

Grade Entered
8110112
cc



THE DEBATE OVER ENERGETIC GOVERNMENT:

Securing the Proper Balance of Energy and Liberty in the American Republic

Michelle Dianne Holowicki

Thesis

**Submitted in Partial Fulfillment of
the Requirements for the Degree of
Master of American History and Government**

**Ashland University
Ashland, Ohio
August 2012**

Author: Michelle D. Holowicki 8/1/12 *

Signature Date

Approved by /s/ Todd Estes (see attached e-mail approval) 08/05/12

Thesis Advisor Signature Date

1s/ David Tucker 8/10/12 (see attached e-mail)

Second Reader Signature Date

Catlin 8/9/2012

Director, MAHG Signature Date

J. H. W. [Signature] 8-9-12

Chairman, MAHG Signature Date

Table of Contents

Introduction.....	2
Chapter 1: The Need for More Energy Under the Articles of Confederation.....	10
Chapter 2: Energy is Debated and Compromised Upon at the Federal Convention.....	33
Chapter 3: Energy is Debated During the Ratification Process.....	61
Chapter 4: An Energetic Government Necessitates a Bill of Rights.....	86
Conclusion.....	113
Works Cited.....	117

THE DEBATE OVER ENERGETIC GOVERNMENT: *Securing the Proper Balance between Energy and Liberty in the Early American Republic*

In all governments, there is a perpetual intestine struggle, open or secret, between Authority and Liberty; and neither of them can ever absolutely prevail in the contest. A great sacrifice of liberty must necessarily be made in every government; yet even the authority, which confines liberty, can never, and perhaps ought never, in any constitution, to become quite entire and uncontroulable.

David Hume, 1777

Introduction

In the United States today, the debate regarding the proper extent of the government's power and how to protect liberty from government encroachment is rampant, but the concerns are not new, nor are they unfounded in political philosophy. It is, rather, an ongoing dispute, spanning 250 plus years of American political history. As Enlightenment philosopher David Hume observed in the late 18th century, there is an eternal struggle between "authority and liberty" inherent in all governments, which neither can win absolutely.¹ Most of America's political leaders through the Revolution and into the early republic also recognized these competing forces. They struggled to understand the tension between liberty and power, not only in theory but also in practice as they engaged in the great experiment of self-government and formed an enduring constitutional republic.

Leading up to the colonies' break from England, liberty was "the argument on every tongue."² Governmental exercise of power was suspect and unpopular. Having suffered

¹ David Hume, "Essay V. Of the Origin of Government," *Essays Moral, Political, Literary*, edited and with a Foreword, Notes, and Glossary by Eugene F. Miller, with an appendix of variant readings from the 1889 edition by T.H. Green and T.H. Grose, revised edition (Indianapolis: Liberty Fund 1987). Accessed on July 10, 2012 online from The Online Library of Liberty, <http://oll.libertyfund.org/title/704/137486>

² Oliver Ellsworth, "Landholder, No. 3," November 19, 1787. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 9, Document 3. (Chicago: University of Chicago Press, 1987), 303.

under the oppressive and tyrannical reign of King George III long enough, Americans believed “a government of energy was inconsistent with liberty,” and contrary to their happiness.³ However, shortly after the Declaration of Independence from Great Britain was signed, and to an even greater degree after separation was formally achieved, there were a number of vocal advocates for a greater concentration of power in the hands of the national government. Although this power was to be limited in scope, confined by an enumeration in the Constitution of only certain delegated responsibilities, it would nevertheless knowingly lead to an increase in the size and strength of the government. The government, as devised under the Constitution of 1787, promised to be more effective than its weak predecessor in providing order; it was a system of governance more coercive, more consolidated, and more energetic. And yet, its advocates did not perceive it as incompatible with the liberty, safety and happiness of the citizens. An examination of the circumstances leading to, and arguments in favor of, a more energetic central authority, is the subject of this research, which aims to shed light on in what way concentrated power can be appropriately compatible with liberty, as understood by several of the key Founders involved with its creation.

In 1774, John Adams offered his view on power and liberty when he urged his countrymen to nip arbitrary power “in the bud,” for it “is the only maxim which can ever preserve the liberties of any people.”⁴ He recognized that “when the people give way, their deceivers, betrayers, and destroyers press upon them so fast, that there is no resisting afterwards. The nature of the encroachment...is such, as to grow every day more and more

³ Ellsworth, “Landholder, No. 3,” *The Founders’ Constitution*, 304.

⁴ John Adams, “Novanglus; Or, A History of the Dispute with America, From Its Origin, in 1754, To the Present Time, No. iii,” *The Revolutionary Writings of John Adams*, Selected and with a Foreword by C. Bradley Thompson (Indianapolis: Liberty Fund, 2000). Accessed on July 10, 2012 online from The Online Library of Liberty, <http://oll.libertyfund.org/title/592/76844>

encroaching. Like a cancer, it eats faster and faster every hour.”⁵ In this assertion, John Adams urged resistance to arbitrary power. But what if the power is not arbitrary and instead, legitimate? What if the power is derived from the people, based on their own consent, and strategically limited? Does that type of increase in the power of government necessarily result in a reduction of liberty? Are the two notions, power and liberty, inherently antagonistic competitors and thereby mutually exclusive? Or is there a way to achieve a certain degree of balance between the two? How the various Founders answered these questions led them to draw different conclusions about how much power to confer on the central government, as well as how that power should be properly vested. Some, like James Madison, Alexander Hamilton and even George Washington believed that power and liberty were not mutually exclusive, and further, that power, properly conferred, was actually a precondition for liberty. Others, especially Thomas Jefferson, believed there was a permanent and irreconcilable conflict between power and liberty. He admitted that he was “no fan of energetic government,” and believed the natural progress of things was “for liberty to yield and government to gain ground.”⁶

Patrick Henry, in the debates of the Virginia Ratifying Convention in June 1788, traced the history of liberty and power in the United States back to Great Britain. He said:

When the American spirit was in its youth, the language of America was different: liberty...was then the primary object. We are descended from a people whose government was founded on liberty: our glorious forefathers of Great Britain made liberty the foundation of every thing. That country is become a great, mighty, and splendid nation; not because their government is strong and energetic, but, sir, because liberty is its direct end and foundation.⁷

⁵ Adams, “No iii,” *The Revolutionary Writings of John Adams*.

⁶ Thomas Jefferson, “Thomas Jefferson, Letter to Colonel Carrington,” May 27, 1788. From *The Political Writings of Thomas Jefferson*, edited by Edward Dumbauld. (New York: The Liberal Arts Press, 1955), 138.

⁷ Patrick Henry, “Speeches of Patrick Henry in the Virginia Ratifying Convention,” June 5, 1788, *The Anti-Federalist: Writings by Opponents of the Constitution*, edited by Herbert J. Storing. (Chicago: University of Chicago Press, 1981), 297-315.

He worried that America had fled from its spirit of liberty, and would unduly suffer from trying to gain satisfaction in a consolidated government. He warned that concentrated power was incompatible with the genius of republicanism, and said that once it was instituted, the people would find that the government never directed “their operations” to the security of liberty and happiness.⁸ Had Americans priorities changed? Had they so quickly forgotten the spirit of liberty so pervasive in 1776?

No figure of the Revolutionary period could perhaps more adequately answer that question than Washington. Interestingly, his letters reveal that even while the fighting with Great Britain was ongoing, he was not as worried about liberty as he was about power: the power of the government to execute the war properly so that liberty could be secured through an independent republic. Once independence was achieved and the peace treaty signed, Washington remained apprehensive that America could not exist long as a nation, without lodging “somewhere a power which will pervade the whole Union in...an energetic manner.”⁹ To him, that type of effective governing power was essential to republican government without which the country was liable to succumb to an even greater extreme (anarchy or tyranny) and demonstrate sadly to the world that “systems founded on the basis of equal liberty are merely ideal and fallacious.”¹⁰

The ability to effectively establish a government that reconciled liberty with power (or energy) was of utmost concern to the political minds involved in the design and workings of the United States. And doing so was not a quick or easy process. It was a challenge that at times united them, and at other times divided them. Each side, armed

⁸ Henry, “Speech in the Virginia Ratifying Convention,” June 5, 1788, *The Anti-Federalist*, 305.

⁹ George Washington, “George Washington to John Jay,” August 1, 1786. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 5, Document 11. (Chicago: University of Chicago Press, 1987), 162-163.

¹⁰ *Ibid*

with the persuasiveness of their well-developed arguments, was firmly convinced of the rightness of their opinion. Yet, neither camp hardly ever got their way entirely, and they even made some missteps along the way – sometimes erring on the side of too little energy, sometimes attempting too much. Throughout the Founding period, they learned to give-and-take for the good of the union and settle a number of disputes through compromise. That they were able to find the proper balance between energy and liberty sooner rather than later gave the republic a chance to achieve lasting union. Thus, how they resolved this struggle, which lasted from the Revolutionary period well into the Early Republic, deserves our attention. It provides great insight into how and why the Framers set up the Constitution in the manner in which they did, and which principles influenced their understanding of a proper government.

In February 1792, Madison wrote an essay, which appeared in the *National Gazette* avowing that “no Government is perhaps reducible to a sole principle of operation.”¹¹ He pointed out that different principles usually co-mingle in the administration of any government, but that nevertheless, it is useful to characterize governments by the *spirit* that predominates in each of the various kinds of government. Madison then divided governments into three categories; one that operated by a permanent military force which maintains the government, one that operated by a corrupt influence and served its own private interest rather than the good of the whole, and lastly, a government which derived “its energy from the will of the society, and [operated] by the reason of its measures, on the understanding and interest of the society.”¹² Thus, in Madison’s view, the brilliance of the American republican system was to obtain its energy (ability to govern effectively) from

¹¹ Lance Banning, ed. “James Madison, Further Essays for the *National Gazette*: Spirit of Governments” in *Liberty and Order: The First American Party Struggle*, (Indianapolis: Liberty Fund, 2004), 136.

¹² *Ibid*, 136.

the consent of the people. The development of such a principle, and the creation of a system of government which embodied it, was as Madison explained, one that humanity had been seeking, and which America was happy to possess.¹³

In addition to a proper reliance on the people through adequate systems of representation, Madison also subscribed to several other principles of “good government” that helped balance energy with liberty; including checks and balances (auxiliary precautions) in the branches of government, a partly federal/partly national structure of authority, and an extended sphere which guards against majority faction. Due to the fact that the Framers came to understand these principles, and were able to knit them together in a workable system (in spite of the diverse opinions and competing interests and opinions of the men involved), the United States government was placed on a firm and permanent footing, which merited the respect at home and abroad that the civil authority needed to properly administrate the thirteen respective states and all of the citizens therein.

Prior to the Constitution, which derived its authority from “We the People,” the Articles of Confederation attempted to sail the ship of state using only a loose coalition of states under a weak central power. During that period, discussions among advocates of strong central government (Madison, Hamilton, Washington) revealed their desire for a more energetic government. Madison and others realized that “liberty may be endangered by the abuses of liberty as well as by the abuses of power.”¹⁴ What specific events or conditions triggered a widespread call for a more energetic authority? What reasons were provided for determining that the Articles could no longer operate effectively? What did

¹³ Ibid, 136-137.

¹⁴ Alexander Hamilton, John Jay, and James Madison, “No. 63,” *The Federalist (The Gideon Edition)*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 330.

energy mean to those who called for it, and why did they think it was important? The defects they identified and the proposals offered to render the government adequate to the exigencies of union, is the subject of the first chapter.

Then, as the Constitution was being written, the delegates present at the Philadelphia Convention discussed what features of a new plan for government would ensure energy without threatening liberty. They considered national and federal balance, representation, delegated powers, and the structure of the various branches all to be part of the conversation pertaining to energy. Thus, the second chapter uncovers how energy was connected to several of the major decisions and compromises ultimately reached in Philadelphia during the summer of 1787.

After the Convention, a divisive and rigorous contest over ratification ensued. For both the proponents of the Constitution and its critics, energy was a subject over which they remained divided. All sought a government that would provide safety and security, promote the general welfare, and secure the basic liberties of the people, but many doubted whether the Constitution set up such a government. Many espoused their concerns that the new vigorous government put the nation on a slippery slope toward tyranny and called for a second convention to remedy the defects of the first. Another contingent, the so-called Federalists, did everything in their power to counter those objections and to prove that enough safeguards had been implemented. During this period, the arguments evolved and the intensity increased: the stakes were high for either side no matter what the outcome of the ratification process was.

Finally, once the requisite number of states had ratified, the debate over energy continued on in the campaign to add a Bill of Rights. While the pro-energy forces triumphed with the ratification of the Constitution, the first Congress of mainly Federalists

bent under the pressure of the critics of the Constitution to draft and adopt a Bill of Rights. The critics had deemed a declaration of rights necessary to prevent a usurpation of liberty by the newly energetic government. By adopting a Bill of Rights, the nation's leaders demonstrated their political skillfulness. They finally achieved the proper and delicate balance between "energy of government [and] the security of private rights."¹⁵ In doing so, they garnered the confidence of the people, avoided continued controversy over the Constitution, and enabled a more cohesive union of the states. Only after the Constitution was in place and the Bill of Rights was ratified, did the debate over energy lose momentum. By then, the government was energetic enough to be satisfactory to the pro-energy contingent, and liberty was protected enough to assure the critics. The concept of energy essentially faded out of popular and political discourse by the end of the 18th century.

However, in the formative stages of the independent republic, as America's political leaders grappled with how to combine all the principles of good government in a way that provided security and maximized liberty, energy was a vital concern. In Hamilton's eyes, energy was a "leading character in the definition of good government."¹⁶ Madison agreed. "Energy in government," he said in Federalist 37, "is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws, which enter into the very definition of good government." In establishing a permanent, efficient and effective government, both energy and liberty were necessary considerations. Both were linked to consent, and republicanism, and crucial to achieving a strong and lasting union.

¹⁵ Hamilton, "No. 26," *The Federalist*, 126-127.

¹⁶ Hamilton, "No. 70," *The Federalist*, 362.

Chapter 1: The Need for More Energy Under the Articles of Confederation

Perhaps this country never saw so critical a period in their political concerns. We have felt the feebleness of the ties by which these United-States are held together, and the want of sufficient energy in our present confederation, to manage, in some instances, our general concernsⁱⁱ.¹⁷

~ Brutus I

In July 1776, the delegates of the Second Continental Congress declared to a candid world, “These united colonies are, and ought to be, free and independent states,” and that as such, they had the full power to do all things “which independent states may of right do.”¹⁸ The powers specifically acknowledged as granted to the Congress of the United States, included conducting war and concluding peace, entering into alliances, and establishing commerce.¹⁹ For the most part, these were foreign policy considerations, but for the Americans to successfully conduct a war against Great Britain, who at the time held the preeminent position of having the most powerful army and navy in the world, they needed a political organization that addressed not only foreign powers, but internal (domestic) powers as well.

For the year prior to the adoption of the Declaration of Independence, the Second Continental Congress, divided into various committees, served as the central authority for orchestrating the fighting against Great Britain; a war that was initially waged for the purpose of redressing colonial grievances. However, the delegates to the Second Continental Congress knew that their ability to conduct the war and administrate the powers of government was insufficient. Thus, the “Representatives of the United States of America, in General Congress, Assembled,” immediately after declaring their intent to

¹⁷ Brutus, “Essay I,” October 18, 1787, *The Essential Anti-Federalist*, ed. by W.B. Allen and Gordon Lloyd, (Lanham: Rowman & Littlefield Publishing, Inc, 2002), 105-115.

¹⁸ “The Declaration of Independence,” July 4, 1776. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 1, Document 5. (Chicago: University of Chicago Press, 1987), 9.

¹⁹ “The Declaration of Independence,” *The Founders' Constitution*, 10-11.

separate fully from England, turned their attention to setting up a more permanent structure of government (as did their respective states).²⁰ The committee responsible for writing the plan (under the chairmanship of John Dickinson) presented a draft of the document on July 12, 1776, but it took more than a year for the Congress to officially adopt a formal plan of government. Many delegates, who sought to preserve the autonomy and “self-rule” provided by state governments, contested the Dickinson draft, which called for a strong central government including the power to levy taxes. After prolonged debate, the delegates of the Continental Congress reached an agreement known as the Articles of Confederation; a revision of the Dickinson version that strengthened the power of the individual States.²¹ The Articles created little more than a “firm league of friendship,” or in effect, an alliance of mostly sovereign states. All powers and rights not expressly delegated to the Congress by the provisions of the Confederation were reserved to the states.

The Articles of Confederation were sent to the respective states for approval two days after the Congress adopted them on November 15, 1777. Unfortunately, ratification was not achieved until 1781, because the unanimous consent of all thirteen states was required for the Articles to go into effect. Several states agreed to its provisions right away, but others were reluctant to agree to the document, despite the fact that the Articles deliberately limited the functions of the central government. They worried about conflicting claims over state boundary lines, tariff lines, trade restrictions and state court decisions. Thus until Maryland finally assented in 1781, most of the war was fought under the leadership of the Second Continental Congress, working in their respective committees.

²⁰ Ibid, 10.

²¹ “The Articles of Confederation,” March 1, 1781. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 1, Document 7. (Chicago: University of Chicago Press, 1987), 23.

The way government was constructed under the Articles reveals the concerns Americans had about concentrating too much power in the hands of a national or “consolidated” government. A government with too much vigor or unchecked authority, as they experienced under the rule of the King and British Parliament, was perceived as a threat to individual liberty. Of course, the impetus for the War for American Independence was a growing frustration over British ability to control, coerce, and govern without consent and without regard for the God-given rights of the people. The commonly held sentiment of the day was that in order for government to rule justly, the consent of those being governed was required. Furthermore, it was understood that government existed for the sole purpose of protecting basic natural rights, including life, liberty and property. As Jefferson explained in the Declaration, when the government did not protect those rights it was the responsibility and duty of the people to disobey that unjust (tyrannical) government and to institute a new one that better preserved their liberties. Thomas Jefferson, George Mason, John Adams and others wrote of the responsibility of governments to protect these undeniable rights, and the responsibility of citizens to rebel when those rights were not protected.

Consent theory and the right to rebel against tyranny guided the writing of the first framework of government. Not wanting a repeat of British abuse of power, the Articles of Confederation government preserved the sovereignty of individual states and only loosely allied the various states under a weak central government. The purpose of the central government was outlined in Article III of the Confederation’s terms, that the states party to the contract entered into it “for their common defence [*sic*],...the security of their Liberties, and their mutual and general welfare.” The importance of each respective state’s

autonomy was reflected in the way that each state received one vote in Congress, regardless of population.²²

On paper, the Congress set up by the Articles had many of the powers “inherent” or essential to good government, including the power to establish the value of coin, borrow money, determine peace and war, and send and receive ambassadors. However, other powers considered necessary for good government were left entirely up to the states. For example, the powers to tax and to regulate foreign and domestic commerce, which had been disputed in the conflict with England, were reserved to the states, since the delegates were not inclined to surrender these powers to the central government of the United States any more than they had been disposed to surrender these powers to the King or Parliament. Without the power to tax, Congress relied upon State contributions, but these were wholly inadequate, and the government was at or near bankruptcy throughout the entire war. Thus, the problems already inherent in fighting a war against the most powerful nation in the world at the time were exacerbated by the fact that the Articles failed to give the requisite power to the federal government to conduct the war.

The few powers that were “expressly delegated” to the central government were vested entirely in a unicameral legislature. Under the Articles, there was no executive with the power to carry out the law, nor was there a federal judiciary to settle interstate disputes. There was only the Congress, but it had hardly any more power under the Articles than it had already been exercising during the war – such as powers to conduct war and make peace, send and receive ambassadors, enter into treaties and alliances, coin money, regulate Indian affairs, and to establish a post office. Congressional committees carried out all governmental functions, including judicial and executive functions, because

²² “The Articles of Confederation,” *The Founders’ Constitution*, 23.

those functions were not appropriated to their own separate branch. In fact, there were dozens of such committees each with overlapping spheres of authority and rival claims of power. With no executive, and no judiciary at the national level, the Confederation relied on the states to enforce national laws and treaties, which the states did not consistently or adequately do.

Within a few years of the Articles' enactment, many began to realize how woefully inadequate the document was for uniformly governing such a vast territory and diverse population. The Articles were flawed, and were not easily corrected because the only provision allowing for amendment of the document required the unanimous consent of every state. Even basic legislation required nine of the thirteen states' approval. Thus, a minority of the states could prohibit the majority from taking action. The United States, seeking independence from Britain and recognition in the eyes of European powers, was proving itself to be embarrassingly disorganized, divided, and powerless to correct these ills from within.

Alexander Hamilton, at the time serving as aide to General Washington, was one of the first of the Revolutionary Generation to begin writing about the ineffectiveness of the government, both prior to the Articles being ratified, as well as after it went into effect. As a member of the Continental Army in the War for American Independence, Hamilton saw firsthand how the inefficiencies of the Congress impacted the Army's ability to achieve victory on the battlefield. The troops were constantly short on munitions and supplies, without pay, and without discipline. Therefore, Hamilton was one of the most fervent critics of the Articles, and one of the most adamant about seeing changes adopted. In September of 1780, Hamilton wrote to James Duane (one of New York's delegates to the Continental Congress) of the many defects in the present system and its unhappy impact on

the army's ability to conduct the war. His letter is significant because it not only fully unpacks the various political problems facing the country (including the government's lack of energy), but also because he offered remedies to help cure its ineptness.

Hamilton stated that the fundamental defect was a "want of power" in Congress.²³ He said that this originated from three sources; namely an excess of the spirit of liberty causing the States to be jealous of all power not in their hands, a hesitancy in Congress about their own powers causing them to be timid and indecisive in their resolutions, and "a want of sufficient means at their disposal to answer the public exigencies and of vigor to draw forth those means." These factors caused the Army to depend on the "states separately, rather than on the whole collectively."²⁴

To those who questioned whether Congress ever had any definitive powers granted beyond the ability to make recommendations, Hamilton countered that the manner in which Congress was appointed showed that they were vested with the power to protect the republic from harm. He said that by declaring independence, levying an army, and entering into a treaty with France, Congress had already committed "the highest acts of sovereignty," and in the same way that those acts of Congress were not disputed, neither should their other acts of sovereignty. Hamilton criticized the individual states for exercising complete control over their internal police, the affairs of the army, and the power of the purse. He noted that the infighting and bickering among the respective states did not bode well for the prospect of future tranquility. He said that the United States

²³ Alexander Hamilton, "Alexander Hamilton to James Duane," September 3, 1780. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 5, Document 2. (Chicago: University of Chicago Press, 1987), 150-153.

²⁴ Hamilton, "Alexander Hamilton to James Duane," *The Founders' Constitution*, 150.

needed “a confederacy capable of deciding the differences and compelling the obedience of the respective members.”²⁵

Hamilton offered that another defect was the “want of method and energy in the administration.”²⁶ He granted that this lack of energy resulted partly from the first defect of the want of power in Congress, and the structural deficiencies related to the power struggle between the central governments and the states, but he saw this situation exacerbated by “the want of a proper executive.”²⁷ Hamilton explained that Congress, a deliberative body, ought not be expected to play the role of an executive body as well. He said that a legislative body, with its many members and frequent rotation of their terms in office, could not “act with sufficient decision, or with system.”²⁸ By this, Hamilton meant that the Congress could not easily reach decisions, act in unison, or conduct their business with any semblance of promptness. He said that the proneness of every assembly to debate served only to delay, and that the variety of details on all subjects they would have to deal with made members of Congress less likely to possess all the knowledge they needed on a particular subject. Hamilton went on to note how recently, boards had been appointed to administer the government, and lamented the folly of this. He said, “their decisions are slower[,] their energy less[,] their responsibility more diffused. They will not have the same abilities and knowledge as an administration by single men.”²⁹ Hamilton preferred instead to see a single man placed at the head of each of the various departments and under the direction of Congress, possessed with the powers of executive administration.

²⁵ Ibid, 151.

²⁶ Ibid, 151.

²⁷ Ibid, 151.

²⁸ Ibid, 151.

²⁹ Ibid, 151.

Thus, Hamilton, in this detailed letter to James Duane, identifies two sources of energy which he deemed requisite for the central government: enough power in the central government (lodged in Congress) to force compliance among the various states, and power within the central government to execute the laws (placed most appropriately in a separate executive department). The need for both of these sources of power to be present in a central government were cited repeatedly over the next ten years, as plans for a new Convention were formed, a new Constitution was written, and as reasons for ratifying that Constitution were put forward. Putting vigor in the hands of the central government as well as creating a better system of checks and balances were the two primary ways in which a more energetic government could be achieved.

It is also worth mentioning that the first notice of the need for a more energetic government came from those who had firsthand experience in the military during the war. The failure of the central government to adequately provide for the army in the course of the war continued to inform their views about requisite powers of government even after the War for American Independence was won. Those who did not have that direct war experience (especially Jefferson), were more skeptical about reforming the Articles of Confederation and more reluctant to relinquish the powers of the States to a central (presumably oppressive) governmental agency.

In addition to Hamilton, George Washington was also a substantial proponent of a government endowed with more energy. This posture was derived largely from his experience as General of the Continental Army and the frustration he endured when Congress was too disorganized and too powerless to meet the needs of the army in the war with Great Britain. In June of 1783, George Washington sent to the state governors what he believed would be his last public message. As he resigned his position of Commander in

Chief of the Continental Army, he offered his observations and recommendations about the future of the country. He noted in his famous “Circular Letter to the States” that despite the “happy conclusion” of the [Revolutionary] war, the frequent distresses and disappointments of the effort “resulted more from a want of energy, in the Continental Government, than a deficiency of means in the particular States.”³⁰ For the difficulties and embarrassments experienced during the war, Washington blamed the lack of energy at the central level. Specifically, he identified that the measures of Congress were deficient because their authority was inadequate, that states only partially complied with the requisitions of Congress, or that they were very much delayed in doing so, and that these factors served to “damp the zeal of those which were more willing to exert themselves,” as well as to “accumulate the expenses of the War, and to frustrate the best concerted Plans.”³¹ He praised his army for their patience, virtue, and perseverance, because the affairs they endured certainly would have long ago produced the dissolution of any army, less patient, less virtuous and less persevering.³² In closing the letter, he said that the “defects of our Federal Government” were “notorious” facts, and prayed that God would “incline the hearts of the Citizens to cultivate a spirit of subordination and obedience to Government.”³³

While energetic government was expressed as a necessary condition of conducting the Revolutionary War, it interestingly remained a topic of political discourse during the post-Revolutionary War period, when many believed that the national government was too

³⁰ George Washington, “George Washington, Circular to the States,” June 14, 1783. *George Washington: A Collection*, ed. by W.B. Allen. (Indianapolis: Liberty Fund Press, 1988), 239-249.

³¹ Washington, “Circular Letter to the States,” *George Washington: A Collection*, 248.

³² *Ibid*, 248.

³³ *Ibid*, 248.

weak to continue to operate the entire nation effectually, even in peacetime. Despite a few significant accomplishments of the government under the Articles, including ultimately winning independence from Great Britain, as well as passing laws for organizing and admitting western lands into statehood and securing a few commercial treaties abroad, there was a definite undercurrent of dissatisfaction with the present system. The debate centered on two broad questions related to energy: How much central government was needed, and assuming that the Articles of Confederation failed to secure that, what changes were necessary to make it "adequate to the exigencies of the Union"?³⁴

George Washington offered his opinion on the energy topic in a letter to John Jay, in August of 1786:

We have errors to correct; we have probably had too good an opinion of human nature in forming our confederation. Experience has taught us, that men will not adopt and carry into execution measures the best calculated for their own good, without the intervention of a coercive power. I do not conceive we can exist long as a nation without having lodged some where a power, which will pervade the whole Union in as energetic a manner, as the authority of the State Governments extends over the several States.³⁵

Washington's letter demonstrated his fear of the republic's ability to endure long without a more coercive power at the national level and his desire to correct that failing (presumably sooner than later). He wanted to see a power that would unite the whole Union, much like the individual state governments were known to unite their respective states. On the question of where the power should be lodged within the federal government, Washington went on in the letter to explain to Jay that he thought it "absurdity and madness" to "be fearful of investing Congress...with ample authorities for

³⁴ "Proceedings of Commissioners to Remedy Defects of the Federal Government," Annapolis in the State of Maryland, September 11, 1786. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 6, Document 2. (Chicago: University of Chicago Press, 1987), 185-187.

³⁵ George Washington, "George Washington to John Jay," August 1, 1786. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 5, Document 11. (Chicago: University of Chicago Press, 1987), 162-163.

national purposes.”³⁶ Washington said that the interests of the members of Congress are linked inseparably with those of the citizens, and that the necessity of frequent election and the rotation in office of the members of Congress made it unlikely that those members of Congress would ever be induced to abuse their power. Washington did not, at this time, mention the necessity of a separate executive branch.

To the critics who attributed the reason for the lack of coercive power in the central government to the humble tone used by Congress in requesting things from the States, Washington said that even if that were true, their requisitions are “a perfect nihility where thirteen sovereign independent disunited States are in the habit of discussing and refusing compliance with them at their option.”³⁷ Put another way, the states had grown accustomed to disobeying federal laws at whim, and so regardless of what tone the Congress used in making the requests in the first place, the policies were not being followed, as they should have been.

The discourse calling for a more energetic federal system was heightened when events in Massachusetts conspired to highlight even more clearly the inefficacies of the central government. In 1786, a former Revolutionary War veteran named Daniel Shays, led a rebellion of armed farmers and debtors in Massachusetts. His group, seeking inflationary legislation that would make it easier to repay their debts, closed down courts in the interior and western part of the State. Military force was needed to put down the uprising. The Articles of Confederation were blamed for this outbreak, for reasons including its failure to prevent lawlessness, the financial chaos consuming the country, and its inability to adequately protect the right of property. The mutiny added momentum to existing

³⁶ Washington, “George Washington to John Jay,” *The Founders’ Constitution*, 162.

³⁷ *Ibid*, 162.

discussions on the subject of constitutional reform. Shays' Rebellion even prompted Washington (at home in Virginia) to ask his friend in Congress, James Madison, whether there could be any stronger evidence "of the want of energy in our governments than these disorders?"³⁸

In the aftermath of the Massachusetts insurrection, rumors began to circulate of a new Convention, whose delegates would be charged with reframing the structure of the national government. John Jay wrote to Thomas Jefferson, in October 1786, that "the inefficacy of our government becomes daily more and more apparent."³⁹ He worried that "a spirit of licentiousness has infected Massachusetts, which appears more formidable than some at first apprehended. Whether similar symptoms will not soon mark a like disease in several other States is very problematical."⁴⁰ Most telling, was his conclusion, that since "the knaves and fools of this world are forever in alliance, it [was] easy to perceive how much *vigour* [*sic*] and wisdom a government, from its construction and administration, should possess, in order to repress the evils which naturally flow from such copious sources of injustice and evil."⁴¹ John Jay was not alone in sensing the sad situation facing the government under the Articles, nor in the call for more vigorous leadership.

Even two years before Shays' Rebellion, Richard Henry Lee, then President of Congress, wrote to James Madison, "It is by many here suggested as very necessary step for Congress to take, the calling on the States to form a Convention for the sole purpose of revising the Confederation, so far as to enable Congress to execute with more energy, effect

³⁸ George Washington, "George Washington to James Madison," November 5, 1786. *George Washington: A Collection*, 339-340.

³⁹ John Jay, "John Jay to Thomas Jefferson," October 27, 1786. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 5, Document 13. (Chicago: University of Chicago Press, 1987), 164-165.

⁴⁰ Jay, "John Jay to Thomas Jefferson," *The Founders' Constitution*, 164-165.

⁴¹ *Ibid*, 165.

and vigor the powers assigned to it, than it appears by experience that they can do under the present state of things."⁴² Now that Shays' rebellion exposed even more clearly the deficiencies in the federal system, many of the nation's leaders began to clamor for action. Washington asked Madison, "If there exists not a power to check [the rebels], what security has a man for life, liberty, or property?"⁴³ He lamented that "the consequences of a lax, or inefficient government, are too obvious to be dwelt on," but went on to observe that "thirteen Sovereignities pulling against each other, and all tugging at the foederal [*sic*] head will soon bring ruin on the whole."⁴⁴ Washington offered his view on a solution: "A liberal, and energetic Constitution, well guarded and closely watched, to prevent incroachments [*sic*], might restore us to that degree of respectability and consequence, to which we had a fair claim, and the brightest prospect of attaining."⁴⁵ Washington purported that an energetic government, carefully structured to prevent infringements on personal liberty, was the only way that the United States could earn a position of respect and esteem. Though he did not say so explicitly, he likely viewed this as something the United States was unable to achieve at this time either at home or abroad, an embarrassing realization given all that had been sacrificed to secure independence and set up a republican system in the first place.

A few months later, writing to General Henry Knox, Washington reflected on the sad state of affairs the disorders in the various states had brought about. He feared that "there are combustibles in every State, which a spark might set fire to" and hoped that in the

⁴² Richard Henry Lee, "Richard Henry Lee to James Madison," November 26, 1786. The Constitutional Sources Project. Accessed on October 24, 2011 from <http://www.consource.org/document/richard-henry-lee-to-james-madison-1784-7-1/>

⁴³ Washington, "Letter to James Madison," November 5, 1786. *George Washington: A Collection*, 340.

⁴⁴ *Ibid*, 340.

⁴⁵ *Ibid*, 340.

present calm, “a prompt disposition to support and give energy to the federal system is discovered.”⁴⁶

Samuel Osgood, a former Massachusetts representative in the Continental Congress and later Commissioner of the Treasury under the Confederation Congress, wrote to John Adams in November 1786 about his view that the government was at a precipice. He told Adams, who was then serving as U.S. Ambassador to the Court of St. James, “The federal government seems to be as near a crisis as it is possible for it to be. The State governments are weak and selfish enough, and they will of course annihilate the first. Their stubborn dignity will never permit a federal government to exist.”⁴⁷ He reported that men in every state were realizing that “without a proper federal head, the individual states must fall a prey to themselves.”⁴⁸ Osgood explained that the main question they were seriously considering was in what way to effect the most easy and natural change of the present form of the federal government to one more energetic, that would, at the same time, create respect, and properly secure life, liberty, and property.⁴⁹ He granted that achieving that change was a difficult pursuit primarily because of the constraints of the amendment process under the Articles, which allowed Congress to make alterations only with the unanimous consent of the state’s legislatures. He hinted that the idea gaining ground in public discourse was to hold a special convention to agree upon and propose such alterations.

⁴⁶ George Washington. “George Washington to Henry Knox,” December 26, 1786, *George Washington: A Collection*, 348-350.

⁴⁷ Samuel Osgood, “Samuel Osgood to John Adams,” November 14, 1786. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 5, Document 14. (Chicago: University of Chicago Press, 1987), 165-166.

⁴⁸ Osgood, “Samuel Osgood to John Adams,” *The Founders' Constitution*, 165.

⁴⁹ *Ibid*, 165.

This was achieved soon enough. At a convention held in Annapolis, Maryland, a meeting of commissioners from the States of New York, New Jersey, Pennsylvania, Delaware and Virginia adopted the following recommendations:

That there are important defects in the system of the Federal Government is acknowledged by the Acts of all those States, which have concurred in the present Meeting; That the defects, upon a closer examination, may be found greater and more numerous, than even these acts imply, is at least so far probable, from the embarrassments which characterize the present State of our national affairs, foreign and domestic, as may reasonably be supposed to merit a deliberate and candid discussion, in some mode, which will unite the Sentiments and Council's of all the States. In the choice of the mode, your Commissioners are of opinion, that a Convention of Deputies from the different States, for the special and sole purpose of entering into this investigation, and digesting a plan for supplying such defects as may be discovered to exist, will be entitled to a preference from considerations, which will occur, without being particularized.⁵⁰

It took over a year and a half for the recommendations at Annapolis to come to fruition. Per the Annapolis plan, a Convention was to assemble for the “sole purpose” of revising the Articles.⁵¹ In the meantime, how to better infuse the government with its requisite energy, or whether it truly needed more energy, was a subject still fiercely contested.

Washington, ever a friend of energetic government, supported the call for a new Convention, although he was hesitant (at first) to attend it personally. He wrote to Henry Knox of the development, explaining the desirability of “a general convention to revise and amend the federal constitution.”⁵² He pointed out the absence of the eastern States at Annapolis, blaming their failure to show up on distractions caused by “internal commotions” and “the want of energy in the government,” but he assumed that they would

⁵⁰ “Proceedings of Commissioners to Remedy Defects of the Federal Government,” *The Founders’ Constitution*, 186.

⁵¹ *Ibid*, 186.

⁵² Washington, “George Washington to Henry Knox,” December 26, 1786. *George Washington: A Collection*, 349.

be most pleased with the plan for revision.⁵³ Though it is clear from this that he harbored grudges and fears of the breakdown of union in the aftermath of Shays' Rebellion, he remained decidedly hopeful about the prospect of securing a more vigorous federal authority.

John Jay, who had been appointed by the Confederation Congress to serve as Secretary of Foreign Affairs, speculated about the changes that would be necessary under a new plan of government. In doing so, he referenced both vehicles through which the government could have adequate powers – giving the central government more authority, and dividing the powers at the federal level into departments. He told Washington that he could foresee “nothing very desirable [*sic*] from any change which does not divide the Sovereignty into its proper Departments.”⁵⁴ He purported the benefits of a separation of powers, saying, “Let Congress legislate--let others execute--let others judge.”⁵⁵ To the question of what powers should be granted to the government, Jay thought “the more, the better--the States retaining only so much as may be necessary for domestic purposes and all their principal officers civil and military being commissioned and removable by the national Gov[ernment].”⁵⁶

Madison and Washington also had a similar exchange about the upcoming Convention between March and April of 1787, just a month before the delegates were scheduled to convene in Philadelphia. Washington told Madison that “a thorough reform of the present system is indispensable...and I hope the business will be essayed in a full

⁵³ Ibid, 349.

⁵⁴ John Jay, “John Jay to George Washington,” January 7, 1787. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 5, Document 15. (Chicago: University of Chicago Press, 1987), 166.

⁵⁵ Jay, “John Jay to George Washington,” *The Founders' Constitution*, 166.

⁵⁶ Ibid, 166.

Convention.”⁵⁷ He hoped that after the convention, “more powers, and more decision” would be found.⁵⁸ He said that if the system was still insufficient upon its revision, and if it “still wants energy and that secrecy and dispatch...which is characteristic of good Government,” that men would finally be convinced of the necessity of change.⁵⁹ Washington expected that the additional powers granted to Congress would be exercised “with a firm and steady hand, instead of fritter[ed] back to the Individual States where the members in place of viewing themselves in their national character, are too apt to be looking.”⁶⁰ In addition to Washington’s dismay at the sectional (state) loyalty, he acknowledged that he was personally more afraid of Congress lacking appropriate powers, than abusing the ones they had. Interestingly, Washington also confessed to Madison that his opinion of public virtue had changed. He said he now had doubt about “whether any system without the means of coercion in the Sovereign, [would] enforce obedience to the Ordinances of a Gen[era]l Government,” but without that obedience he believed “every thing else fails.”⁶¹ Not only did Washington prefer a coercive power in the general government, but so much so that he believed that laws or ordinances unobserved, or partially attended to, were worse than if they had never been made in the first place.⁶² To the question of what type of coercion was required, Washington did not offer an answer, and admitted that this would take a lot of thought. But he did maintain that the continued

⁵⁷ George Washington, “George Washington to James Madison,” March 31, 1787, *George Washington: A Collection*, 360-363.

⁵⁸ Washington, “George Washington to James Madison,” March 31, 1787, *George Washington: A Collection*, 361.

⁵⁹ *Ibid*, 362.

⁶⁰ *Ibid*, 362.

⁶¹ *Ibid*, 362.

⁶² *Ibid*, 362.

non-compliance of the states with Congressional requests provided more than enough evidence for the necessity of a central government imbued with more energy.

Madison agreed and in return proposed that in addition to the present federal powers, the “national Government should be armed with positive and compleat [*sic*] authority in all cases which require uniformity; such as the regulation of trade, including the right of taxing both exports & imports, the fixing the terms and forms of naturalization, &c &c.”⁶³ He laid before Washington’s eyes an outline of a new system. Each proposal he offered remedied one of the “Vices of the Political System of the United States,” a comprehensive list of failures and needs he had sketched out that same month. For instance, one of the vices he listed was the “want of ratification by the people of the Articles of Confederation.”⁶⁴ The fact that it had not been, meant that the states were the parties to the compact, not the people. He feared continued breaches by the states might dissolve the union altogether.⁶⁵ Thus, Madison argued to George Washington that the new plan for government would only obtain energy (and validity) through ratification by the people, not merely the state legislatures.⁶⁶ This distinguishing feature would set up the future constitution as something above ordinary law – organic law – a characteristic that would ensure its supremacy not only to state constitutions and to state law, but also to national law.

To be sure, not all political leaders were so open to giving the government more energy. In fact, many were writing to each other against this notion. A letter from Richard

⁶³ James Madison, “James Madison to George Washington,” April 16, 1787. *The Founders’ Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 8, Document 6. (Chicago: University of Chicago Press, 1987), 250-251.

⁶⁴ James Madison, “Vices of the Political System of the United States,” April 1787. *The Founders’ Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 5, No. 16. (Chicago: University of Chicago Press, 1987), 166-169.

⁶⁵ Madison, “Vices of the Political System,” *The Founders’ Constitution*, 168.

⁶⁶ Madison, “James Madison to George Washington,” *The Founders’ Constitution*, 251.

Henry Lee to Sam Adams on March 14, 1785, reveals Lee's concern about the several cries "that Congress must have more power--That we cannot be secure & happy until Congress command implicitly both purse & sword."⁶⁷ Lee contested with the contrary view, affirming "the first maxim of a man who loves liberty should be, never to grant to Rulers an atom of power that is not most clearly & indispensably necessary for the safety and well being of Society."⁶⁸ He also warned "power poisons the mind of its possessor and aids him to remove the shackles that restrain [him]self."⁶⁹ Lee said that the Confederation should not be presumptuously called "an infallible system for all times and all situations," and recommended that "no change should be admitted until proved to be necessary by the fairest fullest & most mature experience."⁷⁰

Richard Henry Lee also wrote of his apprehensions to George Mason, who was scheduled to attend the Philadelphia Convention on behalf of Virginia. He echoed his earlier sentiment that a change in the Articles was rash. He feared that "the human mind is too apt to rush from one extreme to another."⁷¹ Lee remarked on the irony that when the Confederation was submitted for consideration, the prevailing apprehension was that Congress was given "too great" of powers, not that the powers of Congress were "defective."⁷² Now, just a few short years later, a drastic change in sentiment rendered the cry "give Congress [more] power."⁷³ Rather than blaming structure of the government

⁶⁷ Richard Henry Lee, "Richard Henry Lee to Sam Adams," March 14, 1785. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 5, Document 8. (Chicago: University of Chicago Press, 1987), 160-161.

⁶⁸ Lee, "Richard Henry Lee to Sam Adams," 161.

⁶⁹ *Ibid*, 161.

⁷⁰ *Ibid*, 161.

⁷¹ Richard Henry Lee, "Richard Henry Lee to George Mason," May 15, 1787. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 5, Document 18. (Chicago: University of Chicago Press, 1987), 170.

⁷² Lee, "Richard Henry Lee to George Mason," 170.

⁷³ *Ibid*, 170.

under the Articles themselves for the discontent that seemed to pervade the nation, Lee blamed “vicious manners,” an indirect reference to the clash in Massachusetts.⁷⁴

Thomas Jefferson also weighed in on the issue of energetic government. In January 1786, he addressed the call made by some for more compulsory power in the Confederation government. He disagreed with those who called the decisions of Congress “impotent,” or lacking in strength or vigor. In response to those who said that the government wants energy because of its difficulty in restraining individuals and states from committing wrongs, he acknowledged the truth and inconvenience of it. But, he continued, “energy which absolute governments derive from an armed force, which is the effect of the bayonet constantly held at the breast of every citizen, and which resembles very much the stillness of the grave, must be admitted also to have it’s [sic] inconveniences.”⁷⁵ He continued that after weighing the two conditions, it was far better to submit to the inconvenience of having individuals and states committing wrongs than to have the people submit to the force of government upon them. The number of wrongs committed by citizens versus by the sovereigns (as in other countries) proved that authority figures commit far more wrongs, the effects of which were far more oppressive and degrading to man. He believed the people’s wrongs were “less dangerous to liberty, and less likely to produce much bloodshed.”⁷⁶

An explanation of the complications involved in the debate over the need for a more energetic government and an outline of the consequences for not acting, was published

⁷⁴ Ibid, 170.

⁷⁵ Thomas Jefferson, “Thomas Jefferson, Answers to Demeunier’s First Queries,” January 24, 1786. *The Founders’ Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 9, Document 1. (Chicago: University of Chicago Press, 1987), 302.

⁷⁶ Jefferson, “Answers to Demeunier’s First Queries,” 302.

anonymously in the Philadelphia Freeman's Journal in May of 1787.⁷⁷ The author began his piece by acknowledging the deplorable state of the country under the Articles; giving reasons such as the fact that foreign trade was draining money from the country, people were in debt and unable to pay, industry was stunted, and that treaties were being violated. He said that not only did civil discontent reign at home, but also that the United States was "insulted and despised" and unable to gain respect abroad.⁷⁸

The author wrote that though there was discussion of the intention of some delegates to the upcoming convention to revise the form of Congress, their "schemes" to do so would not be beneficial. He submitted "the error is not in the form of Congress, the mode of election or the duration of the appointment of the members," but in "the want of power in Congress."⁷⁹ His argument was that during the war, Congress (actually) governed the continent, and had at that time, more vigor, energy and unanimity than it was exercising currently. The author complained, "We have gradually declined into feebleness, anarchy and wretchedness, [since] that period in which the several States began to exercise the sovereign and absolute right of treating the recommendations of Congress with contempt."⁸⁰ The editorial went onto explain how the central government supposedly had all of these powers and duties, but was incapable of enforcing or discharging any of them. The "remedy" to these evils was not to consolidate all of the States into one single republic led by a Congress vested with "absolute direction and government of the continent."⁸¹ This he deemed "impracticable and mischievous" in a country as extensive as the United

⁷⁷ "Philadelphia Freeman's Journal," May 16, 1787. TeachingAmericanHistory.org. Accessed on October 15, 2011 from <http://teachingamericanhistory.org/library/index.asp?document=1925>

⁷⁸ "Philadelphia Freeman's Journal," May 16, 1787.

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Ibid

States.⁸² Rather, the author suggested empowering Congress with the things that concern all states – with the full authorizations to regulate and to enforce the regulations.

The author also provided an interesting rebuttal to those who objected to additional Congressional energy for fear of endangering liberty. He said that given the desperate situation, it was justifiable to attempt an experiment that might prove to be a relief from the current ills. He explained that something could be tried for a few years and not necessarily remain permanent. If the new powers were found to promote mischief, they could be refused in the future, and in the meantime, liberty would not be threatened because the delegates serving in the more energetic Congress were still accountable to the people through frequent election. The article seemed to offer a compromise in the debate over energy. To those who were adamant about granting more power, it would be for a trial period. To those who opposed it, the author stressed the urgency of acting soon before the “ruinous” affairs of the country, already “felt and acknowledged,” resulted in “irretrievable confusion.”⁸³

As the Convention approached, most political leaders had offered their view, one way or the other, on the status of the union under the Articles of Confederation. While some viewed the present circumstances of the United States more dismally than others, they were all eager to prove that the American experiment in self-government could last. Given all that was sacrificed to secure independence, and all of the bright prospects and high expectations once before them, no one wanted the United States to sink into “confusion and darkness,” nor to be looked at with contempt by the rest of the world.⁸⁴ The

⁸² Ibid

⁸³ Ibid

⁸⁴ George Washington, “George Washington to James Warren,” October 7, 1785. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 5, Document 9. (Chicago: University of Chicago Press, 1987), 161.

ineptness of the government, a source of disunion, chaos, and embarrassment, had the potential to be remedied by an “assembly of demigods,” set to convene in Philadelphia in May 1787.⁸⁵ The delegates exerted tremendous effort and engaged in enlightened and sophisticated debates in order to create a “more perfect” system. In the course of framing a new Constitution, they also paid close attention to how to properly secure energy in a republican form of government.

⁸⁵ Thomas Jefferson, “Thomas Jefferson to John Adams,” August 30, 1787. TeachingAmericanHistory.org, Accessed on July 18, 2012 from <http://teachingamericanhistory.org/library/index.asp?document=1887>

Chapter 2: Energy is Debated and Compromised Upon at the Federal Convention

...That a federal government may be formed upon a permanent foundation, endowed with energy sufficient to carry into execution every act and resolve necessary to maintain justice and equity, and to support the majesty and dignity as well as the privileges of a free people; and that an effectual barrier may be set to guard your rights against every invasion, foreign and domestic, and to fix you in a lasting peace upon just and righteous principles, accompanied with its concomitants, national glory and felicity.ⁱⁱⁱ⁸⁶

~ Monitor Essay, 1787

By the end of the Confederation period, two main camps had staked out their position on the question of energy. One view held that it was better to imbue the government with sufficient energy than not enough. They believed that there could be no justice, tranquility, or general welfare in America if the government did not have enough energy to secure the preconditions for justice, tranquility, and the like.⁸⁷ Along this line of reasoning, if the government was not empowered with reasonable authority (by remedying the deficiencies under the Articles), society and government might dissolve into anarchy. The goals were simply stated, but wide reaching: the national government must “be armed with a positive & compleat [*sic*] authority in all cases where measures are necessary.”⁸⁸

The other camp centered on the claim that it was better to err on the side of minimal national energy, which maximizes liberty, or else put citizens at risk of being ruled by power that was too distant and too coercive in nature. This group did not buy into the argument that a weak central government leads to insurrection and mischief. They feared the more imminent danger stemmed from the tyranny of a powerful and oppressive

⁸⁶ Monitor, “Monitor Essay,” October 24, 1787. *Friends of the Constitution: Writings of the “Other” Federalists, 1787-1788*, ed. Colleen Sheehan. (Indianapolis: Liberty Fund, 1998), 26-29.

⁸⁷ Philip Kurland and Ralph Lerner, “Introduction to Energetic Government,” *The Founders’ Constitution*. Volume 1, Chapter 9, Introduction. (Chicago: University of Chicago Press, 1987), 301.

⁸⁸ James Madison, “James Madison to Edmund Randolph,” April 8, 1787. *The Founders’ Constitution*. Volume 1, Chapter 6, Document 9. (Chicago: University of Chicago Press, 1987), 190.

government that devoured liberty from afar. In the spirit of the Revolution, they preferred to deal with the inconveniences attending to too much liberty than those attending too small a degree of it. They also subscribed to the belief that it was more prudent to give additional powers only when they were proven absolutely necessary, than to give too many powers up front and never be able to take them away. Thus, their preference was to more or less preserve the existing Confederation system, where the states retained most of their sovereignty and there was only nominal consolidation under a national head.

In light of the discussions prior to the Constitutional Convention about the “want of energy” under the Articles of Confederation, it is no surprise that conversations related to energy pervaded the debates between the 55 delegates to the Philadelphia Statehouse between May and September 1787. Some delegates, in keeping with the charge of the Annapolis Convention, wanted only for the Articles of Confederation “to be so revised, corrected & enlarged, as to render the federal Constitution adequate to the exigencies of Government, & the preservation of the Union.”⁸⁹ Other delegates, believed the defects to be too great to simply amend the present system. Therefore, the prospect of a stronger, more energetic government was inseparably intertwined in multiple topics of discussion.

It is worth pointing out that in *Madison’s Notes on the Debates in the Federal Convention* (the most authoritative if not almost exclusive source on the Convention’s proceedings), the term “energy” was not typically an explicit element of the narrative. Occasionally, the term was used outright, but it was more frequently alluded to in other terms, including “vigor,” “strength,” “efficiency,” “want of power,” and “coercive.” Other times, it was merely implicit in any proposal that would have brought about a stronger national framework or a more “consolidated” system. But without a doubt, it was an

⁸⁹ James Madison, *Notes of Debates in the Federal Convention of 1787*. Bicentennial ed. (New York: Norton, 1987), 118

important consideration the delegates were faced with time and time again throughout their deliberations and decisions.

In the opening speech of the Convention, delivered after George Washington was unanimously chosen as the presiding officer and the rules regarding secrecy and floor proceedings were adopted, Edmund Randolph, on behalf of the Virginia delegation, began to enumerate some of the defects of the Confederation. He included the inability of the Articles to secure against foreign invasion, the fact that particular states could provoke war without control, that the federal government could not check the quarrels between states, and that the national government was incapable of defending itself against encroachments of the states.⁹⁰ Each of these problems could be traced to, or were rooted in, the lack of energy in the present system. Most delegates, by virtue of being present at the Convention in the first place, agreed with the fact that something needed to be done to prop up or amend the present system. However, as other delegates soon pointed out, unchecked authority on a national scale was equally as problematic, in that it threatened individual liberty. Thus, the pursuit of a governmental framework that was energetic enough to instill the new government with enough coercive power over the states and the ability to act with decision, but that would not imitate tyrannical rule which infringed on personal liberty, was the a key challenge facing the Framers.

In tracing the multi-faceted debate over energy through the Convention, it is helpful to begin with the retrospective insight of James Madison, considered by many historians to be the “Father of the Constitution” for his primary role in guiding the floor debates and engineering a large part of the document’s composition. Madison reported, when looking back on the experience of creating the Constitution, that “among the difficulties

⁹⁰ Madison, *Notes of the Debates*, 30.

encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government, with the inviolable attention due to liberty and to the republican form.”⁹¹ Simply put, Madison viewed the framing of the government under the Constitution as a task requiring the establishment of republican government that delicately balanced the often-competing interests of energy, stability, and liberty.

Energy, he later said, is essential to good government in that it empowers the government to act against internal and external dangers.⁹² However, he also knew that while a powerful enough government is needed for it to be effective, too much energy threatens stability, and worse, individual liberty.

Stable government, it was argued, would have to be secured through a proper mode of election and term length, and was necessary given the volatility of most republican governments (and was a vice in the Confederation system because of the mutability of laws).

Liberty would be best secured by accountability to the people through elections, enlargement of the sphere to guard against majority faction, separation of powers and checks and balances between the various branches, and arguably by the enumeration of specific individual rights (although this was conceived of and guaranteed at the national level only after the Constitution was ratified).

As mentioned previously, the question of energy, or “vigor” in the national government was intimately linked to several issues at the Constitutional Convention, but it was most frequently voiced with respect to the authority of the national legislature over the states (which was related to both representation and powers), and in the creation of,

⁹¹ Alexander Hamilton, John Jay, and James Madison, “No. 37,” *The Federalist (The Gideon Edition)*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 181.

⁹² Madison, “No. 37,” *The Federalist*, 181

for the first time in the United States, a separate executive branch of government. In deliberations about the law-making and law-executing branches, delegates gave weight to domestic factors as well as foreign policy implications, seeking to securing the respectability of the young republic at home, and thus in the eyes of the world. It was in these branches of government that energy could be most easily addressed and secured, although it always had to be balanced, as Madison realized, with stability and liberty.

In the legislative branch, energy was discussed with an eye toward keeping the states and citizens in line, in enumerating sufficient powers, and in formulating a proper scheme of representation. The debate over energetic government was only moderately connected to particular structural and operational factors, such as term length or qualifications for office (because those provided stability). Instead, the principle consideration was whether the national legislative body would operate on the states or the people directly, and this meant that securing a sufficiently energetic government would require an agreeable system of representation. Unfortunately, determining representation in the legislature, and whether the states would be represented equally or in proportion to their populations, was a major source of controversy that virtually paralyzed the delegates for a substantial portion of the Convention.

For the purposes of the Convention's proceedings, the delegates operated under the one-state one-vote principle, but the representatives of the larger, more populous states, desired in the new governing system what they believed to be fair: a voice in the legislature proportionate to a state's size. Thus, those delegates (nationalists) who more-or-less favored a "consolidation" of the states into one central government rather than maintaining the current confederation system, found themselves at odds with delegates who wanted to preserve the independence and sovereignty of the individual states. How to constitute the

states and citizens within the new national government, and what role the states were to play in it, divided the proponents of energetic government (usually from larger states) with those from smaller states who tended to fear a coercive national system (especially one that was to be dominated by larger states who might minimize the small states' influence). This base of support is somewhat counter-intuitive in that the smaller states should have, by some accounts, been more interested in establishing a general system for maintaining order and had less to lose by doing so than the larger, stronger states.

James Madison believed that in a republic, the people were the ultimate source of power, and as such, the authority of government must not only be derived from them, but operate on them directly. This led Madison to develop and endorse the Virginia Plan, which called for a two-house legislature that was proportional to the population in both houses, departing from the structure under the Articles where each state had one vote regardless of size in a one house legislature. It was made clear after the initial proposal that not all states, no matter how convincing Madison's principle was, would (or could) agree to it. In fact, the Delaware delegates, including John Dickinson and George Read, representing a population one-tenth of Virginia's, were under strict instructions from their legislature to not support any proposal that altered the one-state one-vote principle. Their attachment to this principle made it so that the delegates had to tread lightly on the issue of representation, so as not to render any states unable to participate in the new agreement.

In the Committee of the Whole, it did not take long for a majority of the states to adopt the Virginia Plan's resolution for the national legislature to consist of two branches. But how the representatives serving in those houses were to be chosen was a significantly more complex matter. When it was proposed that the first branch of the National Legislature ought to be elected directly by the people, Wilson articulated a strong argument

“for drawing the most numerous branch of the Legislature immediately from the people.”⁹³ He said that he favored “raising the federal pyramid to a considerable altitude,” a euphemism for giving it greater energy, but that this depended on its ability to give it “as broad a basis as possible.”⁹⁴ In his view, the confidence of the people was required in any government that intended to last, and this was especially true in a republican system. Madison concurred by saying that “the great fabric” would be more stable and durable if it rested “on the solid foundation of the people themselves.”⁹⁵ George Mason of Virginia also argued for an election of the larger branch by the people, it being the “grand depository of the democratic principle of the government.”⁹⁶

Several delegates dissented. Roger Sherman (Connecticut) opposed election by the people, preferring instead for the choice to be made by state legislatures. He thought the people “want information” and were “constantly liable to be misled.”⁹⁷ Elbridge Gerry of Massachusetts was also wary of vesting the people with the power to select national representatives. He noted that the evils experienced in the country flowed “from the excess of democracy” among people who lacked virtue and were easily convinced by false information. He did not agree with Madison’s assessment that the legislature would possess the confidence of the people if they were chosen directly by them. These delegates refused to see the connection between the legislature being directly elected by the people and the government having sufficient energy. Or, if they did see the connection, they resisted giving the national legislature energy in that way.

⁹³ Madison, *Notes of the Debates*, 40

⁹⁴ *Ibid*, 40

⁹⁵ *Ibid*, 41

⁹⁶ *Ibid*, 39

⁹⁷ *Ibid*, 39

This issue continued to be wrestled with over the next several weeks because the delegates agreed that even after decisions were made, issues could be revisited again. Additionally, debates resolved in the Committee of the Whole were liable to be undone in general assembly. On June 6, the delegates, meeting in the Committee of the Whole, re-examined the decision that the people would elect the first branch, and raised the controversial issue of the relationship between the existing state governments and the proposed national one.

James Wilson continued to press for a vigorous government, whose authority flowed immediately from the legitimate source of all authority, the people. This led Roger Sherman to question what role the delegates saw for the state governments. He thought the states ought to be continued and accordingly, the states should play the primary role in elections to the national legislature. In his opinion, only if the state governments were to be abolished should the people elect national representatives. Sherman went on to discuss the purposes of the Union, which he described as few: defending against foreign danger and internal disputes, making treaties with foreign nations, and regulating foreign commerce. All other matters he saw as better dealt with by the states.

George Mason of Virginia dissented in part, noting that the existing confederacy only operated on the states, and that this would be changed in the new government because it would operate on the people of the states. Madison agreed with Mason and disagreed with Sherman, adding that there were many more objects of a national government than the ones Sherman mentioned. The vote went in favor of the election of the first branch by the people, which led into the discussion of how members of the second branch would be chosen, and again raised the issue of the relationship between the states and the new national government. When Dickinson made the motion that the members of the second

branch should be chosen by the state legislatures, it was observed that this would create a harmony between the national and state governments, since the particular states would become interested in supporting the national government. In Sherman's concurring opinion, their jurisdictions would remain separate and distinct, but it would be good for them to have a mutual interest in supporting each other. Other delegates did not see it that way. The pro-nationalist Wilson was wary of having one branch chosen by the legislature and the other by the people, thinking it a disadvantage to have the two branches resting on different foundations.

Of course, a huge factor in this debate also related to the number of representatives that would be serving in each branch, which was in turn linked to the slavery issue and whether slaves would be counted for the purposes of representation. This issue, because it is not directly tied to energetic government will not be explored in depth here. Suffice it to say, the delegates decided upon a ratio where five slaves would be treated as three free persons for the purposes of representation. Once this issue was determined, the delegates were able to reach a compromise on the more complicated representation scheme in the legislature. The large states consented to representation in the lower house based proportionally on population, and representation in the upper house at two votes per state. Reaching this agreement ("The Great Compromise") was crucial for the continuance of the Convention and its ultimate success in framing the Constitution.

Prior to this, the delegates were deadlocked. Certain states insisted on a national arrangement that operated directly on the people and represented them proportionately, whereas the other states refused to break the federal arrangement under the Articles. It was not until early July that the delegates saw they could have a partly national, partly federal arrangement. By having the lower house chosen directly by the people, and the

upper house members chosen by state legislatures, the delegates agreed to the principle espoused by Oliver Ellsworth and William Davie (North Carolina), that they were partly federal, partly national in their union. As Davie declared, "the Govt. [*sic*] might in some respects operate on the States, in others on the people."⁹⁸ This institutional arrangement, a concession for the wholly national camp, meant the energy of the new government would be derived directly from the people, but also from the states whose interests would be vested in their selected Senators.

Though Madison and others who were of his opinion on representation (James Wilson, Gouverneur Morris and Charles Pinckney) did not challenge the outcome of the Great Compromise for fear the Convention might fall apart, they continued to strive for vesting Congress with requisite authority. Madison intended to lodge as much power in the national government as he reasonably could, but as Madison told Washington later, he sought for a "middle ground," which would "support a due supremacy of the national authority," but not "exclude the local authorities whenever they can be subordinately useful."⁹⁹ Madison worried that if the general government was "feeble," the large States would not trust its ability to last. Those states would see that their own importance and security depended upon their own size and strength. He reasoned that if the delegates gave "sufficient energy & permanency" to the general government, they would "remove the objection" of the states to a more powerful central authority.¹⁰⁰

Wilson held a similar view and saw no incompatibility between the national and state governments, provided the state governments were restrained to certain local

⁹⁸ Ibid, 226

⁹⁹ James Madison, "Summary of Letters from Jay, Knox and Madison," May 1787, TeachingAmericanHistory.org. Accessed on June 15, 2012 from <http://teachingamericanhistory.org/library/index.asp?document=365>

¹⁰⁰ Madison, *Notes of the Debates*, 208

purposes. Mason also agreed, though he was more reluctant to grant too much power to the national government. He said, "A certain portion must necessarily be left in the States," because it was "impossible for one power to pervade the extreme parts of the U.S. so as to carry equal justice to them."¹⁰¹ He also believed that the state legislatures ought to have a means of defending themselves against the encroachments of the national government. He granted that under the Articles, there were certainly evils arising from the state governments, but he did not want to see the new government run into the opposite extreme, given that the new Congress would likely be constituted with far more authority to carry their acts into execution.¹⁰²

Thus, another element related to the vigor of the new central government, concerned the extent of its specific powers in relation to the mostly sovereign and independent state units set up under the Articles. The debates revealed essentially two options for the delegates – creating a national system that was one of delegated powers, which were those specifically enumerated or defined powers that the national government would have – or alternately, giving power to the national government through a general grant. This is important because these powers determined how the national government would relate to the states' governments. The pro-energy delegates, who saw significant shortcomings in the limited powers of the central government under the Articles, supported a general grant of power to Congress. Madison equivocated. He expressed his bias "in favor of an enumeration and definition of the powers necessary to be exercised by the national legislature," but doubted whether it was practicable to do so.¹⁰³

¹⁰¹ Ibid, 87

¹⁰² Ibid, 87

¹⁰³ Ibid, 44

The Virginia Plan called for giving “legislative power in all cases to which the State Legislatures were individually incompetent,” which essentially amounted to a general grant of power. Some delegates, including Pinckney and Sherman, objected to the term “incompetent,” noting its vagueness made them unable to foresee what types of powers would fall under this definition. Nevertheless, this was agreed to for a large part of the Convention. It was not until the Committee of Detail presented their draft of the Constitution on August 6, that enumerated powers appeared for the first time. It included such powers as the power to coin and borrow money, make war and raise armies, regulate international and interstate trade, and establish lower courts. Several of the powers were obvious remedies to Congress’s lack of authority in those areas under the Articles. All of these powers taken together would serve to increase the energy of the government, but not as much as a general grant would have. Interestingly, the last provision enumerated in the report was a power that assuaged the pro-energy delegates. It gave Congress the ability “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.”¹⁰⁴ When the Convention got around to discussing it on August 20, it passed without much fuss. It would later be a major sticking point during ratification for those who feared that the vague “necessary and proper clause” would be a constant source of increase for the powers of the national legislature over the states.

Another power fiercely contested and deemed imperative for the pro-energy delegates was whether or not the national legislature should be able to “negative” (veto) laws of the states that were deemed improper. This power aimed at relieving some of the

¹⁰⁴ Ibid, 489

vices of the government under the Articles whereby state laws conflicted with the actions of the national legislature. This issue was brought up three separate times in the course of the convention, and each time, prompted spirited debate, sometimes garnering the support of a majority of the state delegations, and other times falling short.

When it was first brought up on May 31, the clause (a resolution of the Virginia Plan) was adopted by the Committee of the Whole without debate or dissent. However, when Charles Pinckney of South Carolina motioned in June that “the national legislature should have authority to negative all laws which they should judge to be improper,” it provoked serious discussion back and forth on the issues’ merits. The motion was promptly seconded by James Madison of Virginia, and drew essentially the same group of supporters of energetic government that also supported unity in the executive, including James Wilson. In the debate over a national negative, Madison regarded the power to negative legislative acts of the States as “absolutely necessary to a perfect system.”¹⁰⁵ He said that experience had shown a tendency of the States to encroach on the federal authority, and reminiscent of his arguments in “Vices of the Political System,” he identified several areas of state infringement – including violating national treaties, infringing the rights & interests of each other, and oppressing the weaker party within their jurisdictions. Madison believed the negative was a “mild expedient” to prevent these “mischiefs” [*sic*].¹⁰⁶ If there were a check by the national legislature to negative state laws, there would be less likelihood that a state would commit violations of federal authority. He said that this type of coercion was a proper remedy.

¹⁰⁵ Ibid, 88

¹⁰⁶ Ibid, 88

Pinckney also urged the power as “indispensably necessary” to render the national legislature effectual. He viewed the power as proper assurance that the states would be kept in “due subordination to the nation.”¹⁰⁷ Without the check, he thought it impossible to defend national prerogatives, no matter how extensive those powers were on paper. The history of the United States under the Articles had shown that the states had defied the acts of Congress, as well as foreign treaties. Pinckney summed up his argument by saying that a universal negative was the “corner stone of an efficient national government.”¹⁰⁸ Madison explained that this “prerogative of the General Government is the great pervading principle that must controul [sic] the centrifugal tendency [sic] of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political System.”¹⁰⁹

While Madison and Pinckney viewed this check as practicable, others were concerned about the extent of the power. As an example, a “universal negative” might, according to Hugh Williamson of North Carolina, restrain the States from regulating their internal police. Elbridge Gerry of Massachusetts thought there might be justification for a negative in some cases, but not in others and he hesitated to grant any power that was not completely necessary. For instance, he said a negative in cases of paper money or other similar measures could be granted, but other negatives might “enslave the States” to the National Legislature by interfering with such things as their right to regulate their own militia.¹¹⁰ He thought the negative would be abused, and that it would also deter new states from coming into the Union. Roger Sherman of Connecticut, too, thought the

¹⁰⁷ Ibid, 88

¹⁰⁸ Ibid, 88

¹⁰⁹ Ibid, 89

¹¹⁰ Ibid, 89

negative appropriate only in defined cases. James Wilson of Pennsylvania countered this by saying that defining the cases in which the negative should be exercised was impractical. A universal negative was necessary to avert state disobedience – the principal cause of the “fritter[ing] down” of the confederation to the “impotent condition in which it now stands.”¹¹¹ He explained that the business of the convention is to correct the vices of the confederation. Given that “one of its vices is the want of an effectual control in the whole over its parts,” the delegates should be more concerned that the whole was at the mercy of each part, than that the whole would unnecessarily sacrifice a part.¹¹² John Dickenson agreed that it was impossible to draw a line between proper and improper uses of the negative. He told the delegates that it was time to choose whether to subject the states to the danger of being injured by the power of the national government or to subject the national government to the danger of being injured by the States. He believed the danger was greater from the states and that by allowing the central government the power to negative state laws, it would shut the door to another “spring of discord.”¹¹³

One interesting argument presented by Gunning Bedford, Jr. of Delaware involved the logistical problems involved in allowing a negative to be exercised. He envisioned the laws of the states suspended in the most urgent cases until they could be sent seven or eight hundred miles to be reviewed by a body who may be incapable of knowing whether the law is necessary and pertinent back home. He believed it to be wrong to have the national legislature sit continuously to revise the laws of the states.

¹¹¹ Ibid, 90-91

¹¹² Ibid, 91

¹¹³ Ibid, 91

Madison did not see the power of the negative in the same way. He assumed the power would be lodged in the less expensive and less numerous body, the Senate, and that temporary assent would be given to laws of urgent necessity until later reviewed. Madison asked Bedford rhetorically to consider whether the small state of Delaware would be protected better with the control of a general government withdrawn? On July 17, it was brought up again, and despite Madison's repeated warnings that the negative was essential to the efficacy and security of the general government, it was again defeated.¹¹⁴

James Madison and several other pro-energy delegates continued to fight for it, determined to see a provision for it inserted in the Constitution. Ultimately, the question for extending a negative was struck down in its fourth round of debate (on August 23) by the no votes of seven states. Upon the failure of the negative to be adopted, Madison complained to Jefferson, that he was wary of the plan's inability to "prevent the local mischiefs [*sic*] which everywhere excite disgusts against the state governments."¹¹⁵

The power to negative laws was not only discussed as a power necessary for the vigor of the national government over the states, but in providing energy to the executive branch in its relation to the legislative branch. While this will be crucial to examine, the debate over an energetic executive branch did not actually begin with a discussion of the power of the executive to negative laws of Congress. Rather, it began with the size of the executive branch – specifically whether the executive power should rest in one man, or with a group (perhaps three). It also involved, over the course of the convention, how the

¹¹⁴ Ibid, 304-305

¹¹⁵ James Madison, "James Madison to Thomas Jefferson," September 6, 1787. TeachingAmericanHistory.org. Accessed on July 1, 2012 from

<http://teachingamericanhistory.org/library/index.asp?document=1869>

person(s) would be selected, how long the term of office would be, and the extent of the executive's powers (including its checks and balances with other branches).

In the Virginia Plan, a national executive was called for who was to be elected by the national legislature. On June 1, the delegates for the first time discussed the merits of constructing an executive branch made up of one executive. It was moved by James Wilson of Pennsylvania to have the executive consist of a single person, and seconded by Charles Pinckney of South Carolina. Wilson preferred a single executive, because it gave the most energy, "dispatch and responsibility" to the office.¹¹⁶ John Rutledge of South Carolina was for vesting the executive power in a single person as long as that power did not extend to powers of war and peace. Roger Sherman of Connecticut argued that the executive should be no more than "an institution for carrying the will of the Legislature into effect," and that the person (or persons) should be appointed by and accountable to the legislature, since that body was supposed to reflect the supreme will of society.¹¹⁷ In fact, Sherman believed the number of executives could fluctuate according to what the legislature deemed necessary, based on the current circumstances and experience of those holding the position. Elbridge Gerry wanted to add a council to the executive, which he believed would give it weight and inspire confidence.¹¹⁸

Edmund Randolph rose to offer his opinion on unity in the executive, which he opposed as the "foetus [*sic*] of monarchy."¹¹⁹ He said that the people of America required a different form of government than the British government, which should not be the prototype. He believed the "great requisites" of "vigor, dispatch & responsibility" could as

¹¹⁶ Madison, *Notes of the Debates*, 46

¹¹⁷ *Ibid*, 46

¹¹⁸ *Ibid*, 46

¹¹⁹ *Ibid*, 46

easily be found in three men as in one man.”¹²⁰ He believed that three men would also help prop up the executive in its independence (from the legislature). James Wilson continued to state his disagreement. He said unity in the executive would create a safeguard against tyranny, not create the fetus of monarchy.

At first, the motion was postponed at the suggestion of James Madison. He thought it proper to defer consideration of the number of executive offices to deliberate the extent of executive authority. Before choosing between a unity and a plurality in the executive, it would be good to have an agreement of powers, which would help the delegates to determine whether those powers would best be administered by one or more persons.¹²¹ Thus, the delegates agreed simply to the creation of a national executive (consisting of an undetermined number of officers) and began to discuss the powers such an office would hold.

The initial plan offered by Virginia gave the executive the general authority to execute national laws, and to enjoy the executive rights vested in Congress by the Confederation.¹²² Madison proposed adding to the initial language, to give the executive the power “to carry into effect the national laws” and to “appoint officers in cases not otherwise provided for.”¹²³

While the delegates discussed in general terms what the powers of the Executive would be, the strategy of enumerating the powers and then deciding the number of executives did not really pan out.¹²⁴ When the convention returned to the topic of unity,

¹²⁰ Ibid, 46

¹²¹ Ibid, 47

¹²² Ibid, 31

¹²³ Ibid, 47

¹²⁴ Ibid, 306

Randolph again expressed his opposition. He said the temper of the people was adverse to the “semblance of monarchy.” As he continued, he ventured that “unity was unnecessary” and that a plurality was “equally competent to all the objects of the department.”¹²⁵ In the discussion of which objects the executive department would deal with, foreign policy considerations were paramount to domestic concerns. Pierce Butler of South Carolina opposed an executive consisting of three or more, arguing that they would not look out for the whole, but only for their own local advantages. He noted that in dealing with foreign issues and military measures, more than one executive would be swayed by prejudice or interest to his part of the country. Elbridge Gerry agreed that it would be inconvenient in many instances, particularly in military matters because it would generate a “general with three heads.”¹²⁶ James Wilson also supported one executive and tried to allay concerns by noting, “a single magistrate does not equal a King.”¹²⁷ He also believed a single executive would serve to unify the nation. Wilson explained that the thirteen states, as diverse as their interests were and as rarely as they ever agreed, had all, at the state level, put a single magistrate at the head of the government. Admittedly, the degree of power was different, but there were not any states that chose “co-ordinate heads.”¹²⁸ He reasoned that three members would lead to “uncontrolled, continued, and violent animosities” which would “interrupt the public administration,” and poison the other branches of government, the states, and the people at large.¹²⁹

¹²⁵ Ibid, 58

¹²⁶ Ibid, 60

¹²⁷ Ibid, 59

¹²⁸ Ibid, 59

¹²⁹ Ibid, 59-60

Once unity in the executive was determined, the powers vested in the office were discussed again, this time keeping the size of the executive in mind. Wilson thought a principle reason for unity in the executive was that a single, responsible person might appoint officers.¹³⁰ Rutledge resisted granting so much power to a single person; he was afraid that the people would think the delegates were leaning toward monarchy. Gouverneur Morris hoped to “be indulged” in an extensive view of the executive and their power.¹³¹ On July 19, he noted, “It has been a maxim in Political Science that Republican Government is not adapted to a large extent of Country, because the energy of the Executive Magistracy can not reach the extreme parts of it. Our Country is an extensive one. We must either then renounce the blessings of the Union, or provide an Executive with sufficient vigor to pervade every part of it.”¹³²

To achieve that vigor, the language of the Constitution was written so that “The executive power shall be vested in a single person” (this was first reported on August 6 and agreed to in the final version). This contrasted with the first sentence of Article I, which said that legislative powers “herein granted” were vested in Congress. Nevertheless, the Constitution also specified particular executive powers, including that the President would be the Commander in Chief of the Army and Navy, and have the power to appoint judges, ambassadors and other government officials (with the consent of the Senate), and grant reprieves and pardons.

How the executive was to be selected was also a source of much controversy for the delegates. There were several options discussed for electing the executive; direct election

¹³⁰ Ibid, 67

¹³¹ Ibid, 322

¹³² Ibid, 322

by the people (favored by James Wilson), election by the national legislature (favored by George Mason), selection by the Senate, or chosen by electors (favored by John Rutledge). Sherman expressed his preference for appointment by the legislature, because the executive was supposed to execute the laws made by that body. He believed the “independence of the Executive on the supreme Legislature, was...the very essence of tyranny.”¹³³ On the other hand, Wilson wanted the executive to be selected without intervention from the states. He believed this would produce more confidence among the people and make for a more energetic leader. This issue was decided, re-debated, and re-decided numerous times over the course of the summer. In the last month, it was discussed as part of the Brearly Committee report, where several postponed matters had been referred. The delegates agreed to the election of the executive by a group of electors, each with two votes; a majority of votes being needed to win election. The candidate with the second highest number of votes would become the Vice President. States were entitled to the same number of electors as they had Representatives plus Senators, and each elector had to give at least one vote to a candidate from outside their state. In cases of a tie, the Senate would choose the Vice President and the House (voting in state delegations) would choose the President.¹³⁴ The creation of the Electoral College preserved the principle of a partly national, partly federal arrangement.

Term length was another major consideration. Duration in office, it was argued, would give both stability and energy to an executive. Sherman and Wilson wanted a limited time in office and specifically advocated for a three-year term. Initially, the Committee of the Whole agreed on a seven-year executive term. Of course, term length

¹³³ Ibid, 48

¹³⁴ The Electoral College was modified by the 12th Amendment in 1804 so that the Electors cast separate votes for a designated President and Vice.

necessarily led to the question of re-eligibility; whether or not the executive would serve a single term, or be allowed to stand for re-election. On June 2, the delegates again voted on a seven-year term, as well as ineligibility after one term. How the delegates decided that question also connected to whether the executive could be impeached, and which level of government had the power to do so. Some proposed that the power to impeach be retained by the national legislature. Another proposal suggested impeachment on the request of a majority of the legislatures of individual states.¹³⁵ In early September, the delegates voted on a four-year term of office with unlimited re-eligibility. However, the Chief Executive could be impeached for treason, bribery, or other “high crimes and misdemeanors” with a vote of the House, and then removed from office if convicted by two-thirds of the Senate.

The executive’s power to “negative” any legislative act that was not afterwards passed by a fraction (unspecified) of each branch of the national legislature was a key point of controversy.¹³⁶ James Wilson thought the negative should be absolute. He reasoned that if the executive did not have that “self-defense,” the legislature could “sink it into non-existence.”¹³⁷ Hamilton agreed that the executive should have an absolute negative on the laws. He did not think this power would be abused, nor did he think it would be exercised often. Elbridge Gerry expressed his view that there was no reason to so greatly check (or control) the legislature, since the best men in the community would be in it.¹³⁸ Ben Franklin reported he had seen this power abused in Pennsylvania. There, laws could not be passed without “a private bargain with [the executive]” and the executive used it to extort

¹³⁵ Ibid, 55

¹³⁶ Ibid, 61

¹³⁷ Ibid, 61

¹³⁸ Ibid, 62

money.¹³⁹ Franklin viewed executive veto privilege as a mischievous sort of check. Roger Sherman was also against it, but for different reasons. He disdained “enabling any one man to stop the will of the whole,” and reasoned that an executive should not be permitted to “overrule the decided and cool opinions of the Legislature.”¹⁴⁰ Others also opposed any checks on the legislative branch because the representatives of the people were the best judges of what was for their interest. Butler complained that perhaps greater powers could have been entrusted to the Executive if it was more than one, but was leery of the tendency of executive power to be on a “constant course of increase.”¹⁴¹

Not surprisingly, one of the most extreme advocates for energetic government at the Convention was also a big proponent of the power of the negative. Alexander Hamilton, on June 18, delivered his famous four-hour “Hamilton Plan,” an eleven-point outline for structuring the new government. In it he referenced the ability to negative laws no less than four times; for example, he wanted the executive to be able to negative all laws about to be passed, and he wanted the executives of each state to be able to negative laws. One of the core tenets of his plan was that “all laws of the particular States contrary to the Constitution or laws of the United States...be utterly void” and that “to prevent such laws [from] being passed, the Governour [*sic*] or president of each State shall be appointed by the General Government and shall have a negative upon the laws about to be passed in the State of which he is Governour [*sic*] or President.” As seen by this proposal, the Hamilton Plan vested considerable authority in the central government, including the ability to choose the governors of the states. He also proposed that one branch of the legislature

¹³⁹ Ibid, 62

¹⁴⁰ Ibid, 62-63

¹⁴¹ Ibid, 63

hold their positions for life (or at least pending good behavior) and also suggested that the president serve for life. Though Hamilton's view remained his own, never gaining any traction with the other delegates, it is worth mentioning in this discussion since it shows his obvious bent toward the most energetic national system advocated for by the delegates. Later, in the Federalist Papers, which Hamilton authored, his support of all energetic provisions of the new system is made plainly clear.

As the Convention was winding down, mixed messages were conveyed by the delegates regarding their opinion of the job they were doing. Some called for a second convention to address the shortcomings of this one (such as its consolidated nature) and to amend it accordingly. Others called for a second convention for the purpose of creating an even *more* powerful central government than the one currently under construction. In late August, Gouverneur Morris lamented that he "had long wished for another Convention, that [would] have the firmness to provide a vigorous Government, which we are afraid to do."¹⁴² However, most pro-energy delegates disagreed, and feared that a second convention would undo the progress made by this one. They had compromised and consented to too much already to give in any more.

One thing that the pro-energy delegates were unwilling to bend on was the method by which the new Constitution would be approved. Madison believed that if the people were the source of any delegated power, the people must ratify the new scheme of government, not the state governments. As he wrote to Edmund Randolph, "To give the new system its proper energy it will be desirable to have it ratified by the authority of the people, and not merely by that of the Legislatures."¹⁴³ If the Constitution was to be treated

¹⁴² Ibid, 567

¹⁴³ Madison, "Letter to Edmund Randolph," *The Founders' Constitution*, 190.

as a higher, organic law, it would have to be approved by a new method; one that bypassed the existing Confederation Congress and state legislatures. Eventually the Framers decided that voters of the respective states would choose delegates to send to a special state ratifying convention, with the express purpose of either approving or disapproving the new Constitution. The votes of nine of the thirteen states were necessary for the Constitution to go into effect.

In the state ratifying conventions, old and new issues were raised, and existing divisions were enlarged. The continued divide would require further compromises be made. Once again, energy and liberty played a tremendous role in the debates. Throughout the ratification period, many discussions were centered on whether the Constitution provided adequate safeguards for both liberty and energy. This contest is the subject of Chapter 3.

A substantial part of the ratification debate centered on the failure of the Convention to adopt a Bill of Rights. Near the end of the Convention, George Mason declared his wish that the plan be prefaced with a Bill of Rights, and said he would second a motion made for that purpose. He believed "It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours."¹⁴⁴ His fellow delegates chose not to oblige him. The states voted unanimously not to prepare a Bill of Rights at that time. Their decision ended up being interpreted by the public as the most egregious error of the Convention. It became the central rallying point for opponents of the Constitution and made the fight for ratification even more intense. The critics of the Constitution were certain that the omission of a Bill of Rights meant far too much energy for the government

¹⁴⁴ Ibid, 630

at the precious expense of liberty. The ramifications and outcome of this predicament will be examined more thoroughly in Chapter 4.

What is apparent from the discussion at the Convention is that a substantial number of delegates subscribed to the philosophy that individual liberty was at greater risk without the proper authority in government to secure it, than it was by a too powerful authority in government. In other words, they believed liberty would best be realized by securing an energetic government. Supporters recognized that while this meant sacrificing some liberty temporarily, it was the only thing that could protect it in the long run. There remained opponents who were hesitant to relinquish any liberty or grant any powers to government without enumerated protections of their liberty. For now, those critics were the minority. Overall, the delegates came together for the common good to secure a lasting union by vesting in the general government powers sufficient enough to pervade the vast extent of the nation.

Ultimately, those arguing the necessity of securing adequate exigencies for the United States government put forward the more persuasive argument, but the ability to do so involved, for all intents and purposes, a complete redesign of the governmental framework. As is apparent from the eventual outcome of the Convention, the political minds agitating for more substantial change, including Madison, Hamilton, Charles Pinckney, James Wilson, and Gouverneur Morris made a better case for reconfiguring the system than their colleagues did who feared a break from the status quo. It is worth noting that Washington, too, wanted a more dynamic national government with enough energy and command to be effective, but he did not actively contribute his political views during the floor debates. However, most historians agree that his presence, credibility and

workings behind the scenes contributed greatly to the ability of the Convention to achieve a more energetic system.¹⁴⁵

The successes of the nationalists (or pro-energy delegates), though notable and necessary for ensuring the permanency of the American Republic, were far from a landslide. The Convention delegates did eventually adopt a more energetic framework of government, but it was not nearly as energetic as they had advocated for from the outset. The pro-energy delegates necessarily abandoned several of their most essential tenets (such as a general grant of power to Congress and a negative of state laws), in order to get the other delegates on board with the Constitution, or in some cases, to prevent them from walking out. To that extent, they were in a situation where if they wanted any chance of a national government at all, they would have to be content with one that was certainly more energetic than the Articles, but not as energetic as what they conceived was necessary before the Convention began. They had to, in the course of the Convention, adopt a modified definition of what an energetic government was and a scaled-down understanding of what its key features would look like.

Madison believed that considering the diversity of opinions on all matters facing the convention, it was impossible to consider the “degree of concord which ultimately prevailed” as anything “less than a miracle.”¹⁴⁶ Washington also believed the Constitution was preferable to the government under which the citizens now lived. He agreed with Madison, that it was “little short of a miracle, that the Delegates from so many different states...should unite in forming a system of national Government, so little liable to well

¹⁴⁵ David O. Stewart, *The Summer of 1787: The Men Who Invented the Constitution*. (New York: Simon & Schuster Paperbacks, 2007), 47.

¹⁴⁶ James Madison, “James Madison to Thomas Jefferson,” October 24, 1787, *The Founder's Constitution*, Volume 1, Chapter 17, Document 22. (Chicago: University of Chicago Press, 1987), 644.

founded objections.”¹⁴⁷ Franklin expressed his astonishment that the system approached “so near to perfection as it [did]” given that this assembly of men assembled with them “all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views.”¹⁴⁸ He hoped that since they had succeeded in combining the “strength & efficiency” of the government with the “procuring and securing happiness to the people,” that it would be “generally received.”¹⁴⁹ He implored the delegates for “their own sakes as a part of the people, and for the sake of posterity,” to “act heartily and unanimously in recommending the Constitution” wherever their influence extended. Furthermore, he urged them not to return to their constituents and report their individual objections to it.¹⁵⁰ Doing so, he was firmly convinced, would cause them to “lose all the salutary effects & great advantages resulting naturally in our favor from foreign Nations as well as among ourselves, from our real or apparent unanimity.”¹⁵¹

Sadly, whatever consensus existed in the Philadelphia State House, conveniently covered under the ambiguous form of the “unanimous consent of the States,” under which they signed the Constitution, ruptured as soon as the document was made public.¹⁵² The delegates may have succeeded in balancing republicanism with energy and efficiency on paper, but it would still be a passionate battle to convince the public of its features, to get the document ratified, and get the new system up and running.

¹⁴⁷ George Washington, “To Marquis de LaFayette,” February 7, 1788. *George Washington: A Collection*, ed. by W.B. Allen. (Indianapolis: Liberty Fund Press, 1988), 382-385.

¹⁴⁸ Madison, *Notes of the Debates*, 653.

¹⁴⁹ *Ibid*, 654.

¹⁵⁰ *Ibid*, 654.

¹⁵¹ *Ibid*, 654.

¹⁵² *Ibid*, 654.

Chapter 3: Energy is Debated During the Ratification Process

If we embrace the tenets of those who oppose the adoption of the proposed Constitution as the standard of our political creed we cannot fail to verify the gloomy doctrines which predict the impracticability of a national system pervading the entire limits of the present Confederacy.^{iv153}

~ Alexander Hamilton, *Federalist 23*

Though the thirty-nine delegates who supported the Constitution added their signatures to the document, signifying its completion, the problems facing the nation prior to the Convention did not disappear immediately.¹⁵⁴ Despite the fact that the Convention saw cool, deliberative minds prevail, and from it a system of government rooted in compromise placed on the table, nothing was official (or taken for granted) until the document was ratified by the requisite nine states. Even then, the nation's leaders were in uncharted territory as far as the day-to-day operations of the new government system were concerned and thereby improvised as necessary. For the time being, the status of government remained essentially in limbo, and there was a sense of urgency (especially among the delegates who had put so much time and effort into the document) to see the ratification process through to completion. Ideally, the timeframe for approval would be abbreviated, lest it drag on and cause support for the document to wane. After all, assuming Rhode Island (who was absent from the Convention) would not ratify any time in the near future (if at all), votes of rejection by only four states would be enough to prohibit the entire system from being enacted.

¹⁵³ Alexander Hamilton, John Jay, and James Madison, "No. 23," *The Federalist (The Gideon Edition)*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 1.

¹⁵³ Brutus, "Essay I," October 18, 1787, in *The Essential Anti-Federalist*, ed. by W.B. Allen and Gordon Lloyd, ed. (Lanham: Rowman & Littlefield Publishing, Inc, 2002), 116.

¹⁵⁴ Of the 55 delegates who attended the Convention, 41 were present at the signing. John Dickinson was absent, but George Read signed his name. Three delegates chose not to sign: Edmund Randolph (VA), George Mason (VA) and Elbridge Gerry (MA).

Consequently, the debate over what government would govern best vigorously continued, this time out of the confines of the Philadelphia State House and in the wider public domain. No longer restricted by a promise of secrecy, though often preferring a pseudonym to maintain anonymity, the delegates in the pro-Constitution camp set about the task of showing the American people how the Constitution would better achieve the goals of the Revolution and the promises of the Declaration of Independence than the Articles of Confederation. In a collection of 85 essays known collectively as “The Federalist,” published anonymously under the name “Publius,” (Madison, Hamilton and John Jay), the merits of the new framework were expounded upon, for the purpose of educating the public on how it answered the deficiencies of the Articles, why its specific provisions were decided upon and how these devices would work. Examination of that work is essential to this research. *The Federalist* is considered the most authoritative resource on Constitutional thought. It is not only incredibly thorough, but was crafted by a couple of prominent insiders at the Convention. (While, Jay was not present at the Convention, his essay contribution was minimal in comparison to Hamilton and Madison.)

In *The Federalist*, the term “energy” (or variations of it) were mentioned thirty one times, and more than twenty-five of those references were made by the strong-government minded Hamilton. He devoted an entire essay to describing the necessity of a government “at least as energetic as the one proposed,” and another to outlining the importance of energy in the executive branch. Essays by other “Friends of the Constitution” likewise gave further insight into the Constitution, its novel advancements, and its ability to more aptly govern the vast republic. It is also instructive to examine the speeches in the various state ratifying Conventions, such as those collected in Elliot’s Debates, to see how the issue of energy still weighed heavily on those delegates’ minds.

Simultaneously, those opposed to the Constitution (commonly termed Anti-Federalists or sometimes “Critics of the Constitution”) for fear of its increased energy, sought to engage in the debate through equally passionate and persuasive essays, usually published in various newspapers or pamphlets, with the purpose of describing the dangers of this new system. The key players in American political life also continued their private correspondence on the topic, emphasizing their hopes, insights, fears, and convictions about the new Constitution in several personal letters that are fascinating compositions indicative of early American political thought.

As the dialogue about what form of government would best govern the American republic continued, whether it was too energetic or not energetic enough, was still a leading concern. During the ratification period, the dialogue evolved and the tenor of the debate noticeably changed. Several tenets the “pro-energy” delegates once considered essential to the new national government were never adopted. Instead, a modified definition regarding what constituted an energetic government transpired. Interestingly, they argued that the new system under the Constitution was still sufficiently energetic to govern the American Republic. In other words, although the Constitution lacked many provisions that they initially set out to secure, they trusted that the framework they created would address the shortcomings of the Articles and more aptly administer the nation’s citizens and respective states. The pro-energy nationalists never admitted they would have liked to establish a government with even more vigor, they simply accepted that what they had devised (however scaled down it was) would work and they maintained their enthusiasm for it in unabashed and enlightened arguments in favor of it.

However, the people who had opposed a more energetic system at the Convention as well as those who were leery of calls for it prior to the Convention, still viewed the new

framework with trepidation, even though it was much less energetic than what so many had fought for at the beginning of the summer of 1787.

Put another way, the pro-energy delegates came to terms with their inability to obtain some of their goals, knowing that their options were to give in or not get anything at all. The fear of some states walking out or being unwilling to continue in a union allegedly too energetic and too destructive of state authority and individual liberty, guided the decision-making in Philadelphia and continued to inform and shape their campaign for ratification. The Federalists yearned for a quick approval of the document in order to prohibit the critics from dragging out the process or wrongly swaying public opinion against it – something they felt would further divide the nation and lead to greater instability. It was also part of the Federalist perspective that they stood to lose way more by not obtaining ratification than the Constitution's dissidents stood to give up through its approval. But they faced a great conundrum in that there was no way to establish a permanent and lasting union without energy, and no way to get the requisite energy the government required if there was no union. In the arguments of the Federalists, the two concepts were inextricably linked: energy was tantamount to union.

On the other hand, the delegates favoring less central authority scarcely saw any merits in the Constitution and waged a harsh critique of its new energy during the Ratification process. There were even some who called for a second convention to modify and improve upon the decisions made by the first. It was a threat that gave the Federalists further reason to tread lightly, resulting ultimately in accommodating the Anti-Federalists during the post-ratification campaign for a Bill of Rights. The Federalists claimed there was too much at stake for the *union* if not imbued with enough energy. By contrast, the Anti-

Federalists ascertained that there was too much risk involved for *individuals* and *states* by consenting to that energy.

Despite the various perceptions related to energy, almost all agreed that this was a time for serious consideration and examination; a time for citizens to divest themselves of bias and local interest, and to give to the subject the dignity of reason and independence of sentiment which national interests require.¹⁵⁵ One essay in the Hampshire Gazette called it a period of “political life and death,” whereupon it was within the power of the people to choose “whether you will be free and happy, or enslaved and miserable.”¹⁵⁶ As Hamilton put it, the subject was of monumental importance, for it was up to the people of this country to demonstrate “by their conduct and example,” whether societies of men were capable of “establishing good government from reflection and choice, or whether they [were] forever destined to depend for their political constitutions on accident and force.”¹⁵⁷ Even Brutus, a prominent Anti-Federalist, acknowledged the high stakes of the present crisis when he noted “the happiness and misery of generations yet unborn is in great measure suspended” until the wise and prudent minds of the public investigate and decide upon this momentous question, which they should not help but feel peculiarly interested in the result of.¹⁵⁸

Pelatah Webster, author of numerous political pamphlets on the American government, framed the course of the debate well when in his remarks to the Assembly of

¹⁵⁵ Pelatah Webster, “Remarks on the Address of Sixteen Members of the Assembly of Pennsylvania,” October 12, 1787. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 9, Document 2. (Chicago: University of Chicago Press, 1987), 302-303.

¹⁵⁶ Monitor, “Monitor Essay,” October 24, 1787. *Friends of the Constitution: Writings of the “Other” Federalists, 1787-1788*, ed. Colleen Sheehan. (Indianapolis: Liberty Fund, 1998), 26-29.

¹⁵⁷ Hamilton, “No. 1,” *The Federalist*, 1.

¹⁵⁸ Brutus, “Essay I,” October 18, 1787, in *The Essential Anti-Federalist*, ed. by W.B. Allen and Gordon Lloyd. (Lanham: Rowman & Littlefield Publishing, Inc, 2002), 1.

Philadelphia less than one month following the close of the Convention, he encouraged whomever was to examine the new constitution to consider both the provisions (or remedies) of the law, and the occasions (or “mischiefs”) it was meant to address. It would be detrimental for anyone to fix their attention “only on the superlative authority and energetic force vested in congress and our federal executive powers by the new constitution.”¹⁵⁹ Doing so may result in thinking that the states yielded too much sovereignty and individuals yielded too much personal liberty than was required to maintain the federal government. Instead, he encouraged the members to “consider with full survey the vast supports which the union requires,” and thereby realize that the powers, though extensive, “are not greater than is necessary for our benefit.”¹⁶⁰ In justifying his opinion, he explained how damaging it was when laws were not executed, because “they weaken the government, expose it to contempt, [and] destroy the confidence of all men.”¹⁶¹ Accordingly, he argued that the union could never be supported without definite and effectual laws which were co-extensive with their occasions, and which were supported by authorities and powers that gave them execution with energy. To critics who called the admittance of such powers into the Constitution a sacrifice, Webster retorted that it was a sacrifice to safety, implying that our union and federal government was worth the sacrifice. Every individual under the protection of a strengthened union would rest secure against foreign and domestic insult and oppression, and without it would be subjected to the invasions and abuse of foreign powers, as well as domestic insurrections and rebellions.

¹⁵⁹ Webster, “Remarks on the Address of Sixteen Members of the Assembly of Pennsylvania,” *The Founders’ Constitution*, 303.

¹⁶⁰ *Ibid*, 303.

¹⁶¹ *Ibid*, 303.

The new Constitution properly vested Congress with the powers to cement and support the states in the union, which would directly result in the respect and attention of foreign nations. While it was not a perfect document, being as it was, merely a human composition, future experience would enable both the discovery of, and correction of, any errors therein. It would be a far greater mistake to not support the document as a whole because of a few perceived blemishes in its parts. In Webster's estimation, "the distresses and oppressions both of nations and individuals often arise from the powers of government being too limited in their principle, too indeterminate in their definition, or too lax in their execution, and of course the safety of the citizens depends much on full and definite powers of government, and an effectual execution of them."¹⁶²

Thus, the task for the pro-energy Federalists was this: to satisfactorily answer any objections which had been made to the Constitution and prove that a government at least as energetic as the one proposed was necessary to the preservation of the union. In doing so, the Federalists had to demonstrate that contrary to popular belief, zealotry for an energetic or efficient government did not equate to a fondness for despotism nor hostility to liberty.¹⁶³ This meant spelling out how a vigorous government was essential to the security of liberty, and how a firm and efficient government could still conform to the principles of republican government. It also required an explanation connecting the utility of the union to the people's political prosperity, as well as a reiteration of "the insufficiency of the present confederation" to preserve the union. Beneath the collective argument put forward by various Federalists lay their deepest fear: that if the new Constitution was not adopted, they would face the severe alternative of dismemberment of the Union. As one

¹⁶² Ibid, 303.

¹⁶³ Hamilton, "No. 1" *The Federalist*, 3

delegate admonished in the Connecticut Ratifying Convention, if “we reject a plan of government, which with such favourable [*sic*] circumstances is offered for our acceptance, I fear our national existence [*sic*] must come to a final end.”¹⁶⁴ The stakes, as almost everyone admitted, could not have been any higher.

As several delegates from the Convention testified, the new powers of the national government under the Constitution, while enhanced, were balanced necessarily by a regard for the republican form, checks and balances at the central level, and the creation of a system that was partly national, partly federal. Roger Sherman and Oliver Ellsworth told their Governor in Connecticut, “The Convention endeavored to provide for the energy of government on the one hand and suitable checks on the other hand to secure the rights of the particular states, and the liberties and properties of the citizens.”¹⁶⁵ Its approval by the states would be a means of “securing their rights and lengthening out their tranquility.”¹⁶⁶ James Madison told Thomas Jefferson of the incredible difficulties encountered by the Convention; including uniting “a proper energy in the Executive and a proper stability in the Legislative departments, with the essential characters of Republican Government” and drawing “a line of demarkation [*sic*] which would give to the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them.”¹⁶⁷ By another Federalists’ account, the new federal government was “endowed with energy sufficient to carry into execution every act and resolve necessary to maintain justice and equity,” while still supporting the majesty,

¹⁶⁴ “Oliver Ellsworth and William Samuel Johnson Speeches in the Connecticut Convention,” January 4, 1788. TeachingAmericanHistory.org. Accessed on July 1, 2012 from <http://teachingamericanhistory.org/library/index.asp?document=2074>

¹⁶⁵ “Roger Sherman and Oliver Ellsworth to Governor,” September 26, 1787. TeachingAmericanHistory.org. Accessed on July 1, 2012 from <http://teachingamericanhistory.org/library/index.asp?document=1754>

¹⁶⁶ Ibid

¹⁶⁷ James Madison, “James Madison to Thomas Jefferson,” October 24, 1787, *The Founder’s Constitution*, 644.

dignity and privileges of a free people.¹⁶⁸ Even Hamilton, the most pro-energy advocate during and after the Convention, reminded the New York ratifying delegates that there were “two objects in forming systems of government—safety for the people (the 'liberty of the individual') and energy in the administration (the 'strength of the government').”¹⁶⁹ In each of these interpretations of the work that was accomplished, no one doubted that there could coexist in the new framework both increased energy and liberty simultaneously.

A critical element involved in garnering support for the new Constitution required the Federalists to publicly elucidate the shortcomings of the present system of government under the Articles. James Wilson, in his testimony before the Pennsylvania ratifying assembly “contrasted the imbecility of our present confederation with the energy which must result from the proffered constitution...a constitution whose energy would pervade the union and restore credit and happiness to a distracted empire.”¹⁷⁰ Reminiscent of Madison’s “Vices of the Political System,” Hamilton also reminded the public of the weaknesses of the Confederation: all powers were retained by the states except for those few which were expressly delegated, there was no national guarantee to help state governments in crisis, the deficient method of raising revenue through quotas of contribution, the inability of Congress to regulate interstate commerce, the absence of power to raise troops, the equal representation of states regardless of population, no judiciary, and the requirement for unanimous amendment and ratification.¹⁷¹ The list of faults was lengthy and explicit.

¹⁶⁸ Monitor, “Monitor Essay,” *Friends of the Constitution*, 27.

¹⁶⁹ “Convention of New York, June 25, 1788” from *Elliot’s Debates: Volume 2*, TeachingAmericanHistory.org. Accessed on July 1, 2012 from <http://teachingamericanhistory.org/ratification/elliott/vol2/newyork0625.html>

¹⁷⁰ “Chapter IV: The Debate in the Convention” from *Pennsylvania and the Federal Constitution*, edited by John Bach McMaster and Frederick D. Stone. TeachingAmericanHistory.org. Accessed on July 1, 2012 from <http://teachingamericanhistory.org/ratification/mcmasterstone/chapterIV.html>

¹⁷¹ Hamilton, “No. 21,” & “No. 22” *The Federalist*, 99-112

The Anti-Federalists did not see the present state of things so severely. Granted, some went at least as far as to admit of the shortcomings, as seen in the Centinel's acknowledgement "that the present Confederation is inadequate to the objects of the union, seems to be universally allowed," but most rejected that the present situation was so dire.¹⁷² Therefore, the two sides divided on the question of "what additional powers are wanting to give due energy to the federal government?"¹⁷³ Centinel wanted the public to be careful "not to impute the temporary and extraordinary difficulties that has hitherto impeded the execution of the confederation, to defects in the system itself."¹⁷⁴ The Centinel essay encouraged the people to not ascribe "the difficulties of the people to a due compliance with the requisitions of Congress, to a defect in the confederation."¹⁷⁵ In his opinion, any government, no matter how energetic, would have suffered the same fate under the similar circumstances brought about by the prolonged war with Great Britain and the corresponding increase in taxes.

Jefferson expressed a similar opinion when he wrote Madison in December 1787. In his opinion, "the late rebellion in Massachusetts has given more alarm than I think it should have done."¹⁷⁶ According to his calculations, "one rebellion in 13 states in the course of 11 years, is but one for each state in a century & a half. No country should be so long without one. Nor will any degree of power in the hands of government prevent insurrections."¹⁷⁷ He owned that he was "not a friend to a very energetic government," it being always

¹⁷² "Centinel Letter IV," November 30, 1787, in *The Essential Anti-Federalist*, ed. by W.B. Allen and Gordon Lloyd. (Lanham: Rowman & Littlefield Publishing, Inc, 2002), 240-243.

¹⁷³ Centinel, "Letter IV," *The Essential Anti-Federalist*, 241.

¹⁷⁴ *Ibid*, 241.

¹⁷⁵ *Ibid*, 241

¹⁷⁶ Thomas Jefferson, "Thomas Jefferson to James Madison," December 20, 1787. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 18, Document 21. (Chicago: University of Chicago Press, 1987), 677.

¹⁷⁷ Jefferson, "Thomas Jefferson to James Madison," December 20, 1787, *The Founders' Constitution*, 677.

oppressive.¹⁷⁸

Others not only thought the Articles were sufficient, but went as far as to praise “this same despised government,” which they said merited “the highest encomium” for the way that “it carried us through a long and dangerous war; it rendered us victorious in that bloody conflict with a powerful nation; [and] secured us a territory greater than any European monarch possesses.”¹⁷⁹ Patrick Henry wondered how “a government which has been thus strong and vigorous, [could] be accused of imbecility, and abandoned for want of energy?”¹⁸⁰

One of the Federalists’ arguments was in showing the contradiction of the Anti-Federalists in that, “While they admit that the government of the United States is destitute of energy, they contend against conferring upon it those powers which are requisite to supply that energy.”¹⁸¹ As James Monroe observed:

It is well known from the practice of all the states in the confederacy that no act of Congress, of what nature soever [*sic*] it may be, is of force within them, until it is recognized by their own legislatures, prior to that event it is a nullity, and to that only does it owe its authority. This view of the subject demonstrates clearly that the present government, in its ordinary administration, though a league of independent states for common good, and possessed of extensive powers, must always be void of energy, slow in its operation, sometimes oppressive, and often altogether suspended.¹⁸²

Hamilton endeavored to show that there was no way the affairs of a confederacy could be properly regulated by a government less comprehensive in its institutions than that which has been proposed by the Convention. The Federalists also had to shoot down

¹⁷⁸ Ibid, 677.

¹⁷⁹ Henry, “Speeches of Patrick Henry in the Virginia Ratifying Convention,” June 5, 1788, *The Anti-Federalist*, 299.

¹⁸⁰ Ibid, 299.

¹⁸¹ Hamilton, “No. 15” *The Federalist*, 70.

¹⁸² James Monroe, “Observations on the Constitution,” May 25, 1788. TeachingAmericanHistory.org. Accessed on July 1, 2012 from <http://teachingamericanhistory.org/library/index.asp?document=1799>

the “novel idea” that was floating in some circles to replace the Union with three or four separate Confederacies. As Hamilton stated in Federalist 13, “When the dimensions of a State attain to a certain magnitude, it requires the same energy of government and the same forms of administration which are requisite in one of much greater extent.”¹⁸³ The rule of economies of scale indicated that it would be much more efficient, and substantially less expensive, to run one government than multiple confederacies.

The Federalists also attempted to show how the new government was analogous to the existing state constitutions, though the point was made more implicitly than directly. Hamilton initially set out intending to cover this thoroughly, but felt by Essay 85 no further discussion on this topic was needed. He did say that the alleged “defects” called out in the Constitution (the re-eligibility of the executive, lack of a Bill of Rights, and lack of a council) were also present in the current state constitution of New York. He eloquently pointed out the inconsistency of the critics, noting there is “no better proof of the insincerity and affectation of some of the zealous adversaries of the plan of the convention among us who profess to be the devoted admirers of the government under which they live than the fury with which they have attacked that plan, for matters in regard to which [their] own constitution is equally or perhaps more vulnerable.”¹⁸⁴

But the Constitution was not only analogous to the state governments in its supposed weaknesses; it was also analogous in its strengths. Particularly, both levels of government conformed to republican principles and divided power among various departments. Hamilton also explained how there were additional securities to republicanism, liberty and property in adopting the plan under consideration, namely “the

¹⁸³ Hamilton, “No. 13,” *The Federalist*, 61.

¹⁸⁴ Hamilton, “No. 85,” *The Federalist*, 452.

restraints which the preservation of the Union will impose on local factions and insurrections, and on the ambition of powerful individuals in single States who might acquire credit and influence enough from leaders and favorites to become the despots of the people.”¹⁸⁵ It was also his opinion that the Constitution diminished opportunities for foreign intrigue, which any break in the Confederacy would facilitate. There was no extensive military establishment, an exclusion of titles of nobility, and better safeguards against the State governments that had previously undermined the foundations of property and credit and “planted mutual distrust in the breasts of all classes of citizens.”¹⁸⁶

The critics of the Constitution did not see the parallel between that document and their state constitutions, namely because of the absence of a formal Bill of Rights or any guarantee of essential civil liberties; especially freedom of religion, speech, and press, and due process rights in judicial proceedings. This criticism and its ultimate resolution will be discussed at length in the following chapter. Being that it was the main concession the Federalists had to make during this stage of the process, it warrants more scrupulous attention.

The size of the country to be governed was also addressed in the Federalist argument. The Anti-Federalists had supposed “this continent was much too extensive for one national government, which should have sufficient power and energy to pervade and hold in obedience and subjection all its parts, consistent with the enjoyment and preservation of liberty.”¹⁸⁷ Further, they believed “that the genius and habits of the people

¹⁸⁵ Ibid, 453.

¹⁸⁶ Ibid, 453.

¹⁸⁷ Centinel, “Centinel Letter XIV,” November 30, 1787. TeachingAmericanHistory.org. Accessed on July 1, 2012 from <http://teachingamericanhistory.org/ratification/mcmasterstone/chapterVII.html>

of America were opposed to such a government.”¹⁸⁸ The Federalists turned this argument on its head, noting that the extensiveness of the country was in fact “the strongest argument in favor of an energetic government; for any other can certainly never preserve the Union of so large an empire.”¹⁸⁹ One Pennsylvania Ratifying Convention Delegate, Richard Law, challenged those who “say a free government like this has not energy enough to pervade a country of such vast extent.”¹⁹⁰ He claimed he was dissatisfied with this assertion, and “want[ed] to try [the] experiment.”¹⁹¹ The pro-Constitutionalists wanted to at least take a chance and test out the new system – the situation could only get better and hardly get worse.

Another major point of Federalist contention related to the novelty and genius of the partly national, partly federal construction of the Union under the new Constitution. As Hamilton discussed in Federalist 23, the states under the Articles were expected to act in good faith toward the common defense and general welfare. He noted:

The experiment has, however, demonstrated that this expectation was ill-founded and illusory; and...have sufficed to convince the impartial and discerning, that there is an absolute necessity for an entire change in the first principles of the system; that if we are in earnest about giving the Union energy and duration, we must abandon the vain project of legislating upon the States in their collective capacities; we must extend the laws of the federal government to the individual citizens of America; we must discard the fallacious scheme of quotas and requisitions, as equally impracticable and unjust.¹⁹²

A key innovation for the Convention delegates was keeping the state entities intact, while extending the government’s legislative authority directly to the people; the

¹⁸⁸ Centinel, “Letter XIV.”

¹⁸⁹ Hamilton, “No. 23” *The Federalist*, 116.

¹⁹⁰ Samuel Huntington, Oliver Wolcott, Sr., and Richard Law, “Speeches in the Connecticut Convention,” January 9, 1788. TeachingAmericanHistory.org. Accessed on July 1, 2012 from <http://teachingamericanhistory.org/library/index.asp?document=2005>

¹⁹¹ Ibid

¹⁹² Hamilton, “No. 23” *The Federalist*, 114.

Federalists now had to explain it and justify it to the larger public. As James Wilson put it, the delegates had endeavored to frame a federal and national constitution “that would produce the advantages of good, and prevent the inconveniences of bad government—a constitution whose beneficence and energy would pervade the whole Union, and bind and embrace the interests of every part—a constitution that would insure peace, freedom, and happiness, to the states and people of America.”¹⁹³ In other words, altering the structure was necessary for creating a central authority strong enough to encompass not only the welfare of the states, but of the people as well.

To further calm the Anti-Federalists concerns, the Federalists offered an analogy of the new mixed structure:

Some suppose that the general government, which extends over the whole, will annihilate the state governments. But we ought to consider that this general government rests upon the State governments for its support. It is like a vast and magnificent bridge built upon thirteen strong and stately pillars: now the rulers, those who occupy the bridge, cannot be so beside themselves as to knock away the pillars which support the whole fabrick [*sic*].¹⁹⁴

This metaphor showed that the states were still important to the structure, but could not be dismantled or disregarded without jeopardizing the entire union.

Another excellent comparison was offered by a “Friend of the Constitution,” who asked critics to consider that despite what was said about the Constitution having “few federal features” and being rather “a system of national government,” that “perhaps the features of a confederacy, and of a national government, are happily blended.” He likened it to a child having “a resemblance of both its parents.”¹⁹⁵ If this was the case, “may not the

¹⁹³ “Convention of Pennsylvania, November 26, 1787,” from *Elliot's Debates: Volume 2*. TeachingAmericanHistory.org. Accessed on July 1, 2012 from <http://teachingamericanhistory.org/ratification/elliott/vol2/pennsylvania1126.html>

¹⁹⁴ Samuel Huntington, Oliver Wolcott, Sr., and Richard Law, “Speeches in the Connecticut Convention.”

¹⁹⁵ Atticus, “Essay III: Observations,” November 22, 1787, *Friends of the Constitution: Writings of the “Other” Federalists*,

event be happy for us?...for a confederacy, without energy sufficient to bring the confederates to joint-action, is a mere nullity. Let us not quarrel about words and sounds, national or federal; it is a good system if its tendency be to make us a happy people.”¹⁹⁶

James Monroe also remarked positively on the “mixture between the general and state governments, being partly a consolidated and partly a confederated one,” which he said suggested “a balance between sovereign-ties [*sic*] that is new and interesting.” He liked that the government proceeded from the people, so that “its powers embrace the care of their interests,” but that it sought to preserve state governments as well.¹⁹⁷

The Anti-Federalists were not easily convinced by these arguments. Brutus warned that although “the government reported by the convention does not go to a perfect and entire consolidation...it approaches so near to it, that it must, if executed, certainly and infallibly terminate in it.”¹⁹⁸ Brutus was particularly apprehensive of, and critical toward, the necessary and proper clause (Article I, Section 8), and the supremacy clause (Article XI), which he said amounted to a complete consolidation of the government, rendering the states virtually non-existent.¹⁹⁹ The author of the Federal Farmer essays echoed these concerns as well. He thought the proposed Constitution “appears to be a plan retaining some federal features, but to be the first important step, and to aim strongly, to one consolidated government of the United States.”²⁰⁰ The strong potential of becoming wholly national meant there was also the horrifying prospect of a central government, distant and detached from the desires of the people, operating with unlimited power over them.

1787-1788, ed. Colleen Sheehan. (Indianapolis: Liberty Fund, 1998), 336-340.

¹⁹⁶ Atticus, “Essay III: Observations” November 22, 1787, *Friends of the Constitution*, 338.

¹⁹⁷ Monroe, “Observations on the Constitution,” May 25, 1788.

¹⁹⁸ Brutus, “Essay I,” *The Essential Anti-Federalist*, 107.

¹⁹⁹ *Ibid*, 107.

²⁰⁰ Federal Farmer I, *The Essential Anti-Federalist*, 78.

Of course, proper representation of the states and of the people could lessen the likelihood of the government seizing unauthorized control by keeping the elected officials accountable through frequent elections. Most of the Federalists agreed that the system of representation decided upon at the Convention propped up the authority of the national government, but not egregiously. They strenuously insisted that it would not create an aristocratic ruling class, nor would the representatives fail to retain their connections to and knowledge of their home districts. Madison admitted that “in all cases a certain number at least seems to be necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes; as, on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude.”²⁰¹ For all intents and purposes, the ratio agreed upon by the Convention (one representative in the House for every thirty thousand inhabitants) seemed neither too few nor too many, given that there was no exact maxim which seemed to dictate the varying numbers found in the state representative assemblies.

On the subject of representation, Wilson explained the gains in political science by reminding people that the “doctrine of representation in government was altogether unknown to the ancients. Now, the knowledge and practice of this doctrine is, in my opinion, essential to every system that can possess the qualities of freedom, wisdom, and energy.”²⁰² Madison agreed, and said that a proper government which derived its energy from the “will of the society, and operating by the reason of its measures on the understanding and interest of the society” was the “government for which philosophy has

²⁰¹ Madison, “No. 55,” *The Federalist*, 288.

²⁰² “Convention of Pennsylvania,” November 26, 1787, TeachingAmericanHistory.org

been searching, and humanity been sighing, from the most remote ages.”²⁰³ It was precisely this type of republican government which America “invented,” and would be “her unrivalled happiness to possess.”²⁰⁴

The powers assigned to the government, a key component of its new energy, also had to be defended, particularly with respect to the legislative branch. Several Federalist essays, authored primarily by Madison, argued that there were no unnecessary or improper powers transferred to the national government by the Constitution.²⁰⁵ All of the powers conferred on the government fell within the proper sphere of authority, including the ability to secure against foreign danger, make rules about trade and commerce with other countries, maintain domestic tranquility among the States, and restrain the States from acts injurious to the union. For each power given to the national government and questioned by critics of the Constitution, Madison deftly explained the need for that power – including the more controversial ones – regulating commerce, raising money for the general welfare, and maintaining armies and equipping fleets.

On this subject some Anti-Federalists conceded that the people at large do not complain of Congress (under the Articles), they only wished that Congress had more power. If this was the case, they said the people could rightly make additions to the power which Congress held. They admitted that proper powers would allow Congress to act with more energy and wisdom, but that this end would not be achieved in the national legislature proposed by the Constitution. They worried that this legislature was too

²⁰³ Ibid

²⁰⁴ Ibid

²⁰⁵ Madison, “No. 41-45,” *The Federalist*, 207-242.

secretive and refined by the mode of election to act with energy and wisdom, no matter what its powers.²⁰⁶

In October 1787, Brutus famously cautioned, “If it has its defects, it is said, they can be best amended when they are experienced. But remember, when the people once part with power, they can seldom or never resume it again but by force. Many instances can be produced in which the people have voluntarily increased the powers of their rulers; but few, if any, in which rulers have willingly abridged their authority. This is a sufficient reason to induce you to be careful, in the first instance, how you deposit the powers of government.”²⁰⁷

The Federalists argued that a more authoritative central government, able to enforce its laws and engender compliance among the states, would earn the respect and admiration of the public. In return, the momentum gained through trust and credibility would allow the government to be better able to promote the welfare of the general public. The environment created would be one wherein insurrections and uprisings were less likely to occur. Put another way, an energetic government helped guard against internal dangers. Hamilton asked rhetorically “if experience has not wrought a deep and solemn conviction in the public mind, that greater energy of government is essential to the welfare and prosperity of the community[?]”²⁰⁸

Critics of the Constitution did not believe that “such a sacrifice of civil liberty [was] necessary to the national honor and happiness of America.”²⁰⁹ As one delegate to the

²⁰⁶ “Debates in the Congress of the Confederation,” from November 4, 1782 to June 21, 1783 and from February 19 to April 25, 1787, in *Elliot's Debates: Volume 5*. TeachingAmericanHistory.org, Accessed on July 1, 2012 from http://teachingamericanhistory.org/ratification/elliott/vol5/0616_1787.html

²⁰⁷ Brutus, “Essay I,” *The Essential Anti-Federalist*, 106.

²⁰⁸ Hamilton, “No. 26,” *The Federalist*, 127.

²⁰⁹ “Chapter IV: The Debate in the Convention” from *Pennsylvania and the Federal Constitution*, edited by John Bach

Pennsylvania Convention remarked, while he was “sensible of the expediency of giving additional strength and energy to the Federal head,” he did not believe that this warranted a cheerful acquiescence to a document whose terms were deemed to be unacceptable.²¹⁰

Given that national honor was a consideration, the Federalists were quick to point out that the new Constitution would afford greater protection against external danger. By properly uniting the delinquent states under a more coercive power, they could no longer sabotage national objectives and subject the country to foreign intrusions. The Articles could never “possess either energy or stability, dignity or credit, confidence at home or respectability abroad,” but the Constitution could.²¹¹

The Anti-Federalists did not see the means and ends in the same way. Unlike the Federalists, who saw energy as a means to foreign credibility, the Anti-Federalists saw liberty as the key to respect from abroad.

As to this government being efficient, or rather sufficient to protect the people from the violence of a foreign enemy; the idea is so absurd that it offends common sense; it can neither have strength, energy, nor respectability, in the great scale of nations. For a new country to become strong and energetic, so as to be able to repel a foreign foe; the government must be *free and patriotic*, and the people must be *wealthy and well-affected* to it. Now if these requisites be wanting, that country is in jeopardy every moment; in fact it is on the direct road of falling a prey to the surrounding nations. In this miserable predicament, then, must America stand if we adopt the new constitution: for the government will neither be *free* nor *patriotic*, but on the contrary, *despotic* and *oppressive*; and the people will be *abject slaves* toiling to support a government, which they curse in their hearts: a government composed only of an emperor and a *few lordlings*, surrounded by thousands of blood-suckers, and cringing sycophants.²¹²

McMaster and Frederick D. Stone. TeachingAmericanHistory.org. Accessed on July 1, 2012 from <http://teachingamericanhistory.org/ratification/mcmasterstone/chapterIV.html>

²¹⁰ Ibid

²¹¹ Hamilton, “No. 30,” *The Federalist*, 148.

²¹² “Philadelphensis III,” December 5, 1787. TeachingAmericanHistory.org. Accessed on July 1, 2012 from <http://teachingamericanhistory.org/library/index.asp?document=2090>

The Anti-Federalists probably had the stronger moral argument in this case, but without a government able to hold the union together, there would be no chance of showing foreign countries what it looked like when a nation placed liberty as its leading value. Achieving a lasting union by putting the nation on a proper footing was the foremost goal, with liberty being a close second.

As far as foreign considerations are concerned, a national figurehead in the form of an executive was of utmost importance. With no proper executive department established under the Articles, and the nation's history with the tyrannical King George III, creating an energetic executive who did not resemble a monarch was a challenging balancing act. But Hamilton believed for certain that "energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy."²¹³

Hamilton enumerated the ingredients which he perceived to constitute energy: first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.²¹⁴ In Federalist 70, he went on to discuss each trait in detail. The importance of unity to energy was undisputed because "decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than in proceedings of any greater number; and in proportion as the number is

²¹³ Hamilton, "No. 70," *The Federalist*, 362.

²¹⁴ *Ibid*, 363.

increased these qualities will be diminished.”²¹⁵ James Wilson concurred: “By appointing a single magistrate, we secure strength, vigor, energy and responsibility in the executive department.”²¹⁶ Hamilton also outlined the political science justifications:

Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive and a numerous legislature. They have with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand, while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.²¹⁷

Unity in the executive was also seen as imperative “in the conduct of war,” during which time “the energy of the Executive is the bulwark of the national security,” and would be lost in any plural executive structure.²¹⁸

The second requisite to energy in the executive authority was an appropriate duration in office. Duration conferred two benefits: “personal firmness of the executive magistrate, in the employment of his constitutional powers; and... stability of the system of administration which may have been adopted under his auspices.”²¹⁹

The final “requisite to energy,” was “competent powers.”²²⁰ After surveying the structure and powers of the executive department, Hamilton was convinced they had all the requisites to energy which “republican principles will admit.” Fortunately, it also

²¹⁵ Ibid, 363.

²¹⁶ “Chapter IV: The Debate in Convention” from *Pennsylvania and the Federal Constitution*, TeachingAmericanHistory.org.

²¹⁷ Hamilton, “No. 70,” *The Federalist*, 363.

²¹⁸ Ibid, 366,

²¹⁹ Hamilton, “No. 71,” *The Federalist*, 369.

²²⁰ Hamilton, “No. 73,” *The Federalist*, 380.

combined the “requisites to safety, in a republican sense – a due dependence on the people, [and] a due responsibility.”²²¹

Sadly, the Anti-Federalists were unconvinced that due attention had been paid to both objects (energy and liberty). A prominent delegate in the Pennsylvania Convention, Mr. Whitehill, pointed out the discrepancy, noting that in considering “what was necessary to the safety and energy of the government, some attention ought surely to have been paid to the safety and freedom of the people,” and yet, “no satisfactory reason has yet been offered for the omission of a bill of rights.”²²² Some viewed it as severe as a betrayal of the Revolution. Jefferson also thought it to be problematic, and he wondered how to acquire the good things in the Constitution while also getting rid of the bad.²²³ One method was to adopt it as is, in hopes of future amendment, or alternately, to reject it outright and call a second convention to remedy the defects.²²⁴ Jefferson thought it may be beneficial, now that the document had been “duly weighed and canvassed by the people,” to look at the parts they disliked versus those they approved and then, in keeping with their wishes, have deputies sent to frame another constitution “omitting what [the people] condemned, & establishing the powers you approve.” Jefferson believed changes secured in this way would “be a great addition to the energy of your government.”²²⁵

Jefferson was not the only critic of the Constitution calling for a second convention. An anonymous article written under the pseudonym Philadelphiensis requested that “another Convention be immediately called, and let a system of government fitted to the

²²¹ Hamilton, “No. 77,” *The Federalist*, 400.

²²² “Chapter IV: The Debate in Convention” from *Pennsylvania and the Federal Constitution*, TeachingAmericanHistory.org

²²³ Jefferson, “Thomas Jefferson to James Madison,” December 20, 1787, *The Founders' Constitution*, 677.

²²⁴ *Ibid*, 677.

²²⁵ *Ibid*, 677.

pure principles of the Revolution, be framed.”²²⁶

This was a demand the Federalists did not want to give into. Under no circumstances was a second Convention an option, lest it open the door for a complete overhaul of what they accomplished in Philadelphia. While it made some sense to “make it perfect before it is irrevocably established,” it was a gamble the Federalists were unwilling to take.²²⁷ As Hamilton noted, the extent of the concessions made in Philadelphia “has been greatly exaggerated.”²²⁸ The critics framed the concessions as “an admission that the plan is radically defective and that without material alterations the rights and the interests of the community cannot be safely confided to it.”²²⁹ But, Hamilton, having made a few allowances himself, thought it was a perversion of sentiment to conclude that just because a few things were not idyllic, the entire thing was bad. He believed, “No advocate of the measure can be found who will not declare as his sentiment that the system, though it may not be perfect in every part, is, upon the whole, a good one; is the best that the present views and circumstances of the country will permit; and is such a one as promises every species of security which a reasonable people can desire.”²³⁰

For the time being, the Federalists won the debate. They effectively made the case for ratification, demonstrating that a weak central government was subject to destruction by internal convulsion. With no overriding power to pervade the union, any hope of personal liberty was nonexistent. The Federalists, thus, held the “trump card” so to speak. No matter how much the critics of the Constitution feared the power vested in the new

²²⁶ “Philadelphiensis XII,” April 9, 1788. TeachingAmericanHistory.org. Accessed on July 1, 2012 from <http://teachingamericanhistory.org/library/index.asp?document=2141>

²²⁷ Hamilton, “No. 85,” *The Federalist*, 454.

²²⁸ *Ibid*, 454

²²⁹ *Ibid*, 454.

²³⁰ *Ibid*, 454.

national authority, ratifying the Constitution seemed the only choice for maintaining union, and thus maintaining liberty. Because what they had was not working, the people had reached the point where they were willing to take a gamble on the promise of something better, even if it was not perfect. As Hamilton put it concisely in Federalist 85, reminiscent of similar statements offered by Franklin and Washington at the end of the Convention, “I am persuaded that it is the best which our political situation, habits, and opinions will admit, and superior to any the revolution has produced.”²³¹ As a consolation prize for the Anti-Federalists, there was always the hope of amendment, and to this prospect the Anti-Federalists clung very tightly.

²³¹ Ibid, 454.

Chapter 4: An Energetic Government Necessitates a Bill of Rights

Let me add, that a bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inference.²³²

Thomas Jefferson, 1787

The nine states necessary to secure ratification gave their approval by mid-June 1788; New Hampshire was the last “pillar” needed to put the new Constitution into action. Virginia and New York were two of the four states that remained outside of the Constitutional fold, which was problematic considering their combined populations amounted to about half of the total U.S. population. North Carolina and Rhode Island also had not yet ratified. Several states chose to send along with their approval of the Constitution, exhaustive lists of suggested amendments including specific items to be included in a declaration of rights. A handful of the recommended amendments were structural in nature, but the vast majority of them were designed to secure the rights and personal liberties of individuals. Accordingly, the debate over whether a government could be adequately endowed with enough energy to be effective in its responsibilities and sufficiently respect the liberties of the people continued, both leading up to and during the first Congress under the Constitution. The Congress, under the deft leadership of James Madison, grappled with condensing the extensive list of proposed amendments, followed by proposing, debating and agreeing upon those that would formally protect individual rights from national infringement. The arguments for and against a Bill of Rights, and reasons they were ultimately acceded to, provide insight into the ongoing debate over energetic government. The chosen amendments reveal the importance the first Congress

²³² Thomas Jefferson, “Thomas Jefferson to James Madison,” December 20, 1787. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 18, Document 21. (Chicago: University of Chicago Press, 1987), 677.

gave to protecting liberty; several realized that due attention to the matter and a quick adoption process would prop up the new government and perpetuate its energy.

The Bill of Rights can be properly viewed as the by-product of the bitter partisan dispute over the ratification of the Constitution. The Anti-Federalists' most pronounced contention with the Constitution all along was its failure to provide a Bill of Rights. As they saw it, the government was now much more energetic and therefore potentially much more threatening to the people and the liberty they held so dear. The Anti-Federalists used the absence of a Bill of Rights to sow popular distrust for the Constitution and to mobilize opposition to its ratification. Philadelphiensis pointed out the contradiction in his exclamation, "Strange reverse this! that the freemen of America, the favored of heaven, should submit to a government so arbitrary in its embryo, that even a bill of rights cannot be obtained, to secure to the people their unalienable privileges."²³³ This speaks to the feeling held by some critics that because the new Constitution failed to provide a guarantee of basic civil rights and simultaneously created a more authoritative central power, it betrayed the spirit of freedom so dear to Americans. The Federalist supporters, on the other hand, thought a bill of rights was unnecessary and perhaps even dangerous. They belatedly complied with demands for a bill only to alleviate Anti-Federalist fears that the new government was inattentive to civil and religious rights and to neutralize opposition to the Constitution.²³⁴ Adoption of the Bill of Rights increased the confidence of the states in the new Congress and diminished calls for a second Constitutional Convention. The

²³³ "Philadelphiensis III," December 5, 1787. TeachingAmericanHistory.org. Accessed on July 1, 2012 from <http://teachingamericanhistory.org/library/index.asp?document=2090>

²³⁴ Daniel Dreisbach, "James Madison's 'Nauseous Project of Amendments': The Politics and Intrigue of Amending the Constitution," (lecture, Georgetown University, Washington, , D.C., June 8, 2011).

addition of these amendments allowed the new government to maintain the energy it derived from the support of the people and thereby get off on a proper footing.

The irony in insisting on a bill of rights in the Constitution is that there was not a comparable bill of rights under the Articles. Most of the states, in their own respective constitutions, had chosen to include either a declaration of rights or a specific prohibition of powers of the government, and the people had always believed this was sufficient enough protection. Now, however, an anti-Constitution faction called incessantly for a bill of rights at the national level to guard against general encroachments. As “The State Soldier Essay” explained it, under the Articles, the main complaint was the “want of energy and power,” a desire for more authority in the government (*not* for a Bill of Rights). Even though the defect of insufficient energy was remedied under the Constitution, it somehow did not make the union any more perfect. Rather, it led to the discovery of imperfections that were not seen before: “The want of a bill of rights, a charter for the press, and a thousand other things which are now discovered, have been therefore unnoticed although they existed then in as great a degree as they now do.”²³⁵ Little else could be more frustrating to the Federalists, who thought it was absurd to critique the Constitution for the absence of an enumeration of rights that was not a reality at the national level previously. To the Anti-Federalists, their demands made perfect sense; there were greater threats to liberty in the present Constitution and they must demand greater protection against this authority.

The framers in Philadelphia voted overwhelmingly not to adopt a bill of rights when it was called for just five days before the delegates finished their work. George Mason of

²³⁵ State Soldier, “Essay I,” January 16, 1788, *Virginia Independent Chronicle*. *Friends of the Constitution: Writings of the “Other” Federalists, 1787-1788*, ed. Colleen Sheehan. (Indianapolis: Liberty Fund, 1998), 113-119.

Virginia brought up the need for such a declaration after several delegates mentioned areas where the Constitution was insufficient; namely in guaranteeing juries in civil cases. Mason believed the plan should have been “prefaced with a Bill of Rights,” which he suspected would “give great quiet to the people.”²³⁶ Elbridge Gerry moved for a Committee to prepare a Bill of Rights and Mason seconded the motion. Roger Sherman articulated the argument against adopting one. He explained that he was not opposed to securing “the rights of the people where requisite,” but given that this Constitution did not repeal state declarations of rights, he believed those alone were satisfactory and that the national legislature could be safely trusted. Mason countered with his worry that because the laws of the U.S. were paramount to state bills of rights, the states’ bills were not adequate. According to Madison’s notes, a brief discussion ensued, after which a vote was taken; ten states voted against the committee, no state voted for it, and Massachusetts abstained.²³⁷ While a handful of individuals may have voted for a Bill of Rights, the states in their respective delegations unanimously did not. Mason responded that he would sooner chop off his right hand than add his signature to the Constitution as it stood. He refused to sign, and expressed his hope for a second Convention that would “know more of the sense of the people.”²³⁸

The omission of a Bill of Rights became substantially more problematic after the Constitution was signed and presented to the State legislatures with instructions for submitting the document to a vote in state ratifying conventions. The options given to the state ratifying conventions were to a) approve the Constitution wholesale, or b) reject it

²³⁶ Madison, *Notes of the Debates*, September 12, 1787, 630.

²³⁷ Rhode Island was not present, and New York did not have a vote because Hamilton was the only delegate present.

²³⁸ Madison, *Notes of the Debates*, September 15, 1787, 651.

outright. There was no middle-ground choice to alter or amend it, to accept only certain parts, or to agree to it pending certain changes. Thus, the Anti-Federalists, alarmed by the disregard for enumerating basic liberties, immediately began campaigning against the Constitution altogether. George Mason, Patrick Henry, and several others who feared the powers of the proposed central government, generated substantial popular opposition to the proposed Constitution. During the same period, the Federalists also began their public campaign, although they supported and promoted the Constitution, and steadily defended the lack of a bill of rights.

The correspondence between Madison and Jefferson on this topic illustrates the divide between the two camps during the interim period between the Convention and ratification. Madison provided an outline of the Constitution to Jefferson just before the Convention adjourned (knowing by the time it got to Jefferson in Paris it would already be public knowledge and therefore not violate the secrecy rule). Jefferson responded to Madison in December, and explained he did not like “the omission of a bill of rights, providing clearly, and without the aid of sophism, for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable [*sic*] by the laws of the land, and not by the law of nations.”²³⁹

Jefferson was unconvinced by the arguments made by Madison, James Wilson and others who thought that a Bill of Rights was unnecessary because all [powers] not given to the general government were reserved. Jefferson indicated that the document itself seemed to infer otherwise and he wished that uniformity among the states on such things

²³⁹ Thomas Jefferson, “Thomas Jefferson to James Madison,” December 20, 1787. *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 18, Document 21. (Chicago: University of Chicago Press, 1987), 677.

as trial by jury would have been accomplished through a common establishment of sacred rights. He added, "A bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inference."²⁴⁰ Jefferson was not alone in these sentiments. The call, public and private, for specificity on rights was widespread, especially in light of the greater authority of the government. Opponents of the Constitution claimed they generally supported the rights of the body of the people, and targeted the advocates of the Constitution for being "not very friendly to those rights."²⁴¹

In particular, the critics of the Constitution worried that "inestimable rights" were insecure under the Constitution, including the right of conscience, trial by jury, protection from excessive fines and bail, no unreasonable searches and seizures, freedom of speech and press, and bearing arms.²⁴² Brutus considered the entire foundation of the Constitution as poorly laid because it lacked a declaration of rights "expressly reserving to the people such of their essential natural rights, as are not necessary to be parted with."²⁴³ Both Brutus and another prominent critic, the Federal Farmer, spoke of the anxiety created when the Constitution restricts the general government from doing some things but not others. They pointed to the Constitution's provisions prohibiting Congress from granting titles of nobility, suspending the writ of habeas corpus, and passing bills of attainder or ex post facto laws.²⁴⁴ They argued that it is confusing to restrict the government in some cases and not others; if one was supposed to believe that every power not given to

²⁴⁰ Jefferson, "Thomas Jefferson to James Madison," December 20, 1787, *The Founders' Constitution*, 677.

²⁴¹ Federal Farmer, "Letter VI," December 25, 1787, *The Anti-Federalist*, 68.

²⁴² "The Dissent of the Minority of the Convention of Pennsylvania," December 18, 1787. *The Essential Anti-Federalist*, ed. by W.B. Allen and Gordon Lloyd. (Lanham: Rowman & Littlefield Publishing, Inc, 2002), 33.

²⁴³ Brutus, "Essay II," November 1, 1787, *The Essential Anti-Federalist*, 174-178.

²⁴⁴ Federal Farmer, "Letter XVI," January 23, 1788, *The Anti-Federalist*, 79-86.

Congress was reserved, why did the Framers secure certain rights but omit others of importance? They reminded their readers, "the powers, rights, and authority, granted to the general government by this constitution, are as complete, with respect to every object to which they extend, as that of any state government." They concluded that as such, the Constitution, like its state Constitution counterparts, should have a Bill of Rights.

The Federalists gave a number of various reasons for initially opposing a Bill of Rights. One such argument was based on the fact that this was a limited government, meaning that the Constitution authorized the national government to exercise expressly delegated, enumerated powers only. Because affirmative powers in matters pertaining to civil and religious liberties had not been so delegated, it was assumed that the power to restrict or otherwise interfere with these liberties was denied to the national government. Hamilton articulated this perspective in Federalist 84 when he asked, "For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power of is given by which restrictions may be imposed?"²⁴⁵ Madison also talked about the limited nature of the government in Federalist 45, noting that the States reserved the powers pertaining to liberties. He explained, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain it the state governments are numerous and indefinite. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and the properties of the people, and the internal order, improvement, and prosperity of the State."²⁴⁶ Security in the government, the Federalists argued, came from the fact that the

²⁴⁵ Hamilton, "No. 84," *The Federalist*, 445.

²⁴⁶ Madison, "No. 45," *The Federalist*, 241.

government only had the power to do what the people had told it to. Clearly more powers were now conferred on the government than under the Articles, thus making it more energetic, but it was still limited to the powers specifically given to it. This created in essence, a bill of rights. The Federalists argued this point repeatedly and expressed it especially well at the Virginia Ratifying Convention.

This system proposes a union of thirteen sovereign and independent states, in order to give dignity and energy to the transaction of their common concerns; it would be idle therefore to countenance the idea that any other powers were delegated to the general government than those specified in the constitution itself, which, as I have before observed, amounts in fact to a bill of rights—a declaration of the people in what manner they choose to be governed.²⁴⁷

The Federalists also sometimes pointed to the institutional barriers already in the Constitution. They argued that the most effective protection of rights was found in the form and structures of the government set up in the constitution, which inherently provided checks against the arbitrary exercise of government power. In other words, the true bill of rights was found in the structural design of the government, not only in the strictly delegated powers doctrine but also in the separation of powers among the three branches of the national government and the separate spheres of power between state and national governments (federalism). By this reasoning, it was the arrangement and composition of government that really protects individual rights. In this Constitution, frequent elections and popular representation were republican safeguards that meant the Constitution, for all intents and purposes, was in and of itself a “Bill of Rights.”²⁴⁸ Madison wrote to Jefferson about the importance of and prudence in guarding against dangerous

²⁴⁷ “Chapter IV: The Debate in the Convention” from *Pennsylvania and the Federal Constitution*, edited by John Bach McMaster and Frederick D. Stone. TeachingAmericanHistory.org. Accessed on July 1, 2012 from <http://teachingamericanhistory.org/ratification/mcmasterstone/chapterIV.html>

²⁴⁸ Hamilton, “No. 84,” *The Federalist*, 447.

regimes when the government had the potential to subvert liberty. But Madison remained persuaded that there was “no tendency in our Governments to danger on that side.”²⁴⁹ He was unconvinced of the “tendency in *all* Governments to an augmentation of power at the expence [*sic*] of liberty.”²⁵⁰

Madison connected it back to energy. He reasoned, “Power, when it has attained a certain degree of energy and independence, goes on generally to further degrees. But when below that degree, the direct tendency is to further degrees of relaxation, until the abuses of liberty beget a sudden transition to an undue degree of power.”²⁵¹ In the United States, the government was energetic, but not to the degree that it would gain independence and subvert liberty. More likely, the government would relax because its powers were below that “certain degree.” What this degree was, Madison did not elucidate, he only reflected that it was depressing “that liberty should be equally exposed to danger whether the Government have too much or too little power, and that the line which divides these extremes should be so inaccurately defined by experience.”²⁵² However, Madison maintained that constitutional provisions in favor of essential rights were less necessary in a republic than in a monarchy.²⁵³

The Federalists also said that it would be dangerous to enumerate a Bill of Rights, for fear that it be interpreted to mean that rights were limited to those specifically written, and no more. Both Hamilton and Madison and other leading Federalists made the argument that a bill of rights was not only unnecessary, but might even be risky. The

²⁴⁹ James Madison, “James Madison to Thomas Jefferson,” October 17, 1788, *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner. Volume 1, Chapter 14, Document 47. (Chicago: University of Chicago Press, 1987), 477-478.

²⁵⁰ Madison, “James Madison to Thomas Jefferson,” October 17, 1788. *The Founders' Constitution*, 478.

²⁵¹ *Ibid*, 478.

²⁵² *Ibid*, 478.

²⁵³ James Madison, “Letter from James Madison to Richard Peters,” August 19, 1789. The Constitution Society. Accessed on July 13, 2012 from http://www.constitution.org/jm/17890819_peters.htm.

enumeration of specific rights secure from interference by the national government might imply that the national government had a plausible claim to restrict rights not subject to any specific denial of power. They worried that if a right was not written down, it might be construed that the government retained the power. As Madison articulated at the Virginia Ratifying Convention, when there is an enumeration of rights there is an inevitable conclusion that what is omitted “is intended to be surrendered.”²⁵⁴ Thus, an “imperfect enumeration” was just as dangerous, if not more dangerous, than not having one at all.²⁵⁵

Madison discussed this idea again during the summer debates in the first Congress:

By enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system.²⁵⁶

Hamilton also acknowledged the truth of this when he affirmed, “Bills of Rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and on this very account, would afford a colorable pretext to claim more than were granted.”²⁵⁷

There was also the so-called “parchment barriers” argument. In a letter to Jefferson, in October 1788, Madison contended, “experience proves the inefficacy of a bill of

²⁵⁴ Patrick Henry, “Patrick Henry at the Virginia Ratifying Convention,” June 24, 1788, from *The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution*, TeachingAmericanHistory.org. Accessed on July 11, 2012 from <http://teachingamericanhistory.org/ratification/elliott/vol3/june24.html>

²⁵⁵ “The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution,” June 24, 1788. <http://teachingamericanhistory.org/ratification/elliott/vol3/june24.html>

²⁵⁶ “Debates over the Bill of Rights in the First Congress,” June 8, 1789. TeachingAmericanHistory.org. Accessed on July 16, 2012 from <http://teachingamericanhistory.org/bor/debates/0608.html>

²⁵⁷ Hamilton, “No. 84,” *The Federalist*, 445.

rights on those occasions which its control is most needed.” He noted that if a tyrant sets out to destroy the people’s rights, then a written bill of rights will likely prove to be a mere “parchment barrier.”²⁵⁸ In Madison’s opinion, the greatest tyrant was the majority. When the majority wanted their way, they would simply run roughshod over the minority’s rights. A bill of rights amounted only to words on a piece of paper and afforded little additional protection.

In an anonymous essay entitled “A Countryman II,” the author announced that upon examination of the “new proposed Constitution there cannot be a question but that there is authority enough lodged in the proposed federal Congress, if abused, to do the greatest injury.”²⁵⁹ However, it was pointless to object to the Constitution for that reason. He also reasoned that a bill of rights was merely a “paper protection.”²⁶⁰ While he admitted it was of the greatest benefit to the people to guard such privileges as freedom of speech and trial by jury, he thought the strongest security for those rights was not from the expression of them on paper, but in how the government was designed. He did not see any incompatibility between a strong government and liberty, so long as the government was strongly interested in supporting the privileges of the people. The Congress created by the Constitution *was* interested in doing so, and would not take improper steps for the reason that it would impact those in the Congress just as much as the people at large. He reiterated the historical evidence that showed that the presence of a bill of rights was not enough to adequately keep any government acting in the best interest of the people. A

²⁵⁸ Madison, “James Madison to Thomas Jefferson,” October 17, 1788, *The Founders’ Constitution*, 477.

²⁵⁹ Roger Sherman, “A Countryman II,” November 22, 1787, TeachingAmericaHistory.org. Accessed on July 16, 2012 from <http://teachingamericanhistory.org/library/index.asp?document=1772>

²⁶⁰ Ibid

proper form of government achieved security, and this meant the people serving in that government were to be held accountable to the interests of the people.

The Federalists also put forth the states bills of rights argument which held that insofar as there was protection to be found in a written bill of rights, citizens could find protection in their respective state bills of rights. Even Sherman had brought up this point at the Constitutional Convention when he noted that “the state Declarations of Rights are not repealed by this Constitution, and being in force are sufficient.”²⁶¹ Madison ultimately changed his tone on this point. In his speech in Congress on June 8, 1789, Madison entertained the argument that “a bill of rights is not necessary, because the establishment of this government has not repealed those declarations of rights which are added to the several state constitutions.”²⁶² He admitted “the force of this observation,” but did not see it as conclusive. He stated, “Some states have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper, instead of securing some in the full extent which republican principles would require, they limit them too much to agree with the common ideas of liberty.”²⁶³

Lastly, there was the argument that “we ought not be in a hurry with respect to altering the constitution.”²⁶⁴ Several Federalists conjectured that it was too early to tell what needed to be changed, or what the Constitution’s errors were. As one delegate asked, “What experience have we had of the good or bad qualities of this constitution?”²⁶⁵ The

²⁶¹ Madison, *Notes of the Debates*, September 12, 1787, 630.

²⁶² “Debates over the Bill of Rights in the First Congress,” June 8, 1789.

²⁶³ Ibid

²⁶⁴ Ibid

²⁶⁵ Ibid

Constitution needed a “fair trial” first. Only then would the “propriety of making amendments” be obvious from experience, rather than merely theory. Until the Constitution had a chance to prove whether it was capable of governing, making amendments or even taking up the subject of making amendments seemed imprudent.

In due course, Madison overcame his reservations about adding amendments and began to advocate for them in moderation. While he continued to harbor reservations about the efficacy of a bill of rights, he decided to propose the amendments nonetheless. Although he was not entirely sold on the value, political expedience prevailed and motivated him to throw his genius, clout and prestige behind the effort. In his lengthy speech before Congress in June 1789, Madison first acknowledged the arguments made against the effort, and then provided his perspective:

It has been said, by way of objection to a bill of rights...that in the Federal Government they are unnecessary, because the powers are enumerated, and it follows, that all that are not granted by the constitution are retained; that the constitution is a bill of powers, the great residuum being the rights of the people; and, therefore, a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the Government. I admit that these arguments are not entirely without foundation, but they are not as conclusive to the extent it has been proposed. It is true the powers of the general government are circumscribed; they are directed to particular objects; but even if government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse.²⁶⁶

Though it was hardly a ringing endorsement, Madison said that in adopting a bill of rights there might be “something to gain,” and if done cautiously, “nothing to lose.”²⁶⁷ He admitted, “declarations on paper, tho’ [*sic*] not an effectual restraint, are not without some influence.”²⁶⁸ He emphasized revisions in moderation, and stated his unwillingness to see

²⁶⁶ “Debates over the Bill of Rights in the First Congress,” June 8, 1789.

²⁶⁷ *Ibid*

²⁶⁸ Madison, “Letter from James Madison to Richard Peters,” August 19, 1789. The Constitution Society.

“the door opened for a reconsideration of the whole structure of the Government—for a reconsideration of the principles and the substance of the powers given.”²⁶⁹

Some Federalists, including Madison, eventually complied with Anti-Federalist demands for a bill of rights. The primary reasons they gave for supporting a statement of rights were to assuage growing fears among the American public about the lack of an enumeration of rights in the constitution, to neutralize opposition to the proposed constitution, to silence unrelenting demands for a second constitutional convention to redraft the constitution, and to promote unity among the states. Interestingly, both Federalists and Anti-Federalists explained the addition of a bill of rights with the same nautical metaphor. By agreeing to the Bill of Rights, the Federalists threw “a tub to the whale;” a reference to what sailors did when their ship was in jeopardy from a nearby whale. The Bill of Rights was a “tub” thrown into the ocean by Federalist “sailors” to divert or distract the angry anti-federalist “whale” set on destroying the new national ship of state. To Madison, it was better this be done in the first Congress than in the second Congress, or even more frightening, in a second constitutional convention where the Anti-Federalists would be motivated to attend in droves.

The first Congress had a lot of important business to attend to in creating a new government (the one they had was bare bones) and therefore, the Federalist majority was largely ambivalent about the prospect of amendment making. As one Representative explained, the present time was premature for amendment making because “we have other business before us, which is incomplete, but essential to the public interest.”²⁷⁰ Others also wanted the government completely organized before they entered into the business of

²⁶⁹ “Debates over the Bill of Rights in the First Congress,” June 8, 1789.

²⁷⁰ Ibid

considering amendments and entertained “strong objections to being interrupted in completing the more important business” of organizing the executive and judicial branches.²⁷¹ Several members expressed their belief that passing laws that gave permanency and stability to constitutional regulations would quiet the public more than the Congress spending time entertaining ideas for amendment.²⁷² As one representative put it, there were “a number of important bills on the table which require despatch [*sic*]” and getting caught up in a long list of amendments would delay proper attention to that business.²⁷³ He surmised that the rights and privileges of the people were more in danger by the incompleteness, disorganization, and instability of the general government than they were having those rights unstipulated in the Constitution. One delegate even asked his fellow Congressmen whether they wanted to “be responsible for the risk the Government would run of being injured by an interregnum?”²⁷⁴ He believed that proposing amendments at this time would suspend the operations of Government, and could possibly bring about its ruin.

Despite the protest of his fellow Congressmen, Madison decided the undertaking was both necessary and timely, and felt compelled to fulfill the duty to his constituents to propose and state amendments before the House. If all power was subject to abuse, then it was feasible to guard against the “possible the abuse of the powers of the General Government” in a more secure manner than was now done. He took it upon himself to boil down over 200 suggested amendments from the state proposals to fewer than twenty of the most essential, sensible, and commonly held ideas. Madison noted “it will be of little

²⁷¹ Ibid

²⁷² Ibid

²⁷³ Ibid

²⁷⁴ Ibid

avail to the people if the laws are so voluminous that they cannot be read, or so incoherent that they cannot be understood,” and as such, narrowing the amendments down helped preserve the efficiency (and energy) of the system.²⁷⁵ But even Madison became disgusted with the task at times and dubbed the task his “nauseous project.”²⁷⁶

Madison chose not to propose any alteration which he did not personally support or which was unlikely to meet the concurrence required by the Constitution (two-thirds of both houses of Congress and three-fourths of the State legislatures). And although he recognized that some had leveled criticisms against the Constitution’s structure, he focused on what he believed the mass of the opposition was rooted in: the lack of effectual provisions against encroachments on particular rights and “those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power.”²⁷⁷ He believed the Congress should not consider those rights safe if such a vast number of their fellow citizens thought it beneficial “to secure in a stronger manner their liberties from the inroads of power.”²⁷⁸

The record of the proceedings in the first Congress is incomplete for a number of reasons, chiefly because only the House side of the debate survives. No record of the Senate debate is available. Additionally, a lot of the initial work was done in a Select Committee, comprised of eleven members, one from each state (including Madison). Once the committee issued their report to the entire House, they dissolved themselves into a Committee of the Whole to consider the amendments. The House proceedings are unreliable and give only small glimpses of insight into the debate, rather than verbatim

²⁷⁵ Madison, “No. 62,” *The Federalist*, 323-324.

²⁷⁶ Madison, “Letter from James Madison to Richard Peters,” August 19, 1789. *The Constitution Society*.

²⁷⁷ “Debates over the Bill of Rights in the First Congress,” June 8, 1789.

²⁷⁸ *Ibid*

dialogue. What survives of the debates reveal a lack of enthusiasm, if not disdain for the undertaking; it was a project that was difficult, fatiguing and wearisome. But the debates also show the desire to find consensus quickly, so that more pressing issues could be attended to (such as setting up the judicial branch). They avoided controversial language in favor of ambiguous and non-controversial expressions. They chose words and phrases intentionally, but specifically to be non-specific.

Madison began his proposal for a Bill of Rights with a recommendation that prefixed to the Constitution, there be a declaration that “all power is originally vested in, and consequently derived from, the people.”²⁷⁹ This fit with Madison’s understanding that energy in government stems from consent in the republican form. He also wanted a declaration “that Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally pursuing and obtaining happiness and safety.”²⁸⁰ This would serve to temper the governments’ energy in that it could only be duly exercised to the proper end of promoting natural rights. He introduced other amendments including prohibiting Congress from abridging civil rights on account of religious belief or worship, infringing on the people’s right to speak, write and publish their sentiments, bear arms, and affirming protection from unreasonable searches and seizure. He also enumerated due process rights and protections from cruel and unusual punishment, and that “the powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively.” These aimed at limiting and qualifying the powers of Government “by excepting out of the grant of power those cases in which the Government ought not to act,

²⁷⁹ Ibid

²⁸⁰ Ibid

or to act only in a particular mode.”²⁸¹ He noted that these exceptions were sometimes pointed “against the abuse of the executive power, sometimes against the legislative, and, in some cases against the community itself; or, in other words, against the majority in favor of the minority.”²⁸² Madison explained his view that in the United States, it was less necessary to guard against abuse in the weaker executive department than the stronger legislative department. He confessed, “Prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power.”²⁸³ Madison contended that the danger “is not found in either the executive or legislative departments of Government, but in the body of the people, operating by the majority against the minority.”²⁸⁴

Interestingly, Madison thought there was more danger in the states abusing certain powers than the general government. Accordingly, he proposed “that no State shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases; because it is proper that every Government should be disarmed of powers which trench upon those particular rights.”²⁸⁵ In all of the proposals, Madison tried to avoid endangering the beauty of the government in any one important feature. He did not wish to make alterations that would serve to weaken the government’s frame or abridge its usefulness. In this, Madison showed his true desire – to make the constitution better in the opinion of those opposed to it, without impairing its energy. He professed his eagerness to “obtain the

²⁸¹ Ibid

²⁸² Ibid

²⁸³ Ibid

²⁸⁴ Ibid

²⁸⁵ Ibid

confidence of our fellow-citizens,” which he believed would come in proportion to the fortification of the rights of the people against the encroachments of the Government.²⁸⁶

Other delegates criticized this amendment on the grounds that it would alter the constitutions of particular states, and that the Congress should leave the state governments to themselves and not interfere with them more than they already did.²⁸⁷ But Madison considered it to be the most valuable amendment of all. He reasoned that if there was any reason to restrain the government of the United States from infringing on essential rights, it was equally necessary to secure them against state governments. The House adopted the amendment, but it ultimately failed to garner the requisite support in the Senate.

Elbridge Gerry contributed some insightful ideas to the discussion as well. He reasoned that taking up amendments was “necessary to establish an energetic Government.”²⁸⁸ His idea of such a government was one that gave “due deliberation” to making laws, and “efficiency in the execution.”²⁸⁹ Gerry noted the disposition of the current government, which seemed reluctant to administer the powers with which they were invested, in case they give offense. He said they appeared “afraid to exercise the constitutional powers of the Government, which the welfare of the State requires, lest a jealousy of our powers be the consequence.”²⁹⁰ The great body of constituents opposed to the current Constitution, and apprehensive of the enormous powers of Government was responsible for this timidity. Gerry wanted to take up the business and give the subject full discussion; he believed the constituents would acquiesce to the decision, whether it was to

²⁸⁶ Ibid

²⁸⁷ “Debates over the Bill of Rights in the First Congress,” August 17, 1789.
<http://teachingamericanhistory.org/bor/debates/0817.html>

²⁸⁸ “Debates over the Bill of Rights in the First Congress,” June 8, 1789.
<http://teachingamericanhistory.org/bor/debates/0608.html>

²⁸⁹ Ibid

²⁹⁰ Ibid

reject the amendments or adopt them. Only then would the government “have its due energy, and accomplish the end for which it was instituted.”²⁹¹ Put differently by another Representative, properly receiving and debating the amendments would “tend to tranquilize the public mind, and promote that harmony which ought to be kept up between those in the exercise of the powers of Government, and those who have clothed them with the authority, or, in other words, between Congress and the people. Without a harmony and confidence subsist[ing] between them, the measures of Government will prove abortive, and we shall have still to lament that imbecility and weakness which have long marked our public councils.”²⁹²

Even once the debates on the particular amendments began, certain members still expressed their anxiety about “seeing the system of Government encounter another ordeal, when it ought to be extending itself to furnish security to others.”²⁹³ Many worried about any new amendments that would “tear the frame of Government into pieces.”²⁹⁴ Others begged consideration of amendment, on the grounds that a number of citizens were anxious for amendments. They wondered whether the government could possess energy without the confidence of the people necessary to support it.²⁹⁵ Madison reminded the House of the propriety in attending to objects that “promote that spirit of urbanity and unanimity which the government itself stands in need of for its more full support.”²⁹⁶

²⁹¹ Ibid

²⁹² Ibid

²⁹³ “Debates over the Bill of Rights in the First Congress,” July 21, 1789.
<http://teachingamericanhistory.org/bor/debates/0721.html>

²⁹⁴ Ibid

²⁹⁵ “Debates over the Bill of Rights in the First Congress,” August 13, 1789.
<http://teachingamericanhistory.org/bor/debates/0813.html>

²⁹⁶ Ibid

Amending the Constitution showed good faith and positive intentions to the states that asked for improvements in their respective ratifying conventions.

The actions of the first Congress were significantly impacted by the threat of a second convention. As one representative reported, if the advocates for another federal convention were successful, alarming consequences may result. But even if the convention was not obtained, the idea of it might still render the government weak, if not impracticable. He said “no government can be administered with energy, however energetic its system, unless it obtains the confidence and support of the people.”²⁹⁷

In addition to the debate about which amendments to add, energy was also an underlying component to the debate over where the amendments would fit into the document. Some favored inserting them into the original document, interspersed among their applicable articles and clauses; others wanted them tacked on at the end as a separate entity. Madison originally wanted the amendments to be where “they naturally belong,” by which he meant mingled throughout the document, so as to preserve its readability. If a provision were to be changed by amendment, having the amendment right there would make sure the new standard would be understood and would eliminate the need for reference or comparison. Others encouraged him to preserve the original text, and not allow it to be opened up for changes. Madison thought the notion of having to compare the two instruments would cause considerable embarrassment. But others assured him that by tacking amendments on at the end, it preserved the text of the original document and propped up its significance (and thus energy) by not allowing it to be messed with. Roger

²⁹⁷ “Debates over the Bill of Rights in the First Congress,” August 18, 1789.
<http://teachingamericanhistory.org/bor/debates/0818.html>

Sherman was the chief proponent of accommodating amendments only in “supplementary form.”²⁹⁸

We ought not to interweave our propositions into the work itself, because it will be destructive of the whole fabric. We might as well endeavor to mix brass, iron, and clay, as to incorporate such heterogeneous articles, the one contradictory to the other. Its absurdity will be discovered by comparing it with a law. Would any Legislature endeavor to introduce into a former act a subsequent amendment, and let them stand so connected? When an alteration is made in an act, it is done by way of supplement; the latter act always repealing the former in every specified case of difference.²⁹⁹

Sherman rejected Madison’s arguments for the “neatness and propriety” of incorporating amendments into the Constitution itself. He felt that the Constitution was an act of the people and should remain intact, whereas the amendments would be the act of State governments. He disagreed with the convenience of having the amendments and original text in one instrument and offered that “there can be little more difficulty in comprehending them whether they are combined in one, or stand distinct instruments.”³⁰⁰ Another representative seconded these observations, noting that attempting to substitute a revised Constitution in place of the old, amounted to a repeal of the present constitution, which he believed the Congress had no authority to do. He wondered on what authority they would erect essentially a new Constitution, believing that if they destroyed the original base, the superstructure would fall. He reasoned that the entire government would have to suspend its business while they waited on the states to ratify the changes because he was doubtful they had a right to exercise any authority while the status of the Constitution was in question. This discussion, imperative to the precedent it would set for the future, reveals that a great amount of consideration was given to balancing liberty with

²⁹⁸ Debates over the Bill of Rights in the First Congress, August 13, 1789.
<http://teachingamericanhistory.org/bor/debates/0813.html>

²⁹⁹ Ibid

³⁰⁰ Ibid

energy and stability. Thus, the question of where to put the amendments, no less than what amendments they would be, forced Congress to wrestle with how to simultaneously minimize fluctuations in the Constitution, preserve the authority of the government and secure the rights and liberties of the people. Upon a second discussion of this point, the House agreed by a two-thirds vote to Sherman's motion to add amendments to the constitution by way of supplement on August 19, 1789,³⁰¹

The first ten amendments, as adopted, prohibited national encroachment on certain rights. For example, the first amendment guaranteed that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof," to limit the power of Congress to legislate on religious issues that would amount to an establishment of religion, or that would infringe on someone's ability to freely exercise their religion. If this had been added to the original format of the Constitution, it would have appeared under Article I, Section 9, where powers denied to Congress are listed. This amendment was deemed necessary, despite there being no specific clause under the original Constitution giving Congress the power to act on these measures because of the open ended nature of the necessary and proper clause which might enable Congress to make laws that infringed on the rights of conscience. The provisions for religious freedom, free speech, and due process rights were agreed to not only on the merits of the protections they provided, but also because they signaled to the states and the citizens that they could reasonably have confidence in the new general government.

In the ongoing energy versus liberty debate, amendments nine and ten comprised the most imperative changes. The ninth amendment assured that the enumeration of

³⁰¹ "Debates over the Bill of Rights in the First Congress," August 19, 1789.
<http://teachingamericanhistory.org/bor/debates/0819.html>

rights in the Constitution was not to be interpreted as all-inclusive. Put another way, it guaranteed that those clauses that declared that Congress should not exercise certain powers could not be interpreted to actually extend the powers of Congress. James Madison discussed this when introducing the amendment to the Congress. He noted that a key objection of the Bill of Rights was that enumerating particular exceptions to the grant of power might disparage those rights that were not enumerated. He said "it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure."³⁰² While this was a persuasive argument, Madison believed it could be guarded against through amendment. The first eight amendments addressed the restrictions on the federal governments exercise of enumerated powers, but the ninth amendment addressed the "great residuum" of rights that had not been "thrown into the hands of the government."³⁰³

The tenth amendment was also crucial insofar as the energy debate is concerned. It read, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."³⁰⁴ It harkened back to the arrangement under the Articles of Confederation where states not only retained their sovereignty, freedom, and independence, but also every power not expressly delegated to the United States Congress.³⁰⁵ Many Federalists reasoned this did not have to be expressly stated in the Constitution; that Congress only had the powers "herein vested" and therefore no amendment was needed to reaffirm that truth. But for Anti-Federalists, Congress was not limited to delegated powers because of the Necessary and Proper Clause

³⁰² "Debates over the Bill of Rights in the First Congress," June 8, 1789.

³⁰³ Ibid

³⁰⁴ United States Constitution, Amendment 10

³⁰⁵ Articles of Confederation

in Article I, Section 8, which gave Congress the power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.”³⁰⁶ The exercise of implied powers under a vague “necessary and proper” clause concerned the Anti-Federalists who believed it left the door wide open for exercise of congressional power and would lead to a constant increase in federal authority. They called for a limitation on this exercise to prohibit an excessive usurpation of power on the part of the national government against individuals or states. The Anti-Federalists wanted the clause to read “powers not *expressly* delegated by this Constitution” (emphasis added), but Madison objected to this because he thought it impossible to confine the government to the exercise of express powers. He urged the other gentlemen to admit the necessity of some powers by implication.³⁰⁷ The House agreed. In doing so, they largely calmed the Anti-Federalist worries but without fully giving into their requests. Because the amendment did not specify powers that were “expressly delegated” were reserved, it did not get rid of implied powers altogether, but it did solidify what Federalists were saying all along – that the states and the people were the depositories of any powers not given to Congress. It reaffirmed the partly national, partly federal relationship of the Constitution and reiterated the truth that the energy of the new national government was not absolute. It was a government whose authority was admittedly enhanced, but it still left a lot of its authority in the hands of the states and the people.

The Bill of Rights were debated intermittently in the summer of 1789, and then sent to the states for ratification. The House ultimately approved seventeen amendments on August 24, 1789 and sent them to the Senate for action. The Senate approved 12 of the

³⁰⁶ United States Constitution, Article I, Section 8, Clause 18

³⁰⁷ “Debates over the Bill of Rights in the First Congress,” August 18, 1789.
<http://teachingamericanhistory.org/bor/debates/0818.html>

original 17 by eliminating some and consolidating others. A conference committee, including James Madison, worked out the differences in the amendments, but due to their abbreviated time schedule, largely stuck with the Senate language. Of the 12 amendments sent to the states for ratification on September 25, ten were approved and became part of the Bill of Rights. One amendment was rejected at the state level, and one became the 27th amendment (but not until 1992). In December of 1791, Virginia became the final state of the three-fourths necessary to ratify the ten amendments of the Bill of Rights. The most important liberties Americans held dear became permanently enshrined in the Constitution of the United States.

The Bill of Rights grew out of a concern that in order to effectively balance energy and liberty, a specific enumeration of individual rights was necessary. The Bill of Rights, as originally conceived, served a dual purpose, neither of which substantively changed constitutional law. It reaffirmed federal features of constitutional system crafted in Philadelphia and reassured citizens that the national government would not infringe or intrude into these enumerated areas related to certain rights. It also guaranteed the state governments that the national government would not usurp the states' authority to formulate and assert powers related to civil and religious liberties. Madison, "a friend to what is attainable," had limited his requests to "to the plain, simple, and important security that has been required."³⁰⁸ In this way, he did not jeopardize the energy or stability of the existing system by exposing it to embarrassment, delay, or continued calls for a second Convention.

The Bill of Rights promised that certain things were the prerogative of the state

³⁰⁸ "Debates over the Bill of Rights in the First Congress," August 15, 1789.
<http://teachingamericanhistory.org/bor/debates/0815.html>

governments and that the federal government was prohibited from intruding on those privileges. In this sense, the Bill of Rights explicitly said what was implicit in the Constitutional assignment of powers that were in the original design as crafted in Philadelphia at the Constitutional Convention. It showed the desire of those in government to equally balance, “strength and energy in the one hand, and justice, peace and lenity in the other hand.”³⁰⁹ The two principles, energy and liberty, mutually reinforced each other in a more authoritative Constitution guarded by a Bill of Rights. Most recognized that the new republic was better for having both components in place.

³⁰⁹ State Soldier, “Essay I,” January 16, 1788, *Friends of the Constitution: Writings of the "Other" Federalists, 1787-1788*, 114.

Conclusion:

We cannot overestimate the fervent love of liberty, the intelligent courage, and the sum of common sense with which our fathers made the great experiment of self-government. When they found, after a short trial, that the confederacy of States, was too weak to meet the necessities of a vigorous and expanding republic, they boldly set it aside, and in its stead established a National Union, founded directly upon the will of the people, endowed with full power of self-preservation and ample authority for the accomplishment of its great object. Under this Constitution the boundaries of freedom have been enlarged, the foundations of order and peace have been strengthened, and the growth of our people in all the better elements of national life has indicated the wisdom of the founders and given new hope to their descendants.^{v310}
~ James Garfield, Inaugural Address 1881

The Framers found that in the United States, energy and liberty must be balanced. Though the true aim of government was to protect liberty, it could not be achieved without an energetic system. Through an extensive process of trial and error, and endless debate, the Framers found consensus, and the public found reassurance, in an energetic Constitution albeit limited in delegated powers and by a Bill of Rights. They came to understand the two concepts of energy and liberty as two sides of a coin – they could not properly have one without the other. Under the Articles, the government was too weak to meet the needs of the ever-growing republic. As a result, liberty was threatened and the ongoing stability of the Republic was at risk. The political leaders took it upon themselves to fix the problems inherent in the confederation government by creating a “more perfect union” under a Constitution fully capable of extending its larger authority to the states and to the people. They improved the arrangement through a partly national, partly federal regime, kept the republican principles of self-government and consent at the core, and distributed powers among the various branches to give them their proper authority but

³¹⁰ James Garfield, “First Inaugural Address,” March 4, 1881. TeachingAmericanHistory.org. Accessed on July 15, 2012 from <http://teachingamericanhistory.org/library/index.asp?document=1175>

kept in mind the necessity of “auxiliary precautions” to prohibit any one branch from becoming too powerful.³¹¹ The Framers consciously considered such maxims as John Adams warned of: “A Constitution of Government once changed from Freedom, can never be restored. Liberty, once lost, is lost forever.”³¹² Thus, the Constitution, while it fixed the energy problems of the Confederation, could not stand alone without the guarantees of liberty put forward in the Bill of Rights. Adding amendments that secured the rights of the people garnered the remaining public support and confidence of the states necessary to imbue the government with enough energy to be effective.

George Washington, in his famous Farewell Address of 1796, summed up this narrative nicely. He said that to secure efficacy and permanency in the Union, “a Government for the whole is indispensable.”³¹³ Because the people were sensible of this, they adopted a Constitution of Government “better calculated than your former for an intimate Union, and for the efficacious management of your common concerns.”³¹⁴ Washington went on to remind his “fellow citizens” that this government was the product of their own choice and was adopted upon “full investigation and mature deliberation.”³¹⁵ The system of government they established was free in its principles, able to unite security with energy through distribution of powers, and capable of being amended. Washington urged, “Respect for its authority, compliance with its Laws, [and] acquiescence in its measures,” which he saw as “duties enjoined by the fundamental maxims of true

³¹¹ Madison, “No. 51,” *The Federalist*, 269.

³¹² Margaret A. Hogan and C. James Taylor, eds. “John Adams Letter to Abigail Adams, July 17, 1775,” in *My Dearest Friend: Letters of Abigail and John Adams*. (Cambridge: Belknap Press of Harvard University Press, 2007), 68-69.

³¹³ George Washington, “Farewell Address,” September 19, 1796. *George Washington: A Collection*, ed. by W.B. Allen. (Indianapolis: Liberty Fund Press, 1988), 512-527.

³¹⁴ Washington, “Farewell Address,” 518.

³¹⁵ *Ibid*, 518.

Liberty.”³¹⁶ He encouraged the people to realize their sacred obligation to obey the Constitution, and change it *only* when it was no longer working. Washington, always in favor of strong government, hoped great care would be taken by the people to maintain it. He did not want to see anything negatively impact the energy of the system and believed the authority of the government under the Constitution was not only compatible with liberty, but also essential for it to endure.

Remember, especially, that for the efficient management of your common interests, in a country so extensive as ours, a Government of as much vigour [*sic*] as is consistent with the perfect security of Liberty is indispensable. Liberty itself will find in such a Government, with powers properly distributed and adjusted, its surest Guardian. It is indeed little else than a name, where the Government is too feeble to withstand the enterprises of faction, to confine each member of the Society within the limits prescribed by the laws and to maintain all in the secure and tranquil enjoyment of the rights of person and property.³¹⁷

Washington assured the people that the United States government, as devised under the Constitution and amended by the Bill of Rights, effectively balanced energy (vigor) and efficiency with security (stability) and liberty. He pleaded with the people to abide by and support it because in doing so, they would not only preserve the government, but also their “present happy state.”³¹⁸

Whereas many of the Founders, initially believed that liberty and energy were competing forces, they came to understand that they were in fact, mutually reinforcing each other when they were properly balanced. There would be no energy without liberty, and no liberty without energy. Enough of each was imperative to a successful government, but they could not have too much of one (or both), nor too little of either. The genius of the

³¹⁶ Ibid, 518.

³¹⁷ Ibid, 519.

³¹⁸ Ibid, 519.

American system was its ability to find the delicate balance where the two could exist symbiotically, and finding it early enough in the republican experiment that the government had a chance at perpetuity. With a limited Constitutional system, protecting natural rights and civil rights, Americans were inspired to trust, comply with, and value their political institutions. Thus, by finding the equilibrium point between energy and liberty, the Founders laid a promising foundation for a lasting republic.

Works Cited

- Adams, John, and Margaret A. Hogan and C. James Taylor, eds. *My Dearest Friend: Letters of Abigail and John Adams*. Cambridge: Belknap Press of Harvard University Press, 2007.
- Allen, W. B., Gordon Lloyd, and Margie Lloyd. *The Essential Antifederalist*. 2nd ed. Lanham: Rowman & Littlefield Publishers, Inc, 2002.
- Banning, Lance. *Liberty and Order: The First American Party Struggle*. Indianapolis: Liberty Fund, 2004.
- Carey, George W. and James McClellan, *The Federalist (The Gideon Edition)*, Edited with an Introduction, Reader's Guide, Constitutional Cross-reference, Index, and Glossary by George W. Carey and James McClellan. Indianapolis: Liberty Fund, 2001.
- ConSource. "The Constitutional Sources Project," Accessed on October 24, 2011 from <http://www.consource.org/>
- Dreisbach, Daniel. "James Madison's 'Nauseous Project of Amendments': The Politics and Intrigue of Amending the Constitution." Lecture, James Madison Memorial Fellowship Foundation Summer Institute at Georgetown University, Washington, , D.C., June 8, 2011.
- Kurland, Philip B, and Ralph Lerner. *The Founders' Constitution*. Chicago: The University of Chicago Press, 1987.
- Madison, James. *Notes of Debates in the Federal Convention of 1787*. Bicentennial ed. New York: Norton, 1987.
- Madison, James, and Edward J. Larson, and Michael P. Winship. *The Constitutional Convention: A Narrative History from the Notes of James Madison*. New York: Modern Library, 2005.

Sheehan, Colleen A.. *Friends of the Constitution: Writings of the "Other" Federalists, 1787-1788*. Indianapolis: Liberty Fund, 1998.

Stewart, David O.. *The Summer of 1787: The Men Who Invented the Constitution*. New York: Simon & Schuster Paperbacks, 2008.

Storing, Herbert J., ed., *The Anti-Federalist: Writings by Opponents of the Constitution*. Chicago: University of Chicago Press, 1985.

TeachingAmericanHistory.org, "Document Library," a Project of the Ashbrook Center at Ashland University. Last modified 2012. <http://www.teachingamericanhistory.org>

Washington, George, and W.B. Allen ed. *George Washington: A Collection*. Indianapolis: Liberty Fund Press, 1988.

References (Not Cited)

Collier, Christopher, and James Lincoln Collier. *Decision in Philadelphia: the Constitutional Convention of 1787*. 2007 Ballantine Books trade pbk. ed. New York: Ballantine Books :, 2007.

Sheehan, Colleen A.. *James Madison and the Spirit of Republican Self-Government*. New York: Cambridge University Press, 2009, Introduction.