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SOVEREIGNTY IN THE AMERICAN REVOLUTION: AN HISTORICAL STUDY

It is the purpose of this paper to learn, if possible, from contemporary material just what ideas were in men's minds during the American Revolution when they thought of Congress, of the Union, of the states and their governments, of the Confederation, and of independence, and, further, to learn their true reasons for obeying Congress or their state governments. Then with some definite conclusions based upon facts and not general impressions, I wish to examine again the much-mooted question as to whether there was an American national state in the Revolution, and whether Congress or the state governments exercised the sovereign power. As we all know, this question derives its importance from the long and bitter historical controversy over state sovereignty, nullification, and secession. Personally, I believe that the solution, either in favor of state sovereignty or of Congressional sovereignty during the Revolution, has little or no bearing in establishing the legal right of nullification or secession,¹ but so many able writers² have laid such stress on proving the Continental Congress sovereign that the truth is worth a search.

Since the earliest time claimed for the existence of an American national state is the time of the assembling of the First Continental Congress, I begin with a consideration of that. Story speaks³ of this Congress as coming from "the people, acting directly in their primary, sovereign capacity, and without the intervention of the functionaries, to whom the ordinary powers of government were delegated". The facts are that delegates from two colonies⁴ were chosen by the legislatures,⁵ elected by the people in the ordinary

¹ That question can be settled by studying what the Constitutional Convention thought it had done and actually did, and to what the people of the states or the people of the nation (as one pleases) bound themselves when they accepted a Constitution which provided that the Constitution and laws made in accordance therewith should be the law of the land, enforceable in the courts, and that the government thereby established might operate directly upon every individual. By accepting this they left themselves nothing but the right of revolution.

² Some of these are Lieber, Story, Pomeroy, Hare, Bancroft, Lincoln, Von Holst, Fiske, Burgess.

³ Joseph Story, *Commentaries*, fourth edition, I. 140.

⁴ Rhode Island and Pennsylvania.

⁵ Force, *American Archives*, fourth series, I. 416, 607.

way for ordinary purposes of law-making. The delegates from Massachusetts, a third colony, were chosen by the lower house duly elected, with no special instructions to choose delegates to the Continental Congress.¹ Georgia was not represented at all, and in only six colonies were there special conventions or provincial congresses of the nature Story imagines them all to have been.

He adds to this false premise the assertion, "The Congress thus assembled exercised *de facto* and *de jure* a sovereign authority; not as the delegated agents of the governments *de facto* of the colonies, but in virtue of original powers derived from the people."² Such a statement could come only from one who had not read the instructions of the delegates, or the journal of this Congress's proceedings. Four delegations were instructed to procure the harmony and union of the empire,³ to restore mutual confidence, or to establish the union with Great Britain. Three were instructed to repair the breach made in American rights, to preserve American liberty, or to accomplish some similar end. Two were to get a repeal of the obnoxious acts, or determine on prudent or lawful measures of redress. Three were simply to attend Congress or "to consult to advance the good of the colonies".⁴ North Carolina alone bound her inhabitants in honor to obey the acts of the Congress to which she was sending delegates.⁵ When the Congress met, it restricted its proceedings absolutely to statements of the grievances and appeals for relief. The delegates in no way went beyond their instructions, as a careful examination of their journal will show.⁶ Conservative feelings ruled, and the restoration of union and harmony with Great Britain was the prevalent desire. It is manifestly wrong, therefore, to look at the First Continental Congress as coming together because of a national feeling, because of a desire to form a national state, and therefore to ascribe to it governmental powers. It was called because a joint appeal for relief would naturally be more effective than any single petition. The colonies sending delegates to the First Continental Congress no more coalesced into a national state by that

¹ Force, *American Archives*, fourth series, I. 421.

² Story, *Commentaries*, fourth ed., I. 140. Burgess too, *Political Science and Constitutional Law*, I. 100, says that this Congress "was the first organization of the American state." From the first moment of its existence "there was a sovereignty, a state, not in idea simply, or upon paper, but in fact and in organization."

³ See *Journals of Congress*, I. 15-24. My references to the *Journals*, throughout the article, are to the edition by Mr. W. C. Ford.

⁴ *Ibid.*, 15-30.

⁵ *Ibid.*, 30.

⁶ This is Mr. Ford's opinion (*ibid.*, 6) with which any candid reader of the journal must agree.

act than did the colonies which sent delegates to the Albany Congress or the Stamp Act Congress.

But let us give those who argue along this line the benefit of a doubt, and assume that it was the Second Continental Congress which in their opinion exercised *de facto* and *de jure* a sovereign authority.

Before coming to any conclusion as to the right or wrong of this view we must examine in a historical spirit the question what powers the constituents of the delegations meant to give them, what the Continental Congress thought of its own powers at any time during its existence, what the people of the colonies thought, and to what extent they recognized by their actions the sovereign authority attributed to Congress by Story and others.

Three of the delegations to the Second Congress were chosen by the regular legislatures,¹ three by the lower houses of the legislatures,² and seven by provincial congresses or conventions of town or county delegates.³ Of these delegations three were merely to represent, or attend, meet, and report,⁴ two to join, consult, and advise,⁵ six to concert and agree or determine upon,⁶ while Georgia's delegates were "To do, transact, join and concur with the several Delegates".⁷ Maryland and North Carolina, from the first, and Georgia and New Jersey⁸ later, bound the state and people to abide by the resolutions of Congress,⁹ though doubtless all felt more or less this obligation.

The delegates were to exercise these powers for the purpose of "restoring harmony" or "accommodating the unhappy differences" with Great Britain,¹⁰ to obtain a "redress of American grievances," a "re-establishment of American rights," or "a repeal of offensive acts".¹¹ Some delegations were "to preserve and defend our Rights

¹ Delaware, Rhode Island, and Pennsylvania. See *ibid.*, II., Instructions to Delegates.

² South Carolina, New Jersey, and Connecticut.

³ Georgia was not represented at first, but later a provincial congress sent delegates.

⁴ New Jersey, Pennsylvania, and Virginia.

⁵ Connecticut and Rhode Island.

⁶ Massachusetts, South Carolina, New Hampshire, Maryland, Delaware (also "to report"), and New York. See also Force, *American Archives*, fourth series, II, 379.

⁷ Not sent until September 13, 1775; see *Journals of Congress*.

⁸ February 14, 1776.

⁹ For all the above facts see *Journals of Congress*, II., Instructions to Delegates.

¹⁰ So in the cases of South Carolina, New York, Delaware, Massachusetts, and Georgia.

¹¹ Rhode Island, South Carolina, Maryland, Pennsylvania, New Hampshire, and Massachusetts.

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and liberties”¹ or “for advancing the best Good of the Colonies,”² and three were instructed to no definite purpose.³ Although eight of these colonies sent new instructions before January, 1776⁴ (and this date is important, as will be presently shown), yet only two changed the character of their instructions, Maryland leaving out the binding clause,⁵ and Connecticut making the object sought, defense, security, and the preservation of rights. It is absurd to say that all these legislatures and conventions were hypocritical, saying what they did not mean, and if we seek honestly to know the wishes of the majorities in each representative body we shall examine these instructions, remembering, moreover, that these bodies were for the most part representative not of all the people,⁶ but of the most radical, those who would be the first to think of independence and the formation of a new state.

Remembering these instructions and the length of time they remained unchanged, let us examine the next point made by Justice Story and others in his wake. He says:⁷ “The Congress of 1775 accordingly assumed at once the exercise of some of the highest functions of sovereignty. They took measures for national defence and resistance”, raised an army and navy, established a post-office, raised money, emitted bills of credit, and “contracted debts upon national account,” authorized captures and condemnation of prizes. Let us see what Congress thought and what men of that time thought of the nature of these acts, for this *idea* in men’s minds is of importance.

If the instructions to Congress meant anything, the delegates came together unauthorized by the people to act as a national government. They were to keep the councils of the colonies united while the English government was being forced to yield what men thought their rights⁸ In attempting to accomplish this end open war developed, and the Congress gradually did assume all these

¹ Georgia, North Carolina, and Rhode Island.

² Connecticut.

³ Virginia, North Carolina, and New Jersey.

⁴ Delaware, October 21, 1775; Maryland, December 9, 1775; New Hampshire, August 23, 1775; North Carolina, September 8, 1775; Massachusetts, November 10, 1775; Connecticut, October, 1775; Pennsylvania, November 3, 1775.

⁵ *Journals of Congress*, III. 441; IV. 58.

⁶ All of their acts were repudiated by the Loyalists, who were no insignificant part of the population.

⁷ Story, *Commentaries*, fourth ed., I. 151–152.

⁸ *Journals of Congress*, IV. 136, last paragraph.

⁹ It must be remembered, however, that it was the New England colonies that began the war, and that the other colonies assembled in Congress were most reluctantly dragged into the struggle.

powers which Story enumerates, but the striking thing is that it did all these things at a time when¹ the majority of Congress would vote repeatedly for addresses, to the king, the inhabitants of Great Britain, the people of Ireland and of Jamaica, which asserted, "We have not raised Armies with ambitious Designs of separating from Great Britain, and establishing independent States,"² and assured the king that they most ardently wished the former harmony with Great Britain, vowing their allegiance to him³ and that they would cheerfully bleed in defense of him in a righteous cause. As late as October in 1775, reconciliation is a common sentiment⁴ and the royal post-routes were still in operation.⁵ Even late as January 15, 1776, Samuel Adams could not head off a motion to explain to the people that reconciliation was the desire of Congress.⁶ In the middle of February, 1776, James Wilson argued with great sincerity that many of the steps thus far taken by Congress could be accounted for rationally only upon the supposition that their object was the defense and re-establishment of their rights, and could not be so accounted for if their aim was an independent empire.⁷ I do not believe the majority of Congress to have been hypocrites drawing long faces and pretending a loyalty they did not feel. As James Wilson said, "Those Protestations of Loyalty and Expressions of Attachment ought, by every Rule of Candour, to be presumed to be sincere, unless Proofs evincing their Insincerity

¹ *Navy*.—Congress recommends (July 18, 1775) the states to establish. *Journals*, II. 189. First Continental vessel, October 13, 1775. Fleet provided October 30, 1775. Zubly seconds motion for fleet October 7, 1775, but the previous day asserts that the man who would suggest independence would be torn to pieces like De Witt. *Journals*, III. 483.

Indian Commissioners appointed July 12, 1775.

Post-Office.—A committee to establish post-routes appointed May 29, 1775, and Postmaster-General decided upon July 26; but side by side with the Continental routes, the British postal system existed undisturbed as late as October 7, 1775; see *Journals of Congress* on those dates.

Treasury.—Congress borrows for Continental uses June 3, 1775, uses money first on June 10, and pledges the twelve colonies for redemption of bills of credit June 22, 1775.

Army.—First provision was June 14, 1775. General decided upon, June 15. Organization planned June 16, 1775. Suggestion comes from Massachusetts. *Journals*, II. 78.

² *Ibid.*, 155. July 6, 1775, *ibid.*, IV. 143. See also *Writings of Jefferson*, ed. Ford, I. 482; Force, *American Archives*, fourth series, III. 794, 795.

³ July 8, 1775, *Journals*, II. 160; July 28, 1775, *ibid.*, 139, 155, 198, 217; IV. 137, 142.

⁴ See *ibid.*, III. 481, 482, 489. *Life of Belknap*, 96–97.

⁵ *Journals*, III. 488.

⁶ *Ibid.*, IV. 57; also February 13, 1776, *ibid.*, 137.

⁷ See his convincing argument on this subject, *ibid.*, 142–143.

can be drawn from the Conduct of those who used them."¹ If they were honest it seems axiomatic that the members of the Continental Congress could not regard themselves, or be regarded by the men who read their papers, as the sovereign head of a united people, when they and the people wished to be loyal subjects of the British king, and acknowledged his sovereignty.

In the very "Declaration on Taking Arms,"² Congress showed the desire and expectation of reconciliation. Just as non-importation and non-exportation were not illegal in the colonial view, but a peaceful means of forcing the repeal of obnoxious laws,³ so armies and loyalty were not incompatible.⁴ There is no doubt, as Trevelyan suggests, that many American revolutionists were like the Puritan country gentlemen at the beginning of the struggle against Charles I., who held that to bear arms against the Crown was consistent with the duty of a loyal subject; and loyal subjects they were bound to remain.⁵ The attitude of men to the warlike measures is perhaps most strikingly shown in the seemingly paradoxical position of Zubly, Georgia's delegate (October 6, 7, 1775), who seconded a motion for preparing a plan for an American fleet, though on the previous day he had said that if any one proposed to break off from Great Britain, he would inform his constituents. "I apprehend", he added, "the man who should propose it would be torn to pieces like DeWitt."⁶ The idea of loyalty to the British king and a co-existent desire for an American national state are incompatible, therefore if Congress was doing seemingly sovereign acts, it was merely in the capacity of a party committee⁷ leading a rebellious faction in the empire in an attempt to force the concession of its rights. This liberal faction happened to have its greatest strength in America, and the committee therefore acted in the interests of American Whigs only.

But there came a time when the contemplation of a series of

¹ *Journals*, IV. 137.

² *Ibid.*, II. 139, 155. They assure all the subjects of the empire that they "mean not in any wise to affect that union with them". See also David Humphreys, *Miscellaneous Works*, 271.

³ *Journals*, II. 205; IV. 138.

⁴ See how the taking of Crown Point and Ticonderoga are explained. *Ibid.*, II. 167, 171. Such was the spirit as to opening ports and allowing privateers. *Ibid.*, 201; IV. 231.

⁵ Trevelyan, *The American Revolution*, part II., vol. I., p. 112.

⁶ *Journals of Congress*, III. 483, 486.

⁷ Its work of this kind is best seen in its measures against the Tories, *ibid.*, 280; IV. 25, 49. In this light Congress seems to be only a convention of delegates representing the Whig party in America, not all the American people. The Loyalists held this view throughout the war.

ministerial errors so embittered the colonists against the mother-country that Americans changed the banner under which they were fighting, and in place of liberty merely they were aiming at liberty and independence. They had used the word "union" and the expression "united colonies"¹ a great deal during the earlier struggle, when they simply meant united efforts for the attainment of concessions² which no one colony singly could hope to wrest from the powerful British government. Now they continued the struggle for independence with the same general idea of united effort, no longer of colonies, but of states independent and sovereign in all governmental matters, but leagued to overthrow the power of England, and to command the respect of other world-powers. To attempt united action by a clumsy system of correspondence was impracticable, and the Continental Congress, in which were assembled representatives of the sovereign states, was a convenient centre of intelligence and a source of advice which would keep their forces united.³ As the Maryland convention expressed it, "the best and only proper exercise [of the powers of Congress] can be in adopting the wisest measures for equally securing the rights and liberties of each of the United States, which was the principle of their union."⁴ To Congress was yielded a temporary and indefinite authority for war purposes, but its permanent relation with the states was to be determined by future agreement.⁵

In thus unifying the councils and action of thirteen colonies at first and states later, Congress did many things that seem at first view the acts of a national government, but an analysis of some of these more deceptive actions will clear our understanding of their character. There are instances of dissensions between colonies being referred to Congress to settle, but, since nothing would weaken the colonies' military efficiency as would intercolonial quarrels, it

¹ The use of the word "colony" had significance too, and the retaining it showed how men clung to the idea of preserving the empire. As late as November, 1775, Adams could not get "colony" struck out of a report though the committee "were as high Americans as any in the house". *Works of John Adams*, III. 21, 22.

² Note the distinction in the "Declaration on Taking Arms." They assure all subjects "that we mean not to dissolve that Union [*i. e.*, the national union] . . . which we sincerely wish to see restored," but in the same document "Our Union [*i. e.*, for the purpose of getting concessions] is perfect." July 6, *Journals*, II. 154, 155. See also II. 87-88, 198, 217; III. 321, 477, 488; IV. 142, 146.

³ Note, for example, *ibid.*, II. 60, 74, 85, 183, 188, 189, 192, 212; III. 278, 279, 323, 363; IV. 21, etc.

⁴ Scharf, *Maryland*, II. 273-277.

⁵ Note that North Carolina and Pennsylvania provide in their constitutions for delegates as long as it shall be necessary. Poore, *Constitutions*, North Carolina, xxxvii.; Pennsylvania, sect. 11.

was as important for Congress to try to reconcile these differences as to direct the armies or provide a naval force. That this is not perverting the logic of such action may be plainly seen in the case (September 30, 1775) where Congress is asked to settle the dispute between Connecticut and Pennsylvania "until the matter shall be determined by the King and Council, to whom both sides have submitted the dispute."¹ Congress urged the people of the two colonies not to endanger the union, but it refused to take any measures that would seem an assumption of sovereignty.²

Again, the states called upon Congress, the assembling-place of all of the states, to assume responsibility which the state did not dare assume alone, but which was necessary for the common defense.³ Again the colonies asked Congress about establishing new governments,⁴ and much has been made of the fact that Congress recommended the establishment of such forms as seemed best; but the advice cannot be twisted into a sovereign command, for the thing is to be done "during the continuance of the present dispute between Great Britain and the colonies."⁵ A body regarding itself as sovereign does not speak thus. Later, when affairs were nearer a climax (May 10, 1776), Congress recommended the formation of permanent governments, but it is noticeable that in this case the states acted at their leisure,⁶ and Maryland resented the interference of Congress⁷ and refused to obey. Congress was again rebuffed when it ordered the committee of observation of Baltimore to seize Governor Eden's secretary. The committee acted without the authorization of the Maryland council of safety, and was severely reprimanded for obeying "other than those intrusted with the proper authority by this Province".⁸ Congress was constantly steering between the Scylla of sovereignty, and the Charybdis of inefficiency.

It was in Congress that independence was resolved upon, and

¹ *Journals of Congress*, III. 283, 287, 295, 453, 487. Congress evidently was not looked upon as having sovereign authority.

² *Ibid.*, IV. 283.

³ New Jersey asks, June 24, 1776, about seizing Governor Franklin, *ibid.*, V. 473. Sometimes the approval of Congress is asked for more selfish ends. *Ibid.*, II. 25; III. 274. As to seizing Dunmore, there was a significant dispute. *Ibid.*, 482.

⁴ *Ibid.*, II. 77; III. 298.

⁵ *Ibid.*, 319, 326.

⁶ Delaware and Pennsylvania acted in September, 1776; Maryland in November, 1776; North Carolina in December, 1776; Georgia in February, 1777; New York in April, 1777.

⁷ Force, *American Archives*, fourth series, V. 1588. Note also the attitude of Duane, *Journals of Congress*, VI. 1075; and of Wilson, *ibid.*, 1075-1076.

⁸ *Ibid.*, IV. 286; Force, *American Archives*, fourth series, V. 1564, 1566, 1590.

that, says Von Holst, in destroying the bonds between the colonies and England, "threw down the walls which had hitherto prevented the political union of the thirteen colonies. They were, in fact, thrown together so as to constitute them one people."¹ But was that viewed by contemporaries as an act consolidating the several colonies, and by whose sanction did they regard it as taking effect? It was declared during the debate upon the resolution² "that if the delegates of any particular colony had no power to declare such colony independent, certain they were the others could not declare it for them, the colonies being as yet perfectly independent of each other". Declare independence before these delegates were authorized to that end, and the middle state delegates "must retire" and "their colonies might secede from the union".

This assertion was not disputed³ and Congress waited until, with the exception of New York, all the delegations were instructed favorably or had large powers and were sure enough of subsequent sanction to vote for the resolution. The action of the twelve colonies did not bind New York until her own convention approved, and at least seven of the states⁴ showed by their subsequent resolutions giving to the Declaration the binding force of law within their states that they did not recognize the power of Congress to legislate for them even in a matter so vital to all as the separation from Great Britain.

If there were any doubt as to what the Declaration implied when it said "that these United *Colonies* are . . . Free and Independent *States* . . ." and "they have full Power to levy War", etc., that doubt would be dispelled by reading the resolves of the state conventions or assemblies in approving the Declaration. The Pennsylvania convention passed a resolve approving, in behalf of themselves and their constituents, of Congress's resolution, declaring "this, as well as the other United States of America, free and Independent," and declared "before God and the world that we will support and maintain the freedom and independence of this and the other United

¹ Von Holst, *Constitutional History of the United States*, I. 8.

² By Wilson, Livingston, Rutledge, or Dickinson. *Journals of Congress*, VI. 1088. See also Force, *American Archives*, fourth series, IV. 739.

³ Indeed it was clearly affirmed in the case of Maryland. *Ibid.*

⁴ New York, *ibid.*, fifth series, I. 1391; Rhode Island, *Colonial Records*, VII. 581; Connecticut, *State Records*, I. 3; Pennsylvania, Force, *American Archives*, fifth series, II. 10; Maryland, *ibid.*, III. 88-89; also *ibid.*, fourth series, VI. 1507; New Jersey, *ibid.*, 1648; Virginia, Hazelton, *The Declaration of Independence*, 273.

States of America.”¹ The Connecticut assembly approved of the Declaration, and resolved “that this Colony is and of right ought to be a free and independent State.”² The “walls” were evidently not down in the opinion of these contemporary state legislators and they thought it their sanction which gave validity to the resolution of independence.³ This preservation of state identity, and belief in the state’s freedom to do its will politically, appears frequently during the debate on the Articles of Confederation.⁴

While discussing the land question, Wilson of Pennsylvania said that his state had no right to interfere in those claims, “but she has a right to say, that she will not confederate unless those claims are cut off,”⁵ and Huntington of Virginia denied Congress the right to limit the bounds of his state and asserted that the consequence of such an attempt would be that Virginia would not enter the Confederation.⁶ Witherspoon, August 1, 1776, conceived of the colonies as individuals come together to make a bargain with each other.⁷ That this bargain was thought of as a treaty between sovereign states, there is good contemporary evidence aside from the articles themselves. “I daily expect the Treaty of Confederation”, wrote Governor Cooke of Rhode Island.⁸ Indeed the Confederation seemed to some merely a league which the states formed for the war.⁹ If it were not formed then, Sherman feared it never would be formed¹⁰; some did not see the necessity of it¹¹ even for that pur-

¹ Force, *American Archives*, fifth series, II. 10. See also *Journals of Congress*, V. 690, where the “thirteen independent states of America” are to have initials on the seal.

² *Records of the State of Connecticut*, I. 3.

³ Significant also is Madison’s assertion in 1782, that the Crown rights had not devolved upon Congress, an idea “so extravagant that it could not enter into the thought of man.” *New York Historical Society Collections*, 1878, p. 147.

⁴ *Journals of Congress*, VI. 1081. These debates were after the Declaration of Independence, it must be remembered. Hopkins of Rhode Island asserts, “The safety of the whole depends upon the distinctions of Colonies.”

⁵ *Ibid.*, 1077.

⁶ *Ibid.*, 1083. Franklin thought that if all the colonies would not enter, it had better be formed by those inclined to it. John Adams, *Works*, IX. 373.

⁷ *Journals*, VI. 1103 (but see Adams’s answer, 1104). Sherman thought as did Witherspoon. *Ibid.*, 1081.

⁸ Force, *American Archives*, fifth series, I. 377. See also Randolph’s idea, Madison’s *Writings*, ed. Hunt, III. 37.

⁹ *Journals of Congress*, VI. 1079. Note the same idea in Jefferson to Marbois, *AMERICAN HISTORICAL REVIEW*, October, 1906, p. 77. The first draft of the Articles of Confederation contained a clause, “The said Colonies unite themselves so as never to be divided by any Act whatever,” but this was early struck out of the draft and does not appear later. Evidently none wished to bind the league of friendship so firmly as this.

¹⁰ August 25, 1777. *Life of Sherman*, 106.

¹¹ Force, *American Archives*, fifth series, I. 672.

pose. The agreement of the states to any kind of confederation seemed at times almost desperate, and after all a league of sovereign states was all men would concede.¹

The articles as finally adopted furnish us with an admirable measure of the depths or rather shallows of national feeling and of the intensity or rather weakness of the contemporary desire for a state. We cannot discuss the character of the Confederation here, but it is a common judgment among political scientists and historians that there was less national unity after its adoption than before it.² As Professor Burgess expresses it, "the American [national] state ceased to exist in objective organization." The subjective existence, the "idea in the consciousness of the people"³ which he declares to have remained, is just what I believe that the facts here submitted show not to have existed. Though the whole logic of the situation seems to us now, and seemed to a few leaders then, to point to the necessity of the formation of a national state, yet the vast majority of men refused to see it,⁴ and hugged the delusive phantom of independent and of sovereign statehood for each of the thirteen colonies. Individual interests might be sunk temporarily in order to accomplish by military union a great individual desire, but the affections and the impulses of obedience centred in the state governments.

However dependent the states might be upon each other for military strength to meet the assaults of England, facts, too numerous to be gainsaid, can be cited to show the opinion of state legislatures, state conventions, and individuals in the states as to the actual political independence and sovereignty of the state. To mere assertions in state constitutions that the state is independent and sovereign⁵ we need give little attention, but powers granted in constitutional conventions and acts of sovereignty done by state governments have greater importance. South Carolina specifically endowed its

¹ In this connection it is important to note the contemporary conception of a confederation. Franklin's plan of confederation provided for a league even though the colonies remained part of the British Empire. Bringing about reconciliation was one of the functions of his confederation, and of course the organ of united action, the Congress, could not have sovereign powers if it existed within the British Empire. *Journals of Congress*, II. 195, 198; III. 301; IV. 149. The Rhode Island assembly instructed its delegates to promote a confederation at a time when it would not instruct for independence. *Ibid.*, 353.

² Pomeroy, Von Holst, Burgess, Lieber, *et al.*

³ Burgess, *Political Science and Constitutional Law*, I. 101.

⁴ Fisher Ames, *Works*, I. 113. "Instead of feeling as a nation, a state is our country." See also Austin's *Gerry*, I. 407-415, quoted by Von Holst, I. 29, and Rives, *Madison*, II. 177.

⁵ Poore, *Constitutions*: Connecticut, I. 257; New Hampshire, II. 1281, art. VII.; Massachusetts, I. 958, art. IV.

government with the power to make war, conclude a peace, enter into treaties, lay embargoes, and provide an army and navy.¹ Other states specified some of these powers and implied the rest.²

That these powers were implied is proven by the exercise of them by the government established. Virginia ratified the treaty with France³, and her diplomatic activity was so great that she established by law a clerkship of foreign correspondence⁴. William Lee was sent to France by Governor Henry and was given power under the state seal to obtain arms or borrow money of "his most Christian Majesty."⁵ Franklin speaks of "three several states" negotiating with France for loans and naval and war supplies.⁶ He complains that they "seem to think it my duty . . . to support and enforce their particular demands."⁷ In fact the states seem to have regarded the minister sent by Congress to be their particular minister as well as that of other states. Embargoes were laid⁸ and ports thrown open to the world by the enactments of state legislatures,⁹ sometimes at the suggestion of Congress, but often not. Patrick Henry, who had talked of all America being "thrown into one mass" and who was not a Virginian but an American—when he was seeking to increase the power of Virginia in the First Continental Congress, by securing proportional representation—this same eloquent Henry actively negotiated with Spain in 1778 for a loan and for the approval of Spain to the erection of a fort on Virginia's border, promising in return "the gratitude of this free and independent country, the trade in any or all of its valuable productions, and the friendship of its warlike inhabitants."¹⁰ The whole correspondence is in the tone of one not doubting the independence and sovereignty of his state.

Besides these assumptions of sovereignty in dealing with other

¹ Poore, *Constitutions*, II. 1625-1626.

² See *ibid.*, Pennsylvania, II. 1545, sect. 20; North Carolina, II. 1412, XIX.; Maryland, I. 825, XXXIII.; Delaware, I. 274, 275; Massachusetts, I. 965.

³ See Doniol, *Histoire de la Participation de la France*, IV. 155.

⁴ Hening, *Statutes*, IX. 467. To be filled by a person learned in the modern languages.

⁵ *Calendar of Virginia State Papers*, I. 328-329. Mazzei also was sent to Italy with a like commission. Hunt, *Madison*, 30.

⁶ Wharton, *Diplomatic Correspondence*, III. 192, 153. Maryland and Virginia are especially mentioned.

⁷ *Ibid.*, 192. Later the English government was curious to know whether Congress or the states individually had the right to negotiate. *Diplomatic Correspondence*, 1783-1789, I. 574.

⁸ *State Records of Connecticut*, I. 12, 63, 71. Hening, *Statutes*, IX. 530.

⁹ Virginia, February 16, 1776. *Journals of Congress*, VI. 1072.

¹⁰ Clark MSS., vol. 58, p. 103, library of the State Historical Society of Wisconsin.

nations, the states gave other proofs that they allowed Congress to exercise no function which they did not themselves have greater right to exercise. True, Congress organized a Continental navy, but nine of the thirteen states also fitted out navies of their own¹ and they were able to tax their citizens for supporting the establishment, while Congress could only beg the states to support its navy. Nor were the state fleets very helpful to the Continental fleet, for as Mr. Paullin says², "The commander of a state vessel or the master of a privateer, for aught either could see, subtended as large an angle in maritime affairs, as an officer of Congress, which body was to them nebulous, uncertain, and irresolute." As to privateering some of the states established state privateering, while some adopted the Continental system or adapted state laws to it.³

In the organizing of armies the story is the same. Congress could only urge the patriotic to volunteer and then bemoan its unfilled ranks. It must turn to the states for a support which was never more than half-heartedly given and see with chagrin the state armies filled by drafts and by tempting bounties outbidding what Congress could offer and in defiance of the urgent appeals of Congress to stop this ruinous rivalry.⁴ The sufferings of the Continental troops at Valley Forge were not due to the poverty of America, but to the fact that the states would not exert themselves in taxing for the army's support.⁵ Not only were armies organized by states, but they were used for state ends, and Virginia in the case of the expedition of George Rogers Clark actually carried on war without the knowledge of Congress, at her own expense, and for her own aggrandizement.⁶ Much of the early war in the South was carried on without the aid or advice of Congress.

If Indian affairs were regulated by Congress, so were they by the states. Congress established post-routes, but so did little Rhode Island;⁷ and finally we must remember that whatever acts of sovereign nature Congress recommended, it was the states that enforced these acts—laying an embargo, sanctioning the seizure of provisions for the army, collecting and pledging the only revenues, raising the

¹ Paullin, *The Navy of the American Revolution*, 152. Rhode Island, Connecticut, New York, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Massachusetts.

² *Ibid.*, 153.

³ *Ibid.*, 321.

⁴ *Journals of Congress*, VI. 944-946. Hening, *Statutes*, X. 17, 18.

⁵ Yet Congress was constantly urging, in vain and without power to compel this most necessary obedience. *Journals*, III. 458; IV, 339; and many other instances in the journals. See index, under Bounties, etc.

⁶ Hening, *Statutes*, IX. 552.

⁷ *Colonial Records of Rhode Island*, VII. 352.

only taxes, keeping social order, protecting property, and administering justice.

No one was more conscious of this jealous retention of state sovereignty than the members of Congress themselves.¹ In matters where the interests of an individual state were seriously involved the opposition of the delegates of that single state was enough to cause Congress to refrain from passing a recommendation.² If Congress desired in the interest of all to pry closely into the affairs of a state, an apology was sure to accompany the resolution.³ On committees to consider any important measures Congress thought it necessary to have one member from each colony.⁴ Even in the case of recalcitrant members of its own body, Congress was never forgetful that the member was there in the capacity of a diplomat from a sovereign state.⁵ Limitations upon a delegate's instructions were also duly regarded⁶ and no delegate dared make any important proposition in Congress without first being requested to do so by his state, in the form of a proposition by one sovereign state to the other sovereign states assembled by their delegates in Congress.⁷

These are only a few of the many facts which go to show the truth of Randolph's assertion as to Congress: "They have therefore no will of their own, they are a mere diplomatic body, and are always obsequious to the views of the states".⁸ John Adams, too, described them as "not a legislative assembly, nor a representative assembly, but only a diplomatic assembly."⁹ Only in that view was it reasonable for each state to have but one vote in Congress.¹⁰ Because of the same idea in men's minds, the delegates from all the states except New Hampshire and Georgia were elected by the state legislatures,

¹ Notice their attitude in regard to raising Continental troops. *Journals of Congress*, V. 470, 521.

² *Ibid.*, IV. 279; II. 125; V. 481. Sometimes the resolution was passed in the form of a harmless hint which the state could carry out or not. *Ibid.*, 463; South Carolina delegates to Rutledge.

³ *Ibid.*, IV. 167. Sometimes it resisted appeals to interfere. *Ibid.*, 185.

⁴ *Ibid.*, III. 262, 488; IV. 76.

⁵ *Ibid.*, III. 357; and *Secret Journals*, April 10 and 11, 1778.

⁶ *Journals*, VI. 1074.

⁷ See suggestion of army, navy, independence, etc.

⁸ Madison, *Writings*, ed. Hunt, III. 181. Mason had a like view. "Under the existing Confederacy, Congress represents the states", etc. *Ibid.*, 101. It was this fact and the rise and fall of enthusiasm for the union which handicapped the work of Congress, and explains much of its so-called sloth and incompetence.

⁹ *A Defence of the Constitutions of the United States* (1787).

¹⁰ Madison thought this reasonable only while "the Union was a federal one among sovereign states." Madison, *Writings*, ed. Hunt, III. 44. The idea was that "a little Colony has its all at stake as well as a great one." J. Adams, *Works*, II. 366.

as provided in the new state constitutions. Men thought of the Continental Congress as Europeans later thought of the Congress at Laybach (in 1821) to which the members of the Holy Alliance sent representatives who assumed in no wise any sovereign power over the participating nations. Like it, Congress was an advisory body having no recognized sovereign power but a considerable coercive force exercised through the other states and due to the generally recognized fact that success for each depended upon the unity of all.¹

Yet with all the pressure of a common peril to induce obedience to Congress, there are numerous examples of disobedience by states and state officials, when state interests conflicted with the general interest, and in such cases Congress was helpless.² "So long as the expenses were to be paid by the Continent, the Congress could direct the details and the results, but when the cost was to be paid by the state, recommendations from the Congress carried weight only so far as they fell in with the expediency of the local authorities."³ The very formation of state governments with constitutions prepared the way for a decline in the influence of the Congress.⁴ The strong men preferred to serve in state governments rather than to serve in Congress,⁵ and on the other hand, as Hamilton pointed out, "Each State in order to promote its own internal government and prosperity, has selected its best members to fill the offices within itself, and conduct its own affairs."⁶ It is noteworthy that a recommendation of Congress must first be approved by the state authorities be-

¹ The inhabitants of Savannah express the prevalent idea. Force, *American Archives*, fourth series, II. 1544. Not to wish success of the general cause was "Toryism", a stigma which neither individuals nor states cared to have fixed upon them. See Rush's view, *Pennsylvania Magazine*, XXVII. 135.

² Connecticut and Pennsylvania. *Journals of Congress*, IV. 93; III. 321; V. 469. Note especially the famous Olmstead Case, when Pennsylvania set at naught a decision of the Commissioners of Congress. Congress, "not wishing to endanger the public peace of the United States", proceeded no further. Jameson, *Essays*, 17-22. When a state did obey a request of the Congress which bore hard upon them, Congress commended them for "additional proofs of their meritorious attachment to the common cause." *Journals of Congress*, IV. 99. In a careful study of Maryland's relations with Congress by Mr. F. B. Keeney in my seminary it was shown that out of eighty resolutions of Congress asking Maryland to do certain things forty-five were not heeded by the Maryland convention, and in every controversy between the state and Congress the latter was obliged to yield.

³ Mr. Ford's preface to the *Journals of Congress* for 1776, p. 8.

⁴ *Journals*, IV. 8. One should note too the greater hurry and success in making the state constitutions, and how much more ready men were to yield large powers to them than to grant such to Congress in the Articles of Confederation.

⁵ Washington's *Writings*, ed. Sparks, V. Appendix, 508-509.

⁶ *Ibid.*, 509.

fore a state administrative officer would obey.¹ Finally, it is significant that confidence in state issues of money exceeded that in the Continental bills, indicating a firmer belief in the perpetuity of the states than in the Congress.

Up to this point we have been studying historically the ideas which men had during the American Revolution as to the nature of Congress, the state governments, and the powers of each. If the ideas and wishes of men were what the submitted facts and arguments seem to show, there could have been no common will demanding the creation of a national state. But this is the assertion made by the exponents of the sovereign Congress. A consciousness of nationality no doubt there was, because geographical position, laws, manners, history, and prevailing language² all combined to that end, but it is a mistake to confuse the idea of nationality with that of the state. National consciousness may exist, as it did in the minds of the people of Germany and Italy, before a national state was created. The people dwelling in the loosely confederated states of Germany before 1866 were people of the same race;³ their economic interests were quite as unified as were those of America in 1776, and their several governments were alike in character, but Germany had no central government endowed with sovereign powers, and there was no common will demanding the creation of a national state. This I conceive to have been the condition in America until the trying experiences of the period of the Confederation⁴ taught a majority of Americans, what a few had long seen, that the whole logic of the situation demanded the creation of a national state. Even then it was only with a grudging hand that the essentials of sovereignty were granted to the government created by the Federal Constitution, and in so dubious a manner, that men have disputed ever since as to whether a national state actually did then come into existence.

After all has been said for the view here maintained, there still remain some vexing facts, and some utterances of contemporaries hard to reconcile.⁵ Most of these will be explained, however, if we

¹ *Provincial Papers of New Hampshire*, VII. 512. *Journals of Congress*, IV. 285-286.

² Giddings, *Descriptive and Historical Sociology*, 295.

³ Their race elements were more unified than those of America.

⁴ Added of course to the lessons in unity learned in the Revolutionary army, and the fact that America's isolation from the rest of the world must have given citizens of the several states thoughts of a common destiny.

⁵ Wilson, in *Journals of Congress*, VI. 1105. Rush, *ibid.*, 1081. It is to be noted that the large-state men urged the new idea of a national state most strongly, because it was an argument in favor of proportional representation.

reflect that there had to be a dawn of the idea of a national state, and its light naturally touched the highest peaks first—the men capable of noble conceptions—men like Bismarck in Germany or Cavour in Italy—Washington, Hamilton, Wilson, and Madison, and it is in their writings and acts that we find the most advanced views of the powers of Congress.

CLAUDE H. VAN TYNE.