



CENTER FOR THE STUDY OF THE AMERICAN CONSTITUTION

csac.history.wisc.edu > Document Collections > Constitutional Debates: Federalist and Antifederalist Essays > The Debate Over the Judicial Branch > Jurisdiction

George Mason Speech: Virginia Convention 19 June 1788

Mr. *Mason* replied, that if he recollected rightly, the propriety of the power as explained by him, had been contended for; but that as his memory had never been good, and was now much impaired from his age, he would not insist on that interpretation. He then proceeded. — Give me leave to advert to the operation of this Judicial power. Its jurisdiction in the first case will extend to all cases affecting revenue, excise and custom-house officers. If I am mistaken I will retract. — “All cases in law and equity arising under this Constitution, and the laws of the United States,” take in all the officers of Government. They comprehend all those who act as collectors of taxes, excisemen, &c. It will take in of course what others do to them, and what is done by them to others. In what predicament will our citizens then be? We know the difficulty we are put in by our own Courts, and how hard it is to bring officers to justice even in them. If any of the Federal officers should be guilty of the greatest oppressions, or behave with the most insolent and wanton brutality to a man’s wife or daughter, where is this man to get relief? If you suppose in the inferior Courts, they are not appointed by the States. They are not men in whom the community can place confidence. It will be decided by Federal Judges. Even suppose the poor man should be able to obtain judgment in the inferior Court, for the greatest injury, what justice can he get on appeal? Can he go 400 or 500 miles? Can he stand the expence attending it? On this occasion they are to judge of fact as well as law. He must bring his witnesses where he is not known, where a new evidence may be brought against him, of which he never heard before, and which he cannot contradict.

The Honorable Gentleman who presides here [Edmund Pendleton], has told us, that the Supreme Court of Appeals must embrace every object of maritime, Chancery, and common law controversy. In the two first, the indiscriminate appellate jurisdiction as to fact, must be generally granted; because otherwise it could exclude appeals in those cases. But why not discriminate as to matters of fact in common law controversies? — The Honorable Gentleman has allowed that it was dangerous, but hopes regulations will be made to suit the convenience of the people. — But mere hope is not a sufficient security. I have said that it appears to me (though I am no lawyer) to be very dangerous. Give me leave to lay before the committee an amendment, which I think convenient, easy, and proper. — (Here Mr. *Mason* proposed an alteration nearly the same as the first part of the fourteenth amendment recommended by the Convention, which see at the conclusion.) — Thus, Sir, after limiting the cases in which the Federal Judiciary could interpose, I would confine the appellate jurisdiction to matters of law only, in common law controversies.

It appears to me, that this will remove oppressions, and answer every purpose of an appellate power.

A discrimination arises between common law trials and trials by Courts of Equity and Admiralty.—In these two last, depositions are committed to record, and therefore on an appeal the whole fact goes up; the equity of the whole case, comprehending fact and law, is considered, and no new evidence requisite. Is it so in Courts of common law? There evidence is only given *viva voce*. I know not a single case, where there is an appeal of fact as to common law. But I may be mistaken. Where there is an appeal from an inferior to a Superior Court, with respect to matters of fact, a new witness may be introduced, who is perhaps suborned by the other party, a thousand miles from the place where the first trial was had. These are some of the inconveniences, and insurmountable objections against this general power being given to the Federal Courts. Gentlemen will perhaps say, there will be no occasion to carry up the evidence by *viva voce* testimony, because Congress may order it to be admitted to writing, and transmitted in that manner with the rest of the record. 'Tis true they may, but it is as true that they may not. But suppose they do. Little conversant as I am in this subject, I know there is a great difference between *viva voce* evidence given at the bar, and testimony given in writing. I leave it to Gentlemen more conversant in these matters, to discuss it. They are also to have cognizance in controversies to which the United States shall be a party. This power is superadded, that there might be no doubt, and that all cases arising under the Government might be brought before the Federal Court. Gentlemen will not, I presume, deny that all revenue and excise controversies, and all proceedings relative to the duties of the officers of Government, from the highest to the lowest, may, and must be brought by these means to the Federal Courts; in the first instance, to the inferior Federal Court, and afterwards to the Superior Court.—Every fact proved with respect to these, in the Court below, may be revived in the Superior Court.—But this appellate jurisdiction is to be under the regulations of Congress.—What these regulations may be, God only knows.

Their jurisdiction further extends to controversies between citizens of different States.—Can we not trust our State Courts with the decision of these?—If I have a controversy with a man in Maryland—if a man in Maryland has my bond for 100*l*. are not the State Courts competent to try it?—Is it suspected that they would enforce the payment if unjust, or refuse to enforce it if just?—The very idea is ridiculous. What carry me a thousand miles from home—from my family, and business, where perhaps, it will be impossible for me to prove that I paid it?—Perhaps I have a respectable witness who saw me pay the money:—But I must carry him 1000 miles to prove it, or be compelled to pay it again. Is there any necessity for this power?—It ought to have no unnecessary or dangerous power. Why should the Federal Courts have this cognizance?—Is it because one lives on one side of the Potowmack, and the other on the other?—Suppose I have your bond for 1000*l*.—If I have any wish to harrass you, or if I be of a litigious disposition, I have only to assign it to a Gentleman in Maryland. This assignment will involve you in trouble and expence. What effect will this power have between British creditors and the citizens of this State?—This is a ground on which I shall speak with confidence. Every one who heard me speak on the subject, knows, that I always spoke for the payment of the British debts. I wish every honest debt to be paid. Though I would wish to pay the British creditor, yet I would not put it in his power to gratify private malice to our injury. Let me be put right if I be mistaken. But there is not, in my opinion, a single British creditor, but who can bring his debtors to the Federal Court. There are a thousand instances where debts have been paid, and yet must by this appellate

cognizance be paid again. Are these imaginary cases?—Are they only possible cases, or are they certain and inevitable?—“To controversies between a State, and the citizens of another State.”—How will their jurisdiction in this case do? Let Gentlemen look at the Westward. Claims respecting those lands, every liquidated account, or other claim against this State, will be tried before the Federal Court. Is not this disgraceful?—Is this State to be brought to the bar of justice like a delinquent individual?—Is the sovereignty of the State to be arraigned like a culprit, or private offender?—Will the States undergo this mortification? I think this power perfectly unnecessary. But let us pursue this subject further. What is to be done if a judgment be obtained against a State?—Will you issue a *feri facias*?¹ It would be ludicrous to say, that you could put the State’s body in jail. How is the judgment then to be enforced? A power which cannot be executed, ought not to be granted. Let us consider the operation of the last subject of its cognizance.—Controversies between a State, or the citizens thereof, and foreign States, citizens or subjects.—There is a confusion in this case. This much, however, may be raised out of it—that a suit will be brought against Virginia.—She may be sued by a foreign State.—What reciprocity is there in it?—In a suit between Virginia and a foreign State, is the foreign State to be bound by the decision?—Is there a similar privilege given to us in foreign States?—Where will you find a parallel regulation? How will the decision be enforced?—Only by the *ultima ratio regum*. A dispute between a foreign citizen or subject, and a Virginian cannot be tried in our own Courts, but must be decided in the Federal Court. Is this the case in any other country?—Are not men obliged to stand by the laws of the country where the disputes are?—This is an innovation which is utterly unprecedented and unheard of.—Cannot we trust the State Courts with disputes between a Frenchman, or an Englishman, and a citizen; or with disputes between two Frenchmen? This is disgraceful: It will annihilate your State Judiciary: It will prostrate your Legislature.

Thus, Sir, it appears to me that the greater part of these powers are unnecessary, and dangerous, as tending to impair and ultimately destroy the State Judiciaries, and by the same principle, the legislation of the State Governments. To render it safe there must be an amendment, such as I have pointed out. After mentioning the original jurisdiction of the Supreme Court, which extends to but three cases, it gives it appellate jurisdiction in all the other cases mentioned, both as to law and fact, indiscriminately, and without limitation. Why not remove the cause of fear and danger? But it is said, that the regulations of Congress will remove these. I say, that, in my opinion, they will have a contrary effect, and will utterly annihilate your State Courts.—Who are the Court?—The Judges. It is a familiar distinction. We frequently speak of a Court in contradistinction to a jury. I think the Court are to be the Judges of this.—The Judges on the bench, are to be Judges of fact and law, with such exceptions, &c. as Congress shall make. Now give me leave to ask—is not a jury excluded absolutely?—By way of illustration, were Congress to say that a jury, instead of the Court, should judge the fact, will not the Court be still judges of the fact consistently with this Constitution? Congress may make such a regulation, or may not. But suppose they do, what sort of a jury would they have in the ten miles square? I would rather a thousand times be tried by a Court than by such a jury. This great palladium of national safety, which is secured to us by our own Government, will be taken from us in those Courts; or if it be reserved, it will be but in name, and not in substance. In the Government of Virginia, we have secured an impartial jury of the vicinage. We can except to jurors, and perem[p]torily challenge them in criminal trials.² If I be tried in the Federal Court for a crime which may affect

my life, have I a right of challenging or excepting to the jury? Have not the best men suffered by weak and partial juries? This sacred right ought therefore to be secured. I dread the ruin that will be brought on 30,000 of our people with respect to disputed lands. I am personally endangered as an inhabitant of the *Northern Neck*. The people of that part will be obliged, by the operation of this power, to pay the quitrents of their lands. Whatever other Gentlemen may think, I consider this as a most serious alarm. It will little avail a man to make a profession of his candour. It is to his character and reputation they will appeal. Let Gentlemen consider my public and private character.—To these I wish Gentlemen to appeal for an interpretation of my motives and views. Lord Fairfax's title was clear and undisputed.—After the revolution, we taxed his lands as private property. After his death an act of Assembly was made, in 1782, to sequester the quitrents due at his death, in the hands of his debtors: Next year an act was made restoring them to the executor of the proprietor. Subsequent to this the treaty of peace was made, by which it was agreed, that there should be no further confiscations. But after this an act of Assembly passed, confiscating this whole property.³ As Lord Fairfax's title was indisputably good, and as treaties are to be the supreme law of the land, will not his representatives be able to recover all in the Federal Court? How will Gentlemen like to pay additional tax on the lands in the Northern Neck? This the operation of this system will compel them to do. They now are subject to the same taxes that other citizens are, and if the quitrents be recovered in the Federal Court, they are doubly taxed. This may be called an assertion, but, were I going to my grave, I would appeal to Heaven that I think it true. How will a poor man, who is injured or dispossessed unjustly, get a remedy? Is he to go to the Federal Court, 7 or 800 miles? He might as well give his claim up. He may grumble, but finding no relief, he will be contented.

Again, all that great tract of country between the Blue Ridge and the Allegany mountains, will be claimed, and probably recovered in the Federal Court, from the present possessors, by those companies who have a title to them.—These lands have been sold to a great number of people.—Many settled on them, on terms which were advertised. How will this be with respect to *ex post facto* laws? We have not only confirmed the title of those who made the contracts, but those who did not, by a law in 1779, on their paying the original price. Much was paid in a depreciated value, and much was not paid at all.—Again, the great Indiana purchase which was made to the Westward, will, by this judicial power, be rendered a cause of dispute. The possessors may be ejected from those lands. That company paid a consideration of 10,000*l.* to the Crown, before the lands were taken up. I have heard Gentlemen of the law say, (and I believe it is right) that after the consideration was paid to the Crown, the purchase was legally made, and ought to be valid. That company may come in, and shew that they have paid the money, and have a full right to the land. Of the Indiana company I need not say much. It is well known that their claims will be brought before these Courts. Three or four counties are settled on the lands to which that company claims a title, and have long enjoyed it peaceably. All these claims before those Courts, if they succeed, will introduce a scene of distress and confusion never heard of before. Our peasants will be like those mentioned by *Virgil*, reduced to ruin and misery, driven from their farms, and obliged to leave their country.—

—*Nos patriam fugimus—et dulcia linquimus arva.—*
Virgil's Eclogues

Having mentioned these things, give me leave to submit an amendment which I think would be proper and safe, and would render our citizens secure in their possessions justly held. I mean, Sir, “That the Judicial power shall extend to no case where the cause of action shall have originated before the ratification of this Constitution, except in suits for debts due to the United States, disputes between States about their territory, and disputes between persons claiming lands under the grants of different States.” In these cases there is an obvious necessity for giving it a retrospective power. I have laid before you my idea on the subject, and expressed my fears, which I most conscientiously believe to be well founded.

1. The writ of *feri facias* commanded a sheriff to seize and sell “the goods and chattels” of a debtor in execution of a court judgment.

2. In criminal cases under the common law, each side was entitled to challenge jurors for cause, while defendants were permitted “an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a *peremptory* challenge.” By statute, the prosecution could only challenge for cause.

3. The Northern Neck proprietary, a tract of more than 5,000,000 acres, had been owned by the Fairfax family since the 1690s. In 1781 Thomas, Sixth Lord Fairfax, died in Virginia. He bequeathed five-sixths of the proprietary to his brother Robert, Seventh Lord Fairfax, and the rest to his nephew, Denny Martin, both of Kent, England. In 1782 the Virginia legislature declared that “there is reason to suppose that the said proprietorship hath descended upon alien enemies” and ordered proprietary residents to sequester “in their hands” the quitrents due at the time of the death of the proprietor until the right of descent was determined and to pay future quitrents into the state treasury. The proprietor’s executors prevailed upon the legislature in 1783 to repeal the sequestration provision of the 1782 act. In accord with the Treaty of Peace, the legislature in 1784 ended the confiscation of Loyalist estates.

CITE AS: John P. Kaminski et al., eds., *The Documentary History of the Ratification of the Constitution*, Vol. X: Virginia [3] (Madison, Wis.: Wisconsin Historical Society Press, 1993), 1403–9.