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# Necessary and Proper and Treasonous: All in a Day's Work

Few days over the course of the summer of 1787 were as historically relevant as August 20. Time was dragging on and the weather was not helping. The delegates that had convened in the State House in Philadelphia in May were weary of the oppressive heat and the ideas for polishing off the draft presented on August 6 by the Committee of Detail were coming fast and furious. August was a busy month for the framers, particularly, Monday, August 20.

On that date, Charles Pinckney of South Carolina was particularly active after a restful Sabbath. Mr. Pinckney, along with the "gentleman revolutionary" Gouverneur Morris, introduced a sketch of a proto-presidential cabinet; Pinckney proposed (again) a slate of provisions which would later inform the Bill of Rights passed by the first Congress; the report presented by the Committee of Detail on August 6 was debated, including one of the most contentious provisions, the "necessary and proper clause;" and finally, the Constitutional definition of treason was hammered out by the delegates.

Charles Pinckney was twenty-nine years old at the time of the Convention. Despite his youth, he had already served for over a decade as a representative from South Carolina to the Continental and Confederation Congresses. His election to these bodies was little wonder as William Pierce described Pinckney as "intimately acquainted with every species of polite learning, [ and with] a spirit of application and industry beyond most Men."

Pinckney applied this spirit of application to the study of law and built a successful practice in his home state of South Carolina. Although one of the youngest and most ambitious delegates, Mr. Pinckney's unflinching pro-slavery stance vexed many of his fellow delegates, including many from the South, who favored the abolition of the noxious institution.

Apart from his divisive attitude advocating the perpetuation of the slave trade (which had existed in his world for so many generations he, unfortunately, would have been unlikely to have reflected sufficiently on its morality), Pinckney earned the respect of many of his colleagues for his quest to include a bill of rights written into the federal Constitution. Since his arrival on May 25, Pinckney offered several variations of a bill of rights for the consideration of the convention.

On August 20, he offered a new a list of fundamental rights he deemed worthy of explicit protection in

the Constitution. Among those provisions proposed by Pinckney which eventually were included in the first ten amendments to the Constitution were the right to a writ of habeas corpus, as well as the freedom of the press. Without debate, Pinckney's proposal was referred to the Committee of Detail for consideration.

Apart from the brief list of privileges that he believed ought to be protected, Pinckney teamed with Pennsylvania's Gouverneur Morris and set out a sketch for a Council of State to act as advisers to the President and "to assist the President in conducting the public affairs…."Pinckney and Morris recommended the Council of State be staffed by seven ministers. First, the Chief Justice of the Supreme Court would serve as the President of the Council in the absence of the President and he would "from time to time recommend such alterations of and additions to the laws of the U. S. as may in his opinion, be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union."

The second member of the Council would be a Secretary of Domestic Affairs. This was a sort of Secretary of the Interior, charged with a variety of duties such as "attend[ing] to matters of general police, the State of Agriculture and manufactures, the opening of roads and navigations…."

Third, the Secretary of Commerce and Finance, a man appointed by the President to "superintend all matters relating to the public finances, to prepare & report plans of revenue and for the regulation of expenditures, and also to recommend such things as may in his Judgment promote the commercial interests of the U. S."

Next was the Secretary of Foreign Affairs, the forerunner of the modern Secretary of State. The person nominated to fill this position would "correspond with all foreign Ministers, prepare plans of Treaties, & consider such as may be transmitted from abroad; and generally to attend to the interests of the U. S. in their connections with foreign powers."

A Secretary of War was suggested by Pinckney and Morris, as well. Older readers will recognize this as the title of the office now (after a consolidation of two offices in 1947) designated as the Secretary of Defense. As originally conceived, the Secretary of War would "superintend every thing relating to the war Department, such as the raising and equipping of troops, the care of military stores, public fortifications, arsenals & the like — also in time of war to prepare & recommend plans of offence and Defence."

Those were the most important offices to be filled in the President's cabinet as drawn up by the Pinckney/Morris plan. Over time, the organization so conceived would grow into 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, 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*, written pseudonymously by Hamilton, Madison, and John Jay and published in various newspapers, support for the theory of general agreement on the innocuous import of the phrase is found in the following response to the furor written by Hamilton:

> 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 twenty-fifth year of the reign of Edward III. That law codified and curtailed the common law offence of treason.

Edward III's treason law bifurcated 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 by 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 ObamaCare and the enactment of S.B. 1070 in Arizona.

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…."

As the foregoing illustrates, it is educational to review the record of the Constitutional Convention if for no other reason that to harness its power to illuminate the edges of the contested issues that still incite such controversy.

*Photo: National Archives*