The Debates in the Several State Conventions on the Adoption of the Federal Constitution [Elliot's Debates, Volume 3]

Monday, June 16, 1788.

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

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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

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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 fill 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

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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 hundredors 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

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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, hut 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

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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**.