

The Antifederalist Papers No. 41-43 (Part 2) Richard Henry Lee

"The Quantity of Power the Union Must Possess is One Thing; the Mode of Exercising the Powers Given is Quite a Different Consideration"

. . . In the present state of mankind, and of conducting war, the government of every nation must have power to raise and keep up regular troops. The question is, how shall this power be lodged? In an entire government, as in Great-Britain, where the people assemble by their representatives in one legislature, there is no difficulty; it is of course properly lodged in that legislature. But in a confederated republic, where the organization consists of a federal head, and local governments, there is no one part in which it can be solely, and safely lodged. By Art. 1., Sect. 8., "congress shall have power to raise and support armies," etc. By Art. I., Sect. 10., "no state, without the consent of congress, shall keep troops, or ships of war, in time of peace." It seems fit the union should direct the raising of troops, and the union may do it in two ways: by requisitions on the states, or by direct taxes. The first is most conformable to the federal plan, and safest; and it may be improved, by giving the union power, by its own laws and officers, to raise the state's quota that may neglect, and to charge it with the expense; and by giving a fixed quorum of the state legislatures power to disapprove the requisition. There would be less danger in this power to raise troops, could the state governments keep a proper control over the purse and over the militia. But after all the precautions we can take, without evidently fettering the union too much, we must give a large accumulation of powers to it, in these and other respects. There is one check, which, I think may be added with great propriety-that is, no land forces shall be kept up, but by legislative acts annually passed by congress, and no appropriation of monies for their support shall be for a longer term than one year. This is the constitutional practice in Great Britain, and the reasons for such checks in the United States appear to be much stronger. We may also require that these acts be passed by a special majority, as before mentioned. There is another mode still more guarded, and which seems to be founded in the true spirit of a federal system: it seems proper to divide those powers we can with safety, lodge them in no one member of the government alone; yet substantially to preserve their use, and to insure duration to the government by modifying the exercise of them-it is to empower congress to raise troops by direct levies, not exceeding a given number, say 2000 in time of peace, and 12,000 in a time of war, and for such further troops as may be wanted, to raise them by requisitions qualified, as before mentioned. By the above recited clause no state shall keep troops, etc., in time of peace-this clearly implies it may do it in time of war. This must be on the principle that the union cannot defend all parts of the republic, and suggests an idea very repugnant to the general tendency of the system proposed, which is to disarm the state governments. A state in a long war may collect forces sufficient to take the field against the neighboring states. This clause was copied from the confederation, in which it was of more importance than in the plan proposed, because under this the separate states, probably, will have but small revenues.

By Article I., section 8., congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States. It is to be observed, that the separate states have ever been in possession of the power, and in the use of it, of making bankrupt-laws, militia laws, and laws in some other cases, respecting which, the new constitution, when adopted, will give the union power to legislate, etc. But no words are used by the constitution to exclude the jurisdiction of the several states, and whether they will be excluded or not, or whether they and the union will have concurrent jurisdiction or not, must be determined by inference, and from the nature of the subject. If the power, for instance, to make uniform laws on the subject of bankruptcies, is in its nature indivisible, or incapable of being exercised by two legislatures independently, or by one in aid of the other, then the states are excluded, and cannot legislate at all on the subject, even though the union should neglect or find it impracticable to establish uniform bankrupt laws. How far the union will find it practicable to do this, time only can fully determine. When we consider the extent of the country, and the very different ideas of the different parts in it, respecting credit, and the mode of making men's property liable for paying their debts, we may, I think with some degree of certainty, conclude that the union never will be able to establish such laws. But if practicable, it does not appear to me, on further reflection, that the union ought to have the power. It does not appear to me to be a power properly incidental to a federal head, and, I believe, no one ever possessed it. It is a power that will immediately and extensively interfere with the internal police of the separate states, especially with their administering justice among their own citizens. By giving this power to the union, we greatly extend the jurisdiction of the federal judiciary, as all questions arising on bankrupt laws, being laws of the union . . .-[indeed], almost all civil causes-may be drawn into those courts. We must be sensible how cautious we ought to be in extending unnecessarily the jurisdiction of those courts for reasons I need not repeat. This article of power too, will considerably increase, in the hands of the union, an accumulation of powers, some of a federal and some of an unfederal nature, [already] too large without it. The constitution provides that congress shall have the sole and exclusive government of what is called the federal city, a place not exceeding ten miles square, and of all places ceded for forts, dock-yards, etc. I believe this is a novel kind of provision in a federal republic; it is repugnant to the spirit of such a government, and must be founded in an apprehension of a hostile disposition between the federal head and the state governments. And it is not improbable that the sudden retreat of congress from Philadelphia first gave rise to it. With this apprehension, we provide, the government of the union shall have secluded places, cities, and castles of defense, which no state laws whatever shall invade. When we attentively examine this provision in all its consequences, it opens to view scenes almost without bounds. A federal, or rather a national city, ten miles square, containing a hundred square miles, is about four times as large as London; and for forts, magazines, arsenals, dock yards, and other needful buildings, congress may possess a number of places or towns in each state. It is true, congress cannot have them unless the state legislatures cede them; but when once ceded, they never can be recovered. And though the general temper of the legislatures may be averse to such cessions, yet many opportunities and advantages may be taken of particular times and circumstances of complying assemblies, and of particular parties, to obtain them. it is not improbable, that some considerable towns or places, in some intemperate moments, or influenced

by anti-republican principles, will petition to be ceded for the purposes mentioned in the provision. There are men, and even towns, in the best republics, which are often fond of withdrawing from the government of them, whenever occasion shall present. The case is still stronger. If the provision in question holds out allurements to attempt to withdraw, the people of a state must ever be subject to state as well as federal taxes; but the federal city and places will be subject only to the latter, and to them by no fixed proportion. Nor of the taxes raised in them, can the separate states demand any account of congress. These doors opened for withdrawing from the state governments entirely, may, on other accounts, be very alluring and pleasing to those anti-republican men who prefer a place under the wings of courts.

If a federal town be necessary for the residence of congress and the public officers, it ought to be a small one, and the government of it fixed on republican and common law principles, carefully enumerated and established by the constitution. It is true, the states, when they shall cede places, may stipulate that the laws and government of congress in them shall always be formed on such principles. But it is easy to discern, that the stipulations of a state, or of the inhabitants of the place ceded, can be of but little avail against the power and gradual encroachments of the union. The principles ought to be established by the federal constitution, to which all states are parties; but in no event can there be any need of so large a city and places for forts, etc., totally exempted from the laws and jurisdictions of the state governments. If I understand the constitution, the laws of congress, constitutionally made, will have complete and supreme jurisdiction to all federal purposes, on every inch of ground in the United States, and exclusive jurisdiction on the high seas, and this by the highest authority, the consent of the people. Suppose ten acres at West-Point shall be used as a fort of the union, or a sea port town as a dockyard: the laws of the union, in those places, respecting the navy, forces of the union, and all federal objects, must prevail, be noticed by all judges and officers, and executed accordingly. And I can discern no one reason for excluding from these places, the operation of state laws, as to mere state purpose for instance, for the collection of state taxes in them; recovering debts; deciding questions of property arising within them on state laws; punishing, by state laws, theft, trespasses, and offenses committed in them by mere citizens against the state law.

The city, and all the places in which the union shall have this exclusive jurisdiction, will be immediately under one entire government, that of the federal head, and be no part of any state, and consequently no part of the United States. The inhabitants of the federal city and places, will be as much exempt from the laws and control of the state governments, as the people of Canada or Nova Scotia will be. Neither the laws of the states respecting taxes, the militia, crimes of property, will extend to them; nor is there a single stipulation in the constitution, that the inhabitants of this city, and these places, shall be governed by laws founded on principles of freedom. All questions, civil and criminal, arising on the laws of these places, which must be the laws of congress, must be decided in the federal courts; and also, all questions that may, by such judicial fictions as these courts may consider reasonable, be supposed to arise within this city, or any of these places, may be brought into these courts. By a very common legal fiction, any personal contract may be supposed to have been made in any place. A

contract made in Georgia may be supposed to have been made in the federal city; the courts will admit the fiction. . . . Every suit in which an inhabitant of a federal district may be a party, of course may be instituted in the federal courts; also, every suit in which it may be alleged and not denied, that a party in it is an inhabitant of such a district; also, every suit to which a foreign state or subject, the union, a state, citizens of different states in fact, or by reasonable legal fictions, may be a party or parties. And thus, by means of bankrupt laws, federal districts, etc., almost all judicial business, I apprehend may be carried into the federal courts, without essentially departing from the usual course of judicial proceedings. The courts in Great Britain have acquired their powers, and extended very greatly their jurisdictions by such :fiction and suppositions as I have mentioned. The constitution, in these points, certainly involves in it principles, and almost hidden cases, which may unfold and in time exhibit consequences we hardly think of. The power of naturalization, when viewed in connection with the judicial powers and cases, is, in my mind, of very doubtful extent. By the constitution itself, the citizens of each state will be naturalized citizens of every state, to the general purposes of instituting suits, claiming the benefits of the laws, etc. And in order to give the federal courts jurisdiction of an action, between citizens of the same state, in common acceptance-may not a court allow the plaintiff to say, he is a citizen of one state, and the defendant a citizen of another without carrying legal fictions so far, by any means, as they have been carried by the courts of King's Bench and Exchequer, in order to bring causes within their cognizance? Further, the federal city and districts, will be totally distinct from any state, and a citizen of a state will not of course be subject of any of them. And to avail himself of the privileges and immunities of them, must he not be naturalized by congress in them? And may not congress make any proportion of the citizens of the states naturalized subjects of the federal city and districts, and thereby entitle them to sue or defend, in all cases, in the federal courts? I have my doubts, and many sensible men, I find, have their doubts, on these points. And we ought to observe, they must be settled in the courts of law, by their rules, distinctions, and fictions. To avoid many of these intricacies and difficulties, and to avoid the undue and unnecessary extension of the federal judicial powers, it appears to me that no federal districts ought to be allowed, and no federal city or town-except perhaps a small town, in which the government shall be republican, but in which congress shall have no jurisdiction over the inhabitants of the states. Can the union want, in such a town, any thing more than a right to the soil to which it may set its buildings, and extensive jurisdiction over the federal buildings, and property, its own members, officers, and servants in it? As to all federal objects, the union will have complete jurisdiction over them of course any where, and every where. I still think that no actions ought to be allowed to be brought in the federal courts, between citizens of different states; at least, unless the cause be of very considerable importance. And that no action against a state government, by any citizen or foreigner, ought to be allowed; and no action, in which a foreign subject is party, at least, unless it be of very considerable importance, ought to be instituted in federal courts. I confess, I can see no reason whatever, for a foreigner, or for citizens of different states, carrying sixpenny causes into the federal courts. I think the state courts will be found by experience, to be bottomed on better principles, and to administer justice better than the federal courts. The difficulties and dangers I have supposed will result from so large a federal city, and federal districts, from the extension of the federal

judicial powers, etc. are not, I conceive, merely possible, but probable. I think pernicious political consequences will follow from them, and from the federal city especially, for very obvious reasons, a few of which I will mention.

We must observe that the citizens of a state will be subject to state as well as federal taxes, and the inhabitants of the federal city and districts only to such taxes as congress may lay. We are not to suppose all our people are attached to free government, and the principles of the common law, but that many thousands of them will prefer a city governed not on republican principles. This city, and the government of it, must indubitably take their tone from the characters of the men, who from the nature of its situation and institution must collect there. This city will not be established for productive labor, for mercantile, or mechanic industry; but for the residence of government, its officers and attendants. If hereafter it should ever become a place of trade and industry, [yet] in the early periods of its existence, when its laws and government must receive their fixed tone, it must be a mere court, with its appendages-the executive, congress, the law courts, gentlemen of fortune and pleasure, with all the officers, attendants, suitors, expectants and dependents on the whole. However brilliant and honorable this collection may be, if we expect it will have any sincere attachments to simple and frugal republicanism, to that liberty and mild government, which is dear to the laborious part of a free people, we must assuredly deceive ourselves. This early collection will draw to it men from all parts of the country, of a like political description. We see them looking towards the place already.

Such a city, or town, containing a hundred square miles, must soon be the great, the visible, and dazzling centre, the mistress of fashions, and the fountain of politics. There may be a free or shackled press in this city, and the streams which may issue from it may over flow the country, and they will be poisonous or pure, as the fountain may be corrupt or not. But not to dwell on a subject that must give pain to the virtuous friends of freedom, I will only add, can a free and enlightened people create a common head so extensive, so prone to corruption and slavery, as this city probably will be, when they have it in their power to form one pure and chaste, frugal and republican?

THE FEDERAL FARMER