

Antifederalist No. 46

Where Then Is the Restraint?

This essay by "An Old Whig" (see AFP #'s Nos. 18-20, 49, 50, and 70) appeared in the Maryland Gazette and Baltimore Advertiser on Nov. 2, 1788.

Let us look to the first article of the proposed new constitution, which treats of the legislative powers of Congress; and to the eighth section, which pretends to define those powers. We find here that the Congress in its legislative capacity, shall have the power to lay and collect taxes, duties, and excises; to borrow money; to regulate commerce; to fix the rule for naturalization and the laws of bankruptcy; to coin money; to punish counterfeiters; to establish post offices and post roads; to secure copy rights to authors; to constitute tribunals; to define and punish piracies; to declare war; to raise and support armies; to provide and support a navy; to call forth the militia; to organize, arm and discipline the militia; to exercise absolute power over a district ten miles square, independent of all the State legislatures, and to be alike absolute over all forts, magazines, arsenals, dock-yards, and other needful buildings thereunto belonging. This is a short abstract of the powers given to Congress. These powers are very extensive, but I shall not stay at present to inquire whether these express powers were necessary to be given to Congress? Whether they are too great or too small?

My object is to consider that undefined, unbounded and immense power which is comprised in the following clause -- "And to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States; or in any department or offices thereof." Under such a clause as this, can anything be said to be reserved and kept back from Congress? Can it be said that the Congress have no power but what is expressed? "To make all laws which shall be necessary and proper" -- or, in other words, to make all such laws which the Congress shall think necessary and proper -- for who shalt judge for the legislature what is necessary and proper? Who shall set themselves above the sovereign? What inferior legislature shall set itself above the supreme legislature? To me it appears that no other power on earth can dictate to them, or control them, unless by force; and force, either internal or external, is one of those calamities which every good man would wish his country at all times to be delivered from. This generation in America have seen enough of war, and its usual concomitants, to prevent all of us from wishing to see any more of it -- all except those who make a trade of war. But to the question -- without force what can restrain the Congress from making such laws as they please? What limits are there to their authority? I fear none at all. For surely it cannot be justly said that they have no power but what is expressly given to them, when by the very terms of their creation they are vested with the powers of making laws in all cases -- necessary and proper; when from the nature of their power, they must necessarily be the judges what laws are necessary and proper.

The British act of Parliament, declaring the power of Parliament to make laws to bind America

in all cases whatsoever, was not more extensive. For it is as true as a maxim, that even the British Parliament neither could nor would pass any law in any case in which they did not either deem it necessary and proper to make such a law, or pretend to deem it so. And in such cases it is not of a farthing consequence whether they really are of opinion that the law is necessary and proper, or only pretend to think so, for who can overrule their pretensions? No one; unless we had a Bill of Rights, to which we might appeal and under which we might contend against any assumption of undue power, and appeal to the judicial branch of the government to protect us by their judgments. This reasoning, I fear, is but too just. And yet, if any man should doubt the truth of it, let me ask him one other question: What is the meaning of the latter part of the clause which vests the Congress with the authority of making all laws which shall be necessary and proper for carrying into execution all other powers (besides the foregoing powers vested, etc., etc.)? Was it thought that the foregoing powers might perhaps admit of some restraint, in their construction as to what was necessary and proper to carry them into execution? Or was it deemed right to add still further that they should not be restrained to the powers already named? Besides the powers already mentioned, other powers may be assumed hereafter as contained by implication in this constitution. The Congress shall judge of what is necessary and proper in all these cases, and in all other cases -- in short, in all cases whatsoever.

Where then is the restraint? How are Congress bound down to the powers expressly given? What is reserved, or can be reserved? Yet even this is not all. As if it were determined that no doubt should remain, by the sixth article of the Constitution it is declared that "this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the Constitutions or laws of any State to the contrary notwithstanding." The Congress are therefore vested with the supreme legislative power, without control. In giving such immense, such unlimited powers, was there no necessity of a Bill of Rights, to secure to the people their liberties?

Is it not evident that we are left wholly dependent on the wisdom and virtue of the men who shall from time to time be the members of Congress? And who shall be able to say seven years hence, the members of Congress will be wise and good men, or of the contrary character?