

## Federal Farmer 16

Dear sir,

Having gone through with the organization of the government, I shall now proceed to examine more particularly those clauses which respect its powers. I shall begin with those articles and stipulations which are necessary for accurately ascertaining the extent of powers, and what is given, and for guarding, limiting, and restraining them in their exercise. We often find, these articles and stipulations placed in bills of rights; but they may as well be incorporated in the body of the constitution, as selected and placed by themselves. The constitution, or whole social compact, is but one instrument, no more or less, than a certain number of articles or stipulations agreed to by the people, whether it consists of articles, sections, chapters, bills of rights, or parts of any other denomination, cannot be material. Many needless observations, and idle distinctions, in my opinion, have been made respecting a bill of rights. On the one hand, it seems to be considered as a necessary distinct limb of the constitution, and as containing a certain number of very valuable articles, which are applicable to all societies; and, on the other, as useless, especially in a federal government, possessing only enumerated power — nay, dangerous, as individual rights are numerous, and not easy to be enumerated in a bill of rights, and from articles, or stipulations, securing some of them, it may be inferred, that others not mentioned are surrendered. There appears to me to be general indefinite propositions without much meaning — and the man who first advanced those of the latter description, in the present case, signed the federal constitution, which directly contradicts him. The supreme power is undoubtedly in the people, and it is a principle well established in my mind, that they reserve all powers not expressly delegated by them to those who govern; this is as true in forming a state as in forming a federal government. There is no possible distinction but this founded merely in the different modes of proceeding which take place in some cases. In forming a state constitution, under which to manage not only the great but the little concerns of a community: the powers to be possessed by the government are often too numerous to be enumerated; the people to adopt the shortest way often give

general powers, indeed all powers, to the government, in some general words, and then, by a particular enumeration, take back, or rather say they however reserve certain rights as sacred, and which no laws shall be made to violate: hence the idea that all powers are given which are not reserved; but in forming a federal constitution, which *ex vi termine*, supposes state governments existing, and which is only to manage a few great national concerns, we often find it easier to enumerate particularly the powers to be delegated to the federal head, than to enumerate particularly the individual rights to be reserved; and the principle will operate in its full force, when we carefully adhere to it. When we particularly enumerate the powers given, we ought either carefully to enumerate the rights reserved, or be totally silent about them; we must either particularly enumerate both, or else suppose the particular enumeration of the powers given adequately draws the line between them and the rights reserved, particularly to enumerate the former and not the latter, I think most advisable: however, as men appear generally to have their doubts about these silent reservations, we might advantageously enumerate the powers given, and then in general words, according to the mode adopted in the 2d art. of the confederation, declare all powers, rights and privileges, are reserved, which are not explicitly and expressly given up. People, and very wisely too, like to be express and explicit about their essential rights, and not to be forced to claim them on the precarious and unascertained tenure of inferences and general principles, knowing that in any controversy between them and their rulers, concerning those rights, disputes may be endless, and nothing certain: — But admitting, on the general principle, that all rights are reserved of course, which are not expressly surrendered, the people could with sufficient certainty assert their rights on all occasions, and establish them with ease, still there are infinite advantages in particularly enumerating many of the most essential rights reserved in all cases; and as to the less important ones, we may declare in general terms, that all not expressly surrendered are reserved. We do not by declarations change the nature of things, or create new truths, but we give existence, or at least establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot. If a nation means its systems, religious or political, shall have duration, it ought to recognize the leading principles of them in the front page of every family book. What is the usefulness of a truth in theory, unless it exists constantly in the minds of the people,

and has their assent: — we discern certain rights, as the freedom of the press, and the trial by jury, &c. which the people of England and of America of course believe to be sacred, and essential to their political happiness, and this belief in them is the result of ideas at first suggested to them by a few able men, and of subsequent experience; while the people of some other countries hear these rights mentioned with the utmost indifference; they think the privilege of existing at the will of a despot much preferable to them. Why this difference amongst beings every way formed alike. The reason of the difference is obvious — it is the effect of education, a series of notions impressed upon the minds of the people by examples, precepts and declarations. When the people of England got together, at the time they formed Magna Charta, they did not consider it sufficient, that they were indisputably entitled to certain natural and unalienable rights, not depending on silent titles, they, by a declaratory act, expressly recognized them, and explicitly declared to all the world, that they were entitled to enjoy those rights; they made an instrument in writing, and enumerated those they then thought essential, or in danger, and this wise men saw was not sufficient; and therefore, that the people might not forget these rights, and gradually become prepared for arbitrary government, their discerning and honest leaders caused this instrument to be confirmed near forty times, and to be read twice a year in public places, not that it would lose its validity without such confirmations, but to fix the contents of it in the minds of the people, as they successively come upon the stage. — Men, in some countries do not remain free, merely because they are entitled to natural and unalienable rights; men in all countries are entitled to them, not because their ancestors once got together and enumerated them on paper, but because, by repeated negotiations and declarations, all parties are brought to realize them, and of course to believe them to be sacred. Were it necessary, I might shew the wisdom of our past conduct, as a people in not merely comforting ourselves that we were entitled to freedom, but in constantly keeping in view, in addresses, bills of rights, in news-papers, &c. the particular principles on which our freedom must always depend.

It is not merely in this point of view, that I urge the engrafting in the constitution additional declaratory articles. The distinction, in itself just, that all powers not given are reserved, is in effect destroyed by this very constitution, as I shall particularly

demonstrate — and even independent of this, the people, by adopting the constitution, give many general undefined powers to congress, in the constitutional exercise of which, the rights in question may be effected. Gentlemen who oppose a federal bill of rights, or further declaratory articles, seem to view the subject in a very narrow imperfect manner. These have for their objects, not only the enumeration of the rights reserved, but principally to explain the general powers delegated in certain material points, and to restrain those who exercise them by fixed known boundaries. Many explanations and restrictions necessary and useful, would be much less so, were the people at large all well and fully acquainted with the principles and affairs of government. There appears to be in the constitution, a studied brevity, and it may also be probable, that several explanatory articles were omitted from a circumstance very common. What we have long and early understood ourselves in the common concerns of the community, we are apt to suppose is understood by others, and need not be expressed; and it is not unnatural or uncommon for the ablest men most frequently to make this mistake. To make declaratory articles unnecessary in an instrument of government, two circumstances must exist; the rights reserved must be indisputably so, and in their nature defined; the powers delegated to the government, must be precisely defined by the words that convey them, and clearly be of such extent and nature as that, by no reasonable construction, they can be made to invade the rights and prerogatives intended to be left in the people.

The first point urged, is, that all power is reserved not expressly given, that particular enumerated powers only are given, that all others are not given, but reserved, and that it is needless to attempt to restrain congress in the exercise of powers they possess not. This reasoning is logical, but of very little importance in the common affairs of men; but the constitution does not appear to respect it even in any view. To prove this, I might cite several clauses in it. I shall only remark on two or three. By article 1, section 9, “No title of nobility shall be granted by congress.” Was this clause omitted, what power would congress have to make titles of nobility? in what part of the constitution would they find it? The answer must be, that congress would have no such power — that the people, by adopting the constitution, will not part with it. Why then by a negative clause, restrain congress from doing what it would have no power to do? This clause, then, must have no

meaning, or imply, that were it omitted, congress would have the power in question, either upon the principle that some general words in the constitution may be so construed as to give it, or on the principle that congress possess the powers not expressly reserved. But this clause was in the confederation, and is said to be introduced into the constitution from very great caution. Even a cautionary provision implies a doubt, at least, that it is necessary; and if so in this case, clearly it is also alike necessary in all similar ones. The fact appears to be, that the people in forming the confederation, and the convention, in this instance, acted, naturally, they did not leave the point to be settled by general principles and logical inferences; but they settle the point in a few words, and all who read them at once understand them.

The trial by jury in criminal as well as in civil causes, has long been considered as one of our fundamental rights, and has been repeatedly recognized and confirmed by most of the state conventions. But the constitution expressly establishes this trial in criminal, and wholly omits it in civil causes. The jury trial in criminal causes, and the benefit of the writ of habeas corpus, are already as effectually established as any of the fundamental or essential rights of the people in the United States. This being the case, why in adopting a federal constitution do we now establish these, and omit all others, or all others, at least, with a few exceptions, such as again agreeing there shall be no ex post facto laws, no titles of nobility, &c. We must consider this constitution when adopted as the supreme act of the people, and in construing it hereafter, we and our posterity must strictly adhere to the letter and spirit of it, and in no instance depart from them: in construing the federal constitution, it will be not only impracticable, but improper to refer to the state constitutions. They are entirely distinct instruments and inferior acts: besides, by the people's now establishing certain fundamental rights, it is strongly implied, that they are of opinion, that they would not otherwise be secured as a part of the federal system, or be regarded in the federal administration as fundamental. Further, these same rights, being established by the state constitutions, and secured to the people, our recognizing them now, implies, that the people thought them insecure by the state establishments, and extinguished or put afloat by the new arrangement of the social system, unless re-established. — Further, the people, thus establishing some few rights, and remaining

totally silent about others similarly circumstanced, the implication indubitably is, that they mean to relinquish the latter, or at least feel indifferent about them. Rights, therefore, inferred from general principles of reason, being precarious and hardly ascertainable in the common affairs of society, and the people, in forming a federal constitution, explicitly shewing they conceive these rights to be thus circumstanced, and accordingly proceed to enumerate and establish some of them, the conclusion will be, that they have established all which they esteem valuable and sacred. On every principle, then, the people especially having began, ought to go through enumerating, and establish particularly all the rights of individuals, which can by any possibility come in question in making and executing federal laws. I have already observed upon the excellency and importance of the jury trial in civil as well as in criminal causes, instead of establishing it in criminal causes only; we ought to establish it generally; — instead of the clause of forty or fifty words relative to this subject, why not use the language that has always been used in this country, and say, “the people of the United States shall always be entitled to the trial by jury.” This would shew the people still hold the right sacred, and enjoin it upon congress substantially to preserve the jury trial in all cases, according to the usage and custom of the country. I have observed before, that it is *the jury trial* we want; the little different appendages and modifications tacked to it in the different states, are no more than a drop in the ocean: the jury trial is a solid uniform feature in a free government; it is the substance we would save, not the little articles of form.

Security against ex post facto laws, the trial by jury, and the benefits of the writ of habeas corpus, are but a part of those inestimable rights the people of the United States are entitled to, even in judicial proceedings, by the course of the common law. These may be secured in general words, as in New-York, the Western Territory, &c. by declaring the people of the United States shall always be entitled to judicial proceedings according to the course of the common law, as used and established in the said states. Perhaps it would be better to enumerate the particular essential rights the people are entitled to in these proceedings, as has been done in many of the states, and as has been done in England. In this case, the people may proceed to declare, that no man shall be held to answer to any offence, till the same be fully described to him; nor to furnish evidence against himself:

that, except in the government of the army and navy, no person shall be tried for any offence, whereby he may incur loss of life, or an infamous punishment, until he be first indicted by a grand jury: that every person shall have a right to produce all proofs that may be favourable to him, and to meet the witnesses against him face to face: that every person shall be entitled to obtain right and justice freely and without delay: that all persons shall have a right to be secure from all unreasonable searches and seizures of their persons, houses, papers, or possessions; and that all warrants shall be deemed contrary to this right, if the foundation of them be not previously supported by oath, and there be not in them a special designation of persons or objects of search, arrest, or seizure: and that no person shall be exiled or molested in his person or effects, otherwise than by the judgment of his peers, or according to the law of the land. A celebrated writer observes upon this last article, that in itself it may be said to comprehend the whole end of political society. These rights are not necessarily reserved, they are established, or enjoyed but in few countries: they are stipulated rights, almost peculiar to British and American laws. In the execution of those laws, individuals, by long custom, by magna charta, bills of rights &c. have become entitled to them. A man, at first, by act of parliament, became entitled to the benefits of the writ of habeas corpus — men are entitled to these rights and benefits in the judicial proceedings of our state courts generally: but it will by no means follow, that they will be entitled to them in the federal courts, and have a right to assert them, unless secured and established by the constitution or federal laws. We certainly, in federal processes, might as well claim the benefits of the writ of habeas corpus, as to claim trial by a jury — the right to have council — to have witnesses face to face — to be secure against unreasonable search warrants, &c. was the constitution silent as to the whole of them: — but the establishment of the former, will evince that we could not claim them without it; and the omission of the latter, implies they are relinquished, or deemed of no importance. These are rights and benefits individuals acquire by compact; they must claim them under compacts, or immemorial usage — it is doubtful, at least, whether they can be claimed under immemorial usage in this country; and it is, therefore, we generally claim them under compacts, as charters and constitutions.

The people by adopting the federal constitution, give congress general powers to institute a distinct and new judiciary, new courts, and to regulate all proceedings in them, under the eight limitations mentioned in a former letter; and the further one, that the benefits of the habeas corpus act shall be enjoyed by individuals. Thus general powers being given to institute courts, and regulate their proceedings, with no provision for securing the rights principally in question, may not congress so exercise those powers, and constitutionally too, as to destroy those rights? clearly, in my opinion, they are not in any degree secured. But, admitting the case is only doubtful, would it not be prudent and wise to secure them and remove all doubts, since all agree the people ought to enjoy these valuable rights, a very few men excepted, who seem to be rather of opinion that there is little or nothing in them? Were it necessary I might add many observations to shew their value and political importance.

The constitution will give congress general powers to raise and support armies. General powers carry with them incidental ones, and the means necessary to the end. In the exercise of these powers, is there any provision in the constitution to prevent the quartering of soldiers on the inhabitants? you will answer, there is not. This may sometimes be deemed a necessary measure in the support of armies; on what principle can the people claim the right to be exempt from this burden? they will urge, perhaps, the practice of the country, and the provisions made in some of the state constitutions — they will be answered, that their claim thus to be exempt, is not founded in nature, but only in custom and opinion, or at best, in stipulations in some of the state constitutions, which are local, and inferior in their operation, and can have no controul over the general government — that they had adopted a federal constitution — had noticed several rights, but had been totally silent about this exemption — that they had given general powers relative to the subject, which, in their operation, regularly destroyed the claim. Though it is not to be presumed, that we are in any immediate danger from this quarter, yet it is fit and proper to establish, beyond dispute, those rights which are particularly valuable to individuals, and essential to the permanency and duration of free government. An excellent writer observes, that the English, always in possession of their freedom, are frequently unmindful of the value of it: we, at this period, do not seem to be so well off,



having, in some instances abused ours; many of us are quite disposed to barter it away for what we call energy, coercion, and some other terms we use as vaguely as that of liberty — There is often as great a rage for change and novelty in politics, as in amusements and fashions.

All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by any taxes, duties, or in any manner whatever. Why should not the people, in adopting a federal constitution, declare this, even if there are only doubts about it. But, say the advocates, all powers not given are reserved. — true; but the great question is, are not powers given, in the exercise of which this right may be destroyed? The people's or the printers claim to a free press, is founded on the fundamental laws, that is, compacts, and state constitutions, made by the people. The people, who can annihilate or alter those constitutions, can annihilate or limit this right. This may be done by giving general powers, as well as by using particular words. No right claimed under a state constitution, will avail against a law of the union, made in pursuance of the federal constitution: therefore the question is, what laws will congress have a right to make by the constitution of the union, and particularly touching the press? By art. 1. sect. 8. congress will have power to lay and collect taxes, duties, imposts and excise. By this congress will clearly have power to lay and collect all kind of taxes whatever — taxes on houses, lands, polls, industry, merchandize, &c. — taxes on deeds, bonds, and all written instruments — on writs, pleas, and all judicial proceedings, on licences, naval officers papers, &c. on newspapers, advertisements, &c. and to require bonds of the naval officers, clerks, printers, &c. to account for the taxes that may become due on papers that go through their hands. Printing, like all other business, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it. There may be other powers given, in the exercise of which this freedom may be effected; and certainly it is of too much importance to be left thus liable to be taxed, and constantly to constructions and inferences. A free press is the channel of communication as to mercantile and public affairs; by means of it the people in large countries ascertain each others sentiments; are enabled to unite, and become formidable to those rulers who adopt improper measures.

Newspapers may sometimes be the vehicles of abuse, and of many things not true; but these are but small inconveniencies, in my mind, among many advantages. A celebrated writer, I have several times quoted, speaking in high terms of the English liberties, says, “lastly the key stone was put to the arch, by the final establishment of the freedom of the press.” I shall not dwell longer upon the fundamental rights, to some of which I have attended in this letter, for the same reasons that these I have mentioned, ought to be expressly secured, lest in the exercise of general powers given they may be invaded: it is pretty clear, that some other of less importance, or less in danger, might with propriety also be secured.

I shall now proceed to examine briefly the powers proposed to be vested in the several branches of the government, and especially the mode of laying and collecting internal taxes.