

Antifederalist No. 44

What Congress Can Do; What a State Can Not

"Deliberator" appeared in *The Freeman's Journal; or, The North-American Intelligencer*, February 20, 1788.

A writer in the *Pennsylvania Packet*, under the signature of A Freeman, has lately entered the lists as another champion for the proposed constitution. Particularly he has endeavored to show that our apprehensions of this plan of government being a consolidation of the United States into one government, and not a confederacy of sovereign independent states, is entirely groundless; and it must be acknowledged that he has advocated this cause with as much show of reason, perhaps, as the subject will admit.

The words states, several states, and united states are, he observes, frequently mentioned in the constitution. And this is an argument that their separate sovereignty and independence cannot be endangered! He has enumerated a variety of matters which, he says, congress cannot do; and which the states, in their individual capacity, must or may do, and thence infers their sovereignty and independence. In some of these, however, I apprehend he is a little mistaken.

1. "Congress cannot train the militia." This is not strictly true. For by the 1st Article they are empowered "to provide for organizing, arming, and disciplining" them; and tho' the respective states are said to have the authority of training the militia, it must be "according to the discipline prescribed by Congress." In this business, therefore, they will be no other than subalterns under Congress, to execute their orders; which, if they shall neglect to do, Congress will have constitutional powers to provide for, by any other means they shall think proper. They shall have power to declare what description of persons shall compose the militia; to appoint the stated times and places for exercising them; to compel personal attendance, whether when called for into actual service, or on other occasions, under what penalties they shall think proper, without regard to scruples of conscience or any other consideration. Their executive officer may march and countermarch them from one extremity of the state to the other -- and all this without so much as consulting the legislature of the particular states to which they belong! Where then is that boasted security against the annihilation of the state governments, arising from "the powerful military support" they will have from their militia?

2. "Congress cannot enact laws for the inspection of the produce of the country." Neither is this strictly true. Their power "to regulate commerce with foreign nations and among the several states, and to make all laws which shall be necessary and proper for carrying this power (among others vested in them by the constitution) into execution," most certainly extends to the enacting of inspection laws. The particular states may indeed propose such laws to them; but it is expressly declared, in the 1st article, that "all such laws shall be subject to the revision and control of the Congress."

3. "The several states can prohibit or impose duties on the importation of slaves into their own ports." Nay, not even this can they do, "without the consent of Congress," as is expressly declared in the close of the 1st article. The duty which Congress may, and it is probable will lay on the importation of slaves, will form a branch of their revenue. But this impost, as well as all others, "must be uniform throughout the United States." Congress therefore cannot consent that one state should impose an additional duty on this article of commerce, unless all other states should do the same; and it is not very likely that some of the states will ever ask this favor.

4. "Congress cannot interfere with the opening of rivers and canals; the making or regulation of roads, except post roads; building bridges; erecting ferries; building lighthouses, etc." In one case, which may very frequently happen, this proposition also fails. For if the river, canal, road, bridge, ferry, etc., be common to two states, or a matter in which they may be both concerned, and consequently must both concur, then the interference and consent of Congress becomes absolutely necessary, since it is declared in the constitution that "no state shall, without the consent of Congress, enter into any agreement or compact with another state."

5. "The elections of the President, Vice President, senators and representatives are exclusively in the hands of the states -- even as to filling vacancies." This, in one important part, is not true. For, by the 2d article, "in case of the removal of the President from office, or of his death, resignation, or inability to discharge the duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, etc., both of the President and Vice President, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected." But no such election is provided for by the constitution, till the return of the periodical election at the expiration of the four years for which the former president was chosen. And thus may the great powers of this supreme magistrate of the United States be exercised, for years together, by a man who, perhaps, never had one vote of the people for any office of government in his life.

6. "Congress cannot interfere with the constitution of any state." This has been often said, but alas, with how little truth -- since it is declared in the 6th article that "this constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties, etc., shall be the supreme law of the land, and every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

But, sir, in order to form a proper judgment of the probable effects of this plan of general government on the sovereignties of the several states, it is necessary also to take a view of what Congress may, constitutionally, do and of what the states may not do. This matter, however, the above writer has thought proper to pass over in silence. I would therefore beg leave in some measure, to supply this omission; and if in anything I should appear to be mistaken I hope he will take the same liberty with me that I have done with him -- he will correct my mistake.

1. Congress may, even in time of peace, raise an army of 100,000 men, whom they may canton through the several states, and billet out on the inhabitants, in order to serve as necessary instruments in executing their decrees.

2. Upon the inhabitants of any state proving refractory to the will of Congress, or upon any other pretense whatsoever, Congress may can out even all the militia of as many states as they think proper, and keep them in actual service, without pay, as long as they please, subject to the utmost rigor of military discipline, corporal punishment, and death itself not excepted.

3. Congress may levy and collect a capitation or poll tax, to what amount they shall think proper; of which the poorest taxable in the state must pay as much as the richest.

4. Congress may, under the sanction of that clause I the constitution which empowers them to regulate commerce, authorize the importation of slaves, even into those states where this iniquitous trade is or may be prohibited by their laws or constitutions.

5. Congress may, under the sanction of that clause which empowers them to lay and collect duties (as distinct from imposts and excises) impose so heavy a stamp duty on newspapers and other periodical publications, as shall effectually prevent all necessary information to the people through these useful channels of intelligence.

6. Congress may, by imposing a duty on foreigners coming into the country, check the progress of its population. And after a few years they may prohibit altogether, not only the emigration of foreigners into our country, but also that of our own citizens to any other country.

7. Congress may withhold, as long as they think proper, all information respecting their proceedings from the people.

8. Congress may order the elections for members of their own body, in the several states, to be held at what times, in what places, and in what manner they shall think proper. Thus, in Pennsylvania, they may order the elections to be held in the middle of winter, at the city of Philadelphia; by which means the inhabitants of nine-tenths of the state will be effectually (tho' constitutionally) deprived of the exercise of their right of suffrage.

9. Congress may, in their courts of judicature, abolish trial by jury in civil cases altogether; and even in criminal cases, trial by a jury of the vicinage is not secured by the constitution. A crime committed at Fort Pitt may be tried by a jury of the citizens of Philadelphia.

10. Congress may, if they shall think it for the "general welfare," establish an uniformity in religion throughout the United States. Such establishments have been thought necessary, and have accordingly taken place in almost all the other countries in the world, and will no doubt be thought equally necessary in this.

11. Though I believe it s not generally so understood, yet certain it is, that Congress may emit paper money, and even make it a legal tender throughout the United States; and, what is still worse, may, after it shall have depreciated in the hands of the people, call it in by taxes, at any rate of depreciation (compared with gold and silver) which they may think proper. For though no state can emit bills of credit, or pass any law impairing the obligation of contracts, yet the Congress themselves are under no constitutional restraints on these points.

12. The number of representatives which shall compose the principal branch of Congress is so small as to occasion general complaint. Congress, however, have no power to increase the number of representatives, but may reduce it even to one fifth part of the present arrangement.

13. On the other hand, no state can call forth its militia even to suppress any insurrection or domestic violence which may take place among its own citizens. This power is, by the constitution, vested in Congress.

14. No state can compel one of its own citizens to pay a debt due to a citizen of a neighboring state. Thus a Jersey-man will be unable to recover the price of a turkey sold in the Philadelphia market, if the purchaser shall be inclined to dispute, without commencing an action in one of the federal courts.

15. No state can encourage its own manufactures either by prohibiting or even laying a duty on the importation of foreign articles.

16. No state can give relief to insolvent debtors, however distressing their situation may be, since Congress will have the exclusive right of establishing uniform laws on the subject of bankruptcies throughout the United States; and the particular states are expressly prohibited from passing any law impairing the obligation of contracts.

DELIBERATOR