The Constitutional Convention Did Not Exceed Its Power and the Constitution is not “Unconstitutional”


Atop St. Paul's Cathedral, London

Judging by recent claims in the media such as this one, there is still a lot of life in the old tale (dating back to the Anti-Federalists) that the 1787 federal convention “ran away” and that the Constitution was unconstitutionally adopted.

I’ve dealt with both claims in this column occasionally (see, e.g., here and here), but maybe now is a good time to present a more complete correction of the record.

To get at the the truth you have to know about the laws and practices then applying to interstate conventions, and the procedure leading up to the 1787 gathering. Although the Anti-Federalists were right about certain things (some of their political predictions were brilliant), by and large the law was not their strong point. So their claims that the convention delegates exceeded their powers were partly the result of legal ignorance. They also may have hoped to convince themselves and the public that they had successfully done something they actually had failed to do. Explanation below.

For various reasons, many later writers have accepted the Anti-Federalist charge. This is because most people who write about the Founding may be either historians or lawyers, but they are seldom both. And even the few who are both historians and lawyers have rarely studied 18th century law and convention practice—yours truly modestly excepted.

The usual (false) narrative goes like this:

“The Confederation Congress called the convention and limited its power to proposing amendments to the Articles of Confederation. The Convention disregarded the limit, and drafted an entirely new document. The Articles provided that they could be changed only by unanimous consent among the states. But the convention illegally disregarded that, and allowed ratification of the Constitution by only nine states.”

Here are the facts:

* Before and during the Founding Era, there were many interstate conventions, and most of them were called by individual colonies and states. The call or invitation set the outer limits of the topic, and the powers of individual colony or state “committees” (delegations) were fixed by documents called “commissions” issued by each state to its “commissioners” (delegates).

* Congress did not call the Constitutional Convention. It was called by Virginia and, secondarily, by New Jersey in November 1786 in response to the recommendation of the Annapolis Convention the previous September. These calls provided for the convention to propose changes in the “federal constitution” without limiting the gathering to amendments to the Articles. The *unanimous* authority of 18th century dictionaries tells us that “constitution” in this context meant the entire political system, not merely the Articles as such.

* Today we think of a “confederation” as an actual, although loose, government. But in the 18th century, it was defined as a treaty organization or league—essentially like NATO today. (”Confederation” is based on the Latin word for treaty, *foedus*.) In other words, the Confederation Congress was not a general purpose government, but an entity

comparable to that of the North Atlantic Council in NATO. As individual sovereignties, the states were completely free to negotiate with each other outside the Articles, just as NATO member states may negotiate with each other outside the NATO framework today. The Constitutional Convention, like the previous interstate conventions, was to be a diplomatic negotiation held outside the framework of the Articles.

* Because the convention was to be held outside its purview, Congress had no legal power to affect that effort. There was, however, an early proposal in Congress that Congress endorse it.

* Congress didn't get around to considering the issue for several months. Finally, in February, 1787 a congressional committee recommended that Congress endorse the convention. By then, seven of the 13 states had agreed to participate and broadly empowered their commissioners (delegates) to consider changes in the political system.

* Congressional delegates from New York, where Anti-Federalist sentiment was strong, were instructed to try to stop the congressional endorsement. They tried to amend the committee endorsement into one by which Congress "recommended" that the convention be limited only to amending the Articles. Congress defeated the New York motion

* The congressional delegates from Massachusetts then proposed a compromise. They watered down the New York motion to state only that "in the opinion of Congress it is expedient" that the convention be so limited. In this form it passed.

* But this "opinion" was merely an "opinion" with no—repeat, *no*—legal force.

* The New York and Massachusetts efforts made sense only on the assumption that the seven states that already had empowered their delegates were giving them authority well beyond that of proposing amendments to the Articles.

* New York and Massachusetts later agreed to participate in the Constitutional Convention, but limited their commissioners to proposing amendments to the Articles.

* All the other states ignored them. The original seven continued to give their commissioners authority to recommend an entirely new system. Three more states decided to participate, and they also followed the original, broad formula.

* Thus, in Philadelphia, only the seven commissioners from New York and Massachusetts lacked power to propose a new form of government. Of the seven, three signed the Constitution, one in an individual capacity (Hamilton). Of the 55 delegates, therefore, only Nathaniel Gorham and Rufus King of Massachusetts arguably exceeded their authority by signing.

* Signatories of treaties such as a Founding-Era "confederation" always have the power to reconsider the terms of their connections, even if their coordinating agent (such as the North Atlantic Council, the UN, or the Confederation Congress) objects.

* The Convention was not held under the Articles; it was by agreement of participating states outside the Articles. The Articles did not control the proceedings, either legally or practically.

* The Declaration of Independence explicitly presented Americans to the world as "one people"—not as 13 different peoples. It is true that this "one people" initially operated through 13 separate governments. But this is by no means unusual in world history, where single "peoples" often have been ruled by multiple governments. Good Founding-Era examples were the political fragmention of the German people and of the Italian people. Good modern examples are Korea, Ireland, and the Arabian peninsula.

* Under the political theory of the Founding Era, the people were the "principals" and public officials their "agents." Although the American people had granted governmental power to disconnected sets of agents, they also had the right to change that arrangement. (See the Declaration of Independence.) Legally, a principal could (and still may) revoke and alter his agent's authority at any time, and entrust all or part of that authority to others.

* Put another way, the American people could revisit the treaty obligations their agents had contracted on their behalf. The 1787 convention suggested that the people do just that—by taking some of the power heretofore exercised by state officials and the Confederation Congress and entrusting it to new federal officials. This was why James Madison said on the Convention floor that “he thought it indispensable that the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves.”

* The ratification procedure was crafted so that the Constitution would never come until effect unless it represented the will of a majority of the American electorate. The Framers did this in two ways: (1) Ratification or rejection would come not from state politicians, but from conventions directly elected by the voters for the sole purpose of considering the Constitution, and (2) the Constitution would not go into effect unless conventions in nine states agreed.

* Why nine states? Because as the Constitution’s initial allocation of the new House of Representatives showed (Art.I, Sec. 2, Cl. 3), the Framers believed that any and all combinations of nine states would comprise a majority of American citizens. Even if the four most populous states all refused to ratify, the remaining nine still would represent a majority of the electorate. Moreover, as a matter of political reality, the Constitution would not go into effect unless some large states—particularly Pennsylvania and Virginia—were among the nine.

* Ultimately, of course, all 13 states ratified, satisfying even those who claimed the Articles governed.

So relax: The Founders were honorable men, and the Constitution is constitutional.

Comments