Written by **Joe Wolverton, II, J.D.** on August 20, 2012

August 20, 1787: 225 Years and We're Still Arguing

The more things change, the more they stay the same. Taking a look at the journal of the Constitutional Convention for Monday August 20, 1787, one realizes just how true this is.

A bill of rights, the president's appointment power, the trouble with a "necessary and proper" clause, and the definition of treason were all debated on that hot day in Philadelphia.

The time had come to take up debate on many of the controversial subjects that were left undecided in the first draft of the Constitution presented to the body by the Committee of Detail.

Among the first items on the list was the inclusion of a bill of rights in the Constitution. Charles Pinckney of South Carolina rose and proposed 12 items for inclusion in such a bill. Among the rights named in Pinckey's bill were freedom of the press, restrictions on the suspension of habeas corpus, subordination of the military to the civil power, and that "no religious test or qualification shall ever be annexed to any oath of office under the authority of the U. S."

Although Mr. Pinckney's proposal was ultimately rejected by his colleagues, no man in that room could have foreseen a day when reporters are afraid to write stories critical of the government, when the military may be deployed at the command of the president to detain Americans, and that anyone so detained may be held indefinitely and without the right to know the charges against him. This is the state of affairs in post-NDAA America.

Next up for debate was Pennsylvania's Gouverneur Morris' proposal for a Council of State to act as advisors to the president. Morris's sketch of a proto-presidential cabinet included the departments of State, Domestic Affairs, Commerce and Finance, Foreign Affairs, War, and Marine.

Over time the organization first described by Morris has become a powerful coterie of near-celebrity policymakers with extraordinary, and certainly unexpected, influence.

Necessary and Proper

Next, the attention of the attendees turned to the clause of the Committee of Detail's report that granted the new Congress power to "make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the Government of the United States, or in any department or officer thereof."

This provision was called the "sweeping clause" by George Mason, and others worried about the pernicious prospects of the acts that could be committed under its auspices.

When put to the vote, the "necessary and proper clause" passed unanimously and became the final clause of Article I, Section 8. The inclusion of such a seemingly tautologous clause was not in the original draft submitted to the Committee of Detail by Virginia Governor Edmund Randolph. Instead, John Rutledge of South Carolina inserted a similar sentence giving to Congress "a right to make all laws necessary to carry powers into execution." While credit (or blame) for the eventual promulgation of the

clause that has caused so much trouble could be given to Rutledge, comments were heard from other representatives earlier in the summer suggesting the same idea only in other words.

As stated above, remarkably the inclusion of the clause in the final draft offered to the Convention for a vote was approved without dissent. Given the words of Alexander Hamilton, James Madison, and others after the Convention and in the midst of the contentious state ratifying conventions, the reason for the unhindered passage of the proposed article was the notion shared by most of the delegates in Philadelphia that the clause did not expand the powers of Congress in any appreciable sense.

In the *Federalist Papers*, Alexander Hamilton provided the following definition of "necessary and proper":

> The National Legislature to whom the power of laying and collecting taxes had been previously given, might, in the execution of that power, pass all laws necessary and proper to carry it into effect.… It is expressly to execute these powers, that the sweeping clause … authorizes the National Legislature to pass all necessary and proper laws.

And Madison:

> No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing is included.

Clearly, the Founders (especially those present at the Constitutional Convention in Philadelphia) did not consider the "necessary and proper" clause to be an increase in the already enumerated powers of Congress; rather it was merely the somewhat redundant guarantee of the supplemental support for building the national government. Unfortunately, in this as in few other cases, the Founding Fathers missed the mark as the "necessary and proper" clause has become the inch-wide gap of ambiguity through which has passed a mile-wide column of congressional tyranny.

Treason

After a long day's labor, the convention postponed the debates on the power of Congress to tax and to regulate commerce, and moved on to the consideration of treason: what it meant, how it was to be proved, and how it should be punished.

Rather than re-invent the wheel, the Framers looked to the English Treason Statute of 1351, passed in the 25th year of the reign of Edward III.

Edward III's treason law divided the crime of treason into high treason and petty treason — high treason being defined as disloyalty to the Sovereign, and petty treason being defined as disloyalty to a subject. As the government of the United States was to be a federal republic, no such distinction was necessary.

The debate on this matter was animated and many amendments were moved, seconded, and put to a vote. The clause was dissected, debated, and defined. Some delegates esteemed the matter too important for a single day's deliberation and moved that the question be tabled. This motion failed, and the carving and crafting carried on.

Finally, the article we know as Article III, Section 3 was passed.

It should be noted, however, that there was one of the recommended changes that seems especially prescient given the controversy over nullification and states' rights that has developed in the wake of

the Supreme Court's rulings in the ObamaCare and the Arizona immigration cases.

Luther Martin of Maryland proposed the following amendment to the treason article: "Provided that no act or acts done by one or more of the States against the United States, under the authority of one or more of the said States shall be deemed treason or punished as such."

Reading the speeches of the Framers present on that day in August 225 years ago reveals significant differences in their opinions as to how the Union should be formed. There were many pushing for a stronger national government and many arguing persuasively to protect the independence of the state.

Regardless of their positions along the power spectrum, there is nothing in the record revealing anything close to a suggestion for a government as all-powerful and all-seeing as the one ruling the Union they created.