

The Confederation could seldom be enforced or carried into Execution if no Authority but the Executive only of the Offended State could charge such Criminal: A Criminal for example of Massachusetts has fled to this State and is here discovered: if he cannot be charged but by the Executive of Massachusetts no Process can issue for his arrest no step taken to stop his Flight or prevent his Escape till information can be sent to Massachusetts, and the Executive there have an Opportunity to make their charges and send them forward with the Evidence. In the mean time the Criminal is gone and perhaps while the Information is travelling to Boston he has got on the high Seas on his way to Europe. Besides who would be at the pains and Expence of giving Information which in all probability in nine Instances out of ten would be totally useless.—

November
11
Liber No. 78
p. 465

But you are of Opinion that the Governor alone might have arrested Mr Carbury after Demand. I conceive there is an Obvious Distinction between Arresting a Criminal and the sending him out of the State, and delivering him up to another Power and Jurisdiction. The Powers are separate and distinct and in all free Governments they are exercised by different Branches of its Authority. The Power to Arrest is ever lodged with the Magisterial or judicial Authority, the Power of delivering up a Fugitive Offender is merely ministerial and Executive and accordingly lodged with the Executive. The Confederation does not say what Authority in the State shall arrest or what Authority shall deliver up such Offender: it only says that on the Demand of the Governor or Executive of the Offended State the Criminal shall be delivered up by the State in which he is found. It is therefore only by Construction and Implication that the Governor can exercise even the Power of delivering up such Criminal, but this Construction and Implication are founded upon a clear and obvious Necessity, and I admit that the Power to deliver up is solely and exclusively with the Governor who alone by our Constitution and Form of Government is to exercise all Executive Powers in which the Advice and Concurrence of the Council is not required—The Confederation stipulates that this Power shall be exercised: it is also an Executive Power and there is no other Department in our Government that is Executive but the Governor or Governor and Council, and in this Instance the Constitution does not require the advice and Concurrence:—it therefore might be with the Governor and with him alone. p. 466

But on what Principles, and by what Authority shall he exercise the Magisterial Power to issue a Warrant and to arrest a Fugitive Criminal? The Constitution and Form of Government gives him no such Power, nor does the Confederation say who shall exercise it. If the Governor then is to exercise it solely and exclusively as insisted upon he must take it under the Confederation by Construction and Implication But when Powers are assumed by Implication and