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The Federal Judiciary and the Ratification Process

The debate over the creation of a federal judiciary was filled with compromises, the most important of which was the delegation of creation of inferior federal courts to Congress, should Congress decide to do so. Nevertheless, James Madison, author of many of those compromises, was pleased with the outcome of the deliberations. As he later wrote to Thomas Jefferson, then serving as a diplomat in France, "It may be said that the Judicial authority under our new system will keep the States within their proper limits, and supply the place of a negative on their laws." In the proposed language (not yet called Article III–that was the work of the Committee of Style and Arrangement, and within it, of Philadelphia's Gouverneur Morris), the entire judicial function of the new federal government was vested in the Supreme Court and such inferior courts as were to be created by acts of Congress.[1]

The article reads: Sec. 1: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." Sec. 2: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to

[1]James Madison to Thomas Jefferson, October 24, 1787, in Gaillard Hunt, ed., Writings of James Madison (New York: Putnam, 1910), 5: 26.

controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

At the heart of the article remained the Madisonian Compromise–delay and defer inferior courts until Congress met. The language of section 1 was still Madison's in concept. It was Gouverneur Morris (also a lawyer) who created Article III, however. Done so swiftly in the closing days of the convention, the phrasing and the concentration of the judicial branch in a single article was a triumph for the party in Philadelphia in favor of a strong central government and a strong judiciary. By giving the courts their own article, the Committee of Detail made the judicial branch the equal of the Congress (Article I) and the Presidency (Article II), although the language of Article III was far vaguer than the preceding articles (and they hardly comprehensive).

The second clause in the first sentence gave to the United States Congress some check upon the jurisdiction of such lower courts as Congress deigned to fashion, the jurisdiction of the Supreme Court was laid out in more precision than just about any other language in the Constitution. Congress had another check on the judiciary. Although tenure of federal judges, including the justices of the Supreme Court, was during good behavior (and not at the pleasure or whim of the President or the Congress), justices could be removed by impeachment in the House

of Representatives and conviction in the Senate. This did not mean that the justices had to stay in office their entire lives, and in the early years of the Court many nominees either refused to accept appointment to the court or resigned after a short period of service.[2]

The problem with attributing more precise motives to the framers or giving more precise meaning to the language they adopted, called “originalism” when applied to interpretation of the Constitution today, is that historians are largely dependent on the notes taken by James Madison. These were not stenographic nor verbatim. Nor were they publically available until 1840, after Madison’s death. No one who was at the convention was alive when they were published, and

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[2]Article III was not the only provision for courts in the draft Constitution. Article I, section 8, clause nine afforded Congress the power to constitute “tribunals inferior to the Supreme Court.” As Congress had not yet met and the invitation in Article III to create a structure of lower federal courts had yet to be accepted, the Article I clause may seem redundant. It did not play a major role in the debate at the convention nor would it become the basis for the district and circuit courts when the new Congress did convene. It had a rich life in later years, however, as the authority for establishing “non-Article III courts.” These included administrative agencies with subpoena powers, special review courts with limited objectives created by Article III courts under acts of Congress, and so-called legislative courts empowered by Congress to review the operations of government. The most common of these courts are the federal bankruptcy courts, whose judges are currently appointed by the federal district court bench. The members of these courts do not have tenure on good behavior, nor a guarantee that their salaries will not change during their service. Congress and the federal courts have yet to resolve the question of the judicial status of these courts (for example, whether they can hold jury trials).

thus no one could contradict, amend, or add to what Madison decided to write. One may simply assert that he tried to be as accurate as possible, but even then, he did not have time to hear and write everything that was said. Adding to the incompleteness of the record, he elected not to keep notes on the deliberations of the various committees of the convention to which he was named, a severe gap in the record given that so much of what transpired in the convention took place in committee meetings. This gap is especially glaring for the five days in September when the Committee of Style (on which he served) reduced the twenty-three articles framed by the Committee of Detail to seven and entirely recast the Preamble.[3]

There was another wrinkle in the fabric of the proposed new Supreme Court, a kind of jurisdiction not mentioned in Article III. The objects of the new Supreme Court's purview were clear. These included review of state court decisions and lower federal court decisions–but was the Court to have sole or even primary authority to rule on the meaning of the new Constitution's provisions? William Samuel Johnson offered an amendment to the Committee of Detail report adding "all cases arising under this Constitution" to the jurisdiction of the new court. Madison worried aloud that this might give the high court the power to issue advisory opinions, that is, to interpret the Constitution when it did not have a case or controversy before it. Such a provision in Article III might encourage the justices to meddle in the operations of the other branches. A proposal for this was debated in the Committee of Detail, but not reported out of it.

Elbridge Gerry, a Massachusetts delegate and as close to a democrat as anyone at the

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[3]On the role of the Committee of Style and Arrangement and Gouverneur Morris, see Peter Charles Hoffer, For Ourselves and Our Posterity: The Preamble to the Federal Constitution in American History (New York: Oxford University Press, 2012), 69-79.

convention, argued that the judiciary should only rule on the constitutionality of laws pertaining to judicial matters–whatever they might be (he did not say). The problem, unexamined in the brief debates on the new high court, was that any matter might be deemed "judicial" by the court once it sat, even purely political issues that were best left to the elected branches. In fact, at least eight times during the debates over the federal judiciary, members of the convention said that some government institution must have the final say on the meaning of the Constitution, and implied that it would lie with the High Court. Among these speakers, King, Madison, and Gouverneur Morris served on the Committee of Style, but it left the matter open.[4]

Contrariwise, could Congress, without a constitutional amendment, restrict the jurisdiction of the Supreme Court? Over the years since 1787, the answer seemed to be no, but that answer had qualifications. Congress can set the number of members of the Court, and since 1789 has changed that number from six to seven to nine, to ten, down to seven, and back to nine. Congress can also prescribe rules of procedure for the High Court's appellate jurisdiction–"under

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[4]All three men must have known that state supreme courts in Connecticut, New York, and North Carolina had all claimed for themselves the duty and privilege of laying state legislation on the courts' functions against the text of the state constitution and finding the acts of the assemblies unconstitutional. But this principle of judicial review of legislation related to the function of the courts, a narrow area of governance which immediately concerned the state supreme courts. Whether the state precedent was applicable to the U.S. Supreme Court would have to be determined, perhaps by the latter court itself. Eight times: Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, and David L. Shapiro, Hart and Wechsler's the Federal Courts and the Federal system 9th ed. (New York, Foundation, 2009), 12, n. 67.

such regulations as the Congress shall make"-- knowing full well that procedural rules may restrict jurisdiction and even dictate outcomes of cases. The open-endedness of the Constitution's provisions for a federal judiciary sometimes raised more questions than they answered.[5]

Ratification of the new Constitution was not assured, although its supporters, self-styled federalists, were confident that they could prevail. The major obstacle was the absence in the draft Constitution of some of the guarantees of individual rights one already found in the state constitutions. When Madison returned to the confederation Congress in New York City after the constitutional convention sent the draft document to the Congress, he cleverly defended sending

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[5]In modern times, the issue of "jurisdiction stripping" has occasionally pit Congress against the courts. Ordinarily, the courts will defer to Congress on the basis of Article III's second clause. They did in McCardle (see pp. 000). Also, when in the Norris-LaGuardia Labor Act of 1932 Congress forbade federal courts to issue injunctions against labor unions otherwise acting legally, the U.S. Supreme Court accepted Congress's authority to bar petitioners from gaining this equitable remedy (Lauf v. E.G. Shinner and Co, 303 U.S. 323 [1938]). When the courts can find in the Constitution itself (rather than acts of Congress) a basis for jurisdiction, for example in the Habeas Corpus Clause, the courts have proved more resistant to congressional limits on their jurisdiction. While a direct confrontation is unusual, there are notable cases where neither side wanted to back down. Such confrontations severely test the system of checks and balances, but they also show that the system works. See, e.g., James E. Pfander, "Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation," Northwestern University Law Review 101 (2007), 237-238.

it to the states by turning the absence of a bill of rights on its head. Madison expressed his views with diffident modesty. Not only was it Madison's preferred form of speaking, the opposition was led by Richard Henry Lee, a friend and a fellow Virginia planter. To offend the powerful Lee clan, particularly in view of Madison's hope to be elected to the federal Congress under the new

Constitution, would be political suicide. New York member of congress Melancton Smith's notes on Madison's address began, "[He] should feel delicacy if he had not assented in Convention though he did not approve it." The notes that Smith took of the rest of Madison's comments are equally impenetrable, because Madison's speeches, like his writings, were full of clauses intricately looped about one another. Madison's habit was to qualify every thing he said, sometimes before he had finished saying it. But the gist of his argument was clear. There was "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." In other words, the constitution had first to be ratified and the new government put into operation before amendments could be proposed.[6]

Article III was a serious subject of criticism among the anti-federalists. They were appalled by it, according to Virginia's George Mason, who returned home without signing the Constitution and opposed its ratification: "The Judiciary of the United States is so constructed

[6]James Madison, September 27, 1787, in Congress, in Merrill Jensen et al., eds., Documentary History of the Ratification of the Constitution (Madison, WI: University of Wisconsin Press, 1976–) 1: 339.

and extended, as to absorb and destroy the judiciaries of the several States; thereby rendering law as tedious, intricate and expensive, and justice as unattainable, by a great part of the community, as in England, and enabling the rich to oppress and ruin the poor." Robert Yates of New York, who served his state in the convention but returned home before the conclusion of the meeting and opposed the document, wrote under the pseudonym of "Brutus." He listed the entire project of federal courts as a grievance. He feared consolidation of sovereign states "under the direction of one executive and judicial" branch, meeting far from most people's homes, proceeding under rules and enforcing laws foreign to those of the respective states. Even absent inferior federal courts, the Supremacy Clause of the Constitution, that it "shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution, or law of any state to the contrary notwithstanding" made every state judge and court inferior to the U.S. Supreme Court. The longest lever the antifederalists had to raise opposition to Article III and the judicial arrangements of the new Constitution was the absence of a guarantee of jury trial. As "A Farmer" wrote, "Without then the check of the *democratic* branch – *the jury*, to ascertain those facts, to which the judge is to apply the law, and even in many cases to determine the cause by a *general* verdict – the latitude of judicial power, combined with the various and uncertain nature of evidence, will render it impossible to convict a judge of corruption, and ascertain his guilt." The potential for corruption of federal judges was assumed. [7]

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[7]George Mason, "Objections to the Constitution" circulated October, 1787, in Jon L. Wakelyn, ed., The Birth of the Bill of Rights: Major Writings (Westport, CT: Greenwood, 2004), 233; Brutus, To the Citizens of the State of New York" New York Journal, October 18, 1787; A Farmer, Maryland Gazette [1787] in Herbert J. Storing, ed., The Complete Anti-Federalist, vol.

What was more, the blanket authorization of Congress in Article I to establish inferior courts, coupled with the enumerated power that Congress had to enact laws on bankruptcy, caused antifederalists even more sleepless nights. As the Federal Farmer complained, "By giving this [bankruptcy] 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, even between citizens of the same state, may be tried in the federal courts; and I think it may be shewn, that by the help of these laws, actions between citizens of different states, and the laws of the federal city, aided by no overstrained judicial fictions, almost all civil causes may be drawn into those courts."[8]

To respond to the opponents of the new Constitution, three of its proponents, Alexander Hamilton, John Jay, both of New York, and James Madison, of Virginia, set about to defend it in a series of newspaper articles. Later named The Federalist Papers, these serialized essays explained the need for checks and balances in language that would become a part of American political heritage. The Federalist Papers regarded the separation of the judiciary from the other branches as a vital safeguard in republican governance. As Madison wrote in Federalist Number 47, "The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." How to avoid it? Madison returned to the topic in his Number 51: "by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their

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5 , Maryland and Virginia and the South (Chicago: University of Chicago Press, 1981), 38-39.

[8][Richard Henry Lee?] Federal Farmer, Letter 18, New York Journal, January 25, 1788.

proper places."[9]

When the Virginia ratification convention met, on June 24, 1788, Madison's former ally, Edmund Randolph, had switched sides. As well, the redoubtable Patrick Henry and the much respected George Mason had made plain their intention to oppose the Constitution. Henry was suspicious of central power, and Mason had joined Randolph in refusing to sign the Constitution because it did not contain a bill of rights. Mason and Henry spoke well and often of the danger of adopting a constitution without a bill of rights, but Randolph changed sides once again, and with Madison called for ratification first and amendment later. As Randolph explained, with eight states already having ratified, Virginia's vote would determine "union or no union" and he did not want to be the one blamed for the latter event.

A day later, the federalists knew that victory was within their grasp. On the 26th of June, after three days of remarkably able and learned debate, the convention resolved to send its affirmation of the proposed Constitution to the Congress, along with a resolution—the concession to the dissenters—that the Constitution be soon amended to include basic guarantees of rights, a course Massachusetts and other states had already followed.

In New York, Hamilton and Jay, delegates to the ratification convention, faced even stiffer resistance to the Constitution than Madison was encountering in Virginia. With the convention meeting in Poughkeepsie, halfway up the Hudson River between Albany and New York City, anti-federalist Governor George Clinton hoped that he and his "friends of the people" from the upstate counties would be safe from the influences of the downstate federalists. The

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[9]Madison, Federalist No. 47, in Pole, ed., Federalist, 261; Madison, Federalist No. 51, in ibid, 280.

New York convention was poised to be a donnybrook of confederation-era politics—farmers against merchants, the west against the seacoast, democrats against plutocrats. The vote for the delegates was just as divisive and partisan—with the anti-federalists coming from the rural counties and the federalists coming from Long Island, the city of New York, and its immediate environs. The anti-federalists had a clear majority. Robert Yates and John Lansing, the New York delegates who had left the convention before its end were there, as was Clinton. On the other side were Hamilton, Jay, and Robert R. Livingston Jr.. Outnumbered but not without some cards of their own to play, the federalists were determined that the game be an even match. The federalists' tactics were simple—keep the debate going until news arrived that a ninth state had ratified.

Article III was not a lightening rod for New York antifederalists' criticism, but Hamilton had anticipated the assault. His defense of the value and the need for federal courts in the Federalist has become a classic text in the American constitutional canon. In his Number 22, published on December 14, 1787, he reported that "A circumstance, which crowns the defects of the confederation, remains yet to be mentioned--the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation." In particular, he cited the problems arising from the Treaty that ended the Revolutionary War. " The treaties of the United States to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted in the last resort, to one SUPREME TRIBUNAL." Without a national supreme court whose decisions would be final, there was no protection from "the bias of local views and prejudices, and from

the interference of local regulations." [10]

On May 28, 1787, he concluded his newspaper contributions with more on the proposed courts. The want of a guarantee of jury trial in federal courts Hamilton supplied with reference to Congress's power to create inferior courts and regulate them. "A power to constitute courts, is a power to prescribe the mode of trial; and consequently, if nothing was said in the constitution on the subject of juries, the legislature would be at liberty either to adopt that institution, or to let it alone." The people had nothing to fear from these courts, for "According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices during good behaviour, which is conformable to the most approved of the state constitutions; and among the rest, to that of this state." The final argument, however, was the very one that John Adams had made when the outcome Revolution was in doubt. "Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." The judiciary was the weakest of the departments of

[10]Hamilton, Federalist No. 22, in Pole, ed., Federalist, 121.

government the federalists had created. [11]

At the close of his newspaper pieces defending the Constitution on May 28, 1788 (the last of the Federalist Papers), Hamilton concluded his argument for Article III: "Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations. 'We the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.' Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government."[12]

Hamilton did not expect the intellectual bravura of his contributions to the Federalist newspaper pieces to overwhelm the anti-federalists' opposition. Hamilton repeated each point on the convention floor. Each time Hamilton spoke, the leader of the anti-federalist forces, Melancton Smith, felt obligated to answer. "It was not," he said, "his intention to follow that gentleman through all his remarks," then did exactly what he said he would not do. So Hamilton and Smith went at it, back and forth, for a week, until news came on June 24th that Virginia was likely to ratify. The federalists now held a trump card. By early July, with the heat taking its toll, the delegates knew that Virginia and New Hampshire had ratified. Ten states now belonged to the new federal union.[13]

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[11]Hamilton, Federalist No. 83, in Pole, ed., Federalist, 436; Hamilton, No. 78, ibid., 411-412.

[12]Alexander Hamilton, Federalist No. 84, in Pole, ed., The Federalist, 455.

[13]Melancton Smith, June 20, 1788, in David Wooton, ed., The Essential Federalist and

Was New York in or out? It was the same question that Edmund Randolph had asked himself. Hamilton warned of the evils of staying out of the Union, and Jay moved that the Constitution be accepted without conditions. Their praise of the Preamble and its clauses in the Federalist papers was beginning to tell. By the middle of July, Smith, like Randolph, answered the question in the affirmative—New York should ratify. His was the first defection from the anti-federalist camp, and not the last. On July 26th, by a vote of 30 to 27, New York joined the Union.[14]

Anti-Federalist Papers (Indianapolis: Hackett, 2007), 42.

[14]Pauline Maier, Ratification: The People Debate the Constitution, 1787-1788 (New York: Knopf, 2010), 320–397.