SATURDAY, JULY 21, 1787.

JOURNAL

Saturday July 21. 1787.

It was moved and seconded to add the following clause to the resolution respecting the Electors of the supreme Executive, namely

"Who shall be paid out of the national Treasury for the "devotion of their time to the public service"

which passed unanimously in the affirmative. [Ayes—9; noes — 0.][1]

It was moved and seconded to add after the words "national Executive" in the 10th resolution the words "together with the supreme national Judiciary."

which passed in the negative [Ayes — 3; noes — 4; divided — 2.][2]

It was moved and seconded to agree to the 10th resolution, as reported from the Committee of the whole House, namely

Resolved that the national Executive shall have a right to negative any legislative act, which shall not be afterwards passed unless by two third parts of each Branch of the national Legislature.

which passed unanimously in the affirmative [Ayes — 9; noes — 0.]

On the question to agree to the following amendment of the 3rd clause of the 11th resolution, namely

"That the Judges shall be nominated by the Executive,

---

[1] Vote 63, Detail of Ayes and Noes, see above, *Records* of June 15.

The secretary was evidently unprepared when this first question was taken, and recorded it in a convenient blank space which happened to be at the bottom of the 2d loose sheet of the Detail of Ayes and Noes.

[2] Vote 198, Detail of Ayes and Noes.

"and such nomination shall become an appointment if not "disagreed to by the second Branch of the Legislature"

it passed in the negative [Ayes — 3; noes — 6.]

On the question to agree to the following clause of the 11th resolution, as reported from the Committee of the whole House, namely

"The Judges of which shall be appointed by the second "Branch of the national Legislature"

it passed in the affirmative [Ayes — 6; noes — 3.]

[To adjourn Ayes — 1; noes — 8.] [3]

And then the House adjourned till Monday next at 11 o'clock A. M.

DETAIL OF AYES AND NOES

[Beginning of seventh loose sheet]

	New Hampshire	Massachusetts	Rhode Island	Connecticut	New York	New Jersey	Pennsylvania	Delaware	Maryland	Virginia	North Carolina	South Carolina	Georgia	Questions	Ayes	Noes	Divided
[198]	no			aye			dd	no	aye	aye	no	no	dd	To join the supreme Judiciary with the Executive in the negative	3	4	2
[199]	aye			aye			aye	aye	aye	aye	aye	aye	aye	That the supreme Executive shall possess a revisionary negative	9		
[200]	aye			no			aye	no	no	aye	no	no	no	To agree to the nomination of the Judges by the Executive which shall become an appointment unless disagreed to by the second Branch of ye Legislature	3	6	
[201]	no			aye			no	aye	aye	no	aye	aye	aye	The Judges shall be appointed by the second Branch of the Legislature	6	3	
[202]	no			no			aye	no	no	no	no	no	no	To adjourn	1	8	

[3] Vote 202, Detail of Ayes and Noes. There is no reason for ascribing this question to this place in the proceedings, except for its position in the Detail of Ayes and Noes.

MADISON

Saturday July 21 in Convention

Mr. Williamson moved that the Electors of the Executive should be paid out of the National Treasury for the Service to be performed by them". Justice required this: as it was a national service they were to render. The motion was agreed to nem.— con.

Mr. Wilson moved as an amendment to Resoln: 10. that the ⟨supreme⟩ Natl Judiciary should be associated with the Executive in the Revisionary power". This proposition had been before made, and failed; but he was so confirmed by reflection in the opinion of its utility, that he thought it incumbent on him to make another effort: The Judiciary ought to have an opportunity of remonstrating agst projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature. — Mr ⟨Madison⟩ 2ded. the motion

Mr Ghorum did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures. Nor can it be necessary as a security for their constitutional rights. The Judges in England have no such additional provision for their defence, yet their jurisdiction is not invaded. He thought it would be best to let the Executive alone be responsible, and at most to authorize him to call on Judges for their opinions,

Mr. Elseworth approved heartily of the motion. The aid of

the Judges will give more wisdom & firmness to the Executive. They will possess a systematic and accurate knowledge of the Laws, which the Executive can not be expected always to possess. The law of Nations also will frequently come into question. Of this the Judges alone will have competent information.

Mr. ⟨Madison⟩ — considered the object of the motion as of great importance to the meditated Constitution. It would be useful to the Judiciary departmt. by giving it an additional opportunity of defending itself agst: Legislative encroachments; It would be useful to the Executive, by inspiring additional confidence & firmness in exerting the revisionary power: It would be useful to the Legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity & technical propriety in the laws, qualities peculiarly necessary; & yet shamefully wanting in our republican Codes. It would moreover be useful to the Community at large as an additional check agst. a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities. If any solid objection could be urged agst. the motion, it must be on the supposition that it tended to give too much strength either to the Executive or Judiciary. He did not think there was the least ground for this apprehension. It was much more to be apprehended that notwithstanding this co-operation of the two departments, the Legislature would still be an overmatch for them. Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; & suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.

Mr. Mason said he had always been a friend to this provision. It would give a confidence to the Executive, which he would not otherwise have, and without which the Revisionary power would be of little avail.

Mr. Gerry did not expect to see this point which had undergone full discussion, again revived. The object he conceived

of the Revisionary power was merely to secure the Executive department agst. legislative encroachment. The Executive therefore who will best know and be ready to defend his rights ought alone to have the defence of them. The motion was liable to strong objections. It was combining & mixing together the Legislative & the other departments. It was establishing an improper coalition between the Executive & Judiciary departments. It was making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people. He relied for his part on the Representatives of the people as the guardians of their Rights & interests. It was making the Expositors of the Laws, the Legislators which ought never to be done. A better expedient for correcting the laws, would be to appoint as had been done in Pena. a person or persons of proper skill, to draw bills for the Legislature.

Mr. Strong thought with Mr. Gerry that the power of making ought to be kept distinct from that of expounding, the laws. No maxim was better established. The Judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws.

Mr. Govr. Morris. Some check being necessary on the Legislature, the question is in what hands it should be lodged. On one side it was contended that the Executive alone ought to exercise it. He did not think that an Executive appointed for 6 years, and impeachable whilst in office, wd. be a very effectual check. On the other side it was urged that he ought to be reinforced by the Judiciary department. Agst. this it was objected that Expositors of laws ought to have no hand in making them, and arguments in favor of this had been drawn from England. What weight was due to them might be easily determined by an attention to facts. The truth was that the Judges in England had a great share in ye Legislation. They are consulted in difficult & doubtful cases. They may be & some of them are members of the Legislature. They are or may be members of the privy Council, and can there advise the Executive as they will do with us if the motion succeeds. The influence the English Judges may have in the latter capacity in strengthening the Executive check

can not be ascertained, as the King by his influence in a manner dictates the laws. There is one difference in the two Cases however which disconcerts all reasoning from the British to our proposed Constitution. The British Executive has so great an interest in his prerogatives and such powerful means of defending them that he will never yield any part of them. The interest of our Executive is so inconsiderable & so transitory, and his means of defending it so feeble, that there is the justest ground to fear his want of firmness in resisting incroachments. He was extremely apprehensive that the auxiliary firmness & weight of the Judiciary would not supply the deficiency. He concurred in thinking the public liberty in greater danger from Legislative usurpations than from any other source. It had been said that the Legislature ought to be relied on as the proper Guardians of liberty. The answer was short and conclusive. Either bad laws will be pushed or not. On the latter supposition no check will be wanted. On the former a strong check will be necessary: And this is the proper supposition. Emissions of paper money, largesses to the people — a remission of debts and similar measures, will at sometimes be popular, and will be pushed for that reason At other times such measures will coincide with the interests of the Legislature themselves, & that will be a reason not less cogent for pushing them. It might be thought that the people will not be deluded and misled in the latter case. But experience teaches another lesson. The press is indeed a great means of diminishing the evil, yet it is found to be unable to prevent it altogether.

Mr. L. Martin. considered the association of the Judges with the Executive as a dangerous innovation; as well as one which, could not produce the particular advantage expected from it. A knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher deger degree to the Judges than to the Legislature. And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. It is neces-

sary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating agst. popular measures of the Legislature. Besides in what mode & proportion are they to vote in the Council of Revision?

⟨Mr.⟩ M⟨adison⟩ could not discover in the proposed association of the Judges with the Executive in the Revisionary check on the Legislature any violation of the maxim which requires the great departments of power to be kept separate & distinct. On the contrary he thought it an auxiliary precaution in favor of the maxim. If a Constitutional discrimination of the departments on paper were a sufficient security to each agst. encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper. Instead therefore of contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate & distinct, it was proposed to add a defensive power to each which should maintain the Theory in practice. In so doing we did not blend the departments together. We erected effectual barriers for keeping them separate. The most regular example of this theory was in the British Constitution. Yet it was not only the practice there to admit the Judges to a seat in the legislature, and in the Executive Councils, and to submit to their previous examination all laws of a certain description, but it was a part of their Constitution that the Executive might negative any law whatever; a part of *their* Constitution which had been universally regarded as calculated for the preservation of the whole. The objection agst. a union of the Judiciary & Executive branches in the revision of the laws, had either no foundation or was not carried far enough. If such a Union was an improper mixture of powers, or such a Judiciary check on the laws, was inconsistent with the Theory of a free Constitution, it was equally so to admit the Executive to any participation in the making of laws; and the revisionary plan ought to be discarded altogether.

Col Mason Observed that the defence of the Executive was not the sole object of the Revisionary power. He expected even greater advantages from it. Notwithstanding the precautions taken in the Constitution of the Legislature, it would so much resemble that of the individual States, that it must be expected frequently to pass unjust and pernicious laws. This restraining power was therefore essentially necessary. It would have the effect not only of hindering the final passage of such laws; but would discourage demagogues from attempting to get them passed. It had been said (by Mr. L. Martin) that if the Judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of Judges they would have one negative. He would reply that in this capacity they could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished the further use to be made of the Judges, of giving aid in preventing every improper law. Their aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences.

Mr. Wilson. The separation of the departments does not require that they should have separate objects but that they should act separately tho' on the same objects. It is necessary that the two branches of the Legislature should be separate and distinct, yet they are both to act precisely on the same object

Mr. Gerry had rather give the Executive an absolute negative for its own defence than thus to blend together the Judiciary & Executive departments. It will bind them together in an offensive and defensive alliance agst. the Legislature, and render the latter unwilling to enter into a contest with them.

Mr. Govr. Morris was surprised that any defensive provision for securing the effectual separation of the departments should be considered as an improper mixture of them. Sup-

pose that the three powers, were to be vested in three persons, by compact among themselves; that one was to have the power of making — another of executing, and a third of judging, the laws. Would it not be very natural for the two latter after having settled the partition on paper, to observe, and would not candor oblige the former to admit, that as a security agst. legislative acts of the former which might easily be so framed as to undermine the powers of the two others, the two others ought to be armed with a veto for their own defence, or at least to have an opportunity of stating their objections agst. acts of encroachment? And would any one pretend that such a right tended to blend & confound powers that ought to be separately exercised?[4] As well might it be said that If three neighbours had three distinct farms, a right in each to defend his farm agst. his neighbours, tended to blend the farms together.

Mr. Ghorum. All agree that a check on the Legislature is necessary. But there are two objections agst. admitting the Judges to share in it which no observations on the other side seem to obviate. the 1st. is that the Judges ought to carry into the exposition of the laws no prepossessions with regard to them. 2d. that as the Judges will outnumber the Executive, the revisionary check would be thrown entirely out of the Executive hands, and instead of enabling him to defend himself, would enable the Judges to sacrifice him.

Mr. Wilson. The proposition is certainly ⟨not⟩ liable to all the objections which have been urged agst. it. According to (Mr. Gerry) it will unite the Executive & Judiciary in an offensive & defensive alliance agst. the Legislature. According to Mr. Ghorum it will lead to a subversion of the Executive by the Judiciary influence. To the first gentleman the answer was obvious; that the joint weight of the two departments was necessary to balance the single weight of the Legislature. To the 1st. objection stated by the other Gentleman it might be answered that supposing the prepossion to mix

[4] Crossed out: "Every man must see that such a right had a tendency shortly to bring Take another illustration".

itself with the exposition, the evil would be overbalanced by the advantages promised by the expedient. To the 2d. objection, that such a rule of voting might be provided in the detail as would guard agst. it.

Mr. Rutlidge thought the Judges of all men the most unfit to be concerned in the revisionary Council. The Judges ought never to give their opinion on a law till it comes before them. He thought it equally unnecessary. The Executive could advise with the officers of State, as of war, finance &c. and avail himself of their information and opinions.

On Question on Mr. Wilson's motion for joining the Judiciary in the Revision of laws[5] ⟨it passed in the negative⟩ —

Mas. no. Cont. ay. N. J. not present. Pa. divd. Del. no. Md. ay. Va. ay. N. C. no. S. C. no. Geo. divd. [Ayes — 3; noes — 4; divided — 2.]

⟨Resol: 10 giving the Ex. a qualified veto⟩ without the amendmt. was then agd. to nem. con.

The motion made by Mr. ⟨Madison⟩ July 18. & then postponed, "that the Judges shd. be nominated by the Executive & such nominations become appointments unless disagreed to by ¾ of the 2d. branch of the Legislature," was now resumed.

Mr. Madison stated as his reasons for the motion. 1 that it secured the responsibility of the Executive who would in general be more capable & likely to select fit characters than the Legislature, or even the 2d. b. of it, who might hide their selfish motives under the number concerned in the appointment- 2 that in case of any flagrant partiality or error, in the nomination, it might be fairly presumed that ¾ of the 2d. branch would join in putting a negative on it. 3. that as the 2d. b. was very differently constituted when the appointment of the Judges was formerly referred to it, and was now to be composed of equal votes from all the States, the principle of compromise which had prevailed in other instances required in this that their shd. be a concurrence of two authorities, in one of which the people, in the other the states, should be

[5] See further Appendix A, CCLXXXVII, CCCXXI.

represented. The Executive Magistrate wd be considered as a national officer, acting for and equally sympathising with every part of the U. States. If the 2d. branch alone should have this power, the Judges might be appointed by a minority of the people, tho' by a majority, of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States: and as it would moreover throw the appointments entirely into the hands of ye Nthern States, a perpetual ground of jealousy & discontent would be furnished to the Southern States.

Mr. Pinkney was for placing the appointmt. in the 2d. b. exclusively. The Executive will possess neither the requisite knowledge of characters, nor confidence of the people for so high a trust.

Mr. Randolph wd. have preferred the mode of appointmt. proposed formerly by Mr Ghorum, as adopted in the Constitution of Massts. but thought the motion depending so great an improvement of the clause as it stands, that he anxiously wished it success. He laid great stress on the responsibility of the Executive as a security for fit appointments. Appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications. The same inconveniencies will proportionally prevail if the appointments be be referred to either branch of the Legislature or to any other authority administered by a number of individuals.

Mr. Elseworth would prefer a negative in the Executive on a nomination by the 2d. branch, the negative to be overruled by a concurrence of ¾ of the 2d. b. to the mode proposed by the motion; but preferred an absolute appointment by the 2d. branch to either. The Executive will be regarded by the people with a jealous eye. Every power for augmenting unnecessarily his influence will be disliked. As he will be stationary it was not to be supposed he could have a better knowledge of characters. He will be more open to caresses & intrigues than the Senate. The right to supersede his nomination will be ideal only. A nomination under such circumstances will be equivalent to an appointment.

Mr. Govr. Morris supported the motion. 1. The States in their corporate capacity will frequently have an interest staked on the determination of the Judges. As in the Senate the States are to vote the Judges ought not to be appointed by the Senate. Next to the impropriety of being Judge in one's own cause, is the appointment of the Judge. 2. It had been said the Executive would be uninformed of characters. The reverse was ye truth. The Senate will be so. They must take the character of candidates from the flattering pictures drawn by their friends. The Executive in the necessary intercourse with every part of the U. S. required by the nature of his administration, will or may have the best possible information. 3. It had been said that a jealousy would be entertained of the Executive. If the Executive can be safely trusted with the command of the army, there can not surely be any reasonable ground of Jealousy in the present case. He added that if the Objections agst. an appointment of the Executive by the Legislature, had the weight that had been allowed there must be some weight in the objection to an appointment of the Judges by the Legislature or by any part of it.

Mr. Gerry. The appointment of the Judges like every other part of the Constitution shd. be so modeled as to give satisfaction both to the people and to the States. The mode under consideration will give satisfaction to neither. He could not conceive that the Executive could be as well informed of characters throughout the Union, as the Senate. It appeared to him also a strong objection that ⅔ of the Senate were required to reject a nomination of the Executive. The Senate would be constituted in the same manner as Congress. And the appointments of Congress have been generally good.

Mr. ⟨Madison⟩, observed that he was not anxious that ⅔ should be necessary to disagree to a nomination. He had given this form to his motion chiefly to vary it the more clearly from one which had just been rejected. He was content to obviate the objection last made, and accordingly so varied the motion as to let a majority reject.

Col. Mason found it his duty to differ from his colleagues

in their opinions & reasonings on this subject. Notwithstanding the form of the proposition by which the appointment seemed to be divided between the Executive & Senate, the appointment was substantially vested in the former alone. The false complaisance which usually prevails in such cases will prevent a disagreement to the first nominations. He considered the appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary department itself. He did not think the difference of interest between the Northern and Southern ⟨States⟩ could be properly brought into this argument. It would operate & require some precautions in the case of regulating navigation, commerce & imposts; but he could not see that it had any connection with the Judiciary department.

On the question, the motion now being "that the executive should nominate, & such nominations should become appointments unless disagreed to by the Senate"

Mas. ay. Ct. no. Pa. ay. Del. no. Md. no. Va. ay. N. C. no. S. C. no. Geo. no. [Ayes — 3; noes — 6.]

On question for agreeing to the clause as it stands by which the Judges are to be appointed by 2d. branch

Mas. no. Ct. ay. Pa. no. Del. ay. Md. ay. Va. no. N. C. ay. S. C. ay. Geo. ay. [Ayes — 6; noes — 3.]

Adjourned[6]

[6] See further Appendix A, LXVI, LXVII.