in actual service. He demanded what was to hinder Congress from >>>inflicting it always, and making a >>>general law for the purpose. (APP Note: And This has already happened) If so, said he, it must finally produce, most infallibly, the annihilation of the state governments. These were his apprehensions; but he prayed God they might be groundless.

Mr. MADISON replied, that the obvious explanation was, that the STATES were to appoint the officers, and govern all the militia except that part which was called into the actual service of the United States. He asked, if power were given to the general government, if we must not give it executive power to use it. The vice of the old system was, that Congress could not execute the powers nominally vested in them. If the contested clause were expunged, this system would have nearly the same defect.

Mr. HENRY wished to know what authority the state governments had over the militia.

Mr. MADISON answered, that the state governments might do what they thought proper with the militia, when they were not in the actual service of the United States. They might make use of them to suppress insurrections, quell riots, and call on the general government for the militia of any other state, to aid them, if necessary.

Mr. HENRY replied that, as the clause expressly vested the general government with power to call them out to suppress {417} insurrections, it appeared to him, most decidedly, that the power of suppressing insurrections was exclusively given to Congress. **If it remained in the states, it was by implication.**

Mr. CORBIN, after a short address to the chair, in which he expressed extreme reluctance to get up, said, that all contentions on this subject might be ended, by adverting to the **4th section of the 4th article**, which provides, "that the United States shall guaranty to every state in the Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence. **He thought this section gave the states power to use their own militia, and call on Congress for the militia of other states.** He observed that our representatives were to return every second year to mingle with their fellow-citizens. He asked, then, how, in the name of God, they would make laws to destroy themselves. The gentleman had told us that nothing could be more humiliating than that the state governments could not control the general government. He thought the gentleman might as well have complained that one county could not control the state at large. Mr. Corbin then said that all confederate governments **had the care of the national defence**, and that Congress ought to have it. Animadverting on Mr. Henry's observations, that the French had been the instruments of their own slavery, that the Germans had enslaved the Germans, and the Spaniards the Spaniards, &c., he asked if those nations knew any thing of representation. **The want of "this knowledge" was the "principal" cause of their bondage.** He concluded by observing that the general government had **no power but such as the state government had**, and that arguments against the one **held against the other.**

Mr. GRAYSON, in reply to Mr. Corbin, said he was mistaken when he produced the 4th section of the 4th article, to prove that the state governments had a right to intermeddle with the militia. He was of opinion that a previous application must be made to the federal head, by the legislature when in session, or otherwise by the executive of any state, before they could interfere with the militia. In his opinion, no instance could be adduced where the states could employ the militia; for, in all the cases wherein they could be {418} employed, Congress had the exclusive direction and control of them. Disputes, he observed, had happened in many countries, where this power should be lodged. In England, there was a dispute between the Parliament and King Charles who should have power over the militia. Were this government well organized, he would not object to giving it power over the militia. **But as it appeared to him to be without checks**, and to tend to the formation of an aristocratic body, **he could not agree to it.** Thus organized, his imagination did not reach so far as to know where this power should be lodged. **He conceived the state governments to be at the mercy of the generality.** He wished to be open to conviction, but he could see no case where the states could command the militia. **>>>He did not believe that it corresponded with the intentions of those who formed it, and it was altogether without an equilibrium.** He humbly apprehended that the power of providing for organizing and disciplining the militia, enabled the government to make laws for regulating them, and inflicting punishments for disobedience, neglect, &c. Whether it would be the spirit of the generality to lay unusual punishments, he knew not; but he thought they had the power, if they thought proper to exercise it. He thought that, if there was a constructive implied power left in the states, yet, as the line was not clearly marked between the two governments, it would create

differences. He complained of the uncertainty of the expression, and wished it to be so clearly expressed that the people might see where the states could interfere.

As the exclusive power of arming, organizing, was given to Congress, **they might entirely neglect them; or they might be armed in one part of the Union, and totally neglected in another.** This he apprehended to be a probable circumstance. In this he might be thought suspicious; but he was justified by what had happened in other countries. He wished to know what attention had been paid to the militia of Scotland and Ireland since the union, and what laws had been made to regulate them. There is, says Mr. Grayson, an excellent militia law in England, and such as I wish to be established by the general government. They have thirty thousand select militia in England. But the militia of Scotland and Ireland **are neglected.** I see the necessity of the concentration of the forces of the Union. {419} I acknowledge that militia are the best means of quelling insurrections, and that we have an advantage over the English government, for their regular forces answer the purpose. **But I object to the want of checks, and a line of discrimination between the state governments and the generality.**

Mr. JOHN MARSHALL asked if gentlemen were serious when they asserted that, if the state governments had power to interfere with the militia, it was by implication. If they were, he asked the committee whether the least attention would not **show that they were mistaken.** **The state governments DID NOT derive their powers from the general government; but each government derived its powers from the people, and each was to act according to the powers given it.** Would any gentleman deny this? He demanded if powers not given were retained by implication. Could any man say so? Could any man say that this power was not retained by the states, as they had not given it away? For, says he, **does not a power remain till it is given away? The state legislatures had power to command and govern their militia before, and have it still, undeniably, unless there be something in this Constitution that takes it away.**

For Continental purposes Congress may call forth the militia, as to suppress insurrections and repel invasions. **But the power given to the states by the people is "NOT taken away";** for the **Constitution does NOT say so.** In the Confederation Congress had this power; **but the state legislatures had it "also".** The power of legislating given them within the ten miles square is **exclusive of the states, because it is expressed to be exclusive.** The truth is, that when power is given to the general legislature, if it was in the state legislature before, both shall exercise it; unless there be an incompatibility in the exercise by one to that by the other, or negative words precluding the state governments from it. **But there are NO negative words here. It rests, therefore, with the STATES.**

To me it appears, then, **unquestionable** that the **state governments** can call forth the militia, in case the Constitution should be adopted, in the **same manner as they could have done before** its adoption.

Gentlemen have said that the states cannot defend themselves without an application to Congress, because "Congress" can interpose!

Does not every man feel a refutation of the argument in his own breast?

I will show^{420} that there could NOT be a combination, between those who formed the Constitution, to take away this power.

All the restraints intended to be laid on the state governments (besides where an exclusive power is expressly given to Congress) are contained in the **10th section of the 1st article. This power is **NOT included** in the restrictions in that section. But what excludes every possibility of doubt, is the last part of it that "no state shall engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." **When invaded, they "CAN" engage in war, as also when in "imminent danger". This clearly proves that the states can use the militia when they find it necessary.** The **worthy** member last up objects to the Continental government's possessing the power of disciplining the militia, **because, though all its branches be derived from the people, he says they will form an aristocratic government, unsafe and unfit to be trusted.****

Mr. GRAYSON answered, that he only said it was **so constructed** as to "form" a great **aristocratic "body"**.

APP Note: i.e. a "Mixed Monarchy" as warned again later in the Virginia and Kentucky Resolutions. This is what we have today, and was no where intended by the Founders;

The dangers of "large" republics were warned of by Charles Montesquieu (1750), Bill Yates (Brutus) and Samuel Adams who relates the dangers of "DISTANT LEGISLATURES".

BRUTUS (Robert Yates):

"...History furnishes no example of a free republic, any thing like the extent of the United States.

The Grecian republics were of small extent; so also was that of the Romans.

Both of these, it is true, in process of time, extended their conquests over large territories of country;

and the consequence was, that their governments were "CHANGED"

FROM that of free governments

to those of the MOST "TYRANNICAL" that ever existed in the world."...

APP: This follows Charles Montesquieu (1750) understanding of large republics, and considered by Hamilton (Federalist #9) indicating the necessity of a CONFEDERATE REPUBLIC (of FREE and INDEPENDENT STATES), with a VERY LIMITED Federal Republic "COMPACT"; Which as James Madison indicates in this day convention as well as in the Virginia and Kentucky Resolutions, that if a state feels ANY danger from the Federal Government, the State could "refuse it altogether".

See also Republics and Representation.

Mr. MARSHALL replied, that he was not certain whether he understood him; but he thought he had said so. He conceived that, as the government was **drawn from the people**, the **feelings and interests of the people** would be **attended to**, and that we should be safe in granting them power to regulate the militia. When the government is drawn from the people, continued Mr. Marshall, and depending on the people for its continuance, **oppressive measures will not be attempted**, as they will certainly draw on **their authors** the **resentment** of those on whom **they depend**. On **this** government, **thus depending on ourselves** for its existence, **I will rest my safety, notwithstanding the danger depicted by the honorable gentleman**. I cannot help being surprised that the worthy member thought this power so dangerous. What government is able to protect you in time of war? Will any state depend on its own exertions? The consequence of such dependence, and withholding this power from Congress, will be, that state will fall after state, and be a sacrifice to the want of power in the general government. *United we are strong, divided we fall*. Will you prevent the general government from drawing the militia of one state to another, when the consequence would be, that every state must depend on itself? The enemy, possessing {421} the water, can quickly go from one state to another. No state will spare to another its militia, which it conceives necessary for itself. It requires a Superintending power, in order to call forth the resources of all to protect all. If this be not done, each state will fall a sacrifice. This system merits the highest applause **in "this" respect**. The honorable gentleman said that a general regulation may be made to inflict punishments. Does he imagine that a militia law is to be ingrafted on the scheme of government, so as to render it incapable of being changed? The idea of the worthy member supposes that men renounce their own interests. This would produce general inconveniences throughout the Union, and would be equally opposed by all the states. But the worthy member fears, that in one part of the Union they will be regulated and disciplined, and in another neglected. This danger is enhanced by leaving this power to each state; for some states may attend to their militia, and others may neglect them.

If Congress neglect our militia (citizens), "we can arm them OURSELVES".

CANNOT Virginia "import arms?> >Cannot she put them into the hands of "HER" militia-men?

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He then **concluded by observing**, that the power of governing the militia was **NOT** vested in the states by implication, because, **being "possessed of it" > "antecedent to the adoption of the government, and "not being divested of it" by any grant or restriction in the Constitution, they must necessarily be as "FULLY possessed of it as ever they had been.> And it could NOT be said that the states derived ANY powers from that (the federal government or Constitution) system, "but RETAINED them," >>>>>>"though not acknowledged in ANY part of it"**.

APP: i.e. as Nicholas presents in the last paragraphs of this day convention; These are "PREEXISTING RIGHTS" in the "PEOPLE..."

APP Note: This shows the missuse of the commerce clause which the Federal Government has "arrogated a power which is prohibited"; That is, they have created a "PRETENCE of authority" by which to prohibit states and the people from importing their own arms to equip their own citizen militias; i.e. ALL people.

Mr. GRAYSON acknowledged that all power was drawn from the people. But he could see none of those checks which ought to characterize a free government. It had not such checks as even the British government had. He thought it so organized as to "form" an aristocratic body. If we looked at the democratic branch, and the great extent of country, he said, it must be considered, in a great degree, to be an aristocratic representation. As they were elected with craving appetites, and wishing for emoluments, they might unite with the other two branches. **They might give reciprocally good offices to one another, and mutually protect each other; for he considered them all as united in interest,** and as but one branch. There was no check to prevent such {422} a combination; nor, in cases of concurrent powers, was there a line drawn to prevent interference between the state governments and the generality.

Mr. HENRY still retained his opinion, that the states had no right to call forth the militia to suppress insurrections, **(APP note: This statement is in reference to the document)** But the right interpretation (and such as the nations of the earth had put upon the concession of power) was that, when power was given, it was given exclusively. He appealed to the committee, if power was not confined in the hands of a few in almost all countries of the world. **He referred to their candor,** if the construction of conceded power was not an exclusive concession, in nineteen twentieth parts of the world. The nations which retained their liberty were comparatively few. America **would add to the number of the oppressed nations, if she depended on constructive rights and argumentative implication.** That the powers given to Congress were exclusively given, **was very obvious to him.** **The rights which the states had must be founded on the restrictions on Congress.** He asked, if the doctrine which had been so often circulated, that **rights not given were retained, was true, why there were negative clauses to restrain Congress.** He told gentlemen **that these clauses were sufficient to shake all their implication; for, says he, if Congress had no power but that given to them, why restrict them by negative words? Is not the clear implication this that, if these restrictions were not inserted, they could have performed what they prohibit?**

The worthy member had said that Congress ought to have power to protect all, and had given this system the highest encomium. But he insisted that the power over the militia was concurrent. To obviate the futility of this doctrine, Mr. Henry alleged that it was not reducible to practice. Examine it, says he; reduce it to practice. Suppose an insurrection in Virginia, and suppose there be danger apprehended of an insurrection in another state, from the exercise of the government; or suppose a national war, and there be discontents among the people of this state, that produce, or threaten, an insurrection; suppose Congress, in either case, demands a number of militia, **will they not be obliged to go? Where are your reserved rights, when your militia go to a neighboring state? Which call is to be obeyed, the congressional call, or the call of the state legislature?** The call of Congress must be obeyed. I need not remind this {423} committee

that the **sweeping clause** will cause their demands to be submitted to. **This clause enables them "to make all laws which shall be necessary and proper to carry into execution all the powers vested by this Constitution in the government of the United States, or in any department or officer thereof."** Mr. Chairman, I will turn to another clause, which relates to the same subject, and tends to show the **fallacy** of their argument.

The 10th section of the 1st article, to which reference was made by the worthy member, militates against himself. It says, that "no state shall engage in war, unless actually invaded." If you give this clause a fair construction, what is the true meaning of it? What does this relate to? Not domestic insurrections, but war. **If the country be invaded, a state may go to war**, but cannot suppress insurrections. If there should happen an insurrection of slaves, the country cannot be said to be invaded. They cannot, therefore, suppress it without the interposition of Congress. The 4th section of the 4th article expressly directs that, in case of domestic violence, Congress shall protect the states on application of the legislature or executive; and the 8th section of the 1st article gives Congress power to call forth the militia to quell insurrections: there cannot, therefore, be a concurrent power. **The "state" legislatures ought to have power to call forth the efforts of the militia, when necessary. Occasions for calling them out may be urgent, pressing, and instantaneous. The states cannot now call them, let an insurrection be ever so perilous, without an application to Congress. So long a delay may be fatal.**

There are three clauses which prove, beyond the possibility of doubt, that Congress, and *Congress only*, can call forth the militia. **(APP Note: Speaking of the document)** The clause giving Congress power to call them out to suppress insurrections, that which restrains a state from engaging in war except when actually invaded; and that which requires Congress to protect the states against domestic violence, render it impossible that a state can have power to intermeddle with them. **Will not Congress find refuge for their actions in these clauses?** With respect to the concurrent jurisdiction, it is a political monster of absurdity. **We have passed that clause which gives Congress an unlimited authority over the national wealth; and here is an unbounded control over the national strength.** Notwithstanding {424} **this clear, unequivocal relinquishment of the power of controlling the militia, you say the states retain it, for the very purposes given to congress.** Is it fair to say that you give the power of arming the militia, and at the same time to say you reserve it? This great national government **ought not to be left in this condition. If it be, it will terminate in the destruction of our liberties.**

Mr. MADISON. Mr. Chairman, let me ask this committee, and the honorable member last up, what we are to understand from this reasoning. The power must be vested in Congress, or in the state governments; or there must be a division or concurrence. He is against division. It is a political monster. He will not give it to Congress for fear of oppression. Is it to be vested in the state governments? If so, where is the provision for general defence? If ever America should be attacked, the states would fall successively. It will prevent them from giving aid to their sister states; for, as each state will expect to be attacked, and wish to guard against it, each will retain its own militia for its own defence. Where is this power to be deposited, then, unless in the general government, if it be dangerous to the public safety to give it exclusively to the states? If it must be divided, let him show a better manner of doing it than that which is in the Constitution. I cannot agree with the other honorable gentleman, that there is no check. **There is a powerful check in that paper.** The **STATE** governments are to govern the militia **when not called forth**

for general national purposes; and Congress is to govern such part ONLY as may be in the actual service of the Union. Nothing can be more certain and positive than this. It expressly empowers Congress to govern them when in the service of the United States. It is, then, "clear" that the STATES govern them "when they are not".

(APP Note: The danger that presents itself now, is that the state "militias" once controlled by the state and it's Governor when not in foreign service have been simulated into the standing army as a "National Guard" so that all military men are "always in the service of the United States" - where are our independent state militias? Where is our checks to power clearly intended by the founders to protect each independent state, and if necessary, against the generality? Gone; but not prohibited to reform and reinstitute by the states themselves should they choose, as clearly indicated by these intents being a right of the state to arm, import arms, and discipline its own militias "outside" the federal government. - See again John Marshall's statements above, George Nicholas and Mr. Pendleton's Statements below)

"With respect to suppressing insurrections, I say that those clauses which were mentioned by the honorable gentleman **are compatible with a concurrence of the power**. By the first, Congress is to call them forth to suppress insurrections, and repel invasions of "foreign powers". A concurrence in the former case is necessary, because a whole state may be in insurrection against the Union. What has passed may perhaps justify this apprehension. The safety of the Union and particular states requires that the general government should have power to {425} repel "foreign" invasions. The 4th section of the 4th article is perfectly consistent with the exercise of the power by the states. The words are, "The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence." The word invasion here, after power had been given in the former clause to repel invasions, may be thought tautologous, but it has a "DIFFERENT MEANING from the other". This clause speaks of a particular state. It means that it shall be protected from invasion by "other states". A republican government is to be guarantied to each state, and they are to be protected from invasion from "other states", as well as from foreign powers; and, on application by the legislature or executive, as the case may be, the militia of the other states are to be called to suppress domestic insurrections. Does this bar the states from calling forth their own militia? - "NO" -; but it gives them a supplementary security to suppress insurrections and domestic violence.

The other clause runs in these words: "**No state shall**, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." They are restrained from making war, unless invaded, or in imminent danger. When in such danger, they are "not restrained". I can perceive no competition in these clauses. They cannot be said to be repugnant to a concurrence of the power. If we object to the Constitution in this manner, and consume our time in verbal criticism, we shall never put an end to the business.

Mr. GEORGE MASON. Mr. Chairman, a worthy member has asked who are the militia, if they be not the *people* of this country, and if we are not to be protected from the fate of the Germans, Prussians, by our representation? I ask, Who are the militia? They consist now of the "whole people", except a few public officers. But I cannot say who will be the militia of the future day. If that paper on the table gets **no alteration**, the militia of the future day may not consist of all classes, high and low, and {426} rich and poor; **but they may be confined to the lower and middle classes of the people, granting exclusion to the higher classes of the people.** If we should ever see that day, the most ignominious punishments and heavy fines may be expected. Under the present government, all ranks of people are subject to militia duty. Under such a full and equal representation as ours, there can be no ignominious punishment inflicted. But under this national, or rather consolidated government, the case will be different. The representation being so small and inadequate, they will have no fellow-feeling for the people. They may discriminate people in their own predicament, and exempt from duty all the officers and **lowest creatures of the national government.** If there were a more particular definition of their powers, and a clause exempting the militia from martial law except when in actual service, and from fines and punishments of an unusual nature, then we might expect that the militia would be what they are. **But, if this be not the case, we cannot say how long all classes of people will be included in the militia. There will not be the same reason to expect it, because the government will be administered by different people. We know what they are now, but know not how soon they may be altered.**

Mr. GEORGE NICHOLAS. Mr. Chairman, I feel apprehensions lest the subject of our debates should be misunderstood. Every one wishes to know the true meaning of the system; but I fear those who hear us will think we are captiously quibbling on words. We have been told, in the course of this business, that the government will operate like a screw. Give me leave to say that the exertions of the opposition are like that instrument. They catch at every thing, and take it into their vortex. The worthy member says that this government is defective, because it comes from the people. Its greatest recommendation, with me, is putting the power in the hands of the people. He disapproves of it because it does not say in what particular instances the militia shall be called out to execute the laws. This is a power of the Constitution, and particular instances must be defined by the legislature. But, says the worthy member, those laws which have been read are arguments against the Constitution, because they show that the states are now in possession of the power, and competent to its execution. {427} Would you leave this power in the states, and by that means deprive the general government of a power which will be necessary for its existence? If the state governments find this power necessary, ought not the general government to have a similar power? But, sir, there is no state check in this business. The gentleman near me has shown that there is a very important check.

Another worthy member says there is no power in the states to quell an insurrection of slaves. Have they it now? If they have, does the Constitution take it away? If it does, it must be in one of the three clauses which have been mentioned by the worthy member. The first clause gives the general government power to call them out when necessary. **Does this take it away from the states? > NO >.** But it gives an additional security: for, **besides the power in the state governments to > use their "own" militia >**, it will be the duty of the general government to aid them with the strength of the Union when called for.> NO part > of this Constitution can show that this power is taken away.

But an argument is drawn from that clause which says "that no state shall engage in war unless actually invaded, or in such imminent danger as will not admit of delay." What does this prohibition amount to? It must be a **war with a FOREIGN ENEMY that the states are prohibited from making**; for the **exception to the restriction proves it**. The restriction includes **ONLY OFFENSIVE hostility**, as they are **at liberty to engage in war when invaded, or in imminent danger**. **They are, therefore, NOT restrained from quelling domestic insurrections, which are totally different from making war with a foreign power**. But the great thing to be dreaded is that, during an insurrection, the militia will be called out from the state. This is his kind of argument. **Is it possible that, at such a time, the general government would order the militia to be called?** It is a groundless objection, to work on gentlemen's apprehensions within these walls. As to the 4th article, it was introduced wholly for **the particular aid of the states**. A republican form of government is guaranteed, and protection is secured against invasion and domestic violence **on application**. Is not this a guard as strong as possible? >>>**Does it not "exclude the unnecessary interference of Congress" in business of this sort?**

The gentleman over the way cannot tell who will be the {428} militia at a future day, and enumerates dangers of select militia. Let me attend to the nature of gentlemen's objections. One objects because there will be select militia; another objects because there will be no select militia; and yet both oppose it on these contradictory principles. **If you deny the general government the power of calling out the militia, there must be a recurrence to a standing army**. If you are really jealous of your liberties, **confide in Congress**. (APP Note: After "Confiding in Congress", Congress "Back Stabbed" the States by creating solely a standing Army - The National Guard is not the militia of the whole people or a Militia of the State but a Select standing military ultimately controlled by a federal congress not local state governments)

Mr. MASON rose, and said that he was totally misunderstood. The contrast between his friend's objection and his **was improper**. His friend had mentioned the propriety of having **select militia, like those of Great Britain**, who should be **"more thoroughly exercised than the militia at large could possibly be"**. But he, himself, **had not spoken of a selection of militia**, but of the **exemption of the highest classes** of the people from militia service; **which would justify apprehensions of severe and ignominious punishments**.

Mr. NICHOLAS wished to know whether the representatives of the people would consent to such exemptions, as every man who had twenty-five acres of land could vote for a federal representative.

Mr. GRAYSON. Mr. Chairman, I conceive that the power of providing and maintaining a navy is at present dangerous, however warmly it may be urged by gentlemen that America ought to become a maritime power. If we once give such power, we put it in the hands of men whose interest it will be to oppress us. It will also irritate the nations of Europe against us. Let us consider the situation of the maritime powers of Europe: they are separated from us by the Atlantic Ocean. The riches of all those countries come by sea. Commerce and navigation are the principal sources of their wealth. If we become a maritime power, we shall be able to participate in their most beneficial business. Will they suffer us to put ourselves in a condition to rival them? I believe the first step of any consequence, which will be made towards it, will bring war upon us. Their

ambition and avarice most powerfully impel them to prevent our becoming a naval nation. We should, on this occasion, consult our ability. Is there any gentleman here who can say that America can support a navy? The riches of America are not sufficient to bear the enormous expense it must certainly occasion. I may be supposed to exaggerate, {429} but I leave it to the committee to judge whether my information be right or not.

It is said that shipwrights can be had on better terms in America than in Europe; but necessary materials are so much dearer in America than in Europe, that the aggregate sum would be greater. A seventy-four gun ship will cost you ninety-eight thousand pounds, including guns, tackle, &c. According to the usual calculation in England, it will cost you the further sum of forty-eight thousand pounds to mail it, furnish provisions, and pay officers and men. You must pay men more here than in Europe, because, their governments being arbitrary, they can command the services of their subjects without an adequate compensation; so that, in all, the expenses of such a vessel would be one hundred and forty thousand pounds in one year. Let gentlemen consider, then, the extreme difficulty of supporting a navy, and they will concur with me, that America cannot do it. I have no objection to such a navy as will not excite the jealousy of the European countries. But I would have the Constitution to say, that no greater number of ships should be had than would be sufficient to protect our trade. Such a fleet would not, probably, offend the Europeans. I am not of a jealous disposition; but when I consider that the welfare and happiness of my country are in danger, I beg to be excused for expressing my apprehensions. Let us consider how this navy shall be raised. What would be the consequence under those general words, "to provide and maintain a navy"? All the vessels of the intended fleet would be built and equipped in the Northern States, where they have every necessary material and convenience for the purpose. Will any gentleman say that any ship of war can be raised to the south of Cape Charles? The consequence will be that the Southern States will be in the power of the Northern States.

We should be called upon for our share of the expenses, without having equal emoluments. Can it be supposed, when this question comes to be agitated in Congress, that the **Northern States will not take such measures as will throw as much circulating money among them as possible, without any consideration as to the other states?** If I know the nature of man, (and I believe I do,) they will have no consideration for us. But, supposing it were not so, America {430} has nothing at all to do with a fleet. Let us remain for some time in obscurity, and rise by degrees. Let us not precipitately provoke the resentment of the maritime powers of Europe. **A well-regulated militia** ought to be the defence of this country. In some of our constitutions it is said so. This Constitution should have inculcated the principle, Congress ought to be undersome restraint in this respect. Mr. Grayson then added, that the Northern States would be principally benefited by having a fleet; that a majority of the states could vote the raising a great navy, or enter into any commercial regulation very detrimental to the other states. In the United Netherlands there was much greater security, as the commercial interest of no state could be sacrificed without its own consent. The raising a fleet was the daily and favorite subject of conversation in the Northern States. He apprehended that, if attempted, it would draw us into a war with Great Britain or France. As the American fleet would not be competent to the defence of all the states, **the Southern States would be most exposed**. He referred to the experience of the late war, as a proof of what he said. At the period the Southern States were most distressed, **the Northern States**, he said, were most happy. **They had PRIVATEERS in abundance**, whereas we had but

few. Upon the whole, he thought we should depend on our troops on shore, and that it was **very impolitic** to give this power to Congress **without any limitation**.

Mr. NICHOLAS remarked that the gentleman last up had made two observations the one, that we ought not to give Congress power to raise a navy; and the other, that we had not the means of supporting it. Mr. Nicholas thought it a false doctrine. Congress, says he, has a discretionary power to do it when necessary. They are not bound to do it in five or ten years, or at any particular time. It is presumable, therefore, that they will postpone it until it be proper.

Mr. GRAYSON had no objection to giving Congress the power of raising such a fleet as suited the circumstances of the country. But he could not agree to give that unlimited power which was delineated in that paper.

Adverting to the clause investing Congress with the power of **exclusive legislation** in a district **not exceeding ten miles square**, he said he had before expressed his doubts that this {431} district would be the favorite of the generality, and that **it would be possible for them to give exclusive privileges of commerce to those residing within it**. He had illustrated what he said by European examples. It might be said to be impracticable to exercise this power in this manner. Among the various laws and customs which pervaded Europe, there were **exclusive privileges and immunities** enjoyed in many places. **He thought that this ought to be guarded AGAINST**; for should such **exclusive privileges** be granted to merchants residing within the ten miles square, it would be **highly injurious** to the inhabitants of **OTHER PLACES**.

Mr. GEORGE MASON thought that there were few clauses in the Constitution so **dangerous** as that which gave Congress "exclusive power of legislation" within "ten miles square". Implication, he observed, was **capable of any extension**, and would probably be **extended to augment the congressional powers**. But here there was no need of implication. This clause gave them an unlimited authority, in every possible case, within that district. This **ten miles square**, says Mr. Mason, may set at **defiance the laws of the surrounding states**, and may, like the custom of the superstitious days of our ancestors, become the sanctuary of the blackest crimes. **Here the federal courts are to sit. We have heard a good deal said of justice.**

It has been doubted whether jury trial be secured in civil cases. But I will suppose that we shall have juries in civil cases. What sort of a jury shall we have within the **ten miles square**? The immediate creatures of the government. What chance will poor men get, where Congress have the power of legislating in all cases whatever, and where judges and juries may be under their influence, and bound to support their operations? Even with juries the chance of justice may here be very small, as Congress have unlimited authority, legislative, executive, and judicial. Lest this power should not be sufficient, they have it in every case. **Now, sir, if an attempt should be made to establish tyranny over the people, here are ten miles square where the greatest offender may meet protection**. If any of their officers, or creatures, should attempt to oppress the people, or should actually perpetrate the blackest deed, he has nothing to do but get into the ten miles square. Why was this dangerous power given? Felons may receive an asylum there and in {432} their strongholds. Gentlemen have said that it was dangerous to argue against possible abuse, because there could be no power delegated but might be abused. **It is an incontrovertible axiom, that, when the dangers that may arise from the abuse are greater**

than the benefits that may result from the use, the power ought to be withheld. I do not conceive that this power is at all necessary, though capable of being greatly abused.

We are told by the honorable gentleman that Holland has its Hague. I confess I am at a loss to know what inference he could draw from that observation. This is the place where the deputies of the United Provinces meet to transact the public business. But I do not recollect that they have any exclusive jurisdiction whatever in that place, but are subject to the laws of the province in which the Hague is. To what purpose the gentleman mentioned that Holland has its Hague, I cannot see.

Mr. MASON then observed that he would willingly give them exclusive power, as far as respected the police and good government of the place; but he would give them no more, because he thought it unnecessary. He was very willing to give them, in this as well as in all other cases, those powers which he thought indispensably necessary.

Mr. MADISON. Mr. Chairman: I did conceive, sir, that the clause under consideration was one of those parts which would speak its own praise. It is hardly necessary to say any thing concerning it. Strike it out of the system, and let me ask whether there would not be much larger scope for those dangers. I cannot comprehend that the power of legislating over a "small district", which CANNOT EXCEED ten miles square, and may not be more than one mile, will involve the dangers which he apprehends. If there be any knowledge in my mind of the nature of man, I should think it would be the last thing that would enter into the mind of any man to grant exclusive advantages, in a very circumscribed district, to the prejudice of the community at large. We make suppositions, and afterwards deduce conclusions from them, as if they were established axioms. But, after all, bring home this question to ourselves. Is it probable that the members from Georgia, New Hampshire, will concur to sacrifice the privileges of their friends? I believe that, whatever state may become the seat of the general {433} government, it will become the object of the jealousy and envy of the other states. Let me remark, if not already remarked, that there must be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession. The states may make what stipulation they please in it, and, if they apprehend ANY danger, they may REFUSE it ALTOGETHER. How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the session and deliberations of Congress, would they be secure from insults, or the influence of such state? If this commonwealth depended, for the freedom of deliberation, on the laws of any state where it might be necessary to sit, would it not be liable to attacks of that nature (and with more indignity) which have been already offered to Congress? With respect to the government of Holland, I believe the States General have no jurisdiction over the Hague; but I have heard that mentioned as a circumstance which gave undue influence to Holland over the rest. We must limit our apprehensions to certain degrees of probability. The evils which they urge must result from this clause are extremely improbable; nay, ALMOST impossible.

Mr. GRAYSON. Mr. Chairman, one answer which has been given is, the improbability of the evil that it will never be attempted, and that it is "ALMOST" impossible. This will not satisfy us, when we consider the great attachments men have to a great and "magnificent capital". It would be the interest of the citizens of that district to aggrandize themselves by every possible

means in their power, to the great injury of the other states. If we travel all over the world, we shall find that people have **aggrandized their own "capitals"**. Look at Russia and Prussia. Every step has been taken to **aggrandize their capitals**. In what light are we to consider the **ten miles square**? It is not to be a fourteenth state. The inhabitants will in no respect whatever be amenable to the laws of any state. A clause in the 4th article, highly extolled for its wisdom, will be rendered nugatory by this exclusive legislation. This clause runs thus: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such {434} service or labor, but shall be delivered up on the claim of the party to whom such labor or service may be due." Unless you consider the ten miles square as a state, persons bound to labor, who shall escape thither, will not be given up; for they are only to be delivered up after they shall have escaped into a state. As my honorable friend mentioned, felons, who shall have fled from justice to the ten miles square, cannot be apprehended. The executive of a state is to apply to that of another for the delivery of a felon. He cannot apply to the ten miles square. **It was often in contemplation of Congress to have power of regulating the police of the seat of government; but they never had an idea of exclusive legislation in all cases.** The power of regulating the police and good government of **it** will secure Congress against insults. "**What originated the IDEA**" of the "**exclusive legislation**" was, some insurrection in Pennsylvania, whereby Congress was insulted, on account of which, it is supposed, they left the state.

It is answered that the **CONSENT of the state MUST be required**, or else they **cannot have such a district**, or places for the erecting of **forts**, &c. But how much is already given them! Look at the great country to the north-west of the Ohio, extending to and commanding the lakes.

Look at the other end of the Ohio, towards South Carolina, extending to the Mississippi. See what these, in process of time, may amount to. They may **grant "exclusive privileges"** to any particular part of which they have the possession. But it **may be observed that those extensive countries will be formed** into **independent states**, and **that their CONSENT will be NECESSARY**. To this I answer, that **they may still grant such "privileges"** as, in that country, are already granted to Congress by the states. The grants of Virginia, South Carolina, and other states, **will be subservient to Congress in this respect**. Of course, it results from the whole, that **requiring the consent of the states will be "NO GUARD" against this "ABUSE of POWER"**.

[A desultory conversation ensued.]

Mr. NICHOLAS insisted that as the state, within which the ten miles square might be, could prescribe the terms on which Congress should hold it, no danger could arise, as **no state would CONSENT to injure itself**: there was the same {435} security with respect to the places purchased for the **erection of forts, magazines**, &c.; and as to the territory of the United States, the power of Congress **only extended to make needful rules and regulations concerning "it"**, without prejudicing the claim of any particular state, **the right of territory not being given up; that the grant of those lands to the United States was for the general benefit of all the states**, and **>not to be perverted to their prejudice>**; that, consequently, whether that country were formed into new states or not, the danger apprehended could not take place; that the seat of government was to be **still a part of the STATE**, and, as to general regulations, was to be **considered as SUCH**.

Mr. GRAYSON, on the other hand, contended that the **ten miles square could not be viewed as a state**; that the state within which it might be would have no power of legislating over it; that, consequently, persons bound to labor, and felons, might receive protection there; **that "exclusive emoluments" might be granted to those residing within it**; that the territory of the United States, being a part of no state or states, might be appropriated to what use Congress pleased, **without the consent of any state or states**; and that, consequently, **such exclusive privileges and exemptions might be granted**, and such protection afforded to fugitives, within such places, as Congress should think proper; that, after mature consideration, he could not find that the **ten miles square** was to be looked upon even as a part of a state, but to be totally **independent of all**, and subject to the exclusive legislation of Congress.

Mr. LEE strongly expatiated on the impossibility of securing any human institution from possible abuse. He thought the powers conceded in the paper on the table not so liable to be abused as the powers of the state governments. Gentlemen had suggested that the seat of government would become a sanctuary for state villains, and that, in a short time, **ten miles square** would **subjugate a country of eight hundred miles square**. This appeared to him a most improbable possibility; nay, he might call it impossibility. Were the place crowded with rogues, he asked if it would be an agreeable place of residence for, the members of the general government, who were freely chosen by the people and the state governments. **Would the people be so lost to honor and virtue, as to select men who would willingly {436} associate with the most abandoned characters?** He thought the honorable gentleman's objections against remote possibility of abuse went to prove that government of no sort was eligible, but that a state of nature was preferable to a state of civilization. He apprehended no danger; and thought that persons bound to labor, and felons, could not take refuge in the ten miles square, or other places exclusively governed by Congress, **because it would be contrary to the Constitution, and a palpable usurpation, to protect them.**

Mr. HENRY entertained strong suspicions that great dangers must result from **the clause (APP: The Sweeping Clause)** under consideration. They were not removed, but **rather confirmed**, by the remarks of the honorable gentleman, in saying that it was extremely improbable that the members from New Hampshire and Georgia would go and legislate exclusively for the **ten miles square**. **If it was so improbable, why ask the power? Why demand a power which was not to be exercised?** Compare this power, says he, with the next clause, which gives them power to make all laws which shall be necessary to carry their laws into execution. By this they have a right to **pass any law that may facilitate the execution of their acts**. They have a right, **by this clause**, to make a law that such a district shall be set apart for any purpose they please, and that any man who shall act contrary to their commands, within certain tell miles square, or any place they may select, and strongholds, shall be hanged without benefit of clergy. If they think any law necessary for their personal safety, after perpetrating the most tyrannical and oppressive deeds, cannot they make it by this sweeping clause? If it be necessary to provide, not only for this, but for any department or officer of Congress, does not this clause enable them **to make a law for the purpose?** And will not these laws, made for those purposes, be paramount to the laws of the states? **Will not this clause give them a right to keep a "powerful army continually on foot", if they "think it necessary" to aid the execution of their laws? Is there any act, however atrocious, which they cannot do by virtue of this clause?** Look at the use which has been made, in all parts of the world, of that **human thing called power**. Look at the predominant **thirst**

of dominion which has **invariably and uniformly prompted rulers to abuse their powers**. Can you say that you will be safe when you give such **unlimited powers**, {437} without any **real responsibility**? Will you be safe when you trust men at Philadelphia with power to make any law that will enable them to carry their acts into execution? **Will not the members of Congress have the same passions which "other rulers" have had? They will not be superior to the frailties of human nature. However cautious you may be in the selection of your representatives, it will be "dangerous to trust them with such unbounded powers". Shall we be told, when about to grant such illimitable authority, that it will "never be exercised"!**

I conjure you once more to remember the admonition of that sage man who told you that, **when you give power, you know not what you give**. I know the absolute necessity of an energetic government. **But is it consistent with any principle of prudence or good policy to grant unlimited, unbounded authority, which is so totally unnecessary that gentlemen say it will "never be exercised"?** But gentlemen say that we must make experiments. **A wonderful and unheard-of experiment it will be, to give "unlimited power unnecessarily"!** I admit my inferiority in point of historical knowledge; but I believe no man can produce an instance of an unnecessary and unlimited power, given to a body independent of the legislature, within a particular district. **Let any man in this Convention show me an instance of such separate and different powers of legislation in the same country show me an instance where a part of the community was independent of the whole.**

The people within that place, and the strongholds, may be "excused from all the burdens imposed on the rest of the society", and may "enjoy exclusive emoluments", to the great injury of the rest of the people. But gentlemen say that the power will not be abused. They ought to "show that it is necessary". All their powers may be fully carried into execution, without this exclusive authority in the ten miles square. **The sweeping clause will fully enable them to do what they please.** What could the most extravagant and boundless imagination ask, but power to do every thing? **I have reason to suspect ambitious grasps at power.** The experience of the world **teaches me the jeopardy of giving enormous power. Strike this clause out of the form of the government, and how will it stand? Congress will still have power, by the sweeping clause, to make laws within that {438} place and the strongholds, independently of the local authority of the state.** I ask you, if this clause be struck out, whether the **sweeping clause will not enable them to protect themselves from insult. If you grant them these powers, you destroy "every degree of responsibility". They will fully screen them from justice, and preclude the possibility of punishing them. No instance can be given of such a wanton grasp of power as an exclusive legislation in all cases whatever.**

Mr. MADISON. Mr. Chairman, I am astonished that the honorable member should launch out into such strong descriptions without any occasion. Was there ever a legislature in existence that held their sessions at a place where they had not jurisdiction? I do not mean such a legislature as they have in Holland; for it deserves not the name. Their powers are such as Congress have now, which we find not reducible to practice. If you be satisfied with the shadow and form, instead of the substance, you will render them dependent on the local authority. Suppose the legislature of this country should sit in Richmond, while the exclusive jurisdiction of the place was in some

particular county; would this country think it safe that the general good should be subject to the paramount authority of a part of the community?

The honorable member asks, Why ask for this power, and if the subsequent clause be not fully competent for the same purpose. If so, what new terrors can arise from this particular clause? It is only a superfluity. If that "latitude" of construction which he contends for were to take place with respect to the "sweeping clause", there "would" be room for those horrors.

But it gives no supplementary power. It only enables them to execute the "delegated powers".

"If" the "delegation" of their powers be "safe", no possible inconvenience can arise from this clause.

It is at most "but" explanatory.

For when any power is given, its delegation necessarily involves authority to make laws to execute it. Were it possible to delineate on paper all those particular cases and circumstances in which legislation by the general legislature would be necessary, and leave to the states all the other powers, **I imagine no gentleman would object to it.** But this is not within the limits of human capacity. The particular powers which are found necessary to be given {439} are therefore delegated "generally", and particular and minute specification is left to the legislature.

[Here Mr. Madison spoke of the distinction between regulation of police and legislation, but so low he could not be heard.]

When the honorable member objects to giving the general government jurisdiction over the place of their session, does he mean that it should be under the control of any particular state, that might, at a critical moment, seize it? I should have thought that this clause would have met with the most cordial approbation. As the consent of the state in which it may be must be obtained, and as it may stipulate the terms of the grant, should they "violate the particular stipulations" it would be an "usurpation"; so that, if the members of Congress were to be guided by the laws of their country, none of those dangers could arise.

[Mr. Madison made several other remarks, which could not be heard]

Mr. HENRY replied that, if Congress were vested with supreme power of legislation, paramount to the constitution and laws of the states, the dangers he had described might happen; for that Congress would not be confined to the enumerated powers. This construction was warranted, in his opinion, by the addition of the word DEPARTMENT, at the end of the clause, and that they could make any laws which they might think necessary to execute the powers of any DEPARTMENT or officer of the government.

Mr. PENDLETON. Mr. Chairman, this clause does "NOT" give Congress power to impede the operation of ANY PART of the Constitution,(N) or to make ANY REGULATION that may affect the interests of the citizens of the Union at large. But it gives them power over the local police of the place, so as to be secured from any interruption in their proceedings.

Notwithstanding the violent attack upon it, I believe, sir, **this is the "fair construction of the clause"**. It gives them power of exclusive legislation in any case within that district. What is the meaning of this? **What is it opposed to? Is it opposed to the general powers of the federal legislature, or to those of the state legislatures? I understand it as opposed to the legislative power of that state where it shall be.** **What, then, is the power? It is,** that Congress shall **exclusively legislate there,** in order **to preserve {440} serve the police of the place and their own personal independence,** that they may not be overawed or insulted, and of course to preserve them in opposition to any attempt by the state where it shall be **this is the "fair construction"**. Can we suppose that, in order to effect these salutary ends, Congress will make it an asylum for villains and the vilest characters from all parts of the world? Will it not degrade their own dignity to make it a sanctuary for villains? **I hope that no man that will ever "compose" that Congress will associate with the most profligate characters.** **(APP: If this was not such a sad statement, it would be funny)**

Why oppose this power? Suppose it was contrary to the sense of their constituents to grant **exclusive privileges** to citizens residing within that place; **the effect would be directly in opposition to what he says.** It could have **no operation without the limits of that district.** Were Congress to make a law granting them an exclusive privilege of trading to the East Indies, **it could have NO effect the moment it would go without that place;** for their **exclusive power** is **confined to that district.** Were they to pass such a law, **it would be nugatory;** and every member of the community at large could trade to the East Indies as well as the citizens of that district. **This exclusive power is limited to that place solely,** for their **own preservation,** which all gentlemen allow to be necessary.

Will you pardon me when I observe that their construction of the preceding clause does not appear to me to be natural, or warranted by the words.

They say that the state governments have no power at all over the militia. The power of the general government to provide for arming and organizing the militia is to introduce a uniform system of discipline to pervade the United States of America. But the power of *governing* the militia, so far as it is in Congress, extends **only** to such parts of them as may be employed in the service of the United States. When not in their service, **Congress has no power to govern them.** **The states then have the "sole" government of them;** and though Congress "*may*" provide for arming them, and prescribe the "*mode*" of discipline, yet **the STATES have the Authority of training them,** according to the uniform discipline prescribed by Congress. **But there is NOTHING to preclude them from arming and disciplining them, should Congress neglect to, do it.** As to calling the militia to execute the laws of the {441} Union, I think the fair construction is directly opposite to what the honorable member says. **The 4th section of the 4th article contains nothing to warrant the supposition that the states cannot call them forth to suppress domestic insurrections.** [*Here he read the section.*] All the restraint here contained is, that Congress may, at their pleasure, **on "application of the state legislature", or "(in vacation)" of the executive,** protect each of the states against **domestic violence.** **This is a restraint on the general government "not to interpose".**

The "state" is in "full possession" of the "power" of using its "own militia" to protect itself against domestic violence; and the power in the general government "cannot be

exercised, or interposed", without the "application of the state itself". This appears to me to be the "obvious" and "fair construction".

With respect to the necessity of the ten miles square being superseded by the subsequent clause, which gives them power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof, I understand that clause as NOT going a "single step beyond" the "DELEGATED powers". What can it act upon? Some power given by this Constitution. If they should be about to pass a law in consequence of this clause, they must pursue some of the "DELEGATED powers", but can by "NO MEANS" depart from them,

(N)OR "ARROGATE" "ANY NEW" powers; for the PLAIN LANGUAGE of the clause is, to give them power to pass laws in order to give "effect" to the "DELEGATED" powers".

Mr. GEORGE MASON. Mr. Chairman, gentlemen say there is no new power given by this clause. Is there any thing in this Constitution which secures to the states the powers which are said to be retained? Will powers remain to the states which are not expressly guarded and reserved? I will suppose a case. Gentlemen may call it an impossible case, and "suppose" that Congress will act with wisdom and integrity. Among the enumerated powers, Congress are to lay and collect taxes, duties, imposts, and excises, and to pay the debts, and to provide for the general welfare and common defence; and by that clause (so often called the sweeping clause) they are to make all laws necessary to execute those laws. Now, suppose oppressions {442} should arise under "this" government, and any writer should dare to stand forth, and expose to the community at large the abuses of "those" powers; could not Congress, under the "idea" of providing for the "general welfare", and under their "own" construction, say that this was destroying the "general peace", encouraging sedition, and poisoning the minds of the people? And could they not, in order to provide against this, lay a dangerous restriction on the press? Might they not even bring the trial of this restriction within the ten miles square, when there is no prohibition against it? Might they not thus destroy the trial by jury? Would they not "extend" their implication?

It appears to me that they MAY and "WILL". And shall the support of our rights depend on the bounty of men "whose interest it may be to oppress us"? That Congress should have power to provide for the general welfare (APP Note: Defense against "Foreign" aggression) of the Union, I grant.

But I wish a clause in the Constitution, with respect to ALL powers which are NOT granted, that they are retained by the states.

Otherwise, the power of providing for the "general welfare" may be "perverted to its destruction".

Many gentlemen, whom I respect, take different sides of this question. We wish this amendment to be introduced, to remove our apprehensions. There was a clause in the Confederation reserving to the states respectively every power, jurisdiction, and right, not

expressly delegated to the United States. This clause has never been complained of, but approved by all Why not, then, have a similar clause in this Constitution, in which it is the more indispensably necessary than in the Confederation, because of the great augmentation of power vested in the former? In my humble apprehension, unless there be some such clear and finite expression, this clause now under consideration will go to any thing our rulers may think proper. Unless there be some express declaration that every thing not given is retained, it will be carried to any power Congress may please.

Mr. HENRY moved to read from the 8th to the 13th article of the declaration of rights; which was done.

Mr. GEORGE NICHOLAS, in reply to the gentlemen opposed to the clause under debate, went over the same grounds, and developed the same principles, which Mr. Pendleton and Mr. Madison had done. The opposers of the {443} clause, which gave the power of providing for the general welfare, supposed its dangers to result from its connection with, and extension of, the powers granted in the other clauses. He endeavored to show the committee that it only empowered Congress to make such laws as would be necessary to enable them to pay the public debts and provide for the common defence; >that this "general welfare" was united, "NOT" to "the general power of legislation", but to the >particular power> of laying and collecting taxes, imposts, and excises, for the purpose of paying the debts and providing for the "common defence", that is, that they could raise as much money as would pay the debts and provide for the "common defence", in "consequence of this power". The clause which was affectedly called the "sweeping clause" contained "NO new grant of power". To illustrate this position, he observed that, if it had been added at the end of every one of the enumerated powers, instead of being inserted at the end of all, it would be obvious to any one that it was "NO" augmentation of power. If, for instance, at the end of the clause granting power to lay and collect taxes, it had been added that they should have power to make necessary and proper laws to lay and collect taxes, who could suspect it to be an addition of power? As it would grant "NO" new power if inserted at the end of each clause, it could not when subjoined to the whole.

He then proceeded thus: But, says he, who is to determine the extent of such powers? I say, the same power which, in all well-regulated communities, determines the "extent" of "legislative" powers. If they exceed these powers, the "JUDICIARY" will declare it "VOID", or else "the PEOPLE" will have a "RIGHT" to declare it "VOID". Is this depending on any man? But, says the gentleman, it may go to any thing. It may destroy the trial by jury; and they may say it is necessary for providing for the general defence. The power of providing for the general defence only extends to raise any sum of money they may think necessary, by taxes, imposts, But, says he, our only defence against oppressive laws consists in the virtue of our representatives. This was misrepresented.

If I understand it right, NO "new" power can be exercised.

As to those which are actually granted, we trust to the fellow-feelings of our representatives; and if we are deceived, we then "trust to altering our {444} government". It appears to me, however, that we can confide in their discharging their powers rightly, from the

peculiarity of their situation, and connection with us. If, sir, the powers of the former Congress were very inconsiderable, that body did not deserve to have great powers.

It was so constructed that it would be dangerous to invest it with such. But why were the articles of the BILL of RIGHTS read? Let him show us that those rights are given up by the Constitution. Let him prove them to be violated.

He tells us that the most worthy characters of the country differ as to the necessity of a bill of rights. It is a simple and plain proposition. It is agreed upon by all that the people have all power. If they part with any of it, is it necessary to declare that they retain the rest? Liken it to any similar case. If I have one thousand acres of land, and I grant five hundred acres of it, must I declare that I retain the other five hundred? Do I grant the whole thousand acres, when I grant five hundred, unless I declare that the five hundred I do not give belong to me still?

It is "so" in "this case". After granting some powers, the rest must "REMAIN" with "the PEOPLE".

Gov. RANDOLPH observed that he had some objections to the clause. He was persuaded that the construction put upon it by the gentlemen, on both sides, was erroneous; but he thought any construction better than going into anarchy.

Mr. GEORGE MASON still thought that there ought to be some express declaration in the Constitution, asserting that rights not given to the general government were retained by the states. He apprehended that, unless this was done, many valuable and important rights would be concluded to be given up by "implication".

All governments were drawn from the people, though many were perverted to their oppression. The government of Virginia, he remarked, was drawn from the people; yet there were certain great and important rights, which the people, by their bill of rights, declared to be paramount to the power of the legislature. He asked, Why should it not be so in this Constitution? Was it because we were more substantially represented in it than in the state government? If, in the state government, where the people were substantially and fully represented, it was necessary that the great rights of human nature should {445} be secure from the encroachments of the legislature, he asked if it was not more necessary in this government, where they were but inadequately represented?

He declared that "artful sophistry and evasions could not satisfy him". He could see no clear distinction between rights relinquished by a positive grant, and lost by implication. Unless there were a bill of rights, implication might "swallow up all our rights".

Mr. HENRY, Mr. Chairman, the "necessity" of a "BILL of RIGHTS" appears to me to be "greater" in this government "than ever it was in any government before". "I have observed already, that the sense of the European nations, and particularly Great Britain, is against the construction of rights being retained which are not expressly relinquished. **I repeat, that all nations have adopted this construction that all rights not expressly and unequivocally reserved to the people are "impliedly and incidentally relinquished to rulers",** as necessarily

inseparable from the delegated powers. It is so in Great Britain; for every possible right, which is not reserved to the people by some express provision or compact, is within the king's prerogative. It is so in that country which is said to be in such full possession of freedom. It is so in Spain, Germany, and other parts of the world. Let us consider the sentiments which have been entertained by the people of America on this subject.

At the revolution, it must be admitted that it was their sense to set down those great rights which ought, in all countries, to be held inviolable and sacred. Virginia did so, we all remember. She made a compact to reserve, expressly, certain rights.

When fortified with full, adequate, and abundant representation, was she satisfied with that representation? NO.

She most cautiously and guardedly reserved and secured those invaluable, inestimable rights and privileges, which no people, inspired with the least glow of patriotic liberty, ever did, or ever can, abandon. She is called upon now to abandon them, and dissolve that compact which secured them to her. She is called upon to accede to another compact, which most infallibly supersedes and annihilates her present one. Will she do it? This is the question. If you intend to reserve your unalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights. If the people do not think it necessary to {446} reserve them, they will be supposed to be given up. How were the congressional rights defined when the people of America united by a confederacy to defend their liberties and rights against the tyrannical attempts of Great Britain? The states were not then contented with implied reservation.

No, Mr. Chairman. It was expressly declared in our Confederation that every right was retained by the states, respectively, which was not given up to the government of the United States.

But there is no such thing here. You, therefore, by a natural and unavoidable implication, give up your rights to the general government.

Your own example furnishes an argument against it. If you give up these powers, without a bill of rights, you will exhibit the most absurd thing to mankind that ever the world saw government that has abandoned all its powers the powers of direct taxation, the sword, and the purse. You have disposed of them to Congress, without a bill of rights without check, limitation, or control. And still you have checks and guards; still you keep barriers pointed where?

Pointed against your weakened, prostrated, enervated STATE government!

You have a bill of rights to defend "you" against the state government, which is "bereaved of all power", and yet you have "none" against Congress, though in full and exclusive possession of all power! You arm yourselves against the weak and defenceless, and expose yourselves naked to the armed and powerful. Is not this a conduct of unexampled absurdity?

What barriers have you to oppose to this most strong, energetic government? To that government you have nothing to oppose. All your defence is given up.

This is a real, actual defect. It must strike the mind of every gentleman.

When our government was first instituted in Virginia,

we declared the "COMMON LAW" of England to be "in FORCE".

That system of law which has been admired, and "has protected us and our ancestors", is excluded by that system. Added to this, we adopted a bill of rights.

By this Constitution, some of the best barriers of human rights are "thrown away".

Is there not an additional reason to have a bill of rights? By the ancient common law, the trial of all facts is decided by a jury of impartial men from the immediate vicinage. This paper speaks of different juries from the common law in criminal cases; and in civil controversies {447} excludes trial by jury altogether. There is, therefore, more occasion for the supplementary check of a bill of rights now than then. Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.

What says our bill of rights? "that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights?

You let them loose; you do more you depart from the genius of your country.

That paper tells you that the trial of crimes shall be by jury, and held in the state where the crime shall have been committed. Under this extensive provision, they may proceed in a manner extremely dangerous to liberty: a person accused may be carried from one extremity of the state to another, and be tried, not by an impartial jury of the vicinage, acquainted with his character and the circumstances of the fact, but by a jury unacquainted with both, and who may be biased against him. Is not this sufficient to alarm men? How different is this from the immemorial practice of your British ancestors, and your own! I need not tell you that, by the common law, a number of hundreds were required on a jury, and that afterwards it was sufficient if the jurors came from the same county. With less than this the people of England have never been satisfied. That paper ought to have declared the common law in force.

In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishment. But Congress may

introduce the practice of the CIVIL law, in preference to that of the COMMON law. They may {448} introduce the practice of France, Spain, and Germany of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity.

We are then lost and undone.

And can any man think it troublesome, when we can, by a small interference, prevent our rights from being lost? If you will, like the Virginian government, give them knowledge of the extent of the rights retained by the people, and the powers of themselves, they will, if they be honest men, thank you for it. Will they not wish to go on sure grounds?

But if you leave them otherwise, they will not know how to proceed; and, being in a state of uncertainty, they will "assume" rather than give up powers by "implication".

A bill of rights may be summed up in a few words.

What do they tell us?

That our rights are reserved.

Why not say so?

Is it because it will consume too much paper?

Gentlemen's reasoning against a "bill of rights" does not satisfy me. Without saying which has the right side, it remains doubtful. A **bill of rights** is a favorite thing with the Virginians **and the people of the other states likewise**. It may be their prejudice, but the government ought to **suit their geniuses**; otherwise, its operation will be unhappy. **A bill of rights, even if its necessity be doubtful, will exclude the possibility of dispute**; and, with great submission, I think the **BEST way is to "have NO dispute"**. In the **present** Constitution, they are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of the commission of a fact, &c. There was certainly some celestial influence governing those who deliberated on that Constitution; for they have, with the most cautious and enlightened circumspection, **guarded those indefeasible rights which ought ever to be held sacred!**

The officers of Congress may come upon you now, **fortified with all the terrors of "paramount federal authority"**. **Excisemen may come in multitudes; for the limitation of their numbers no man knows.**

They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and {449} measure, every thing you eat, drink, and wear.

They ought to be restrained Within proper bounds.

With respect to the freedom of the press, I need say nothing; for it is hoped that the gentlemen who shall compose Congress will take care to infringe as "little as possible" the rights of human nature. This will result from **their "integrity"**.

They should, from prudence, abstain from violating the rights of their constituents. They are not, however, "expressly" restrained. But whether they will intermeddle with that palladium of our liberties or not, I leave you to determine.

Mr. GRAYSON thought it questionable whether rights not given up were reserved. A majority of the states, he observed, had expressly reserved certain important rights by bills of rights, **and that in the Confederation there was a clause declaring expressly that every power and right not given up was retained by the states.** It was the general sense of America **that such a clause was necessary;** other, wise, **why did they introduce a clause which was totally unnecessary?**

It had been insisted, he said, in many parts of America, that a **bill of rights** was only necessary between a prince and people, and not in such a government as this, which was a compact between the people themselves. This did not satisfy his mind; for so extensive was the power of legislation, in his estimation, that he doubted whether, **when it was once given up, any thing was retained.** He further remarked, that there were some negative clauses in the Constitution, which refuted the doctrine contended for by the other side. For instance; the 2d clause of the 9th section of the 1st article provided that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." And, by the last clause of the same section, "no title of nobility shall be granted by the United States."

Now, if these restrictions had not been here inserted, he asked whether Congress would not most clearly have had a right to suspend that great and valuable right, and to grant titles of nobility. When, in addition to these considerations, he saw they had an indefinite power to provide for the general welfare, he thought there were great reasons to apprehend great dangers.

He thought, therefore, that there ought to be a bill of rights."

Mr. GEORGE NICHOLAS, in answer to the two gentlemen {450} last up, observed that, though there was a declaration of rights in the government of Virginia, it was no conclusive reason that there should be one in this Constitution; for, if it was unnecessary in the former, its omission in the latter could be no defect. They ought, therefore, to prove that it was essentially necessary to be inserted in the Constitution of Virginia. There were five or six states in the Union which had no bill of rights, separately and distinctly as such; but they annexed the substance of a bill of rights to their respective constitutions. These states, he further observed, were as free as this state, and their liberties as secure as ours. If so, gentlemen's arguments from the precedent were not good. In Virginia, all powers were given to the government without any exception. It was different in the general government, to which certain special powers were delegated for certain purposes. He

asked which was the more safe. Was it safer to grant general powers than certain limited powers? This much as to the theory, continued he. What is the practice of this invaluable government? Have your citizens been bound by it? They have not, sir. You have violated that maxim, "that no man shall be condemned without a fair trial." That man who was killed, not *secundum artem*, was deprived of his life without the benefit of law, and in express violation of this declaration of rights, which they confide in so much. But, sir, this bill of rights was no security. It is but a paper check. It has been violated in many other instances. Therefore, from theory and practice, it may be concluded that this government, with special powers, without any express exceptions, is better than a government with general powers and special exceptions. But the practice of England is against us. The rights there reserved to the people are to limit and check the king's prerogative. It is easier to enumerate the exceptions to his prerogative, than to mention all the cases to which it extends. Besides, these reservations, being only formed in acts of the legislature, may be altered by the representatives of the people when they think proper. No comparison can be made of this with the other governments he mentioned. There is no stipulation between the king and people. The former is possessed of absolute, unlimited authority.

But, sir, this Constitution is defective because the common {451} law is not declared to be in force! What would have been the consequence if it had? It would be immutable. But now it can be changed or modified as the legislative body may find necessary for the community.

But the "COMMON LAW" is "NOT EXCLUDED". There is "NOTHING" in "that paper" (APP Note: referring to the US Constitution being considered) to warrant the assertion.

As to the exclusion of a jury from the vicinage, he has mistaken the fact. The legislature may direct a jury to come from the vicinage. But the gentleman says that, by this Constitution, they have power to make laws to define crimes and prescribe punishments; and that, consequently, we are not free from torture. Treason against the United States is defined in the Constitution, and the forfeiture limited to the life of the person attainted.

Congress have power to define and punish:

- a.) **piracies and felonies committed on the high seas, and**
- b.) **offenses against the laws of nations;**

but they (APP: the federal government, legislature or supreme court) CANNOT DEFINE or PRESCRIBE the PUNISHMENT of "ANY OTHER CRIME WHATEVER", WITHOUT "VIOLATING the CONSTITUTION".

(APP Note: See this also in the Virginia and Kentucky Resolutions - Kentucky Resolutions #2 - This can be no clearer, the federal government and all those officials and citizens who support or allow others to be prosecuted under any "other crimes and punishments" not listed are in DIRECT VIOLATION to the Constitution they claim to uphold.)

If we had no security against torture but our declaration of rights, we might be tortured to-morrow;

for it has been repeatedly infringed and disregarded. **A bill of rights is only an acknowledgment of the PREEXISTING CLAIM TO RIGHTS IN THE PEOPLE.**

They BELONG TO US AS MUCH as if they had been inserted in the Constitution.(APP Note: **Which they eventually were**) But it is said that, if it be doubtful, the possibility of dispute ought to be precluded. Admitting it was proper for the Convention to have inserted a bill of rights, it is not proper here to propose it as the condition of our accession to the Union. Would you reject this government for its omission, dissolve the Union, and bring miseries on yourselves and posterity? I hope the gentleman does not oppose it on this ground solely. Is there another reason? He said that it is not only the general wish of this state, but all the states, to have a bill of rights. If it be so, where is the difficulty of having this done by way of subsequent amendment? We shall find the other states willing to accord with their own favorite wish.

The gentleman last up says that the power of legislation includes every thing. A general power of legislation does. **But this is a special power of legislation.** Therefore, it does **NOT contain that plenitude of power which he imagines.** They **"CANNOT LEGISLATE" in "ANY case" but those "PARTICULARLY ENUMERATED"**. No gentleman, who is a friend to the government, ought to withhold his assent from it for this reason.

{452} **Mr. GEORGE MASON** replied that the worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that **no man can give evidence against himself;** and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, **torture was included in the prohibition.**

Mr. NICHOLAS acknowledged the bill of rights to contain that prohibition, and that the gentleman was right with respect to the practice of extorting confession from the criminal in those countries where torture is used; but still he saw no security arising from the bill of rights as separate from the Constitution, **for that it had been frequently violated with impunity.**

This Constitutional Debate was made June 16, 1788; [Elliot misprinted this as Monday, June 14, 1788.]