

## **Empowering the Confederation:**

### **A Counterfactual Model**

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In any counterfactual model, suspension of belief is imperative. If we steadfastly adhere to what actually happened, we can imagine only with great difficulty what might have been. Monday-morning quarterbacks always have 20/20 vision. For counterfactual history to be effectual, we need the same optical maladies possessed by the actual participants in events. Few had a clear vision of the future; most had blurred vision; while others were blind.

Let's start out with certain key assumptions held by most Americans in the mid 1780s.

1. Congress under the Articles of Confederation was too weak.
2. The Union should be maintained and Congress strengthened.
3. The Articles should be amended—not abandoned in favor of a radical new untried system of government that rested on a variety of new philosophical assumptions that contradicted the accepted political theories of the day.
4. The Confederation government was in a state of flux. Gradually since 1774 it had changed dramatically, and more changes were expected in an evolutionary adjustment to new circumstances.
5. Most American favored a republican form of government with a bicameral legislature.

Originally Congress was run by a system of committees chaired by and composed of members of Congress. The president of Congress was the most powerful figure. When

Congress was not in session, a committee of the states governed. (This happened but once.) The committee consisted of one delegate from every state and could act only with the vote of at least nine delegates.

Congress soon discovered that it was incapable of running its primary committees, consequently Congress established permanent departments staffed and chaired by non-delegates to Congress. These departments included:

1. The War Department,
2. The Foreign Affairs Department,
3. The Finance Department, and
4. The Post Office.

Congress sat much of the year and thus the committee of the states did not take an active role in governing. Rather Superintendent of Finance Robert Morris assumed the role of prime minister and coordinated much of what Congress did. Morris became feared and despised. When he threatened one too many times to resign if Congress did not follow his lead, Congress accepted his resignation and in his place created a three-man Board of Treasury. Secretary for Foreign Affairs John Jay filled the power vacuum and served effectively as prime minister of the United States for five years.<sup>1</sup>

We all know the story of how the hard times of the mid-1780s led to the Federal Convention of 1787 that was called by Congress to amend the Articles of Confederation. Led by a handful of “radicals,” the Convention in four months drafted an entirely new constitution that called for a powerful central government made up of three separate but

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<sup>1</sup> See John P. Kaminski, “Honor and Interest: John Jay’s Diplomacy During the Confederation,” *New York History* 83 (Summer 2002), 293–327, esp. 303–4.

somewhat inter-connected branches. After almost a year of intensive public debate the new Constitution was adopted and two years later a bill of rights was added.

Was this familiar chain of events inevitable as our history books so often imply? Obviously not. In fact, had two important events not occurred in 1786, all of American history would have been different. These two events could easily have been avoided; and, in fact, probably should have been avoided. What were these two events?

1. Secretary for Foreign Affairs John Jay should never have asked for a change in his instructions in negotiating with Spanish envoy Don Diego de Gardoqui.
2. Congress should not have rejected New York's ratification of the Impost of 1783.

First, let's look at Jay, America's most seasoned diplomat (with the possible exception of Benjamin Franklin). Jay should have known the furor that would erupt when Congress acceded to his request to temporarily forego America's right to navigate the Mississippi River as the price exacted by Spain in order to consummate a commercial treaty between the two countries. Jay should have realized what the South's reaction would be—how angry Southerners would fear the avaricious Northerners, who would readily sell the Southern birthright for a few pieces of gold. Jay should have also realized the impact that the Spanish negotiations would have on his own career. The second most popular man in America (second only to George Washington) was now despised by almost half the nation.

The immediate impact of the disclosure of the secret Jay-Gardoqui negotiations was that no commercial treaty with Spain could be approved by Congress. The Articles of Confederation provided that the approval of nine states was necessary to adopt treaties;

thus the five Southern states could block any treaty considered by Congress. More importantly, Jay's blunder killed the seven amendments proposed in August 1786 by a grand committee of Congress that would have made the Articles of Confederation viable. I'll come back to these amendments later.

In April 1783 Congress proposed that the states give it the power to levy a five percent tariff on imports for no more than twenty-five years, the revenue of which was earmarked for the payment of the principal and interest on Congress' wartime debt.<sup>2</sup> By 1786 all of the states except New York had adopted the Impost. In May 1786 New York's legislature adopted the Impost but with restrictions unacceptable to Congress. Congress asked New York to reconsider the Impost. In February 1787 the state Assembly refused to alter its stance and thus, according to James Madison, "put a definitive veto on the Impost."<sup>3</sup>

Congress should not have rejected New York's adoption of the Impost. Melancton Smith, one of New York's delegates to Congress and perhaps the ablest of Governor George Clinton's lieutenants, argued passionately in Congress for approval of New York's adoption.<sup>4</sup> All of the other states had placed provisos on their adoptions of the Impost—some more restrictive than New York's. All provided that their citizens' rights as protected in their state constitutions and bills of rights could not be violated in prosecuting cases under the Impost. Smith reiterated his position in a pamphlet published

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<sup>2</sup> For the Impost of 1783, see Merrill Jensen, John P. Kaminski and Gaspare J. Saladino, eds., *Constitutional Documents and Records, 1776–1787* (Volume I of *The Documentary History of the Ratification of the Constitution*, Madison, Wis., 1976), 146–47.

<sup>3</sup> Madison to George Washington, 21 February 1787, Robert A. Rutland et al., eds., *The Papers of James Madison* (Chicago and Charlottesville, 1973–), IX, 285.

<sup>4</sup> Smith's draft speech is located in his papers in the New York State Library.

in February 1787, in which he reprinted all of the states' ratifications of the Impost.<sup>5</sup> The Virginia delegates to Congress agreed with Smith that Congress should accept New York's adoption of the Impost, implement the tariff, and go about its business collecting the revenue.<sup>6</sup> Had Congress followed this advice, its financial needs would have been met and no federal convention would have been called to meet in Philadelphia in the Spring of 1787. Furthermore, the states were already recovering from the economic depression. Another couple of years would have made the recovery more obvious, while at the national level, the Impost revenue (enhanced because of the surge in American commerce in the 1790s) joined with revenue from the sale of western lands, receipts from the post office, and payments of the state requisitions (if needed) would have made the Confederation sound economically.

What type of government would have evolved. The answer to that question is derived from the evolving pattern already underway and from the amendments proposed in Congress in the summer of 1786.<sup>7</sup> The first amendment gave Congress the power to regulate foreign and interstate commerce and to lay duties on imports and exports. This amendment would give Congress diplomatic leverage in negotiating commercial treaties with other countries and coordinating the sometimes contradictory commercial policies of the states. The power to lay duties would give Congress an independent source of revenue without dependence on the states. The rights of citizens as provided in state

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<sup>5</sup> *The Resolutions of Congress, Of the 18<sup>th</sup> of April, 1783: Recommending the States to invest Congress With the Power to Levy an Impost, for the Use of the States; and the Laws of the respective States, passed in pursuance of the said Recommendation. Together with Remarks on the Resolutions of Congress, and Laws of the different States, By A Republican* (New York, 1787). (Evans 20783)

<sup>6</sup> James Monroe to Governor George Clinton, New York, 16 August 1786, Paul H. Smith, ed., *Letters of Delegates to Congress, 1774–1789* (26 vols., Washington, D.C., 1976–2000), XXIII, 479–80.

<sup>7</sup> For the seven amendments, see *Constitutional Documents and Records*, 163–68.

constitutions were protected from encroachment by Congress. All commercial legislation needed the approval of nine states in Congress to enact.

The next three amendments dealt with congressional requisitions. States were obligated to pay the requisitions. States not paying were assessed a ten percent surcharge. In delinquent states, Congress could appoint tax collectors who would directly assess the people in the manner previously used by the state legislature. Another amendment provided that “new Systems of Revenue” could be adopted for a maximum of fifteen years with the approval of only eleven states—not the unanimity required by the original Articles.

The penultimate amendment gave Congress the power to define treason and piracy and called for the creation of a federal court to try federal officers and to have appellate jurisdiction over cases tried in state courts on all matters concerning treaties, commerce, the collection of federal revenue, and all cases in which the United States was a party. In this federal court, the writ of habeas corpus and trial by jury were held to be sacred. No member of Congress or other federal officer could be a judge. The seven judges of this court were apportioned among the states accordingly: one from New Hampshire, Rhode Island, and Connecticut; one from Massachusetts; one from New York and New Jersey; one from Pennsylvania; one from Delaware and Maryland; one from Virginia; and one from North and South Carolina and Georgia.

The final amendment attempted to assure full representation in Congress—a problem Congress had regularly faced. Those delegates who did not attend Congress were declared ineligible to serve in Congress or in any other federal or state position.

Finally, what kind of federal government would have evolved? I am confident that the Confederation Congress would have evolved into a parliamentary system of government. The committee of the states would have evolved into a senate—a kind of House of Lords—elected by Congress to serve a lengthy term, perhaps a dozen years. This body would protect the interests of the wealthy. John Jay would have become the actual prime minister. Another amendment to the Articles would have provided for a rotating prime minister to be elected from different states much the way Congress had been electing its president.

In all acts of Congress and in all cases before the federal court, the rights of individuals would have been protected by the constitutions and bills of rights of the states. In essence, the state protections of rights would have been incorporated onto the federal government 150 years before the federal Bill of Rights was first incorporated onto the states in the case of *Gitlow v. New York* in 1925.

These amendments would have gone a long way to solidify Congress. They would have preserved the Confederation and left most domestic matters to the states. They would have done exactly what Thomas Jefferson said most Americans wanted: “to leave with the States all authorities which respected their own citizens only, and to transfer to the U.S. those which respected citizens of foreign or other states: to make us several as to ourselves, but one as to all others.”<sup>8</sup> There would have been no need for a radical revolution in government. A federal convention would never have been called.

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<sup>8</sup> To William Johnson, Monticello, 12 June 1823, Merrill D. Peterson, ed., *Thomas Jefferson: Writings* (New York, 1984), 1475.