



This Week at the Convention of 1787: Congress Would Be Filled With Men of Virtue, of Valor, of Integrity, and Above Suspicion

The controversial topics seemed never-ending at the Constitutional Convention of 1787. We've covered treason, state sovereignty, taxes, and now the powers of Congress and the trust the American people could put in them.

The draft of the Constitution that the delegates were debating included five restrictions on Congress:

1. No export taxes
2. No tax or prohibition on migration or importation of slaves
3. No capitation tax, unless laid in proportion to the census of the states
4. No navigation act, unless passed by two-thirds of each House
5. No titles of nobility (this prohibition applied to the United States, not just to Congress)



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This week, though, some familiar foes of increased federal power wanted to impose additional restrictions on Congress, and the opposition was ready to resist any new limitations.

The first of the new proposals was made by Elbridge Gerry of Massachusetts and seconded by James McHenry of Maryland: "The Legislature shall pass no bill of attainder nor any ex post facto law."

To us, such restrictions sound reasonable and not anything we'd expect to be resisted or opposed. Not that week. Everything would be opposed. I think, as John Adams famously said during the Second Continental Congress' debate on declaring independence, "If it were moved and seconded that two and three make five, we should spend two whole days debating the matter and only then pass a resolution in the affirmative."

Gouverneur Morris, James Wilson, and William Johnson of Connecticut argued that such suggestions displayed "an improper suspicion" of Congress, and that it was "an unnecessary guard, as the principles of justice, law, etc., were a perpetual bar" to such things as ex post facto laws and bills of attainder.

"To say that the legislature shall not pass an ex post facto law, is the same as to declare that they shall not do a thing contrary to common sense — that they shall not cause that to be crime which is no crime," Johnson added.

There is much revealed in Johnson's opposition to something as seemingly simple and uncontroversial as forbidding ex post facto laws and bills of attainder.

First, Johnson was one of the most well-educated of the Founding Fathers. He was a lawyer renowned



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for his comprehension of complex legal questions and the ability to articulate them in a way that made molehills out of mountains. In his sketches of the delegates at the convention, William Pierce wrote of Johnson, “He possesses the manners of a Gentleman and engages the Hearts of Men by the sweetness of his temper, and that affectionate style of address with which he accosts his acquaintance ... eloquent and clear, always abounding with information and instruction.... [He is] one of the first classics in America.”

Johnson’s disagreement with Gerry and his allies was not that such things as bills of attainder and ex post facto laws were not bad. His point was that the men who occupied positions of power in the government of the United States would be men whose love of liberty and commitment to the cause of protecting it would serve as insuperable barriers to even considering the type of tyranny Gerry and the others were trying to prevent.

While these portraits of the philosophy of the framers may seem picayune, they’re not. These stories show us the caliber of men who assembled there in Philadelphia, and how they anticipated that an extraordinary level of virtue would similarly be seen in anyone seeking and accepting the trust of the people they serve.

It’s historically and constitutionally curious to know that there was a week at the end of August in 1787 in which some of the heavyweights of the Founding Fathers faced off in a series of bouts, ducking and weaving, showing skills that few if any possess today. But that’s not why this article was written.

This article was written to remind us of the qualities that were once so expected that there were men who didn’t think we needed to expressly prohibit ex post facto laws and bills of attainder. Today, we hear proposals of imposing new laws and regulations on Congress every day. We hear of congressmen who might have ties to the Chinese Communist Party, or who might be using insider information to make money on the stock market — and those are a couple of the tamer scandals.

We must remember, as our Founding Fathers’ hero Algernon Sidney observed in his book *Discourses Concerning Government*:

This is not every man’s work: valor, integrity, wisdom, industry, experience and skill, are required for the management of those military and civil affairs that necessarily fall under the care of the chief magistrates.... They therefore may reasonably be advanced above their equals, who are most fit to perform the duties belonging to their stations, in order to the public good, for which they were instituted.

Note those qualities of a good political servant of the people: valor, integrity, wisdom, industry, experience, and skill. These were the qualities men such as William Johnson expected representatives to possess, thus they would never need to be kept from doing that which was so obviously criminal and corrupt.

At the end of the day, Elbridge Gerry’s proposal to prohibit bills of attainder was approved unanimously, whereas the ban on ex post facto laws being passed by Congress was approved by a vote of 7-3, and ultimately became part of Article I, Section 9 of our current Constitution.



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