CHAPTER III.

The Convention of 1801.

The Constitutional Convention of 1801 had its origin in differences of opinion concerning the proper construction of § 23 of the Constitution, which provided for a Council of Appointment. The section is as follows:

"That all officers other than those who, by this Constitution, are directed to be otherwise appointed, shall be appointed in the manner following, to wit: The assembly shall, once in every year, openly nominate and appoint one of the senators from each great district, which senators shall form a council for the appointment of the said officers, of which the governor for the time being, or the lieutenant governor, or the president of the senate (when they shall respectively administer the government), shall be president, and have a casting voice, but no other vote; and, with the advice and consent of the said council, shall appoint all the said officers: and that a majority of the said council be a quorum: and further, the said senators shall not be eligible to the said council for two years successively."

This council was an important part of the state government until abolished by the Constitution of 1821, which took effect on the 31st of December, 1822. The council, therefore, existed more than forty-five years; and while it has gone into history, probably never to return as a feature of our constitutional machinery, it played such an important part in the early history of the state, especially its political history, that it should receive here more than a passing notice.

The first constitution-makers had not gone very far

in the direction of choosing officers by popular election. Most of the officers were chosen by appointment; and we shall see, as we note the development of our constitutional system, how slowly the theory of elections by the people made its way. The framers of the first Constitution treated this subject from the point of view of their own experience, and also in accordance with the custom of that time.

In the chapter on the first Constitution, I have referred to a letter written by John Jay to Robert R. Livingston and Gouverneur Morris, dated at Fishkill, April 29, 1777, nine days after the Constitution was adopted, from which it appears that the original draft of § 22, afterwards § 23, provided for appointment of officers by the legislature, on the nomination of the governor, and that this provision was generally disapproved by the Convention. The original form of the section has been given in the previous chapter. Several plans were proposed and discussed by members out of session, and finally the section as it stands was prepared by Mr. Jay, proposed by him in convention, and adopted. Having written the section, his opinion must have great weight in determining its proper construction; and he always claimed that it gave the governor the exclusive right of nomination. It may be well to note here that while the section, as proposed by Mr. Jay, was under consideration by the Convention, an amendment was offered by William Harper, providing for the appointment of four senators, to compose a council of appointment, "which council shall appoint all the said officers." This amendment did not give the governor any authority in the council, and he could not nominate or appoint any officer; that power was to be vested solely in the council.

It will be seen by the construction given to § 23 by the Convention of 1801 that the senators in the council

possessed practically the power which they would have possessed under this proposed amendment; for under that construction they controlled the council, making nominations and appointments, and the governor was obliged to issue commissions accordingly. The Convention rejected the Harper amendment, leaving the section as proposed by Mr. Jay. The Convention that adopted the Constitution construed the section in the ordinance of the 8th of May, 1777, providing for the appointment of certain officers, and instituting the new government, in which ordinance it is declared that "the appointment of officers in this state is, by the Constitution thereof, vested in the governor, by and with the advice and consent of the Council of Appointment." This construction is quite significant, but it seems to have been overlooked in the controversy that arose over the section more than twenty years afterwards.

The records of the council do not show who made nominations, but it seems that Governor Clinton, up to 1794, exercised the sole power of nomination, "although doubts had arisen previously as to this power." The appointments are evidenced by a resolution entered on the minutes "that be and he hereby is appointed" (naming the office). The commissions were signed by the Governor, and recited, among other things, that, by virtue of statute or other authority, "we have nominated, constituted, and appointed, and by these presents do nominate, constitute, and appoint." One of these commissions, issued in February, 1779, contains the following attestation: "Witness our trusty and well-beloved George Clinton, Esq., Governor of our said state. General and Commander in Chief of all the militia, and Admiral of the navy of the same, by and with the advice and consent of the Council of Appointment," followed by the date and signature; and this was afterwards the

usual form. The form of the commission would indicate a nomination by the Governor and confirmation by the council; and this, as already stated, seems to have been the usual practice, although the records do not show the fact of a nomination by the Governor. The form of statutes creating offices during the early state history should not be overlooked, for they show a legislative construction of the constitutional provision. Thus, in 1779, the Governor was authorized by statute, "by and with the advice and consent of the Council of Appointment, to nominate and appoint" a state clothier. Many other offices were created during the next twenty-five years, with a like provision relative to appointment and confirmation; but the practice of the council does not seem to have been changed in consequence of these special acts, nor does it appear that the Governor in fact actually nominated an officer, and that his nomination was confirmed by the council. I think, without exception, the commissions during the existence of the council recited that the appointments were made "by and with the advice and consent of the Council of Appointment," although, by the declaration of the Convention of 1801, any member of the council might make a nomination. It will be observed that the early statutes providing for appointment of an officer by the governor and council used the form followed in modern statutes which provide for the appointment by the governor and senate; but in these later days the senate would hardly claim a concurrent right of nomination.

On the 29th of January, 1794, Egbert Benson was appointed puisne judge of the supreme court on the nomination of the council, and against the protest of the Governor, who claimed the exclusive right to make all nominations. John Jay was elected governor in the spring of 1795, while he was abroad as an envoy of the

United States. He reached New York on his return, May 28th; he resigned the office of chief justice of the United States the 29th of June, 1795, and on the 1st of July took the oath of office as governor of New York. In his speech to the legislature at the opening of the session, January, 1796, he made the following reference to the subject of appointments: "There is an article in the Constitution, which, by admitting of two different constructions, has given rise to opposite opinions, and may give occasion to disagreeable contests and embarrassments. The article I allude to is the one which ordains that the person administering the government for the time being shall be president of the Council of Appointment, and have a casting voice, but no other vote; and, with the advice and consent of the said council, shall appoint all the officers which the Constitution directs to be appointed. Whether this does, by just construction, assign to him the exclusive right of nomination, is a question which, though not of recent date, still remains to be definitely settled. Circumstanced as I am in relation to this question, I think it proper to state it, and to submit to your consideration the expediency of determining it by a declaratory act." He did not mention the subject again in his communications to the legislature until February 26, 1801, when the relations between the Governor and the majority of the council had become so strained that the business of the council was practically at a standstill. This condition grew out of incidents that occurred on the 11th and 24th of February. On the 11th the Governor nominated eight candidates for the office of sheriff of Dutchess county, but they were rejected by the council. On the 24th the Governor proposed that all nominations be entered on the minutes of the council. This proposition was rejected by a majority of the council, on the grounds that it had not been

the custom to enter the nominations on the minutes, that such entry would unnecessarily "swell the minutes," that the law did not require such entry, "and because the council do not admit, but deny, that the right of nomination exists in the Governor exclusively, which His Excellency claims and insists upon."

The council was composed at this time of DeWitt Clinton, Ambrose Spencer, Robert Roseboom, and John Sanders.

The issue was further intensified at the same meeting when Mr. Clinton nominated a candidate for the office of sheriff of Orange county. The minutes state that Governor Jay, "claiming the exclusive right of nomination, observed that it would be proper for him to consider what ought to be his conduct relative" to the nomination made by Mr. Clinton. He declined to present the nomination to the council, which soon adjourned, and did not meet again while Mr. Jay was governor.

Governor Jay's Special Message.

Governor Jay sent a special message to the assembly on the 26th of February, 1801, and the same message to the senate on the 27th, in relation to the Council of Appointment, reciting the differences which had existed between the council and Governor, not only during his own term, but during the term of his predecessor, Governor Clinton. Governor Jay claimed that under the Constitution the governor had the exclusive right of nomination. Some members of the Council of Appointment claimed a concurrent right of nomination. This the Governor denied, and in this message he recommends that it be settled in some way, either by a declaratory act of the legislature, or by judgment of law.

On the 27th of February the assembly adopted a preamble referring to the Governor's message of the pre-

vious day, and the questions presented by it, which was followed by a resolution declaring "as the sense of this house, that the legislature have no authority to interpose between the Executive and the members of the Council of Appointment, touching the right of nomination, or to pass a declaratory act, defining the powers of the said council, or prescribing the manner in which the same shall be exercised."

On the 7th of March the senate adopted a concurrent resolution for a joint committee of the two houses to inquire and report what had been the practice of the Council of Appointment concerning nominations; but the assembly did not concur in this resolution.

On the 18th of March a communication relating to this subject was sent to the assembly by a majority of the Council of Appointment. It was signed by DeWitt Clinton, Ambrose Spencer, and Robert Roseboom.

Mr. Clinton, then a young man, had recently entered public life, and was at the beginning of a career which proved alike honorable to himself and to the state. At this time he was very persistent in pressing the claims of the council to a concurrent right of nomination; but he afterwards had abundant reason to change his views, when, as governor, the council was frequently opposed to him politically, and he was obliged to issue commissions to his political opponents. Mr. Spencer was serving his second term in the senate, and was soon afterwards appointed attorney general. A little later he was appointed associate justice, and afterwards chief justice, of the supreme court.

In this communication these members of the council stated at length their views on the conflicting claims of the Governor and council to the right of nomination. They denied the Governor's exclusive right of nomination, and asserted that not only by the Constitution, but

by the practice of the council, the council had a concurrent right of nomination, and that appointments must be made by the council as a whole, including the Governor, who had only a casting voice. It also appeared from this communication that there were political differences between the Governor and the Council of Appointment; that he nominated to office members of his own party, whose nominations had been rejected by the council, and had refused to consider nominations made by members of the council.

Convention Recommended.

On the 6th of April the legislature passed an act recommending a convention for the purpose of considering the question of the construction of § 23 of the Constitution, and also that part of the Constitution relating to the number of members of the senate and assembly.

On the same day the senate adopted a preamble referring to the differences between the Governor and council, reciting "that the legislature cannot now adopt or concur in any measure to produce a seasonable and legal decision on the right of nomination; and that the right has been uniformly claimed and generally exercised as well by the late as the present Governor." Then follows a concurrent resolution suggesting "that it would be proper for the members of the Council of Appointment to signify to His Excellency, the Governor, their willingness to waive the aforesaid question relative to the right of nomination, and to proceed in the business of the council in the manner heretofore generally practised, until a legal decision can be had on that question." While this resolution was pending, DeWitt Clinton offered as a substitute a preamble reciting among other things, "that great and extensive injuries may result to the community from these differences, whereby the house

of assembly may deem it their duty to interfere in the capacity of the grand inquest of the state, and to institute an impeachment against the delinquent or delinquents before the court for the trial of impeachments," and that the legislature, by passing a law for a convention, had adopted the only measure in their power to correct the evil. This preamble was followed by a resolution to the effect that in view of the possible presentation of the matter to the court for the trial of impeachments, of which the senators were members, they could not now properly express an opinion on either side of the controversy. Mr. Clinton's resolution was rejected. He then offered another resolution to the effect that it would be proper for the Governor to convene the council, and to signify to them his willingness so to accommodate with them respecting the right of nomination as to prevent a further interruption of appointments until a constitutional decision could be had on that question. This resolution was also rejected.

The assembly declined to concur in the senate resolution, but on the 8th adopted another resolution reiterating the views expressed by it on the 27th of February, with the following significant preamble:

"WHEREAS, It appears to this House from two several messages of His Excellency, the Governor, and from a communication of a majority of the members of the Council of Appointment, that the said council have not been convened since the 24th of February last for the performance of the duties committed to them by the Constitution; and that a controversy has arisen between His Excellency and the council respecting the right of nomination, which has created a new and unprecedented crisis in our public affairs; that notwithstanding speculative differences may hitherto have existed between the former governor and former councils on this subject,

yet, that in practice, the business of appointments was never suspended; and that the present is the first council, under the present Governor's administration, who ever experienced any embarrassments in the execution of their official duties:

"AND WHEREAS, By the Constitution and laws of this state, at fixed periods certain appointments are enjoined and required to be made, yet the judges and justices of several counties, the mayors of the four cities, eight sheriffs, the auctioneers of this city, and a number of other officers, have not been appointed at the times prescribed by the said Constitution and laws:

"AND WHEREAS, A high responsibility must rest on His Excellency or the council, and such injurious consequences may result as will induce the next house of assembly to prefer an impeachment against the delinquent or delinquents; and whereas, the senate principally compose the court for the trial of impeachments; and whereas, the legislature have, by passing a law calling a convention, made the only provision in their power for the correction of this evil: therefore, *Resolved*, That this House do persist in their said resolution."

It appears from Hammond's Political History of New York (vol. 1, 157) and also from Pellew's Life of John Jay (p. 298) that, while the issue with the council was pending, Governor Jay requested the opinion of the chancellor and judges of the supreme court concerning the construction of § 23, "which they unanimously declined giving, on the ground that the expression of an opinion by them was not within the scope of their official duties, but entirely extrajudicial."

It has already been noted that the assembly expressed the opinion that the legislature had no power to determine the construction of § 23 by a declaratory act, and the senate seems to have taken the same view. It does

not appear that any effort was made to procure a solution of the problem by the other method suggested by Governor Jay, namely, a judicial decision. The legislature adopted an entirely different course, and provided for a convention to determine the proper construction of the disputed section.

The first Constitution did not contain any provision for its own amendment, nor for calling future constitutional conventions. The legislature of 1801 could not absolutely direct that a convention be held, but passed a law recommending a convention for the purposes therein mentioned. This act, chapter 159, authorized and proposed the election of delegates to a convention to consider two features of the Constitution,—namely, that relating to the number of members of the senate and assembly, and the section relating to the Council of Appointment. It will be observed that the people were not given an opportunity to express their judgment on the question of holding a convention. While the bill was pending an amendment was once agreed to in the assembly giving this right, but later it was abandoned, and under the law the people were only given power to elect delegates. The people, who might have objected to such a convention, had no opportunity to express their objection, except by declining to vote for delegates, and this meant nothing, for the persons who received votes as delegates would be entitled to sit, if regularly chosen, even if the majority of the people had been opposed to a convention. We shall see in the next chapter that a bill passed in 1820 for a convention, without a previous submission of the question to the people, was vetoed by the Council of Revision on objections prepared by Chancellor Kent, then a member of the council. In this opinion he calls attention to the act of 1801, and distinguishes it from the act then under consideration on

the ground that it conferred on the delegates power to determine two questions only; one of which, that relating to the Council of Appointment, was one of construction, and not of amendment; but he expressed the doubt whether a convention called to change the legislature was constitutional unless previously authorized by the people. Chancellor Kent, then an associate justice of the supreme court, was a member of the Council of Revision in 1801, but he and Chancellor Livingston were both absent when the convention bill was presented to the council, and it does not appear that there was any objection to it.

In addition to the question relating to the construction of § 23, the act conferred on the Convention power to consider that part of the Constitution "respecting the number of senators and members of assembly, and to reduce and limit the number as the Convention may deem proper."

The senate was originally composed of twenty-four members, and the assembly of seventy members, and provision was made for an increase in each branch at stated periods, until the maximum should be reached, which was fixed at one hundred senators and three hundred members of assembly. The increase in membership had apparently been more rapid than was at first anticipated. Governor Jay, in his speech to the legislature at the opening of the session, which began November 4, 1800, called attention to this increase, and recommended a convention to consider the question of the number of members of the senate and assembly. This seems to have been the only recommendation on the subject, and it is probable that a convention would not have been called at that time for the sole purpose of considering the number of members of the legislature; but when a convention seemed necessary to settle the controversy

over the Council of Appointment, the subject of the legislature was included. At that time the senate had increased to forty-three members, and the assembly to one hundred and twenty-six members.

The Convention.

The delegates to the Convention of 1801 were required to meet in the courthouse in the city of Albany on the second Tuesday of October. They met accordingly on October 13. The following is the list of delegates by counties:

Albany.—John V. Henry, Daniel Hale, Leonard Gansevoort, Johan Jost Dietz, Peter West, S. Van Rensselaer, Josiah Ogden Hoffman, Abraham Van Ingen.

Cayuga.—Silas Halsey.

Chenango.—Stephen Hoxie, John W. Buckley.

Clinton and Essex.—Thomas Tredwell.

Columbia.—Alexander Coffin, Benjamin Birdsall, Moses Younglove, Thomas Trafford, James I. Van Alen, Stephen Hogeboom.

Delaware.—Roswell Hotchkis, Elias Osborn.

Dutchess.—Peter Heusted, Jonathan Akin, J. Van Benthuysen, T. W. Van Wyck, Edmond Parlee, Isaac Bloom, Ithamer Weed, Joseph Thorn, Smith Thompson, Caleb Hazen.

Greene.—Marton G. Schuneman, Stephen Simmons.

Herkimer.—Evans Wherry, M. B. Tallmadge, George Rosecrantz.

Kings.—John Hicks.

Montgomery.—Thomas Sammons, Nathaniel Campbell, Peter Waggoner, Jun., Caleb Woodworth, Jonathan Hallett, John Herkimer.

New York.—James Nicholson, William Edgar, Solomon Townsend, George Clinton, Jun., Archibald Kerly, Joshua Barker, Maturin Livingston, John Mills, Peter H. Wendover, William Van Ness, Nicholas DePeyster, Daniel D. Tompkins, John Bingham.

Oneida.—James Dean, Bezaleel Fisk, Henry Huntington.

Onondaga.—Moses Carpenter.

Ontario and Steuben.—Moses Atwater, John Knox.

Orange.—Aaron Burr, Peter Townsend, Arthur Parks, James Clinton, John Steward.

Otsego.—David Shaw, James Moore, Daniel Hawks, Luther Rich.

Queens.—John Schenck, John W. Seaman, DeWitt Clinton, James Rayner.

Rensselaer.—Cornelius Lansing, Jacob Yates, Jonathan Rouse, John Ryan, Wm. W. Reynolds, Jonathan Niles.

Richmond.—Joseph Perine.

Rockland.—Peter Taulman.

Saratoga.—John Thompson, Samuel Lewis, Adam Comstock, D. L. Van Antwerp, Beriah Palmer.

Suffolk.—William Floyd, Joshua Smith, Jun., Ezra L'Hommedieu, Samuel L'Hommedieu.

Tioga.—John Patterson.

Ulster.—Abraham Schoonmaker, Anning Smith, John Cantine, Lucas Elmendorf.

Washington.—Edward Savage, Solomon King, Solomon Smith, John Vernor, Thomas Lyon, John Gale.

Westchester.—Jonathan G. Tompkins, Pierre Van Cortlandt, Jun., Israel Honeywell, Ebenezer White, Thomas Ferris.

Aaron Burr, then Vice President of the United States, was a delegate, and was chosen president of the Convention. DeWitt Clinton, a member of the Council of

Appointment, was also a delegate. Daniel D. Tompkins began his public career as a delegate to this Convention. Smith Thompson, afterwards a justice of the supreme court of the state and of the United States, was also a delegate.

The Convention at once addressed itself to the task committed to it, and completed its labors on the 27th of October. The result of its deliberations appears in five paragraphs, four of which relate to the legislature; one, the last, determines the construction of the disputed section relating to the Council of Appointment. The amendments permanently fixed the number of senators at thirty-two. The assembly was given one hundred members, and provision was made for a possible increase to one hundred and fifty, by additions to be made after each census.

The principal subject of consideration was the construction to be given to article 23. A motion for a construction of the article giving the senators the exclusive right of nomination was defeated by a vote of 93 to 6. A motion to give the Governor the exclusive right of nomination was defeated, but the journal does not give the vote.

The resolution of the Convention as finally adopted declares that under the "true construction" of the article "the right to nominate all officers other than those who, by the Constitution, are directed to be otherwise appointed, is vested concurrently in the person administering the government of this state for the time being, and in each of the members of the Council of Appointment." This resolution was adopted by a vote of 86 to 14. Daniel D. Tompkins voted in the negative; and twenty years afterwards, in the Constitutional Convention of 1821, he referred with apparent self-satisfaction to this vote. The large vote in favor of the resolution is ex-

plained by the fact that each of the two great political parties of that day had committed itself in favor of nominations by the members of the council,—the Federalist, in the winter of 1794, and the Republicans, in 1801.

It has already been noted that the convention which framed the Constitution had given this provision a different construction, but in the partisan struggle for power at the beginning of the last century the opinions of the authors of the Constitution seem to have been overlooked or ignored. Under the construction given by this Convention the council became a powerful and sometimes a very objectionable political machine, and at the time of its abolition, twenty-one years later, it wielded a patronage including nearly 15,000 officers, with an aggregate salary list of one million dollars. It often dispensed patronage with a high hand, making appointments and removals at will; it reduced the dignity and responsibility of the governor, so that, instead of being the chief executive of the state, he had only a casting vote in this appointing body, and only one fifth of the power of making nominations.

The plan of this council, as devised by Mr. Jay, was reasonable; and if it had been administered as intended, it might have continued as a permanent feature in our Constitution. We have adopted, as a substitute for this plan, the confirmation of the governor's appointments by the state senate, where confirmation is required at all, and have given the governor the absolute power of appointment without confirmation, in a large number of cases. Mr. Jay's plan contemplated a joint responsibility for appointments, to be shared by the governor and the legislature, by providing a council composed of four senators, distributed geographically through the state,

with power only to confirm or reject nominations by the governor. The whole legislature was charged with a duty and responsibility in the matter by requiring the assembly to choose the council from the senators, thus directly or indirectly bringing both branches of the legislature into coöperation with the governor in making appointments; but the efficiency of the plan was destroyed by the construction given to the article by the Convention of 1801.

The evolution of this council, and its final destruction, without a dissenting vote, by the Convention of 1821, shows that even the cohesive power of patronage as a political force must yield to higher principles of constitutional government when it is discovered that the dispensing of such patronage by an unrestrained and irresponsible body is inimical to the best interests of the state.