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The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*

On June 7, 1776, Richard Henry Lee proposed to the Second Continental Congress "[t]hat these United Colonies are, and of right ought to be, free and independent States," and "[t]hat a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation."¹ Lee's resolution reflected the linkage between independence and confederation in the public mind.² The result was the Articles of Confederation, drafted in 1776-1777 and finally ratified on March 1, 1781, which remained in effect until 1789 and represented the first American experiment with a written national charter.³

The conventional view of this period is that it was dominated by deep factional conflict concerning the amount of power that should be vested in the national government.⁴ The text of the Articles, according to this view, represented a victory for the group favoring minimal national authority,⁵ and as a result the Articles government

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1. 5 JOURNALS OF THE CONTINENTAL CONGRESS 425 (W. Ford ed. 1906) [hereinafter cited without cross-reference as JOURNALS].

2. See NEW JERSEY IN THE AMERICAN REVOLUTION, 1763-1783: A DOCUMENTARY HISTORY 402 (L. Gerlach ed. 1975) (issues of independence and confederation were inseparable) [hereinafter cited as DOCUMENTARY HISTORY]; cf. Jensen, *The Articles of Confederation*, in FUNDAMENTAL TESTAMENTS OF THE AMERICAN REVOLUTION 62 (Library of Congress Symposium on the American Revolution 1973) (politicians who opposed confederation did so because they saw it as step toward independence) [hereinafter cited as Jensen, TESTAMENTS].

3. Other plans of confederation had been proposed during the colonial period. See, e.g., 6 THE WRITINGS OF BENJAMIN FRANKLIN 420-25 (A. Smyth ed. 1906); 2 HISTORY OF THE CELEBRATION OF THE ONE HUNDREDTH ANNIVERSARY OF THE PROMULGATION OF THE CONSTITUTION OF THE UNITED STATES 439 app. (H. Carson ed. 1889); J. SCOTT, THE UNITED STATES OF AMERICA: A STUDY IN INTERNATIONAL ORGANIZATION 471 app. (1920).

4. See, e.g., H. HENDERSON, PARTY POLITICS IN THE CONTINENTAL CONGRESS (1974); J. Davis, Sections, Factions, and Political Centralism in the Confederation Period: 1774-1787, at 381-89 (1972) (unpublished doctoral dissertation for University of Wisconsin). See generally M. JENSEN, THE NEW NATION (1950) [hereinafter cited as M. JENSEN, NATION].

Professor Jensen is the leading authority on the drafting and text of the Articles by virtue of his book M. JENSEN, THE ARTICLES OF CONFEDERATION (1940) [hereinafter cited as M. JENSEN, ARTICLES]. This work has been reprinted with new prefaces (1948, 1959, 1970) reflecting the changes in the author's thinking over the years; the text, however, remains unaltered.

5. See M. JENSEN, ARTICLES, *supra* note 4, at 11-12.

was barely functional.⁶ Its inability to handle crises such as Shays' Rebellion stimulated a centralist reaction that led to the drafting of the Constitution in 1787⁷ and the establishment of a stronger national government.⁸

This Note disputes the accepted view of the Articles Period and interprets the years 1777-1789 as ones in which the national government gained and exercised increasing powers. The legal and political institutions created during this period were the basis for the Constitution's national federalism, a political structure characterized by state deference to national power in certain major policy areas and the common recognition of a national citizenship given reality by comity among the states.⁹ Examination of the drafting history and actual text of the Articles suggests that the document was the result of a drive toward union, not an obsession with decentralization. In fact, the national government grew in power and institutional strength from 1777 to 1789, and the theoretical and institutional structures of the government of the early Constitution Period owed a very substantial debt to those of the Articles Period.

I. Formal Federalism: The Drafting and Text of the Articles

The leading historian of the Articles of Confederation asserts that their adoption represented a victory for "radicals," who wanted a weak central government, over "conservatives," who favored greater

6. See p. 149 & note 48 *infra* (citing sources).

7. See M. STARKEY, *A LITTLE REBELLION* 242 (1955) (but for Shays' Rebellion, Federal Constitution might not have come to pass); R. TAYLOR, *WESTERN MASSACHUSETTS IN THE REVOLUTION* 103-77 (1954); *id.* at 168 ("[C]ertainly the upheaval in Massachusetts and the fear that disorder would spread intensified the demand for a stronger central government.")

8. The classic expression of this idea remains J. FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY 1783-1789* (illustrated ed. 1897). See, e.g., *id.* at 177-78 ("The events of 1786 impressed upon men's minds more forcibly than ever the wretched and disorderly condition of the country, and went far toward calling into existence the needful popular sentiment in favour of an overruling central government.")

9. The national federalism that began to emerge during the Articles Period thus meant that the states had surrendered certain aspects of their sovereignty, and that the national government would deal directly with individuals. See note 151 *infra*. This Note does not suggest that the Constitution's structure of government was created by the Articles or that today's structure of government appeared in 1789. Rather, it seeks to point out the significant ways in which the government of the early Constitutional Period rested on that of the Articles Period, just as the government of today rests on that of the early Constitutional Period. Neither the Articles nor the Constitution, by themselves, created strong centralized structures. Both, for instance, contained broad clauses reserving all powers not delegated to the national government to the states. See U.S. CONST. amend. X; ARTICLES OF CONFEDERATION art. II, *reprinted in* 9 JOURNALS at 908 [hereinafter cited as ARTICLES with page citation to 9 JOURNALS].

national power for the protection of property rights.¹⁰ This conventional view is undermined by a critical examination of the drafting process and the textual provisions of the Articles. The members of Congress displayed a consistent willingness to compromise or surrender elements of state sovereignty in recognition of the overriding need for full national authority in certain areas and for interstate cooperation and comity. The resulting Articles clearly express these principles of national authority and national citizenship.

A. *Drafting the Articles*

While the dominance of the "radicals" is conventionally said to be shown by their emasculation of "conservative" John Dickinson's first draft and production of a final draft that left few powers to the central government,¹¹ the successive drafts of the Articles¹² do not show such a steady movement from a strong to a weak central government. For instance, between the first and second drafts, alterations in limiting language served to strengthen the supremacy clause,¹³ enhance central authority over the general budget,¹⁴ and

10. This thesis is developed at length in M. JENSEN, *ARTICLES*, *supra* note 4. For a clear definition of Jensen's use of the terms "radical" and "conservative," see Jensen, *The Idea of a National Government During the American Revolution*, 58 *POLITICAL SCI. Q.* 356, 360 n.7 (1943). There is a substantial and growing body of literature that casts doubt on the validity of Jensen's dichotomy. See, e.g., Weir, "The Harmony We Were Famous For": *An Interpretation of Pre-Revolutionary South Carolina Politics*, 26 *WM. & MARY Q.* 473 (3d ser. 1969) (study inconsistent with Jensen model); Rakove, *Book Review*, 6 *J. INTERDISCIPLINARY HIST.* 744, 746 (1976) (reviewing H. HENDERSON, *supra* note 4, and discussing flaws with his approach). See generally Greene, *Changing Interpretations of Early American Politics*, in *THE REINTERPRETATION OF EARLY AMERICAN HISTORY* 151 (R. Billington ed. 1966).

11. See M. JENSEN, *ARTICLES*, *supra* note 4, at 130 (theory of Dickinson draft was to make Congress supreme authority; final draft was pact among sovereign states that delegated certain powers and retained all others).

12. The first draft of the Articles [hereinafter cited as *ARTICLES* (draft 1)] was reported to the Continental Congress on July 12, 1776, by the committee that had been appointed under Lee's resolution, see p. 142 *supra*, to prepare a plan of confederation. 5 *JOURNALS* at 546. The manuscript of this first draft is in the handwriting of John Dickinson of Pennsylvania, is believed to have been largely drafted by him, and is commonly known as the "Dickinson draft" of the Articles.

The first draft was revised by the Committee of the Whole, and a second draft [hereinafter cited as *ARTICLES* (draft 2)] was ordered printed on August 20, 1776. 5 *JOURNALS* at 689. Further congressional debates led to the printing of a third draft [hereinafter cited as *ARTICLES* (draft 3)]. The final version of the Articles was essentially the same as the third draft, with "sundry small amendments made in the diction, without altering the sense." 9 *JOURNALS* at 907.

13. Compare *ARTICLES* (draft 1) art. XII, 5 *JOURNALS* at 678 ("Every Colony shall abide by the Determinations of the United States assembled, concerning the Services performed and Losses or Expences incurred by every Colony for the common Defence or general Welfare . . .") with *ARTICLES* (draft 2) art. X, 5 *JOURNALS* at 678 ("Every State shall abide by the determinations of the United States in Congress Assembled, on all questions which by this Confederation are submitted to them.")

14. The first draft read: "The United States assembled shall have Authority for the Defence and Welfare of the United Colonies and every of them, to agree upon and fix

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increase national military powers.¹⁵ Between the second and third drafts of the Articles, further centralizing changes were made, including the addition of an article granting “the free inhabitants of each of these states . . . all the privileges and immunities of free citizens in the several states,”¹⁶ requiring that “[f]ull faith and credit shall be given in each of these states to the records . . . of every other state,”¹⁷ and mandating interstate extradition.¹⁸ At the same time, the framers further strengthened the budget authority,¹⁹ and added a provision granting congressional immunity.²⁰ Although there were also important changes that weakened national authority,²¹ most notably the strengthening of the article recognizing the reserved powers of the states,²² there was no overall movement in that direction.²³

The drafting process reveals that Congress shared the country's desire for confederation.²⁴ The members knew that union could only be

the necessary Sums and Expences” ARTICLES (draft 1) art. XVIII, 5 JOURNALS at 683 (emphasis supplied). The second draft deleted the italicized language, and with it the burdensome requirement that each expenditure be demonstrably for the benefit of each state. See ARTICLES (draft 2) art. XIV, 5 JOURNALS at 683.

15. Compare ARTICLES (draft 1) art. XVIII, 5 JOURNALS at 683 (authority to raise naval forces from states and issue regulations for them) with ARTICLES (draft 2) art. XIV, 5 JOURNALS at 682, 684 (authority to build and equip navy and direct its operations).

16. ARTICLES (draft 3) art. IV, 9 JOURNALS at 908-09. The first draft contained a weaker form of this provision, ARTICLES (draft 1) arts. VI, VII, 5 JOURNALS at 676, dropped from draft 2, that required comity among the states in matters of migration and “Trade, Navigation, and Commerce,” but in all other cases restricted citizens of other states to the rights they already enjoyed.

17. ARTICLES (draft 3) art. IV, 9 JOURNALS at 909. The judicial implementation of this clause is discussed at pp. 159-60 *infra*.

18. ARTICLES (draft 3) art. IV, 9 JOURNALS at 909; see p. 162 & note 138 *infra*.

19. Congress, which had previously been authorized only “to agree upon and fix the necessary sums and expences,” ARTICLES (draft 2) art. XIV, 5 JOURNALS at 683, was given the new power “to appropriate and apply” the revenue, ARTICLES (draft 3) art. XIV, 9 JOURNALS at 920.

20. ARTICLES (draft 3) art. V, 9 JOURNALS at 910; see p. 161 & note 135 *infra*.

21. For example, in the first draft the states “unite[d] themselves so as never to be divided by any Act whatever,” and entered into a league of friendship, ARTICLES (draft 1) art. II, 5 JOURNALS at 674. In the succeeding draft the nature of the union was recharacterized to retain only the league of friendship, see ARTICLES (draft 2) art. II, 5 JOURNALS at 674.

22. See M. JENSEN, ARTICLES, *supra* note 4, at 175 (change concerned “basic constitutional issue of the Revolution”); cf. Letter from Thomas Burke to the Governor of North Carolina (April 29, 1777), reprinted in 2 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 345-46 (E. Burnett ed. 1923) (author of change notes that it caused little controversy among members) [hereinafter cited as LETTERS]. Compare ARTICLES (draft 2) art. III, 5 JOURNALS at 675 with ARTICLES (draft 3) art. II, 9 JOURNALS at 908.

23. See p. 166 *infra* (Appendix summarizing changes made during drafting of Articles).

24. See, e.g., Jefferson, *Notes of Debates in the Continental Congress*, in 6 JOURNAL: at 1102 (Mr. Chase observed that “our importance, our interests, our peace required that we should confederate”); J. WITHERSPOON, Speech in Congress (July 30, 1776), in 9 THE WORKS OF JOHN WITHERSPOON, D.D. 135 (Edinburgh 1805) (“The absolute necessity of union . . . is felt and confessed by every one of us, without exception.”); Letter from Corn[eli]us Harnett to Governor Caswell (Mar. 20, 1778), reprinted in 13 THE STATE RECORDS OF NORTH CAROLINA 386 (W. Clark ed. 1896) (every member of Congress but one

attained if the final version of the Articles proved acceptable to all thirteen state legislatures. The most important objectives of the draftsmen, therefore, were to overcome centrifugal forces²⁵ and achieve the greatest possible degree of support for each position taken.

For example, on the volatile issue of the basis of representation in the national legislature, Thomas Jefferson accurately predicted that "the good whigs" would "cede their opinions for the sake of the Union."²⁶ Although the small states, which favored a one-state, one-vote plan,²⁷ held a clear majority and could have enacted their wishes at any time,²⁸ they engaged in lengthy discussions and numerous attempts at compromise²⁹ with the larger states, which favored voting

"seems to wish for a Confederacy") [hereinafter cited as RECORDS]; Letter from Edward Rutledge to Robert R. Livingston (Oct. 2, 1776), *reprinted in* LETTERS, *supra* note 22, at 113.

For views of religious leaders, see, e.g., E. HUNTINGTON, THE HAPPY EFFECTS OF UNION AND THE FATAL TENDENCY OF DIVISIONS 11, 12, 13, 17, 20 (Hartford 1776); R. ROSS, A SERMON IN WHICH THE UNION OF THE COLONIES IS CONSIDERED AND RECOMMENDED; AND THE BAD CONSEQUENCES OF DIVISION ARE REPRESENTED 5, 6-7 (New York 1776). For views of private persons, see, e.g., T. PAINE, COMMON SENSE 30, 56, 61, 71-72 (Philadelphia 1776) (favoring union as soon as possible because it would be more difficult to achieve later); Letter from William Hooper to Robert Morris (Feb. 1, 1777), *reprinted in* COLLECTIONS OF THE NEW-YORK HISTORICAL SOCIETY FOR THE YEAR 1878, at 418 (1879) [hereinafter cited as COLLECTIONS 1878].

In addition to their shared desire for union, the members' agreement on such other matters as the importance of state sovereignty and the need for "virtue" in public officers, both seen as important checks on the corrupting influence of political power on officeholders, smoothed the road to compromise at many points. See, e.g., A. MATHER, THE CHARACTER OF A WELL ACCOMPLISHED RULER DESCRIB'D (New Haven 1776). See generally THE ANTIFEDERALISTS xxv-xxx, xcvi-xcix (C. Kenyon ed. 1966) (discussing shared beliefs of political opponents).

25. Concerning the divisions caused by parochialism, see, e.g., H. HENDERSON, *supra* note 4, at 53-54, 60, 113-20 (discussing numerous controversies over the appointments of specific generals to the Continental Army); Letter from William Duer to Robert R. Livingston (May 28, 1777), *reprinted in* LETTERS, *supra* note 22, at 231. Yet these disputes also led to congressional assumption of a conciliating role, exemplified by the resolution: "That a letter be written to General Schuyler, requesting him to recommend, in the strongest terms, harmony between the officers and troops of the different states; [and] to discountenance and suppress all provincial reflections and ungenerous jealousies of every kind . . ." 5 JOURNALS at 591.

26. Letter from Thomas Jefferson to John Adams (May 16, 1777), *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON 19 (J. Boyd ed. 1950).

27. On the positions in the representation debate, see generally Adams, *Notes of Debates in the Continental Congress*, in 6 JOURNALS at 1081; Jefferson, *supra* note 24, at 1104-06; Letter from William Williams to the Governor of Connecticut (July 5, 1777), *reprinted in* LETTERS, *supra* note 22, at 399-400.

28. The delegates to the first Continental Congress, after a debate similar to that in the second, had decided to give each state one vote at least on a temporary basis. The stated ground for this decision was a lack of adequate population data. The result was to do what a majority of the delegates wanted without giving offense to the others. See M. JENSEN, ARTICLES, *supra* note 4, at 57-59.

29. For instance, feeling "that the smaller states should be secured in all questions concerning life or liberty, and the greater ones in all respecting property," Samuel

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according to population. Eventually, a spirit of compromise prevailed: the delegates achieved virtual unanimity³⁰ as the larger states, seeing the need to accommodate the smaller ones,³¹ supported the one-state, one-vote plan.

The process of compromise that marked the drafting debates is clearly visible in the surviving rollcall votes on various other provisions³² and in the congressional appeal to the states for ratification of the Articles.³³ This process was successful in gaining the support of the states. Although nine states formally requested modifications in the Articles,³⁴ eleven ratified them within a year of their promulgation, and all thirteen states ultimately did so.³⁵ A typical response came from the Delaware Council, which felt that the terms of the Articles were "in divers respects unequal and disadvantageous to this state," but ordered its delegates to ratify them because of "the present necessity of acceding to the Confederacy proposed."³⁶

B. *The Text of the Articles*

What is most remarkable about the drafting and ratification of the Articles is that the political community reached broad agreement on a wide variety of provisions that formed the bedrock of a new

Chase of Maryland "proposed that in votes relating to money, the voice of each colony should be proportioned to the number of it's inhabitants" while each state should have only one vote in all other matters. Jefferson, *supra* note 24, at 1102. Roger Sherman of Connecticut and Thomas Jefferson both proposed plans under which either the acquiescence or the approval of a majority of both the states and the national population would be required in certain instances. See Adams, *supra* note 27, at 1081; Letter from Thomas Jefferson to John Adams, *supra* note 26, at 19.

30. In the four recorded rollcall votes on representation, the majority position carried by a total of 40 to 5, see 9 JOURNALS at 779-82. The motion to grant each state one vote carried 10 to 1, *id.*

31. See E. BURNETT, *THE CONTINENTAL CONGRESS* 249 (1941).

32. The records of the sixteen rollcall votes taken on the Articles are to be found in 9 JOURNALS at 779-82, 801, 803-04, 807-08, 835, 843, 849, 850, 879, 896, 934, 935. Their most salient characteristic is their consistent one-sidedness; aggregating the results of all these votes, the majority positions carried by a margin of 125-30. Rollcalls normally indicate questions about which there is some disagreement. Large portions of the Articles were approved without dissent by voice votes. See, e.g., *id.* at 826, 833-34, 848.

33. See 9 JOURNALS at 932-34 (Articles as proposed are compromise, reflecting "disposition to conciliate" in order to secure plan affording "tolerable prospect of a general ratification," and should be examined by legislators in liberal spirit in view of "absolute necessity of uniting").

34. See Harmon, *The Proposed Amendments to the Articles of Confederation* (pts. 1-2), 24 S. ATLANTIC Q. 298, 411 (1925).

35. See 1 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 96-137 (M. Jensen ed. 1976) (giving dates and texts of state requests for modifications and state ratifications) [hereinafter cited as *RATIFICATION*].

36. Delaware Council Resolution of January 28, 1779, reprinted in *id.* at 131.

national federalism.³⁷ The Articles contained significant grants of power and authority to the national government.

The first stone in the federal structure under the Articles was a supremacy clause: "Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which, by this confederation, are submitted to them. And the articles of this confederation shall be inviolably observed by every State. . . ."³⁸ This clause was reinforced by a series of prohibitions designed to prevent the states from interfering with the plenary authority granted Congress over military, diplomatic, and commercial affairs.³⁹

Furthermore, the Articles granted significant financial powers to the national government. Congress assumed the debts previously incurred for national purposes,⁴⁰ and received authority to defray all expenses "that shall be incurred for the common defence or general welfare."⁴¹ To implement this power, the national government was given the exclusive rights to regulate the value of both national and state coinage, "to appropriate and apply the [necessary sums of money] for defraying the public expences," and "to borrow money or emit bills on the credit of the united states."⁴² The Articles also created the basis for a national judicial system.⁴³ They empowered the gov-

37. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 359 (1969) ("What is truly remarkable about the Confederation is the degree of union that was achieved.") Although recent writers occasionally have taken this view, see, e.g., Young, *The Articles of Confederation and Perpetual Union*, 63 A.B.A.J. 1572 (1977), the Articles are conventionally regarded as having created "a confederation so loose that it had no power," Wright, *The Relation of Law in America to Socio-Economic Change*, 28 ARK. L. REV. 440, 450 (1975); see, e.g., 1 J. HARE, *AMERICAN CONSTITUTIONAL LAW* 16-18 (1889); 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 116-18 (P. Bradley ed. 1945). In setting forth the concept of a national federalism based on deference to national power in certain areas and recognition of a common citizenship, this Note suggests not only that the Confederation government did have power, but also that the existence and exercise of that power had important implications for the future of the country's development.

38. ARTICLES art. XIII, 9 JOURNALS at 925; cf. U.S. CONST. art. VI, cl. 2 (supremacy clause). The supremacy clause of the Articles was fully as effective in requiring state judges to follow national policy in those matters committed to national control as is the supremacy clause of the Constitution. See pp. 153-54 & note 77 *infra*.

39. See pp. 150-54 *infra*. The prohibitions on state action are to be found in ARTICLES art. VI, 9 JOURNALS at 911-13.

40. ARTICLES art. XII, 9 JOURNALS at 924; see J. FISKE, *supra* note 8, at 101 ("[B]y assuming all debts contracted by Congress prior to the adoption of the articles, and solemnly pledging the public faith for their payment, it was implicitly declared that the sovereignty here accorded to Congress was substantially the same as that which it had asserted and exercised ever since the severing of the connection with England.")

41. ARTICLES art. VII, 9 JOURNALS at 913; see p. 161 & note 132 *infra*.

42. ARTICLES art. IX, 9 JOURNALS at 919-20; see p. 154 *infra*.

43. For a general discussion of this system, see Sergeant, *A Brief Sketch of the National Judiciary Powers Exercised in the United States, From the First Settlement of the Colonies to the Time of the Adoption of the Present Federal Constitution*, in P. DU PONCEAU, *A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES* 135-58 (Philadelphia 1824).

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ernment to set up "courts for the trial of piracies and felonies committed on the high seas," and also to establish courts with appellate jurisdiction over all prize cases.⁴⁴

In addition to reposing important governmental powers at the national level, the Articles sought to create a system of interstate cooperation and comity. The two most important provisions in this regard were the privileges-and-immunities and the full-faith-and-credit clauses,⁴⁵ provisions that created a "universal intercitizenship" that "gave reality to the nascent and feeble Union."⁴⁶ Congress, moreover, was made "the last resort on appeal in all disputes . . . between two or more states, concerning boundary, jurisdiction or any other cause whatever."⁴⁷

II. Institutional Federalism: Substantive Powers and the Development of Government Machinery, 1777-1789

The conventional view is that American political history from the Declaration of Independence to the Constitution was dominated by "the complete inability of the government set up by the Articles of Confederation to function."⁴⁸ This view ignores effective exercises of national power that took place during this period and the evolution of institutions extending beyond the text of the Articles. Congress and the state judiciaries often read the Articles broadly and expansively in response to the practical needs of the country. The institutions created by Congress exercised wide powers that furthered national unity, and the states acquiesced.

A. National Powers and Their Expansion

Even before actual fighting with the British began, the Continental Congresses assumed broad military and administrative powers⁴⁹ with-

44. ARTICLES art. IX, 9 JOURNALS at 916. For a discussion of how Congress used these powers, see pp. 158-59 & notes 114-16 *infra*.

45. See p. 145 *supra* & pp. 159-60 *infra*; THE FEDERALIST No. 42 (J. Madison) (privileges-and-immunities clause); Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 33-53 (1957) (full-faith-and-credit clause).

46. J. FISKE, *supra* note 8, at 97.

47. ARTICLES art. IX, 9 JOURNALS at 916; see pp. 155-56 *infra*.

48. C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY 16 (1922); see Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 589 (1973); O'Brien, *The Executive and the Separation Principle at the Constitutional Convention*, 55 MD. HIST. MAGAZINE 201, 205 (1960).

49. See G. WOOD, *supra* note 37, at 355.

out express legal authority,⁵⁰ and afterwards these developments continued.⁵¹ Congress construed its authority broadly within the area of its delegated powers, especially in the war, foreign affairs, and fiscal fields, and continued to assume powers that had not been delegated. According to Madison, a catalogue of congressional actions that were "violations of their chartered authorities" under the Articles "would not a little surprise those who have paid no attention to the subject."⁵² Informed contemporaries⁵³ and the states themselves recognized this developmental process, and most supported it because they agreed upon the desirability of a national confederation and the practical necessity for its expansive assertions of power.⁵⁴

1. *The War Power*

The Revolutionary War was the most important basis for the assertion of broad congressional authority. In prosecuting the war, the national government established practices and institutions that continued long after the fighting had stopped. Congress took those actions it deemed necessary, notwithstanding its lack of formal power, and insisted that its judgment on military matters should be final.⁵⁵ For example, the congressional decision in 1781 to authorize the

50. See Jensen, *TESTAMENTS*, *supra* note 2, at 61-62; *cf.* *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 80-82 (1795) (league existed among states prior to Articles and Congress exercised extensive revolutionary powers on its behalf).

51. See 2 I. BRANT, *JAMES MADISON* 129 (1948) (listing wartime actions showing expansive congressional interpretation of general welfare).

52. *THE FEDERALIST* No. 42 (J. Madison) 280 (J. Cooke ed. 1961).

53. See Letter from Thomas Burke to Governor Caswell (Mar. 11, 1777), *reprinted in* 11 *RECORDS*, *supra* note 24, at 417-18, 421 [hereinafter cited as *Burke-Caswell Letter*]; Letter from Thomas Paine to Robert Morris (Nov. 20, 1782), *reprinted in* *COLLECTIONS* 1878, *supra* note 24, at 486.

54. See, e.g., Rosenberg, *William Paterson: New Jersey's Nation-Maker*, 85 N.J. HIST. 7, 23-24 (1967) (Paterson and other believers in states' rights still saw need for strong confederation); Commentary by "A True Patriot," *New Jersey Gazette*, April 11, 1781, *reprinted in* *DOCUMENTARY HISTORY*, *supra* note 2, at 419 (central government needs greater authority); Letter from Abraham Baldwin to Charles Thomson (Feb. 14, 1786), *reprinted in* *COLLECTIONS* 1878, *supra* note 24, at 202-04 (Middle Atlantic and Southern states are favorably inclined toward increasing strength of union).

The state of Massachusetts prosecuted in its own name sedition and treason against the United States, granted agents of the central government immunity from suit on official contracts, and shaped its rules of law to effectuate the national power to issue currency. See Nelson, *The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws* 18 nn.67 & 68, 20 n.75 (1969) (unpublished essay on file with *Yale Law Journal*) (citing cases); *cf.* *Respublica v. Sweers*, 1 U.S. (1 Dall.) 41 (Pa. 1779), *discussed in* note 119 *infra* (state prosecution involving forging of receipts with intent to defraud United States).

55. See *Burke-Caswell Letter*, *supra* note 53, at 421 ("I am often suggesting to Congress that the Civil Power of the States is the best instrument for calling forth their proportion of exertions . . . but they hear with reluctance any thing that looks like the interposition of such a power in military affairs . . .")

seizure of supplies by the Continental Army has been called "one of the decisive steps of the war,"⁵⁶ yet the impressment measure Congress passed was not authorized by any specific provision of the Articles and its terms directly contravened a number of state laws.⁵⁷ Similarly, the evolution in form and function of the congressional "Board of War and Ordnance" from 1776 to 1787⁵⁸ found its justification in practical rather than legal considerations.

As a general rule, the states cooperated in congressional extension of the war power. Many state courts recognized congressional powers in such military matters as prizes and governance of the army.⁵⁹ For instance, the Pennsylvania Supreme Court upheld the power of Congress to "direct the removal of any articles that were necessary to the maintenance of the Continental army, or useful to the enemy," because Congress was "vested with the powers of peace and war."⁶⁰ The state legislatures acquiesced in the broad jurisdiction of the military justice system. Although the basis in the Articles for such a power was questionable,⁶¹ federal military courts exercised jurisdiction not only over military and nonmilitary offenses of soldiers, but also over spying and other illicit conduct by civilians within war zones.⁶² The nationwide use of such authority supplies one example of the way the Continental Army, despite the political disputes it sometimes engendered,⁶³ served as an important unifying force.⁶⁴

56. 2 I. BRANT, *supra* note 51, at 117.

57. *See id.* at 114-17. In 1776, acting on its own authority, Congress had given General Washington the power to impress supplies. It then asked the states to pass laws authorizing impressments. Not liking the resulting state legislation, which seemed too restrictive, Congress passed the 1781 resolution to override it.

58. *See p. 157 infra.*

59. *See Nelson, supra* note 54, at 19 & nn.73-74.

60. *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 362 (Pa. 1788).

61. Dickinson in preparing his draft of the Articles apparently questioned the propriety of granting to the national government "[t]he power of arresting and trying persons in the Service of the United States, in any Colony, without applying to the Government of such Colony." 5 JOURNALS at 550 n.2. The only authority to be found for the actions actually taken is ARTICLES art. IX, 9 JOURNALS at 919 (Congress empowered to make "rules for the government and regulation of the . . . land and naval forces").

62. Brief for the United States at 35-42, *O'Callahan v. Parker*, 395 U.S. 258 (1969) (listing 70 instances prior to 1783 where courts martial assumed jurisdiction of apparently nonmilitary criminal offenses committed by military personnel); Nelson, *supra* note 54, at 20 & nn.77-80 (citing cases).

63. *See, e.g.,* note 25 *supra*; 23 JOURNALS at 624-25, 629-31 (friction over nonpayment of New Jersey troops).

64. *See* H. HENDERSON, *supra* note 4, at 325 ("The army was a nationalizing force, both because it won the war and because of its unhappy status of being a public creditor."); H. WARD, *THE DEPARTMENT OF WAR 1781-1795*, at 41 (1962) (two favorite toasts in the army were "A hoop to the barrel" and "Cement to the Union").

2. Foreign Affairs Powers

The pre-Constitution Congress exercised considerable power in foreign affairs, and established enduring principles and institutions of national diplomacy.⁶⁵ For example, representatives of Congress asserted in international negotiations that the United States collectively, and not individually, had succeeded to all the sovereign rights of the British Crown. Although not directly adopted by Congress,⁶⁶ the idea survived as "a premise of infinite possibilities."⁶⁷ It not only framed the national discussion of westward expansion,⁶⁸ but also seems to have served as a source of substantive authority in foreign affairs matters.

Certainly Congress asserted broad authority to make international agreements and enforce them directly against individual Americans. In proclaiming the 1783 treaty of amity and commerce with Sweden,⁶⁹ for example, Congress "enjoined and required" all the citizens and inhabitants of the United States "to govern themselves strictly in all things according to the stipulations" of the treaty.⁷⁰ In 1781 Congress, apparently basing its action on a combination of its war powers

65. But see, e.g., Olson, *The Sonderstrom Incident: A Reflection Upon Federal-State Relations Under the Articles of Confederation*, 55 N.Y. HIST. SOC'Y Q. 109 (1971) (conventional view that national foreign relations power during Articles Period could be and was frustrated by states).

66. See 18 JOURNALS at 936 (letter of instructions to John Jay, Minister to France and Spain); Letter from Robert Livingston to Benjamin Franklin (Jan. 7, 1782), reprinted in 5 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 89 (F. Wharton ed. 1889) [hereinafter cited as CORRESPONDENCE]. The inclusion of this claim in a proposed letter to the American peace negotiators triggered a controversy in Congress in 1783, but the legislators did not push the discussion to any resolution. See COLLECTIONS 1878, *supra* note 24, at 139-45 (notes of this debate by Secretary of Congress Charles Thomson).

67. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 528 (1925). The Supreme Court has recently approved this view of the history. In 1975, the Court confirmed the report of a special Master who had declared "that sovereignty and dominion passed after independence to the national government in which the powers of external sovereignty were reposed and not to the . . . States." Report of Albert B. Maris, Special Master at 63, *United States v. Maine*, 420 U.S. 515 (1975); see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936) ("the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America").

68. See COLLECTIONS 1878, *supra* note 24, at 145-50 (report by Secretary Thomson of extensive debate on national sovereignty provoked by petition from residents of "Kentuckey" seeking statehood); Welling, *The States'-Rights Conflict Over the Public Lands*, 3 PAPERS AM. HIST. A. 411, 416-22 (1889), reprinted in J. WELLING, ADDRESSES, LECTURES AND OTHER PAPERS 208-15 (1904).

69. 8 Stat. 60, T.S. No. 346 (1783).

70. 25 JOURNALS at 614. Eleven international agreements entered into by the United States during the Articles Period, including treaties of friendship with the Netherlands, Prussia, and Morocco, are to be found at 8 Stat. 6-115.

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and its power to enter into commercial treaties,⁷¹ had enacted an ordinance imposing an embargo on all trade with British subjects and warning that the national government would punish individual violators.⁷²

In implementing this expansive conception of the national foreign affairs power, Congress was aided by an embryonic federal bureaucracy⁷³ and, more importantly from a practical standpoint, by deference from the states and their courts.⁷⁴ Courts in Massachusetts, for example, applied the peace treaty with Great Britain⁷⁵ in full, where its terms were clear, to override conflicting state policies.⁷⁶ The celebrated New York case of *Rutgers v. Waddington*,⁷⁷ decided in 1784, probably represented the prevailing view:

The foederal compact hath vested Congress with full and exclusive powers to make peace and war. This treaty [with Great Britain] they have made and . . . we are clearly of [the] opinion

71. On the role of the war power in the embargo, see 2 I. BRANT, *supra* note 51, at 109, 111. For the power to enter into commercial treaties, see ARTICLES art. IX, 9 JOURNALS at 915.

72. See 19 JOURNALS at 315-16 (Americans are "strictly enjoined and required" to observe embargo and "will answer the same at their peril").

73. See pp. 157-58 *infra*.

74. Several years later, Secretary of State Jefferson noted the acceptance by the states of the superiority of "treaties made by Congress according to the confederation" over "the laws of the States." Letter from Thomas Jefferson to George Hammond (May 29, 1792), reprinted in 1 AMERICAN STATE PAPERS, FOREIGN RELATIONS 209 (Washington 1833) (quoting state statutes and official documents in support of contention). The strongest congressional assertion of the superiority of treaties to state legislation came in a 1787 circular letter to the states reprinted in 32 JOURNALS at 177-84.

75. 8 Stat. 80, T.S. No. 104 (1783), reprinted in DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY 1606-1926, at 204 (W. MacDonald ed. 1926). Some of the provisions regularly involved in lawsuits were Article IV, providing that creditors on either side should meet with no legal impediments to the recovery of debts previously contracted; Article V, stipulating, *inter alia*, that all persons having any interests in confiscated lands should meet with no legal impediment in the prosecution of their rights; and Article VI, barring future prosecutions or confiscations against any person by reason of the part he may have taken in the war, and requiring the release of all those in custody on such charges.

76. See Nelson, *supra* note 54, at 25-29.

77. See 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 289-419 (J. Goebel, Jr. ed. 1964) (including transcript of opinion and documentation on case). The case was a statutory trespass action brought to recover damages for defendant's occupation of plaintiff's property during the time New York City was in British hands. Alexander Hamilton represented the defendant. The Mayor's Court of the City of New York held that part of the action was barred by the provisions of Article VI of the peace treaty with Great Britain, see note 75 *supra*, the authorizing state statute notwithstanding. See J. FISKE, *supra* note 8, at 135 (case important for implicit assertion of rights of United States against legislature of single state); Letter from Alexander Hamilton to Thomas Jefferson (Apr. 19, 1792), reprinted in 1 AMERICAN STATE PAPERS, *supra* note 74, at 232 (Hamilton's view of case); cf. *Respublica v. Gordon*, 1 U.S. (1 Dall.) 233 (Pa. 1788) (refusing to sustain suggestion of attainder filed against defendant, because doing so "would contravene an express article in the treaty").

that no state in this union can alter or abridge, in a single point, the foederal articles [of confederation] or the treaty.⁷⁸

3. *Financial Powers*

Financial problems plagued the new nation, and, lacking a dependable source of revenue, the Confederation never solved its money troubles.⁷⁹ Nonetheless, on two occasions, twelve of the thirteen states agreed to tariff proposals that would have provided such revenue.⁸⁰ These plans probably would have made the Confederation government fiscally viable, because the mechanisms set up under the Articles for handling the funds that did come in were virtually identical to those existing in the early years under the Constitution.⁸¹ One such mechanism, although it was of greater symbolic than practical significance,⁸² was the Bank of North America, which Congress incorporated in 1781 in an effort to ease the wartime shortage of capital.⁸³ Although this action was assailed as wholly unauthorized by the Articles, its supporters considered it justified by the federal government's "general powers . . . resulting from the union of the whole."⁸⁴

4. *Interstate Powers*

The Confederation government also exercised a variety of powers relating to problems that the states could not solve individually.⁸⁵

78. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 77, at 413. The court did reserve power to determine "the operation and effects of the treaty" by "a fair and reasonable construction" of it.

79. See generally McLaughlin, *The Articles of Confederation*, in *ESSAYS ON THE MAKING OF THE CONSTITUTION* 57-60 (L. Levy ed. 1969).

80. See H. HENDERSON, *supra* note 4, at 325-38. Interestingly, Virginia initially approved the first revenue-raising plan, which was proposed as an amendment to the Articles, and then effectively killed it by voting to reverse that approval. See *id.* at 327-28. This would seem to be a precedent for the validity of a state legislature's rescission of its ratification of a constitutional amendment.

81. See generally p. 158 *infra*.

82. Cf. F. McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790*, at 36 (1965) (Bank could help state governments put their finances on an orderly basis, lower prices for imported goods, help manufacturers and farmers, and serve as stabilizing mechanism by controlling money supply).

83. One strong additional motivation for the formation of the Bank is reflected in Robert Morris's desire "to unite the several States more closely together in one general money connexion, and indissolubly to attach many powerful individuals to the cause of our country by the strong principle of self-love and the immediate sense of private interest." Letter from Robert Morris to John Jay (July 13, 1781), *reprinted in* 4 CORRESPONDENCE, *supra* note 66, at 563.

84. J. WILSON, *Considerations on the Bank of North America*, in 2 THE WORKS OF JAMES WILSON 829 (R. McCloskey ed. 1967).

85. Congress delegated an appreciable portion of this job to its President, an officer who sometimes had considerable political influence. See generally J. SANDERS, *THE PRESIDENCY OF THE CONTINENTAL CONGRESS 1774-89: A STUDY IN AMERICAN INSTITUTIONAL HISTORY* (2d printing, revised 1930); Klingelhofer, *The Presidents of the United States in Congress Assembled* (pts. 1-4), 28 MANUSCRIPTS 2, 83, 171, 255 (1976).

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One important set of such powers grew out of the formation of a national domain⁸⁶ as states with extensive claims to western lands ceded them to the national government in the interests of interstate harmony. Control over the national domain—an area larger than any existing state—gave Congress an important source of wealth,⁸⁷ political patronage, power, and prestige. Although cession of the western lands was only achieved after considerable political bickering,⁸⁸ this authority served as a powerful unifying force.⁸⁹

Congressional possession of the territory also led to the assertion of broad powers to govern it. Despite the lack of any grant of such a power in the Articles,⁹⁰ Congress passed three major ordinances concerning the territories between 1784 and 1787.⁹¹ In these enactments, Congress strongly asserted its sole authority over these areas,⁹² and set up a detailed plan of territorial governance.⁹³ Congress's assertion of its implied powers was thus not confined to fields in which it held delegated authority. In order to extend to the western lands "the fundamental principles of civil and religious liberty" on which the original states had been erected, Congress assumed the power "to fix and establish those principles as the basis of all laws, constitutions, and governments" in those regions.⁹⁴

The Congress was also active in settling disagreements among the states. The Articles set out in considerable detail the procedures for

86. For an explanation of the various cessions of state lands by which Congress came into the control of these areas, see Jensen, *The Creation of the National Domain, 1781-1784*, 26 *MISS. VALLEY HIST. REV.* 323 (1939-40).

87. See *THE FEDERALIST* No. 38 (J. Madison); J. Davis, *supra* note 4, at 118, 155, 455 n.139; Letter from John Adams to Mr. Calkoen (Oct. 26, 1780), *reprinted in* 7 *THE WORKS OF JOHN ADAMS* 298 (C. Adams ed. Boston 1854).

88. See M. JENSEN, *ARTICLES*, *supra* note 4, at 198-224.

89. See H. HENDERSON, *supra* note 4, at 259 ("the West constituted a lure holding the Confederation together, for only a united confederation could successfully exploit its resources"); Hutchinson, *Unite to Divide; Divide to Unite: The Shaping of American Federalism*, 46 *MISS. VALLEY HIST. REV.* 3, 9 (1959) (West became chief link between states because it instilled confidence in payment of national debt, presented foreign issues requiring national response, and caused expansion of congressional authority).

90. See *THE FEDERALIST* No. 38 (J. Madison); J. FISKE, *supra* note 8, at 221-23; Hutchinson, *supra* note 89, at 10-11.

91. Ordinance for the Government of Western Territory (Apr. 23, 1784), *reprinted in* *RATIFICATION*, *supra* note 35, at 150-53; Ordinance for the Sale of Western Lands (May 20, 1785), *reprinted in id.* at 156-63; Ordinance for the Government of the Territory of the United States North-West of the River Ohio (July 13, 1787), *reprinted in id.* at 168-74 [hereinafter cited as Northwest Ordinance]. See generally H. HENDERSON, *supra* note 4, at 371-76.

92. See Ordinance for the Government of Western Territory, *supra* note 91, at 151-52.

93. See Northwest Ordinance, *supra* note 91, at 169-71 (providing *inter alia* for appointment of numerous officials and establishment of territorial legislature, and enunciating certain fundamental principles to be observed in territory).

94. Northwest Ordinance, *supra* note 91, at 172.

Congress to follow in deciding any dispute between states,⁹⁵ but these formal arrangements were fully employed only once.⁹⁶ Congress usually would intervene in interstate disputes to resolve them without litigation.⁹⁷ The paucity of formal proceedings thus hid a substantial amount of national activity in this area.

More visible was the post office, which developed in response to the government's communication needs and became an important centralizing institution. The leaders of the Revolution recognized early the importance of being able to communicate effectively with their sympathizers in other colonies,⁹⁸ and the Continental Congress appointed its first postmaster nine months before the Declaration of Independence.⁹⁹ Under authority granted by the Articles,¹⁰⁰ Congress spurned the cheaper method of sending the mail by horse and rider and set up postal routes that would subsidize certain stagecoach services, in order to facilitate freer passage among the states.¹⁰¹ By the time of the drafting of the Constitution, national authority over the growing¹⁰² postal service was vigorously defended as increasing national cohesiveness.¹⁰³

B. *The Machinery of Federalism: Administrative and Judicial Implementation of National Power*

During the 1770s and 1780s, a federal administrative structure began to emerge, a national court system started to function, and state courts began to take measures giving reality to the ideas of comity expressed in the Articles. The Articles Period thus saw the develop-

95. See ARTICLES art. IX, 9 JOURNALS at 916-18.

96. See Taylor, *Trial at Trenton*, 26 WM. & MARY Q. 521 (3d ser. 1969). The dispute was between Pennsylvania and Connecticut and concerned title to the Wyoming Valley. After a proceeding with all the earmarks of a common law trial, the commissioners chosen to hear the case rendered judgment in favor of Pennsylvania, "and the government of Connecticut submitted as gracefully as possible." J. Fiske, *supra* note 8, at 152.

97. Seven such instances are discussed in Davis, *Federal Courts Prior to the Adoption of the Constitution*, 131 U.S. 1-lxiii app. (1889). See 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 182-95 (1971); J. Welling, *Land Politics of the United States*, in ADDRESSES, LECTURES AND OTHER PAPERS, *supra* note 68, at 159.

98. See Vermilye, *The Early New York Post Office*, 13 MAGAZINE AM. HIST. 113, 118-19 (1885).

99. See 2 JOURNALS at 208-09.

100. ARTICLES art. IX, 9 JOURNALS at 919.

101. See Holmes, *Shall Stagecoaches Carry the Mail?—A Debate of the Confederation Period*, 20 WM. & MARY Q. 555, 566, 573 (3d ser. 1963).

102. See M. JENSEN, NATION, *supra* note 4, at 363-64.

103. See THE FEDERALIST No. 42 (J. Madison) 287 (J. Cooke ed. 1961); Rush, Address to the People of the United States (1787), reprinted in PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA 403 (H. Niles ed. Baltimore 1822).

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ment of a network of important links binding the country together and providing a permanent basis for national governance.

1. *The Embryonic Federal Administration*

To enforce its substantive powers, Congress in the 1780s created the beginnings of a federal bureaucracy. Although this administrative framework was never more than rudimentary during the Articles Period, it was a significant element of the government of national federalism. The growth of a bureaucracy represented an expansive interpretation of national powers and a functional implementation of those powers on a small, but growing, scale.

With respect to the congressional powers over war, foreign affairs, and finance, a clear pattern emerged. In each case, Congress first established a standing committee of its own members to deal with the area, but ultimately delegated most of the burden to an outside administrative department created for the purpose. For example, Congress in June 1776 began to organize its exercise of war powers by creating a standing committee, the "Board of War and Ordnance." When the Board proved incapable of staying abreast of military affairs,¹⁰⁴ a "Board of War" consisting of three persons not members of Congress was established in October 1777 and vested with important administrative duties and substantive powers.¹⁰⁵ In 1781, the legislators assigned many of this Board's duties to a single "Secretary at War."¹⁰⁶ During the remainder of the Articles Period, the incumbents of the post gradually expanded their authority and, in addition to auditing military accounts¹⁰⁷ and superintending military justice, took control over such matters as administering the lands granted as bounties to veterans and directing Indian affairs in the territories governed directly by Congress.¹⁰⁸

Similarly, the legislative committee formed in 1775 for the "purpose of corresponding with our friends in . . . other parts of the

104. H. WARD, *supra* note 64, at 2-3 (1962).

105. See 9 JOURNALS at 818-20. Among the many powers and duties of the Board were to "superintend the raising, recruiting, and despatching, of the land forces" of the United States, to "lay before Congress proper and seasonable estimates" of the military supplies that would be needed, "and, in general, to superintend the several branches of the military department." *Id.* at 819. The authorizing resolution contemplated that the Board members themselves would request legislation from Congress in order to obtain such greater powers as they might consider necessary. See *id.*

106. See 19 JOURNALS at 126-27. This assignment took place three weeks before the Articles went into effect, and was based on the belief that too much of the work of the Board's various incarnations was still reviewable by Congress, thus clogging the administrative machinery. See H. WARD, *supra* note 64, at 5-6.

107. See H. WARD, *supra* note 64, at 83-88.

108. See M. JENSEN, NATION, *supra* note 4, at 365.

world"¹⁰⁹ was replaced in 1781 by a regular "Department of Foreign Affairs" to conduct the country's diplomatic business. By 1782 the duties of the Secretary of Foreign Affairs were quite extensive and included communicating to the states complaints lodged against them by other states or citizens of other states.¹¹⁰

The administration of financial affairs displayed the same pattern. At first, Congress itself, through a committee, processed governmental disbursements; but even while this system lasted, it became necessary to hire a full-time staff to deal with the flow of business. Through detailed legislation enacted in 1779, Congress delegated many of its financial functions to a Treasury Board primarily composed of administrators who were not members of Congress.¹¹¹ This significant step made the Treasury a more independent agency and opened the way for the creation of a class of professional officeholders on the policymaking level.¹¹² The department underwent a number of structural changes during the 1780s, each of which had the effect of increasing its functions, and by 1789 it had established a set of systematic accounting procedures¹¹³ that was to endure well into the next century.

2. *The Judicial System*

The Articles authorized Congress to establish a national appellate tribunal to decide maritime cases, a power the legislators themselves had exercised since 1775.¹¹⁴ Some maritime cases were heard on the national level over an eleven-year period, including about forty-nine that resulted in outright reversals of the state court.¹¹⁵ Execution of

109. 3 JOURNALS at 392. See also 5 JOURNALS at 425 (formation of foreign alliances included in Lee's motion on independence).

110. See Guggenheimer, *The Development of the Executive Departments, 1775-1789*, in *ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD* 162 (J. Jameson ed. 1889).

111. See 14 JOURNALS at 903-08.

112. See H. HENDERSON, *supra* note 4, at 268.

113. See M. JENSEN, *NATION*, *supra* note 4, at 371-74.

114. Congress resolved in November 1775 that it would begin hearing such cases, see 3 JOURNALS at 374, and the resolution was carried into effect the next year, see H. BOURGUIGNON, *THE FIRST FEDERAL COURT* 48-50 (1977). In March 1776, Congress also began to authorize and control privateering. See 4 JOURNALS at 230-32, 253-54. Under ARTICLES art. IX, 9 JOURNALS at 916, Congress was given the power of erecting "courts for the trial of piracies and felonies committed on the high seas." Congress exercised this prerogative on April 5, 1781, see 19 JOURNALS at 354-56, by designating certain state judges to sit on such cases.

115. See H. BOURGUIGNON, *supra* note 114, at 208, 217. Congressional transformation of the tribunal from a standing committee to a formal and independent court took place almost a year before ratification of the Articles authorized it. See *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54 (1795) (holding that action had nevertheless been proper). See generally Davis, *supra* note 97, at xix-xlix (includes list of 104 decided admiralty cases). Certain of the court's opinions are printed at 2 U.S. (2 Dall.) 1-42.

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the national judgment was, however, generally a routine matter.¹¹⁶

State courts in the Articles Period generally gave effect to the Articles' provisions for interstate comity.¹¹⁷ These provisions, argued before courts¹¹⁸ and construed and applied as authoritative by judges of the period, led to cases reaffirming national sovereignty¹¹⁹ and foreshadowing many aspects of later constitutional development.¹²⁰

Much litigation focused on the full-faith-and-credit clause, as judgment creditors from one state frequently sought to bring suit on their judgments in the courts of other states.¹²¹ State judges regularly gave "full credence . . . to judgments of the courts in any of the United States"¹²² so long as both parties had been within the jurisdiction of the court rendering judgment and had received or could have

116. See H. BOURGUIGNON, *supra* note 114, at 236. There was substantial agreement that the area was a proper one for the application of a uniform national law. Indeed, most states explicitly instructed their admiralty judges "to use the resolves of Congress and the law of nations in preference to state laws as the legal norms for deciding cases of capture." *Id.* at 75. Congress expressly resolved, on December 4, 1781, that the "rules of decision in the several courts shall be the resolutions and ordinances of the United States in Congress assembled, public treaties when declared to be so by an act of Congress, and the law of nations, according to the general usages of Europe," 21 JOURNALS at 1158 (basing action on ARTICLES art. IX, 9 JOURNALS at 915).

117. See p. 149 *supra*.

118. For example, in urging the Pennsylvania Supreme Court to enforce a Massachusetts attachment under the full-faith-and-credit clause of the Articles, counsel in one case argued that the Articles had created a union stronger than any known to history and that in adopting the clause "the authors of the system intended to make a judgment in *New-Jersey* as binding in *Pennsylvania*, as if it had been obtained in *any County of this State*." *Phelps v. Holker*, 1 U.S. (1 Dall.) 261, 263 (Pa. 1788).

119. See, e.g., *Respublica v. Sweers*, 1 U.S. (1 Dall.) 41 (Pa. 1779). The defendant argued that he could not have defrauded the United States because, in 1777 and 1778, they were not a corporate entity "known in law." *Id.* at 44. His conviction was upheld, with the court writing: "From the moment of their association, the *United States* necessarily became a body corporate. . . ." *Id.*

120. For example, there are strong Eleventh Amendment undertones in the case of *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 note (Philadelphia C.P. 1781), in which the plaintiff was held unable to attach in Pennsylvania certain property belonging to the State of Virginia, in satisfaction of a debt.

Similarly, a dispute involving due process, judicial review, and privileges and immunities arose in *Bayard v. Singleton*, 1 N.C. (Tay.) 5 (Super. Ct. 1787). In this ejectment action, the defendant claimed the benefit of a law providing that anyone who lived on a confiscated estate needed only to file proper proof of that fact in order to win automatically in any challenge to his title. The plaintiffs, represented by James Iredell and others, insisted that the law unconstitutionally deprived them of the right to trial by jury. The court upheld this position, saying, "these plaintiffs being citizens of one of the United States, or citizens of this State, by the confederation of all the States; which is to be taken as a part of the law of the land, unrepealable by any act of the General Assembly," could not be deprived by statute of the right to a jury trial. *Id.* at 7.

121. Plaintiffs seemed undeterred by the fact that during the drafting of the Articles the Congress had defeated by a vote of 5-2 a proposal to add to the clause an explicit statement that "an action of debt may lie in a court of law of any State for the recovery of a debt due on a judgment of any court in any other State." 9 JOURNALS at 895; cf. note 148 *infra* (incorporation power presented similar situation under Constitution).

122. *Kibbe v. Kibbe*, 1 Kirby 119, 126 (Conn. Super. Ct. 1786).

received a fair trial.¹²³ Thus the full-faith-and-credit clause of the Articles allowed a debtor sued in Pennsylvania to defend successfully on the basis of his discharge under the insolvency laws of Maryland.¹²⁴ Similarly, Massachusetts courts entertained suits on out-of-state judgments and, when appropriate, gave effect to out-of-state statutes.¹²⁵

III. Constitutional Federalism: Governmental Continuity, 1777-1789, and Its Implications

The continuing growth of the authority of the national government in the Articles Period provides a useful context for examining the drafting and adoption of the Constitution. During the decade before 1787, the major principles of state deference to national power in certain areas and recognition of national citizenship were established, and major organs of the national government were created. Thus the theory and the practice of the period laid the foundation for the Constitution.¹²⁶

A. Textual Continuities

Numerous provisions of the Constitution were both conceptual and textual descendants of provisions of the Articles or enactments during the Articles Period. For example, over half of the clauses in Article I, Section 8 of the Constitution, detailing the enumerated powers of Congress, can be traced back to specific provisions of the Articles.¹²⁷

123. See *id.* (plaintiff's attempt to recover on a Massachusetts judgment fails because Massachusetts court was without personal jurisdiction over defendant); *cf.* *Phelps v. Holker*, 1 U.S. (1 Dall.) 261 (Pa. 1788) (where plaintiff's Massachusetts judgment was valid there only to extent of property actually seized, it would be given no greater effect in Pennsylvania).

124. *Millar v. Hall*, 1 U.S. (1 Dall.) 229 (Pa. 1788); *accord*, *Thompson v. Young*, 1 U.S. (1 Dall.) 294 (Philadelphia C.P. 1788). It seems clear that these cases overruled *James v. Allen*, 1 U.S. (1 Dall.) 188 (Philadelphia C.P. 1786), which reached an opposite result.

125. See *Nelson*, *supra* note 54, at 21.

126. See R. BROWN, *REINTERPRETATION OF THE FORMATION OF THE AMERICAN CONSTITUTION* 1-2 (1963) ("The Constitution did not spring full-blown from the pens of the Founding Fathers as something completely new in government . . . [W]e must consider it as the product of a long evolutionary development.")

127. These powers include those relating to: borrowing (*compare* U.S. CONST. art. I, § 8, cl. 2 *with* ARTICLES art. IX, 9 JOURNALS at 920); Indian affairs (*compare* U.S. CONST. art. I, § 8, cl. 3 *with* ARTICLES art. IX, 9 JOURNALS at 919); commercial regulation (*compare* U.S. CONST. art. I, § 8, cl. 5 (power "[t]o coin Money, regulate the Value thereof, . . . and fix the Standard of Weights and Measures") *with* ARTICLES art. IX, 9 JOURNALS at 919 ("power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states; fixing the standard of weights and measures")); the post office (*compare* U.S. CONST. art. I, § 8, cl. 7 *with* ARTICLES art. IX, 9 JOURNALS at 919); creation of inferior courts (*compare* U.S. CONST. art. I, § 8, cl. 9 *with* ARTICLES art. IX, 9 JOURNALS at 916); international law offenses (*compare* U.S. CONST. art. I, § 8, cl. 10

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Similarly, the congressional power “[t]o make Rules for the Government and Regulation of the land and naval Forces”¹²⁸ was added to the Constitution “from the existing Articles of Confederation,”¹²⁹ and the authority “to borrow money or emit bills on the credit of the United States”¹³⁰ was embodied in the right “[t]o borrow Money on the credit of the United States.”¹³¹

Madison cited the Articles provision giving Congress the power to defray from the common treasury all “expences, that shall be incurred for the common defence or general welfare”¹³² when he argued in support of the general welfare clause of the Constitution empowering Congress “to pay the Debts and provide for the common Defence and general Welfare of the United States.”¹³³

Both the Articles and the Constitution barred the states from interfering with the exercise of the enumerated national powers. Many of the restraints on state action in the fields of war and foreign affairs found in the Constitution, such as those on authorizing privateering or entering into foreign alliances, had close textual ties to the corresponding provisions of the Articles.¹³⁴ Similarly, safeguards for national deliberations from outside interference found their inspiration in the Articles.¹³⁵ The restraints on national power in the

(power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”) with ARTICLES art. IX, 9 JOURNALS at 916 (“appointing courts for the trial of piracies and felonies committed on the high seas”); and several aspects of military affairs (*compare* U.S. CONST. art. I, § 8, cls. 11, 13, 14, 16 (powers to declare war, maintain navy and regulate armed forces) with ARTICLES art. IX, 9 JOURNALS at 915-20 (granting Congress same powers)).

Although this list of textual similarities could be appreciably extended by considering other sections of the Constitution, the powers conferred in the Articles were often not as extensive as those conferred in the corresponding clauses of the Constitution. Moreover, numerous provisions of the Constitution—including the very significant ones creating the Presidency and granting a national taxing power—had no counterparts in the Articles.

128. U.S. CONST. art. I, § 8, cl. 14.

129. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 330 (1911); *see* ARTICLES art. IX, 9 JOURNALS at 919.

130. ARTICLES art. IX, 9 JOURNALS at 920.

131. U.S. CONST. art. I, § 8, cl. 2.

132. ARTICLES art. VIII, 9 JOURNALS at 913; *see* THE FEDERALIST No. 41 (J. Madison) 278 (J. Cooke ed. 1961). During the Articles Period Congress recommended to the states an amendment to the Articles relating to the apportionment of charges incurred for the general welfare. The proposed language was closely followed in the corresponding provision of the Constitution. *Compare* 24 JOURNALS at 260-61 with U.S. CONST. art. I, § 2, cl. 3.

133. U.S. CONST. art. I, § 8, cl. 1.

134. *Compare* U.S. CONST. art. I, § 10, cls. 1, 3 with ARTICLES art. VI, 9 JOURNALS at 911-12.

135. The Articles provided:

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress: and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of

two documents are also closely parallel.¹³⁶

The clauses dealing with national citizenship are yet another example of heavy borrowing by the framers of the Constitution from the Articles Period. The full-faith-and-credit clause was taken over virtually intact,¹³⁷ as was the operative language of both the privileges-and-immunities clause and the extradition clause.¹³⁸

The Constitution's protections of individual rights also reflected political developments under the Articles. The Constitution clearly showed, for instance, the strong influence of the Northwest Ordinance, which had provided for freedom of religion, the availability of habeas corpus and trial by jury, the prohibition of "cruel or unusual punishments," requirements of due process of law before deprivation of liberty or property, and the security of private contracts against later legislation.¹³⁹

B. Continuities in Interpretation and Application

The Articles Period also bequeathed to the framers of the Constitution the practice of expansive interpretation of governing legal

their going to and from, and attendance on Congress, *except for treason, felony, or breach of the peace.*

ARTICLES art. V, 9 JOURNALS at 910.

The Constitution states:

[The Senators and Representatives shall] in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. CONST. art. I, § 6, cl. 1.

136. Compare U.S. CONST. art. I, § 6, cl. 2 with ARTICLES art. V, 9 JOURNALS at 910 (plural office-holding); compare U.S. CONST. art. I, § 9, cl. 7 with ARTICLES art. IX, 9 JOURNALS at 920 (accounting for public funds); compare U.S. CONST. art. I, § 9, cl. 8 with ARTICLES art. VI, 9 JOURNALS at 911 (prohibition on conferring titles of nobility).

137. Compare U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.") with ARTICLES art. IV, 9 JOURNALS at 909 ("Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other State.")

138. Compare U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.") with ARTICLES art. IV, 9 JOURNALS at 908 ("[T]he free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several States . . ."); compare U.S. CONST. art. IV, § 2, cl. 2 (any person charged with crime, "who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime") with ARTICLES art. IV, 9 JOURNALS at 909 (if anyone charged with crime shall "flee from justice and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence").

139. See Northwest Ordinance, *supra* note 91, at 172-74. The Ordinance also banned "slavery [or] involuntary servitude . . . otherwise than in punishment of crimes whereof the party shall have been duly convicted." *Id.*

instruments. With or without formal legal authority, the national government had repeatedly taken a broad view of its own powers, and the states and the people had acquiesced. The Continental Congresses assumed many economic powers,¹⁴⁰ exercising numerous functions of sovereignty well before the Declaration of Independence,¹⁴¹ and contemporaries generally had very little patience with the concept that the Articles were intended to be rigid limitations on the developing powers of the national government.¹⁴²

The broad assertions of collective sovereignty advanced in external affairs, and the generous reading of congressional power used to justify the imposition of a national trade embargo and the creation of a detailed administrative machinery for the western territories, reflect this attitude.¹⁴³ The expansive interpretation of the Articles put forward in support of congressional incorporation of the Bank of North America¹⁴⁴ is another example. In defending the institution against a threatened revocation of its charter in Pennsylvania,¹⁴⁵ James Wilson argued that, despite the Articles' reservation to the states of all non-delegated powers,¹⁴⁶ the plan of union required that "[w]henver an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States."¹⁴⁷ Even if Wilson's views were not shared by all those who voted for the national bank legislation, his arguments do suggest the

140. See Jensen, TESTAMENTS, *supra* note 2, at 61-62.

141. See Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 80-82, 109-13 (1795) (summarizing activities of Congress during war); R. NICHOLS, THE INVENTION OF THE AMERICAN POLITICAL PARTIES 120-24 (1967) (opening of American ports to foreign trade, authorizing death by court martial for spies and traitors, adopting rules for navy and capture of prizes, creating committee to seek foreign aid); Jensen, TESTAMENTS, *supra* note 2, at 61-62 (creation of army and appointment of generals, issuance of paper money).

142. See THE FEDERALIST No. 44 (J. Madison) 303 (J. Cooke ed. 1961) ("It would be easy to shew if it were necessary, that no important power, delegated by the articles of confederation, has been or can be executed by Congress, without recurring more or less to the doctrine of *construction* or *implication*."); J. WILSON, *supra* note 84, at 829-30. One reason for this attitude was doubtless the realization that the Articles themselves represented essentially a codification of existing congressional practices. See J. FISKE, *supra* note 8, at 101; DOCUMENTARY HISTORY, *supra* note 2, at 403.

143. See pp. 152-55 *supra*.

144. For the proceedings of Congress on the incorporation of the Bank, see 20 JOURNALS at 545-48. For Robert Morris's observations on the plan, see 4 CORRESPONDENCE, *supra* note 66, at 566-68. This was not the first congressional foray into the banking field; in 1780, Congress had pledged the faith of the United States to protect from loss subscribers to the Bank of Pennsylvania. See B. HAMMOND, BANKS AND POLITICS IN AMERICA 43 (1957).

145. See R. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA 173-75 (1942); B. HAMMOND, *supra* note 144, at 52-63.

146. See ARTICLES art. II, 9 JOURNALS at 908 ("Each state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States . . .")

147. J. WILSON, *supra* note 84, at 829.

flexible way in which the Articles often were interpreted to allow the establishment of pragmatic national institutions.¹⁴⁸

The result of this process was that the overall structure of the government chartered by the Constitution was similar in many respects to the one that already existed under the Articles. A national legislature already engaged actively in the creation of national laws, treaties and policies; a national court of appeals, the institutional predecessor of the Supreme Court,¹⁴⁹ rendered judgments superior within its jurisdiction to state court decisions; and federal administrative departments carried the national will into execution.¹⁵⁰ Both the old and the new national governments could deal directly with individuals in certain instances,¹⁵¹ and both systems bound individuals into a common political community by full-faith-and-credit and privileges-and-immunities clauses.¹⁵² As the Constitution government began its

148. In the case of the western lands, the framers of the Constitution found it necessary to write in a provision granting to Congress the power it had already been exercising: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." U.S. CONST. art. IV, § 3, cl. 2. The convention defeated a motion to grant similar explicit sanction to the power that Congress had exercised in the case of the Bank of North America, voting down a proposal that the United States be allowed "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent." See 2 M. FARRAND, *supra* note 129, at 615-16. As a result, the debate over the legitimacy of implying such a power continued into the next century. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); 3 M. FARRAND, *supra* note 129, at 362-64, 375-76.

149. See Act of May 8, 1792, ch. 36, § 12, 1 Stat. 275 (1792); Jameson, *The Predecessor of the Supreme Court*, in *ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES*, *supra* note 110, at 44. On more than one occasion, Chief Justice Marshall brusquely rejected the argument that the Supreme Court could not carry into effect decrees of the prize court. See, e.g., *Jennings v. Carson*, 8 U.S. (4 Cranch) 2, 4-8, 21, 25 (1807).

150. See Guggenheimer, *supra* note 110, at 183-84. But see L. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 1 (1948) (Washington administration inherited almost no functioning administrative apparatus from Confederation).

151. As James Madison put it:

In cases of capture, of piracy, of the post-office, of coins, weights and measures, of trade with the Indians, of claims under grants of land by different States, and above all, in the case of trials by Courts-martial in the army and navy, by which death may be inflicted without the intervention of a jury, or even of a civil Magistrate; in all these cases the powers of the confederation operate immediately on the persons and interests of individual citizens.

THE FEDERALIST No. 40 (J. Madison) 262 (J. Cooke ed. 1961). But cf. *National League of Cities v. Usery*, 426 U.S. 833, 844 (1976) (citing *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71 (1869)) (Constitution substituted government acting directly on individuals for one that did not do so).

152. It is, however, true that the Constitution government, like the Articles government, was in some respects far removed from the daily life of the citizen. See J. YOUNG, *THE WASHINGTON COMMUNITY 1800-1828*, at 28-34 (1966). See also McColley, *Jefferson's Rivals: The Shifting Character of the Federalists*, *MIDCONTINENT AM. STUD. J.*, Spring, 1968, at 24 ("Under the supposedly more perfect government of the Constitution of 1787 we

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work, the Department of War remained intact under the same individual,¹⁵³ and the Post Office employees continued to follow the same routines as before the transition.¹⁵⁴

Conclusion

The events and experiences of the period from 1777 to 1787 yielded broad support for a national government operating under a "federal Constitution adequate to the exigencies of Government and the preservation of the Union."¹⁵⁵ Both the Articles and the Constitution represented a series of pragmatic compromises that codified and expanded on existing practices and impliedly sanctioned flexible interpretation in their implementation. The common law attorneys who drafted and later construed both charters eschewed strict literalism and political inflexibility, as they sought a solution to the overriding problem of creating a national union.

Appendix

The significant textual changes made in the Articles during the drafting process are summarized in the following table. One or two alterations that appeared to be merely verbal were not included. Although in several cases the precise strengthening or weakening effect of a change is questionable, the significance of the table lies not in the individual items, but rather in the fact that no clear pattern of changes in either direction is discernible.

had whiskey rebellions, western conspiracies, financial confusion and secessionist plots quite as alarming as the troubles of the 1780's.")

Indeed, it had been argued in favor of the adoption of the Constitution that it in fact conferred few new powers on the federal government. See *THE FEDERALIST* No. 38 (J. Madison) 247 (J. Cooke ed. 1961); Nelson, *supra* note 54, at 19 n.70. As Madison put it:

The present Congress can make requisitions to any amount they please; and the States are constitutionally bound to furnish them; they can emit bills of credit as long as they will pay for the paper; they can borrow both abroad and at home, as long as a shilling will be lent. Is an indefinite power to raise troops dangerous? The Confederation gives to Congress that power also; and they have already begun to make use of it. . . . The existing Congress, without any . . . controul, can make treaties which they themselves have declared, and most of the States have recognized, to be the supreme law of the land.

THE FEDERALIST, *supra*, at 247.

153. See M. JENSEN, *NATION*, *supra* note 4, at 365; H. WARD, *supra* note 64, at 101-03.

154. See Guggenheimer, *supra* note 110, at 182-83.

155. 32 *JOURNALS* at 74 (call for Convention); see E. FERGUSON, *THE POWER OF THE PURSE* 337 (1961) ("That the crisis of the Union inspired the calling of the Federal Convention indicates such a level of agreement as to suggest that there was no crisis at all")

SUMMARY OF CHANGES IN ARTICLES OF CONFEDERATION

| ARTICLE NUMBER IN FINAL DRAFT | SUBJECT | CHANGED BETWEEN DRAFT NUMBERS | EFFECT ON CENTRAL GOVERNMENT |
|--|--------------------------------|--|------------------------------------|
| 2 | Reserved powers | 1-2 | Strengthens |
| | Reserved powers | 2-3 | Weakens |
| | | | [1-3 weakens] |
| 3 | Nature of union | 1-2 | Weakens |
| 4 | Interstate comity | 1-2 | Weakens |
| | Interstate comity | 2-3 | Strengthens greatly |
| | | | [1-3 strengthens] |
| 5 | Delegate's appointment | 1-2 | Strengthens |
| | Congressional immunity | 2-3 | Strengthens |
| | Number of delegates | 2-3 | Strengthens |
| | Officeholding restriction | 2-3 | Weakens |
| 6 | Marque and reprisal | 2-3 | Weakens slightly |
| 8 | Taxation | 2-3 | No effect |
| 9 | Maritime jurisdiction | 1-2 | Weakens |
| | Congressional judicial power | 2-3 | Weakens |
| | Treaties of commerce | 2-3 | Weakens |
| | Appointment of judges | 2-3 | Weakens |
| | Private land disputes | 2-3 | Strengthens |
| | Regulation of money | 2-3 | Weakens |
| | Indian affairs | 1-2 | Weakens |
| | Indian affairs | 2-3 | Weakens |
| | Western lands | 1-2 | Weakens |
| | Post office | 1-2 | Strengthens |
| | Commissioning of officers | 2-3 | Strengthens |
| | Adjournment of Congress | 1-2 | Strengthens |
| | Military powers of Congress | 1-2 | Strengthens |
| | Council President's tenure | 2-3 | Weakens |
| | Expenditures | 1-2 | Strengthens |
| | Expenditures | 2-3 | Strengthens |
| | Accounting for expenditures | 2-3 | Weakens |
| | Naval forces | 1-2 | Strengthens |
| | Expenses of land forces | 2-3 | Strengthens |
| | Taxation | 1-2 | Strengthens |
| | Peace treaties | 1-2 | Strengthens |
| | Peace treaties | 2-3 | Weakens |
| | | | [1-3 no effect] |
| | Appropriation | 1-2 | Weakens |
| | Commander-in-chief appointment | 1-2 | Weakens |
| | Council of State | 2-3 | Strengthens |
| 10 | Military powers of Council | 1-2 | Weakens |
| | Powers of Council | 2-3 | Strengthens |
| 11 | Admission of Canada | 2-3 | Strengthens |
| 12 | Honoring of old debts | 2-3 | Strengthens |
| 13 | Submission to national power | 1-2 | Strengthens |

Totals

Changes between Drafts 1 and 2: 18

Changes between Drafts 1 and 2 strengthening/weakening the central government: 10/18

Changes between Drafts 2 and 3: 23

Changes between Drafts 2 and 3 strengthening/weakening the central government: 11/11

Changes between Drafts 2 and 3 not affecting the central government: 1