ARTICLES

WAS THE CONSTITUTION ILLEGALLY ADOPTED?

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ABSTRACT: *This article analyzes the claim that the Constitution was illegally ratified in 1788. This claim is founded on the premise that the Constitutional Convention violated its mandate by adopting a wholly new document rather than simply altering the Articles of Confederation, and by allowing the proposed Constitution to be ratified without unanimous ratification by the states. The article concludes that the Constitution can truly be seen as both a series of amendments and a name change, which was subsequently unanimously accepted by the First Congress. Further, the ratification process was not illegal, as all thirteen state conventions accepted the change in ratification procedure, although only eleven state conventions approved of the document before its adoption.*

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Introduction

From the time of the Constitutional Convention's conclusion until today, there has been a contentious allegation that it was a runaway convention and that the Constitution was illegally adopted. For example, historian Joseph Ellis, in his bestseller *Founding Brothers,* repeats the charges against the Constitutional Convention:

> Over the subsequent two centuries critics of the Constitutional Convention have called attention to several of its more unseemly features: the convention was extralegal, since its explicit mandate was to revise the Articles of Confederation, not replace them; . . . the machinery for ratification did not require the unanimous consent dictated by the Articles themselves. There is truth in each of these allegations.[1]

These two charges are serious because they suggest that under the law existing at the time, the Constitution was actually illegally adopted. The allegations can be summarized as follows: (1) a new document was proposed rather than mere changes to the Articles of Confederation as specified in the call of the Convention; and (2) the new Constitution allowed for ratification by only nine states whereas the Articles of Confederation required all thirteen states to approve any changes before they became effective.

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1 Joseph J. Ellis, Founding Brothers: The Revolutionary Generation 8 (2000).

On the surface, these two accusations are plausible. Indeed, historians agree, essentially unanimously, on the second charge's truthfulness. It should be noted, however, that most of these same historians believe that the end of saving the Republic justified the means of violating the Articles' rules concerning the amendment process. A fresh look at historical documents and clearly established legal principles shows that both of these attacks on the integrity of the Constitution are in error.

The New Document vs. Amendments Charge

At the request of Virginia, the Annapolis Convention convened with only five states in attendance. The Convention had been called solely for the purpose of considering changes to the Articles of Confederation regarding the regulation of commerce. The delegates quickly realized the need for a second convention with broader authority and with more states in attendance. On September 11, 1786, the delegates adopted this resolution:

> Under this impression, Your Commissioners, with the most respectful deference, beg leave to suggest their unanimous conviction, that it may essentially tend to advance the interests of the union, if the States, by whom they have been respectively delegated, would themselves concur, and use their endeavors to procure the concurrence of the other States, in the appointment of Commissioners, to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to

> devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union; and to report such an Act for that purpose to the United States in Congress assembled, as when agreed to, by them, and afterwards confirmed by the Legislatures of every State, will effectually provide for the same.[2]

On February 21, 1787, Congress responded by voting to authorize a convention in Philadelphia under these terms:

> Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.[3]

The convention was authorized for the "sole and express purpose of revising the Articles of Confederation."[4] As is obvious, howev-

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2 Notes on the Debates in the Federal Convention, http://avalon.law.yale.edu/subject_menus/debcont.asp [hereinafter Federal Convention].

3 *Id*.

4 *See supra* text accompanying note 3.

er, the Constitutional Convention recommended an entirely new document—or did it?

The Constitutional Convention had recommended two or three modest changes to the text of the Articles and had also recommended that the name of the document be changed to 'The Constitution of the United States' so that no one would suggest that the Constitutional Convention had violated the scope of its authority. Thus, the name change alone does not make the work of the Convention illegal. In fact, it is normal legislative practice to change the name of an existing law when it is revised; moreover, it is a recognized legal principle that the title of a law is not part of the body of the law. Thus, changing its name is of no legal consequence.

Congress placed no limits on the authority of the Convention to make amendments, allowing it to recommend as many changes as it deemed necessary. Additionally, some matters of substance remained unchanged between the Articles of Confederation and the Constitution.

Article I of the Articles of Confederation named our nation the United States of America. This did not change under the Constitution.

Article II asserted that the states retained all power not specifically delegated to the federal branch. This did not change, as was made evident by numerous declarations to that effect by the various state ratification documents. Moreover, the Tenth Amendment was later added to the Constitution to clarify this further.

Article III said that the states formed a mutual defense compact. The operation of the military changed under the Constitution, but the duty of defense of the whole nation did not.

Article IV had a provision that people moving from one state to another had to be treated as citizens in the new state when they arrived—a provision that appears in Article IV, Section 2 of the Constitution with only modest changes in wording.

These examples are sufficient to demonstrate that the Constitution did indeed retain many elements of the Articles of Confederation and was ultimately constructed as a series of its recommended amendments. Many additional phrases and concepts, including the General Welfare Clause, were carried over from the Articles to the Constitution. Therefore, it is simply not true to assert that its content comprised "an entirely new document."

To be sure, the proposed amendments were presented as a package deal to be voted up or down rather than as a series of discrete amendments. But there was nothing in Congress' authorization of the Philadelphia Convention that prevented it from recommending that the proposed amendments be approved en masse. In fact, no credible politician would have thought it wise to propose that Congress consider twenty or thirty amendments on an individual basis, especially seeing as any recommended changes would require a series of political compromises to reach a balance. It simply made common political sense for the amendments to be submitted as a single package deal, and nothing in the call

for the Convention suggested any impropriety in that approach.

Recall now that the resolution from Congress charged the Constitutional Convention with making recommendations for amendments to the Articles and submitting them first to Congress, and then to the states. The Convention had no power to do anything more than this. So on September 17, 1787, the delegates officially transmitted the proposed Constitution to Congress, which was then meeting in New York. Until Congress and the state legislatures acted, no ratification for the "recommendation" was possible.

On September 28, 1787, eleven days after receiving the recommendation from the Philadelphia Convention, Congress voted to approve the submitted recommendation. The official language reads as follows:

> Resolved Unanimously that the said Report with the resolutions and letter accompanying the same be transmitted to the several legislatures in Order to be submitted to a convention of Delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.[5]

Note that Congress was the agency that called "for the sole and express purpose of revising the Articles of Confederation" and this same Congress *unanimously* approved the pro-

5 Federal Convention, http://avalon.law.yale.edu/subject_menus/debcont.asp.

posed Constitution, sending it on to the states.[6] If the Convention had indeed exceeded its authority, then Congress had the legal authority and the clear opportunity to reject the proposal. Thus, by examining the content of the document as well as the unanimous approval of Congress, it is clear that the Constitution was an appropriate, albeit substantial, amendment to the Articles of Confederation.

This brings us to the second charge levied by critics to prove that the Constitution was illegally adopted: the fact that the Constitution was to be ratified by just nine states instead of the unanimous vote of thirteen states required by the Articles of Confederation.

The Second Charge--Nine-State Ratification vs. Unanimity

Focusing solely on the number of states required for ratification is misleading, as there was an even more important change in the process. Under the Articles of Confederation, proposed amendments were to be ratified by the state *legislatures*. Under the Constitution, they were to be ratified by state *conventions*. Therefore, before we can even consider the switch from thirteen states to nine, we must ask: How was the switch made from ratification by legislatures to ratification by conventions?

If things were to properly proceed under the Articles of Confederation, then all thirteen states would have to approve of this *change in process* before the Constitution could be legal-

6 *See supra* text accompanying note 3.

ly adopted by the new method. Remember the new method of approval had two components: (1) ratification by conventions; and (2) ratification by nine states only.

Revisiting the language from Congress that approved the work of the Constitutional Convention, we see that Congress did not send the Constitution to the state conventions. Instead, the "report [was] transmitted to the several *legislatures.*"[7] It was then the legislatures' responsibility to authorize the election of delegates "in conformity to the resolves of the Convention."[8] This last clause meant that the states were being asked to approve this new process, authorizing the election of delegates to a ratification convention, and requiring only nine ratifications—both matters being clearly specified in the "resolves of the Convention."[9]

Thus, before any state could submit the proposed Constitution to a ratification convention, its state legislature had to approve the new process. If all thirteen state legislatures approved this process, then the Articles of Confederation would be fully satisfied.

This analysis looks at ratification as a two-step process:

1. The state *legislatures* had to approve the new process.

2. The state ratification *conventions* had to approve the new Constitution.

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7 *See supra* text accompanying note 5 (emphasis added).

8 *Id.*

9 *Id.*

As long as all thirteen state legislatures approved the change in process, then it would be perfectly legal under the Articles for nine state conventions to ratify the Constitution. It is very important to note, however, that without approval for the change in process by all thirteen legislatures, it would not be legal to submit the Constitution to state conventions no matter how many states were required to ratify for approval.

Eleven states held ratification conventions and approved the Constitution between December 17, 1787 and July 26, 1788, and the government under the Constitution went into effect on March 4, 1789. It is self-evident that the legislatures of each of these states voted to approve the new process since these conventions required prior legislative approval.

However, we must also consider North Carolina and Rhode Island, the only two states that did not ratify the Constitution before it was put in operation. If North Carolina and Rhode Island had failed to approve or had rejected this *change in process*, then the critics would be right – the Constitution would have been adopted contrary to the rules of the Articles of Confederation, which required unanimity among the states.

But the North Carolina *legislature* clearly approved the change in process and authorized the election of delegates for this express purpose. On August 2, 1788, the North Carolina Convention tabled any further consideration of the Constitution by a vote of 183 to 83. The Convention delegates attached a number of recommended amendments which they wanted to see adopted by

a second general convention before ratification. This was a tacit rejection of the Constitution as written, but this rejection by the *convention* has no bearing on the action of the *legislature* that had previously approved the change in the process.

An Unconventional Convention

This leaves Rhode Island. It is generally thought that Rhode Island simply ignored the entire process until after the new government, under the Constitution, had already begun operating. If this were true, then the second charge against the Constitution (that it did not properly follow the amendment process under the Articles of Confederation) would be true.

However, in February 1788, the legislature of Rhode Island adopted a resolution submitting the Constitution of the United States to a vote of all the people of the state.[10] In effect, this act appointed all the people of the entire state as delegates to the ratification convention. The people were to assemble on the fourth Monday of March in "conventions" in each town. These Rhode Island ratification conventions were different from those in any other state, but nothing in the text of the transmittal from Congress prohibited Rhode Island from adopting this format for a ratification convention. These town conventions were held on March 24, 1789, and the Constitution was overwhelmingly rejected (2,708 to 237). The defeat was more lopsided than it might have been,

10 The resolution adopted by the Rhode Island legislature is printed in the March 8, 1788, edition of the *Providence Gazette and Country Journal*, no. 1262, p. 2, col. 2–3.

though, since most federalists boycotted the meetings. However, this rejection by the Rhode Island *convention* does not detract from the fact that the Rhode Island *legislature* approved the process that had been suggested by the Philadelphia Convention and had been officially approved by Congress. Without this approval by the legislature, the town conventions could have never been held.

Therefore, the Articles of Confederation were fully satisfied. Before the Constitution was agreed to, Congress and all thirteen state legislatures approved a new process for changing the Articles of Confederation. By the unanimous action of thirteen state legislatures, ratification conventions were convened – an explicit approval of the new process that included the transfer of decision-making from legislatures to conventions and changed the required number of approvals from thirteen to nine.

Both of the aforementioned accusations against the Constitution are therefore disproven by a careful examination of the multiple steps in the process. The Constitutional Convention did not, in fact, exceed its authority by incorporating all of its proposed amendments into a single document with a new name, as proven by the unanimous acceptance of the report by the very agency that called the Convention into session. Moreover, Congress and all thirteen state legislatures approved the new ratification process as required by the Articles. Therefore, we can safely conclude that the Constitution of the United States was legally adopted.