The road to union: America’s forgotten first constitution
May 14, 2014 by Donald Applestein Esq.

Donald Applestein looks back at America’s other Constitution, the Articles of Confederation, in a three-part series. First: how another group of Founders drew up an initial draft.

The movement to form some kind of union among the colonies began when an unambiguous resolution for outright independence was adopted by the Second Continental Congress on May 15, 1776. That was followed on June 2, 1776, when Richard Henry Lee of Virginia moved that “a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.”

On June 13, a committee consisting of one delegate from each of the 13 states was created “to prepare and digest the form of confederation.” John Dickinson of Delaware was selected as the committee’s chairman. (Other committee members were Samuel Adams, Josiah Bartlett, Button Gwinnett, Joseph Hewes, Stephen Hopkins, Francis Hopkinson, Robert R. Livingston, Thomas McKean, Thomas Nelson, Edward Rutledge, Roger Sherman and Thomas Stone.)

From the personal notes of committee members, the debates on each and every article were bitter, long and sharp. Two views emerged: the “radicals” who wanted a strong central government and the “conservatives” who wanted the states to control. While the conservatives outnumbered the radicals, they were divided based upon region: the southern conservatives and the “Eastern Provinces” conservatives from New England and the Mid-Atlantic states.

The southern conservatives, led by John Rutledge of South Carolina, wanted to protect and preserve the southern aristocracy. Rutledge was also apprehensive of the Eastern Provinces “democratic tendencies” and their devotion to the “good of the whole.”

While the Eastern conservatives were willing to give the new government more powers, Rutledge and the southern colonies were not. The result was a split in the conservatives’ strength.

The “Dickinson Draft” reflected the ideas and ideals of the radicals. The states were given unfettered control in a very limited number of areas, and the central government was given control in many areas.

The Dickinson Draft was submitted to Congress on July 12 and 80 copies were ordered from printers John Dunlap and David C. Claypool (who later printed the first copies of the Constitution, one copy of which is on display at the National Constitution Center).

Distribution of the copies was limited to the members of Congress and again sitting as a Committee of the Whole, the debates commenced on July 22. A portion of each day of the next 20 days was devoted to debating the Dickinson Draft.

Some specific features of the Draft dealing with the states were:
• The Articles were a “confederation and perpetual union between the colonies”
• Powers of the colonies were limited to:
  • Each colony retained “sole and exclusive” regulation of its “internal police” ... “that shall not interfere with the Articles of Confederation” (this was the only power retained as the “sole and exclusive” power of the colonies).
  • Each colony could retain “its present Laws, Rights and Customs, as it may think fit... and in all matters that shall not interfere with the Articles of Confederation” (nothing dealt with future laws etc.). [Emphasis supplied]
• Limitations placed on the colonies:
  • No colony could receive representatives nor enter into any “Treaty, Confederation or Alliance” with a foreign nation without the prior consent of the Congress
  • The colonies could impose imposts or duties on imports or exports, provided they would not interfere with treaties entered into by the United States
  • Inhabitants of each colony would retain the same “Rights, Liberties, Privileges, Immunities and Advantages in the other Colonies which the said Inhabitants now have ...” [Emphasis supplied]

On the other hand, the only ‘unqualified limitation’ on the central government was Congress would never impose taxes or duties on the colonies except in managing the postal service.

Article XVIII provided an extensive list of powers of the central government. For example, the central government could:

• Congress would have the “sole and exclusive Right and Power” to determine war and peace
• Establish “captures” of land and water and the division of those captures
• Grant letters of marque and reprisal in time of peace
• Appoint courts for trial of all crimes, frauds and piracy committed at sea or navigable rivers
• Send and receive ambassadors
• Enter into treaties and alliances
• Settle all disputes between two or more states, (though no process of settling those disputes was provided for)
• Coin money and regulate its value
• Regulate trade and manage affairs with Indians
• Establish the boundaries of states claiming lands to “the South Seas”
• Assign territories for new colonies from lands “separated or purchased” from Great Britain
• Establish new colonies within which forms of government were to be established “on the Principles of Liberty”
• Establish and regulate post offices
• Appoint general officers of the army and all naval officers and establish rules governing land and sea forces

A “Council of State” and committees and civil officers necessary for managing the general affairs of the country while Congress is in session or in recess were provided for. This was the basis for a bureaucracy to carry out the functions of the central government.

Clearly, the Dickinson Draft gave most power to the central government with the states’ “unqualified power” limited to their internal police forces. As to the distribution of power among the states, the Draft provided for equality in that each state would have one vote.

There was no standing army in peacetime however each state was to maintain and equip a militia with sufficient arms and material. The rest of the Draft dealt with procedural and administrative
matters such as when Congress was to meet and the length of time a representative could service – three out of every six years.

Perhaps the most intriguing provision was Article XX, which envisioned the admission of Canada upon its “acceding to this Confederation.” However the admission of any other colony would only be upon the affirmative vote of nine colonies. In other words, if Canada wanted in, that was fine but everyone else had to be voted in.

Aside for these specific provisions, the debates over the Dickinson Draft quickly identified three major area of disagreement: (1) apportionment of taxes among the states, (2) control of some states’ western boundaries and (3) representation in Congress.

Next, we will look at the changes that resulted from the Congressional debates which followed and what was finally adopted.

“This is the first of three articles dealing this America’s forgotten first constitution: the Articles of Confederation. Next, we will review the Articles as adopted by the states. Finally, we will look at some of the challenges that arose under the Articles which led to the calling of the Constitution Convention.

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The road to union: The states assert themselves May 22, 2014 by Donald Applestein Esq.

“Dickinson Draft” was submitted to the Congress on July 12, 1776, about 80 copies were printed and distributed to the members, and on July 22 the debates began. Very quickly three basic issues were identified. They centered around the issue on who or what was sovereign and if the union were to be a national state or a federation of independent states? The issues were: (1) the basis of taxation, (2) who was to control the western territories and (3) representation in the Congress.

BASIS OF TAXATION

The new government would obviously have expenses and one problem was how were the monies for the central government’s treasury to be apportioned among the states. The Dickinson Draft provided that apportionment would be based on total number of inhabitants of “every Age, Sex and Quality, except of Indians not paying taxes.”

The states with large black populations strongly opposed this provision. They asserted that apportionment should be based on land valuation. South Carolina delegates frankly stated that if the issue was whether slaves were property or not, there would be no federation. Samuel Chase of Maryland advocated that taxes should be apportioned on the basis of the number of white inhabitants. He offered an amendment on that basis, which was defeated along strict sectional lines,
with southern states for it and northern states against. By October, 1777, this provision the Dickinson Draft was opposed by everyone except the New England delegates.

A motion was made that taxes would be based on the value of land and improvements thereon. The four New England states voted against it, claiming that their lands were more valuable than southern lands. In response, it was not surprising that North and South Carolina, Virginia, Maryland and New Jersey voted in favor. In the end, the New England states yielded.

CONTROL OF THE WESTERN LANDS

Some states had charters which granted them lands to the “South Sea” or to the Mississippi River. They were referred to as the “landed” states. Other states – specifically Pennsylvania, Delaware, New Jersey and Rhode Island – had defined western boundaries. They were referred the “landless” states and they took the position that Congress should set state boundaries and have control of all those lands.

The “landed” states argued that granting that much power to Congress was unacceptable and that Congress should not be granted such extensive powers. The western lands question was debated through October, 1777 and ultimately the “landed” states’ view prevailed. Congress would not have authority of boundaries or control of the western lands. This was a fundamental change from the Dickinson Draft which, in Article XVIII, had granted Congress “sole and exclusive powers” to limiting the boundaries of states who claimed land to the “South Sea.”

REPRESENTATION IN CONGRESS

Representation in Congress was the most contentious issue debated. How were the states to be represented in Congress? This was a battle between the “small” states – those with smaller populations and the “large” states – those with large populations. As expected the “small” states advocated equal representation with each state having one vote. The “large states” argued that representation should be based on population.

The “small” states feared that they would be “swallowed up” by the large states. Large states argued that members in Congress represented all of the people in the nation and not individual states. Therefore, population should be the standard. The problem with using population as the measure was there were no statistics available. Because of that reality, the Dickinson Draft provided for each state having one vote.

John Witherspoon, president of Princeton University, got to the heart of the matter when he observed that the difference was the type of union the delegates were debating: a “federal union” or an “incorporating union” such as the union of Scotland and England. Witherspoon argued that Congress was considering a “federal union” where “Every Colony is a distinct person.”

On the other side, John Adams argued that delegates were representatives of all the people and therefore representation should be based on population. (This position was consistent with the New England or “radical” view which emphasized “democratic tendencies.”)
A compromise was finally agreed upon that provided that on certain issues – such as a declaration of war or the coinage of money or the apportionment of expenses – a vote of nine states would be sufficient for passage. This was another distinct change from the Dickinson Draft.

Underlying these issues was concept of “sovereignty.” Did sovereignty lie with the people as the New England “radicals” asserted? Or, did sovereignty originate from a central authority and get passed down through grants and charters as the southern aristocracy or “conservatives” claim.

Dr. Thomas Burke of North Carolina attacked Article II of the Dickinson Draft, which reserved to the states only control of their “internal police” and left everything else to Congress. He proposed an amendment that read:

“all sovereign power was in the States separately, and that particular acts of it [Congress] which should be expressly enumerated, would be exercised in conjunction, and not otherwise, but that in all things else each State would exercise all the rights and power of sovereignty, uncontrolled.” [Emphasis and clarification added]

In final form, the “Burke amendment” was adopted with 11 votes and provided,

Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the united states in Congress assembled.

Acceptance of this amendment turned the Dickinson Draft on its head. It made the states the sovereign and the central government was a subordinate body with strictly limited and delegated powers.

Some additional issues remained such as the regulation of trade. Under the Dickinson Draft, the states were prohibited from imposing tariffs and duties contrary to treaties entered into by Congress. By amendment that restriction was modified so that no trade treaty of Congress could restrict the “legislative power” of the states. This gave the states the upper hand. The states were also empowered to impose duties and imposts on foreigners just as they imposed on their own citizens i.e. the states were free to do what they wanted.

Another change dealt with the “Council of State.” The Council of State in the Dickinson Draft was changed to the “Committee of the States.” In addition to the name change, the organization’s power was restricted to only when Congress was in “recess.”

By November 10, 1777 a final draft was near. Several amendments were added. Members of Congress were given freedom of speech while in Congress and could not be questioned or impeached by any court or place outside of Congress. Members were also free from arrest and imprisonment while attending or traveling to and from Congress. Also provided for was the extradition of persons who fled one state to another. One state’s records were provided full faith to every other State. Persons moving from one State to another were granted the same rights and privileges as the citizens of the State to which they moved.

On November 15 the Articles were approved and 300 hundred copies were ordered to be distributed to the various state delegations. A circular letter was prepared on November 17 to the states.
explaining the proposal and that ratification was “essential to our very existence as a free people and without it we may soon be constrained to bid adieu to independence, to liberty and safety.”

Notwithstanding this call for prompt action, ratification would take the next three and one-half years, mainly because of continuing debate over the western lands issue. However, ratification was final achieved on January 20, 1781 when Maryland authorized its Congressional delegates to sign the Articles and after some last-minute haggling with New York, they signed on March 1, 1781!

Thus, the Articles of Confederation finally became America’s first Constitution.

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The Road To Union: The coming of America’s second Constitution June 6, 2014 by Donald Applestein Esq.

This is the third of three articles dealing with America’s forgotten first constitution: the Articles of Confederation. In this article, Donald Applestein looks at some of the challenges that arose under the Articles that eventually led to the calling of the Constitution Convention.

The traditional, political view of events that led to the calling of the 1787 Constitution Convention in Philadelphia was the alleged defects in the Articles of Confederation. Those were principally in the areas of inability to tax, control and regulate commerce and trade, and the lack of flexibility.

TAXATION

Under the Articles, the Congress had no power tax. It could impose tariffs and duties, but not direct taxes. As a result, Congress was left to make “requests” of the states to send revenue. As would be expected, this system did not produce the revenues needed to finance the War and other costs of government.

Not only were receipts below what was requested, but they were not received in a timely or consistent fashion. This situation precipitated the necessity of seeking foreign loans, primarily from France and the Netherlands. The circumstances surrounding these loans were further exacerbated by the country’s inability to repay them as expected. Following the War, this problem persisted with the continuing for revenues.

All of this had a negative impact on the country’s credit and standing in the community of nations. The repayment problems of Congress spilled over into the private sector, adversely affecting the development of manufacturing, and domestic and international trade.

COMMERCE AND TRADE

Foreign merchants were unwilling to extent credit to United States merchants and manufacturers because of the government’s inability to repay its loans. They said, “if your government does not repay its loans, why should I expect you to repay yours. We won’t do business with you.”
Domestically, individual states imposed tariffs and duties on interstate trade, which hampered development of our domestic economy. Congress was powerless to intercede. Promotion of the domestic economy became extremely difficult, if not impossible. Indeed, many of the Founding Fathers, including George Washington and Alexander Hamilton, were frustrated with interstate commerce.

LACK OF FLEXIBILITY

In order to amend the Articles, all 13 states had to agree to changes. This proved to be a near impossibility. (Imagine requiring unanimity of the current Congress!) Each state wanted to protect its interests above all else, and therefore amending the Articles proved to be impossible. This forced the conclusion that a fundamental change was required, if not a total overhaul of the Articles.

It was these concerns that led to a meeting between delegates from Maryland and Virginia to discuss their common water border. Initially meeting in Alexandria, Virginia, Washington invited the delegates to his home at Mount Vernon, and they began meeting on March 25, 1785.

They met to discuss issues of navigation on the Potomac River and the Chesapeake Bay, fishing rights, and the development of commerce in general. The conference proved successful and produced the Mount Vernon Compact. Under the Compact, which was approved by both legislatures, the Potomac was under Maryland’s sole jurisdiction but was declared a common waterway for use by Virginia. The two states also agreed to share expenses associated with navigation aids, reciprocal fishing rights, and mutual defense. Delaware and Pennsylvania were invited to join the Compact.

In January 1786, with Maryland’s support, Virginia invited all states to a meeting in Annapolis in September to discuss commercial issues and for the reduction of the trade barriers that had developed between the states. Delegates from six states – New York, New Jersey, Pennsylvania, Delaware, Maryland and Virginia – met from September 11 to September 14 to discuss reduction of trade barriers. New Hampshire, Massachusetts, Rhode Island, and North Carolina appointed delegates, but they did not arrive in time to take part.

The upshot of the “Annapolis Convention” (officially, the “Meeting of Commissioners to Remedy Defects of the Federal Government”) was a report to Congress and the states calling for a constitutional convention in Philadelphia the following May. The report called on all states to attend, and urged that delegates be given authority to examine problems broader than just commerce.

Initially, there was a lack interest among the states to attend, until Washington announced his intention to attend the upcoming convention. With his announcement and the experience of Shays’ Rebellion, there was a distinct change in thinking that the convention was going to be serious. Now, the country was on its way to Philadelphia and its second Constitution.

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