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An Antifederalist View of the Appointing Power under the Constitution

By Richard Henry Lee.

. . . . In contemplating the necessary officers of the union, there appear to be six different modes in which, in whole or in part, the appointments may be made. 1. by the legislature; 2. by the president and the senate; 3. by the president and an executive council; 4. by the president alone; 5. by the heads of the departments; 6. by the state governments. Among all these, in my opinion, there may be an advantageous distribution of the power of appointments.

In considering the legislators, in relation to the subject before us, two interesting questions particularly arise: 1. whether they ought to be eligible to hold any offices whatever during the period for which they shall be elected to serve, and even for some time afterwards. 2. how far they ought to participate in the power of appointments. As to the first, it is true that legislators in foreign countries, or in our state governments, are not generally made ineligible to office. There are good reasons for it. In many countries the people have gone on without ever examining the principles of government. There have been but few countries in which the legislators have been a particular set of men periodically chosen. But the principal reason is, that which operates in the several states, viz., the legislators are so frequently chosen, and so numerous, compared with the number of offices for which they can reasonably consider themselves as candidates, that the chance of any individual member's being chosen, is too small to raise his hopes or expectations, or to have any considerable influence upon his conduct. Among the state legislators, one man in twenty may be appointed in some committee business, etc., for a month or two; but on a fair computation, not one man in a hundred sent to the state legislatures is appointed to any permanent office of profit. Directly the reverse of this will evidently be found true in the federal administration. Throughout the United States, about four federal senators, and thirty-three representatives, averaging the elections, will be chosen in a year. These few men may rationally consider themselves as the fairest candidates for a very great number of lucrative offices, which must become vacant in the year; and pretty clearly a majority of the federal legislators, if not excluded, will be mere expectants for public offices. I need not adduce further arguments to establish a position so clear. I need only call to your recollection my observations in a former letter, wherein I endeavored to show the fallacy of the argument, that the members must return home and mix with the people. It is said, that men are governed by interested motives, and will not attend as legislators, unless they can, in common with others, be eligible to offices of honor and profit. This will undoubtedly be the case with some men, but I presume only with such men as never ought to be chosen legislators in a free country. An opposite principle will influence good men. Virtuous patriots, and generous minds, will esteem it a higher honor to be selected as the guardians of a free people. They will be satisfied with a reasonable compensation for their time and service; nor will they wish to be within the vortex of influence. The valuable effects of this principle of making legislators ineligible to offices for a given time, has never yet been

sufficiently attended to or considered. I am assured that it was established by the convention after long debate, and afterwards, on an unfortunate change of a few members, altered. Could the federal legislators be excluded in the manner propose, I think it would be an important point gained; as to themselves, they would be left to act much more from motives consistent with the public good. In considering the principle of rotation I had occasion to distinguish the condition of a legislator from that of a mere official man. We acquire certain habits, feelings, and opinions, as men and citizens -- others, and very different ones, from a long continuance in office. It is, therefore, a valuable observation in many bills of rights, that rulers ought frequently to return and mix with the people. A legislature, in a free country, must be numerous; it is in some degree a periodical assemblage of the people, frequently formed. The principal officers in the executive and judicial departments must have more permanency in office. Hence it may be inferred, that the legislature will remain longer uncorrupted and virtuous; longer congenial to the people, than the officers of those departments. If it is not, therefore in our power to preserve republican principles for a series of ages, in all the departments of government, we may a long while preserve them in a well formed legislature. To this end we ought to take every precaution to prevent legislators becoming mere office-men; choose them frequently, make them recallable, establish rotation among them, make them ineligible to offices, and give them as small a share as possible in the disposal of them. Add to this, a legislature in the nature of things is not formed for the detail business of appointing officers, there is also generally an impropriety in the same men making offices and filling them, and a still greater impropriety in their impeaching and trying the officers they appoint. For these and other reasons, I conclude the legislature is not a proper body for the appointment of officers in general. But having gone through with the different modes of appointment, I shall endeavor to show what share in the distribution of the power of appointments the legislature must, from necessity, rather than from propriety, take.

2. Officers may be appointed by the president and senate. This mode, for general purposes, is clearly not defensible. All the reasoning touching the legislature will apply to the senate. The senate is a branch of the legislature, which ought to be kept pure and unbiased. It has a part in trying officers for misconduct, and in creating offices it is too numerous for a council of appointment, or to feel any degree of responsibility. If it has an advantage of the legislature, in being the least numerous, it has a disadvantage in being more unsafe; add to this, the senate is to have a share in the important branch of power respecting treaties. Further, this sexennial senate of 26 members, representing 13 sovereign states, will not in practice be found to be a body to advise, but to order and dictate in fact; and the president will be a mere *primus inter pares*. The consequence will be that the senate, with these efficient means of influence, will not only dictate, probably, to the president, but manage the house, as the constitution now stands; and under appearances of a balanced system, in reality govern alone. There may also, by this undue connection, be particular periods when a very popular president may have a very improper influence upon the senate and upon the legislature. A council of appointment must very probably sit all, or near all, the year. The senate will be too important and too expensive a body for this. By giving the senate, directly or indirectly, an undue influence over the representatives, and the improper means of fettering, embarrassing, or controlling the president or executive, we give the government in the very outset a fatal and pernicious tendency to . . . aristocracy. When we, as a circumstance not well to be avoided, admit the senate to a share of power in making treaties, and in managing foreign concerns, we certainly progress full far enough towards this most undesirable point in government. For with this power, also, I believe, we must join that of

appointing ambassadors, other foreign ministers, and consuls, being powers necessarily connected. In every point of view, in which I can contemplate this subject, it appears extremely clear to me, that the senate ought not generally to be a council of appointment. The legislature, after the people, is the great fountain of power, and ought to be kept as pure and uncorrupt as possible, from the hankerings, biases, and contagion of offices. Then the streams issuing from it will be less tainted with those evils. It is not merely the number of impeachments, that are to be expected to make public officers honest and attentive in their business. A general opinion must pervade the community, that the house, the body to impeach them for misconduct, is disinterested, and ever watchful for the public good; and that the judges who shall try impeachments, will not feel a shadow of bias. Under such circumstances men will not dare transgress, who, not deterred by such accusers and judges, would repeatedly misbehave. We have already suffered many and extensive evils, owing to the defects of the confederation, in not providing against the misconduct of public officers. When we expect the law to be punctually executed, not one man in ten thousand will disobey it. It is the probable chance of escaping punishment that induces men to transgress. It is one important means to make the government just and honest, rigidly and constantly to hold before the eyes of those who execute it, punishment and dismissal from office for misconduct. These are principles no candid man who has just ideas of the essential features of a free government will controvert. They are, to be sure, at this period, called visionary, speculative and anti-governmental -- but in the true style of courtiers, selfish politicians, and flatterers of despotism. Discerning republican men of both parties see their value. They are said to be of no value by empty boasting advocates for the constitution, who, by their weakness and conduct, in fact, injure its cause much more than most of its opponents. From their high sounding promises, men are led to expect a defense of it, and to have their doubts removed. When a number of long pieces appear, they, instead of the defense, etc., they expected, see nothing but a parade of names; volumes written without ever coming to the point; cases quoted between which and ours there is not the least similitude; and partial extracts made from histories and governments, merely to serve a purpose. Some of them, like the true admirers of royal and senatorial robes, would fain prove, that nations who have thought like free-men and philosophers about government, and endeavored to be free, have often been the most miserable. If a single riot in the course of five hundred years happened in a free country; if a salary or the interest of a public or private debt was not paid at the moment -- they seem to lay more stress upon these trifles (for trifles they are in a free and happy country), than upon the oppressions of despotic government for ages together. As to the lengthy writer in New York, I have attentively examined his pieces. He appears to be a candid good hearted man, to have a good style and some plausible ideas. But when we carefully examine his pieces, to see where the strength of them lies -- when the mind endeavors to fix on those material parts, which ought to be the essence of all voluminous productions -- we do not find them. The writer appears constantly to move on a smooth surface, the part of his work like the parts of a cob-house, are all equally strong and all equally weak, and all like those works of the boys, without an object. His pieces appear to have but little relation to the great question, whether the constitution is fitted to the condition and character of this people or not.

But to return. 3. Officers may be appointed by the president and an executive council. When we have assigned to the legislature the appointment of a few important officers; to the president and senate the appointment of those concerned in managing foreign affairs; to the state governments the appointment of militia officers; and authorize the legislature, by legislative acts, to assign to

the president alone, to the heads of the departments, and courts of law respectively, the appointment of many inferior officers -- we shall then want to lodge some where a residuum of power, a power to appoint all other necessary officers, as established by law. The fittest receptacle for this residuary power is clearly, in my opinion, the first executive magistrate, advised and directed by an executive council of seven or nine members, periodically chosen from such proportional districts as the union may for the purpose be divided into. The people may give their votes for twice the number of counselors wanted, and the federal legislature take twice the number also from the highest candidates, and from among them choose the seven or nine, or number wanted. Such a council may be rationally formed for the business of appointments; whereas the senate, created for other purposes, never can be. Such councils form a feature in some of the best executives in the union. They appear to be essential to every first magistrate, who may frequently want advice.

To authorize the president to appoint his own council would be unsafe. To give the sole appointment of it to the legislature would confer an undue and unnecessary influence upon that branch. Such a council for a year would be less expensive than the senate for four months. The president may nominate, and the counselors always be made responsible for their advice and opinions, by recording and signing whatever they advise to be done. They and the president, to many purposes, will properly form an independent executive branch; have an influence unmingled with the legislative, which the executive never can have while connected with a powerful branch of the legislature. And yet the influence arising from the power of appointments be less dangerous, because in less dangerous hands -- hands properly adequate to possess it. Whereas the senate, from its character and situation, will add a dangerous weight to the power itself, and be far less capable of responsibility, than the council proposed. There is another advantage: the residuum of power as to appointments, which the president and council need possess, is less than that the president and senate must have. And as such a council would render the sessions of the senate unnecessary many months in the year, the expenses of the government would not be increased, if they would not be lessened by the institution of such a council. I think I need not dwell upon this article, as the fitness of this mode of appointment will perhaps amply appear by the evident unfitness of the others.

4. Officers may be appointed by the president alone. It has been almost universally found, when a man has been authorized to exercise power alone, he has never done it alone; but, generally, [was] aided [in] his determinations by, and rested on the advice and opinions of others. And it often happens when advice is wanted, the worst men, the most interested creatures obtrude themselves, the worst advice is at hand, and misdirects the mind of him who would be informed and advised. It is very seldom we see a single executive depend on accidental advice and assistance; but each single executive has, almost always, formed to itself a regular council, to be assembled and consulted on important occasions. This proves that a select council, of some kind is, by experience, generally found necessary and useful. But in a free country, the exercise of any considerable branch of power ought to be under some checks and controls. As to this point, I think the constitution stands well. The legislature may, when it shall deem it expedient, from time to time, authorize the president alone to appoint particular inferior officers; and when necessary, to take back the power. His power, therefore, in this respect, may always be increased or decreased by the legislature, as experience, the best instructor, shall direct -- always keeping him, by the constitution, within certain bounds. Officers, in the fifth place, may be appointed by

the heads of departments or courts of law. Art. 2., Sect. 2., respecting appointments, goes on -- "But congress may by law vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments." The probability is, as the constitution now stands, that the Senate, a branch of the legislature, will be tenacious of the power of appointment, and much too sparingly part with a share of it to the courts of law, and heads of departments. Here again the impropriety appears of the senate's having, generally, a share in the appointment of officers. We may fairly assume, that the judges and principal officers in the departments will be able well informed men in their respective branches of business; that they will, from experience, be best informed as to proper persons to fill inferior offices in them; that they will feel themselves responsible for the execution of their several branches of business, and for the conduct of the officers they may appoint therein. From these, and other considerations, I think we may infer, that impartial and judicious appointments of subordinate officers will, generally, be made by the courts of law, and the heads of departments. This power of distributing appointments, as circumstances may require, into several hands, in a well formed disinterested legislature, might be of essential service not only in promoting beneficial appointments, but also in preserving the balance in government. A feeble executive may be strengthened and supported by placing in its hands more numerous appointments; an executive too influential may be reduced within proper bounds, by placing many of the inferior appointments in the courts of law, and heads of departments; nor is there much danger that the executive will be wantonly weakened or strengthened by the legislature by thus shifting the appointments of inferior officers. Since all must be done by legislative acts which cannot be passed without the consent of the executive, or the consent of two-thirds of both branches, a good legislature will use this power to preserve the balance and perpetuate the government. Here again we are brought to our ultimatum -- is the legislature so constructed as to deserve our confidence?

6. Officers may be appointed by the state governments. By Art. 1., Sect. S., the respective states are authorized exclusively to appoint the militia officers. This not only lodges the appointments in proper places, but it also tends to distribute and lodge in different executive hands the powers of appointing to offices, so dangerous when collected into the hands of one or a few men.

It is a good general rule, that the legislative, executive, and judicial powers, ought to be kept distinct. But this, like other general rules, has its exceptions; and without these exceptions we cannot form a good government, and properly balance its parts. And we can determine only from reason, experience and a critical inspection of the parts of the government, how far it is proper to intermix those powers. Appointments, I believe, in all mixed governments, have been assigned to different hands -- some are made by the executive, some by the legislature, some by the judges, and some by the people. It has been thought advisable by the wisest nations -- that the legislature should so far exercise executive and judicial powers as to appoint some officers judge of the elections of its members, and impeach and try officers for misconduct; that the executive should have a partial share in legislation; and that judges should appoint some subordinate officers, and regulate so far as to establish rules for their own proceedings. Where the members of the government, as the house, the senate, the executive, and judiciary, are strong and complete, each in itself, the balance is naturally produced; each party may take the powers congenial to it, and we have less need to be anxious about checks, and the subdivision of powers.

If after making the deductions already alluded to, from the general power to appoint federal officers, the residuum shall be thought to be too large and unsafe, and to place an undue influence in the hands of the president and council, a further deduction may be made, with many advantages and perhaps with but a few inconveniences -- and that is, by giving the appointment of a few great officers to the legislature -- as of the commissioners of the treasury, of the comptroller, treasurer, master coiner, and some of the principal officers in the money department; of the sheriffs or marshals of the United States; of states attorneys, secretary of the home department, and secretary of war; perhaps of the judges of the supreme court; of major generals and admirals. The appointments of these officers, who may be at the heads of the great departments of business, in carrying into execution the national system, involve in them a variety of considerations. They will not often occur and the power to make them ought to remain in safe hands. Officers of the above description are appointed by the legislatures in some of the states, and in some not. We may, I believe, presume that the federal legislature will possess sufficient knowledge and discernment to make judicious appointments. However, as these appointments by the legislature tend to increase a mixture of power, to lessen the advantages of impeachments and responsibility, I would by no means contend for them any further than it may be necessary for reducing the power of the executive within the bounds of safety.

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