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Confederation Congress and the Constitution

Melancton Smith's Notes of Debates 27 September 1787

Richard Henry Lee: Every man to see with his own eyes; to judge for themselves. Congress, acting under the present Constitution definitely limiting their powers, have no right to recommend a plan subverting the government. This remark felt, as a gentleman yesterday justify, by the necessity of the case. This [is] dangerous because this principle has been abused to bad 100 times [to one] where it is used for good. The Impost [of 1781] referred [to] as an instance to justify; that [was] within the powers [of Congress; it was] sent to [receive?] the approval of 13 states; and within this line this [Constitution] by [the approval of] nine [states]. This plan proposes [to] destroy the Confederation of 13 and [to] establish a new one of 9. Yet it would be indecent not to send it to the states for 12 states sent delegates [to the Federal Convention], as he understands, to amend the present government. Men of respected characters have agreed upon this. It [the Constitution] should be forwarded. A gentleman yesterday said the Confederation says nothing of [a] convention. It is true it does not point [to] a convention, but it does not forbid [this?] to be proposed by one, or any other way. Congress is only to agree. If this was not destructive, but an amendment, Congress might consider [the Constitution]. Proposes a resolution, stating that as Congress have no right under the Confederation to recommend alterations of the Confederation unless agreed to by 13 states, and this [Constitution] proposes an amendment by 9.

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Rufus King: Recommends moderation and is sorry Mr. Dane is intemperate.

Henry Lee: Approves the motion of Richard Henry Lee as bringing the point to view: whether it shall be passed with investiture or without. Thinks Mr. Dane has not appeared intemperate.

Richard Henry Lee: At a loss to understand Mr. King. Feel his pulse and he will find no inte[mperance?]. Congress must do something. Some think it [the Constitution] must be approved. Some think we have no right to determine. He [thought?] his motion neutral. If he is called to approve, his conscience will oblige him to declare his sentiments. He is candid, not sinister.

Abraham Clark: Don't like any proposal yet made. He can't approve it [the Constitution], but thinks it will answer no purpose to alter it. Will not oppose it in any place. Prefers a resolution to postpone [Lee's motion] to take up one, barely to forward a copy to the states, to be laid before the legislatures to be referred to conventions.

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Richard Henry Lee: The resolution moved is an approval.

Abraham Clark: Does not mean to approve the plan, but [only] the resolution of [the Federal] Convention [which stated that the Constitution was] to be laid before the conventions of the states. By that we only approve that it [the Constitution] be laid before the states, but does not recommend that [it] be ratified. We may take it up and alter it.

Nathaniel Gorham: Hopes it [Lee's motion] will be postponed as it is plainer. The resolution of Mr. Lee states [that] we cannot take it [the Constitution] up and will prevent Congress from setting the government to work if 9 or 10 states agree to it. Therefore there must be war. The new government must raise troops to upset Congress.

William Grayson: The motion from Virginia [is] better than [that from New] Jersey. The one from Jersey just forwards the proposal by a bare implicit approbation; the one [from] Virginia gives a reason why it don't approve and leaves the adv[ocates?] to say Congress would have approved, if they could. In favor of the motion from Virginia. Is in favor of the new Constitution. This [Confederation] proposes a mode of altering. If we depart from the mode in this case, it will form a precedent from doing it in the old one—[in] the [way the] 13th Article [found?]. 9 states may agree to the new [Constitution]; the other 4 ought to be left in possession of this [Confederation] if they choose and not [be] forced to come in. Does not think there has yet been any departure from the Confederation. Congress had a right to refer to any body to report. Keep the present [Confederation] until you get a better.

Against the Constitution. It affects his state. Personal right[s] not in the danger some fear. Bills of rights essential in monarchies. The government is democratic all [over?]. Liberty as safe as in the hands of Rhode Island if gentlemen embarrassed respecting personal liberty. But can't say so as to property, an idea taken up, [but] never admitted in [the] Confederation. Majority never governs—the Netherlands instanced. Nine states should have been required [to alter the Confederation?]. The representation in the Senate unequal.

Richard Henry Lee: It is objected that if this Congress cannot decide now, a new, a future one cannot. [This argument] has not force, for this is a first principle that the majority of the people have a right to make a new one. If 9 states agree, the majority of the people [agree].

Henry Lee: Will vote for the postponement [of Lee's motion] because he supposes we have a right to decide from the great principle of necessity or the *salus populi*. This necessity justifies the measure. Congress and all the states have decided it. Are the laws of Congress paramount to the constitutions of the different states?

Nathan Dane: Wishes to steer in the channel of neutrality, yet suggest whether a motion which brings into view so materially the question of 9 states [should be adopted]. Prefers the Jersey [motion].

Understands the clause which makes the clause declaring the Constitution [the] supreme law, [is] different from the Convention [draft].

Richard Henry Lee: We live in an enlightened age. People will understand us. To accommodate, has left out the words 9 and 13. Will consent they may be put out. The doctrine of *salus populi* [is] dangerous. [It] has been in the [mouths] of all tyrants. If men may do as they please, from this argument all constitutions [are] useless. All tyrants have used it.

James Madison: Can't accede to it [Lee's motion]. [It] is not respectful to the Convention. After what has been done, if Congress does not agree, [it] implies a disagreement. Congress from

former acts do not object to a national government. If either [Lee's or Clark's] motion is adopted it implies disap[robation]. The question is, whether on the whole it is best to adopt it, and [we] ought to say so. The powers of [the] Convention [are] the same as of Congress. The reason of Convention [was] that they might not be interrupted; and that persons might be admitted [to the Convention] whether or not [they] be in Congress, and to prevent jealousies. If this House can't approve [the Constitution], it says the crisis is not yet arrived and implies a disapp[robation]. [In] a great many instances, Congress have recommended what they have no right [to recommend]

Richard Henry Lee: The Convention have not proceeded as this House were bound [by the Articles of Confederation]. It is to be agreed to by the states and means the 13 [states]. But this [Constitution] recommends a new confederacy of 9 [states]. The Convention [had] no more powers than Congress, yet if 9 states agree [the Constitution] becomes supreme law. Knows no instance on the Journals, as he remembers, opposing the Confederacy. The Impost [of 1781] was to be adopted by 13 [states]. The resolution from [New] Jersey approves [the Constitution] for Congress don't send out anything but such as they approve.

Abraham Clark: Unhappy to differ from [Richard Henry] Lee. He reveres his judgment. If his objection [is] good, his own proposal [is] liable to the like objection.

William Samuel Johnson: Hardly possible to send it out without approving or disapproving. For this reason, Mr. Lee's motion [ought to be postponed]. Congress ought to approve or disapprove. They may do it. It is their duty to do it. The people will see [that] we, that Congress, act without power in the case of 9 or 13 [states]. They will see, that the act of [21] February [calling the Convention] was departing from the Constitution. [The] Confederation says Congress was to make alterations. Congress appoint a Convention to do it. He saw it so at the time and opposed it. The argument then was salus populi. Nothing from Congress would do. The proposal from [the] Convention [is] not a proposal to 9 [states] but to all. It is hoped all will [agree]. Mr. Lee says, if 9 agree to alter by the people; this says, if 9 do in this case, we will set it going on the principle of majority. On the principle of Congress referring to the Convention, they are a committee and have made report. Congress then must approve or disapprove. It don't imply an approbation of all its parts, but the best upon the whole, a matter of accommodation. We say it is better than the present [constitution], better than running the risk of another.

James Madison: Did not say the Convention moved exactly in the line of their appointment. Congress did depart from the idea of [a] federal and recommend a national government in February 1781. Congress did [so] from the principle [of] salus populi. The western country, its sale and government, [is] an instance of exceeding powers, as Congress have in many instances exceeded their power. If it does not in this instance approve, it will imply disapproval.

Richard Henry Lee: The western country was once Virginia's. She gave it to Congress. Congress sells it as she had a right. The government [is] temporary and not inconsistent.

If I understand, gentlemen, this [Constitution] is to be adopted and no other, with[out] alterations. Why so? [There are] good things in it, but many bad. So much so that, he says here as he will say everywhere, that if adopted, civil liberty will be in eminent danger. The greatest parts of difficulty arises from debt. If that was removed, and [the government] could make treaties without the limitations, and to regulate the trade with reasonable limits—but at all events, he sees not the necessity of pressing this [Constitution] without any amendments. Thinks the [state] conventions had best have had the liberty to alter [the Constitution]

Pierce Butler: The question ought to be on the whole—no amendments. The objections [are] not pointed [out]. Dane has leading objections but declines naming them. Lee [says the Constitution is] dangerous to civil liberty. The Convention could have made a better—but that this [is] best on the whole. [Congress] have no power and it will answer no purpose to alter. The state of the country [is] contemptible abroad and on the eve of anarchy at home. Anarchy will follow if it [the Constitution] is not adopted.

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The motion from Richard Henry Lee was postponed, and then a motion was made by Edward Carrington.

Henry Lee: Thinks the matter [the Constitution] was to be taken up [by Congress] in its parts, but cannot agree to it in all its parts, without [an] examination by paragraphs and propose [such?] amendments [as] are necessary. Congress will subject themselves to disgrace by voting on a matter which they have not examined. Moves to postpone [Carrington's motion] and [have the Constitution] taken up by paragraphs.

Nathaniel Gorham: Thinks not necessary to take up [the Constitution] by paragraphs. Every gentleman may propose amendments. No necessity of a bill of rights, because a bill of rights in state governments was intended to retain certain powers [in the people] as the legislatures had unlimited powers.

James Madison: The business is open to consideration. Should feel delicacy if he had not assented in Convention though he did not approve it. Gentlemen have said this is in the situation of a bill agreed to by one house. This principle will oppose amendments because the act if altered will not be the act of both. It must be altered in all stages. It may be, but it cannot succeed, nor any other alteration if all are to agree in this manner. [The] Confederation was proposed without alteration. No probability of Congress agreeing in alterations. Those who disagree, differ in their opinions. A bill of rights [is] unnecessary because the powers are enumerated and only extend to certain cases, and the people who are to agree to it are to establish this.

Richard Henry Lee: It is admitted and [a] fact that this [Constitution] was to be sent to Congress, but surely it was to be considered and altered, and not to be sent forward without. The bill of rights will be brought forward. [A bill of rights] not necessary in [the] Confederation because it is expressly declared [that] no power should be exercised, but such as is expressly given, and therefore no constructive power can be exercised. To prevent this [is] the great use of a bill of rights.

Rufus King: The House cannot constitutionally make alterations. The idea of [the] Convention originated in the states, and this led the House to agree. They proposed the Convention should propose alterations, which when agreed to here and confirmed by the states [should be adopted], and therefore [Congress] are to agree or disagree to the alterations and cannot alter [the Constitution] consistently with their own act. Congress have taken their line, but in consequence of that [decision they are put?]. The majority of the people, it is said [by Richard Henry Lee], may alter, and if they have manifested a desire to change, this House may advise it, as it is not obligatory. We may advise as any other body of men. To satisfy forms it was ordered to pass this House. They may agree or disagree. If they do disagree it will not prevent them [the states] to accept. If they [Congress] agree it will give weight.

Richard Henry Lee: Strangest doctrine he ever heard, that [in] referring a matter of report, that no alterations should be made. The idea the common sense of man. The states and Congress, he thinks, had the idea that Congress was to amend if they thought proper. He wishes to give it a candid inquiry, and proposes such alterations as are necessary. If the gentleman [King] wishes it should go forth without amendments, let it go with all its imperfections on its head, and the amendments by themselves. To insist that it should go as it is without amendments is like presenting a hungry man 50 dishes and insisting he should eat all or none.

James Madison: A circumstance distinguishes this report from others. The Convention was not appointed by Congress, but by the people from whom Congress derive their power. Congress only to concur. Admits Congress may alter, but if they do alter, it is not the act of Convention but of Congress; and excludes [the] Convention entirely and confines the House in the trammels of the Confederation. Not unusual to propose things in the lump. So the Confederation was presented.

Richard Henry Lee: A report implies a right to consider on the whole or part. The Confederation went in such way as to admit of objections, and most states proposed them. If it is amended, he thinks it will be more likely to succeed, as capital objections will probably be removed. The idea seems to be, this must be agreed to or nothing else. Why this idea? This supposes all wisdom centers in the Convention.

Nathaniel Gorham: Why does not the gentleman propose his amendments? Then the question of the expediency of the amendments will be considered.

William Samuel Johnson: The term of report: a general expression, not meant as in cases where [a] report is made to Congress. The people and Congress agree the alterations shall be made by Convention, and the nature of things forbids any alteration as it will make it no act of Convention. Congress are not to judge in the last resort, but the people; and therefore it must be approved or disapproved in the whole.

Richard Henry Lee: Is it the idea of Convention that not only Congress but the states must agree in the whole, or else to reject it? And it seems all idea of amendments are precluded.

James Madison: The proper question is whether any amendments shall be made, and that the House should decide. Suppose alterations sent to the states. The Arts. [Articles of Confederation] requires the delegates [in Congress] to report [alterations] to them [i.e., the state legislatures]. There will be two plans. Some will accept one and some another. That will create confusion and proves it was not the intent of the state.

Richard Henry Lee: Some admit the right but doubt the expediency and proposes amendments.

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Nathan Dane: The gentlemen from the Convention are pushing the business by refinements. [Is] that the common sense of the country? If the House mean to preclude amendments, the gentleman [i.e., Dane] will stand excused to vote in the negative.

Edward Carrington: When he made the motion, supposed every man had a right to examine [the Constitution]. He had considered and made up his mind. If any gentleman has not made up his mind, he ought to have a liberty of amending. For though he thinks it inexpedient to amend, as he fears it would defeat the whole. Important amendments are offered by a member. He ought to have a right to support them.

Abraham Clark: The motion by Mr. Lee for amendments will do injury by coming on the Journal, and therefore the House, upon cool reflection, will think it best to agree to send it [the Constitution] out without agreeing.

William Grayson: It is a curious situation. It is urged all alterations are precluded. Has not made up his mind, and thinks it precipitant to urge a decision in two days on a subject [which] took 4 months. If we have no right to amend, then we ought to give a silent passage, for if we cannot alter, why should we deliberate. His opinion [is that] they should stand solely upon the opinion of [the] Convention. The salus populi much talked of. This Constitution will not remove our difficulties—the great defects a disinclination to pay money. That removed, our great difficulty would be over. No necessity to urge a hasty decision. In 2 or 3 years we should get a good government.

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