DOI: 10.12797/Politeja.11.2014.32.11

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THE CONSTITUTIONAL LIMITS ON THE FEDERAL GOVERNMENT ACCORDING TO THE CONSTITUTION'S FRAMERS

ABSTRACT The U.S. Constitution, as understood by the men who wrote it – the Framers – authorized only a limited form of federal government: limited in what it is allowed to do. That power, in turn, can only legitimately come from the People, who created the Federal Government. The said government is merely their creature. The objects on which it may legislate and spend money are strictly limited by its text, most notably Article I of the Constitution and the Tenth Amendment. The so-called Interstate Commerce, General Welfare, and Necessary and Proper clauses, sometimes invoked in the contemporary news media as giving the Federal Government broad powers, are actually limited in scope and do not give it any broad powers. This is clearly demonstrated by the writings of the men who wrote the Constitution – the Framers, chiefly James Madison and Alexander Hamilton. Their writings, particularly *the Federalist Papers*, explain what exact objects the Federal Government's authority is limited to, and why the claims of those who interpret the Constitution as giving the central government sweeping powers are wrong. The Necessary and Proper clause only gives the Congress the power to execute powers already granted, and does not give it any new substantive authority. The General Welfare clause (part of Clause 1 of Article I, Section 8 of the Constitution) is a general statement immediately limited and qualified by Clauses 3-16; and in the Framers' times, "welfare" meant only exemption from any unusual calamity and enjoyment of the ordinary blessings of society. The Interstate Commerce Clause only authorizes Congress to prevent the states from inhibiting interstate commerce – the free transportation and sale of goods and services across state borders – with barriers such as interstate tolls. Thus, the

Federal Government the Framers envisaged – and created with the Constitution – was one of strictly limited, enumerated powers. This article starts from the premise that the men who wrote the Constitution knew it best and are the most credible authority on its genuine meaning. This is confirmed further by the writings of constitutional law scholars and by rulings of the Supreme Court in the Marshall era – rulings which, to this day, greatly influence American jurisprudence, and whose authors looked to *the Federalist Papers* for the correct interpretation of the Constitution.

Key-words: the U.S. Constitution, the Framers of the Constitution

On September 17th, 1787, after almost four months of debate, a group of Founding Fathers known as the Framers (so called because they framed the United States' Constitutional and thus governmental system) completed their work and signed the proposed United States Constitution. However, to become the Supreme Law of the Land, the document had to be ratified by at least nine states. But in at least some of them, such as New York and Virginia, there was stiff opposition to the Constitution, as it was feared that the new document would create a vast, omnipotent, unlimited government similar to the monarchy from which America had declared independence just 11 years earlier.

Foreseeing such charges and desiring to set the record straight, Alexander Hamilton, James Madison (today called "The Father of the Constitution"), and John Jay wrote a series of 85 essays, today called *the Federalist Papers*, in which they explained the proposed Constitution, clause by clause, and addressed the various objections against the new document. In doing so, they demonstrated that the Constitution authorizes a Federal Government of only limited, enumerated powers whose activities are limited to a short list of objects.

This article starts from the premise that that the men who wrote the Constitution knew it best and are the most credible authority on its genuine meaning. Indeed, on that issue, *the Federalist Papers* were considered the most authoritative source long after 1787: in 1825, for example, the University of Virginia's Board of Visitors (of which James Madison himself and Thomas Jefferson were members) included these essays in the course materials for its law school students: *Resolved that* [...] *on the distinctive principles of the government of our own state, and of that of the US. the best guides are to be found in 1. the Declaration of Independence, as the fundamental act of union of these states. 2. the book known by the title of* The Federalist*, being an authority to which appeal is habitually made by all, and rarely declined or denied by any as evidence of the general opinion of those who framed, and of those who accepted the Constitution of the US. on questions as to it's* [sic] *genuine meaning. 3. the Resolutions of the General assembly of Virginia in 1799. on the subject of the Alien and Sedition laws, which appeared to accord with the predominant sense of the people of the US. 4. the Valedictory address of President Washington, as convey-*

ing political lessons of peculiar value. and that in the branch of the school of Law, which is to treat on the subject of Civil polity, these shall be used as the text and documents of the school.[1]

Thomas Jefferson was the University of Virginia's founder and first President, and he personally designed the University's curriculum and coursebooks as well as selecting the books to be bought for UVA's library. The Board of Visitors' decision clearly demonstrates that *the Federalist Papers* were, in 1825, considered the most authoritative explanation of the Constitution's meaning. To this day, many notable historians and jurists share this opinion. In particular, Richard B. Morris considered them *an incomparable exposition of the Constitution, a classic in political science unsurpassed in both breadth and depth by the product of any later American writer.* Joseph Story, a longtime Associate Justice of the Supreme Court from 1811 to 1845, also considered them the most authoritative source of knowledge on this subject. So did a famous politician, Henry Cabot Lodge of Massachusetts. The U.S. Supreme Court has also often looked to *the Federalist Papers* for guidance in interpreting the Constitution, and has quoted them in 291 separate rulings.[2]

Thus, since *the Federalist Papers* are considered the highest authority on the Constitution's genuine meaning, let us assess what powers does the Constitution delegate to the three branches of the Federal Government. We will begin with the legislative branch, as it was granted the relatively broadest scope of powers: sole legislative authority and sole taxation and spending authority, also known as "the power of the purse".

1. THE POWERS OF THE CONGRESS

The legislative branch, called the Congress, was created by Article I of the Constitution. Its powers (other than those to make their own rules of conducting business and choosing their officers, granted by Sec. 2-3) are itemized in Sec. 8 of the Article. Its first and second clause may at first seem to delegate broad powers: *The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States;*

To borrow money on the credit of the United States [...].[3]

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1 'Minutes of the Board of Visitors of the University of Virginia, March 4th, 1825', pp. 82-83, para. 1, University of Virginia Library, at <http://xtf.lib.virginia.edu/xtf/view?docId=2006_04/uvaGenText/tei/bov_18250304.xml&query=true>, 3 April 2014.

2 E.g.: R.B. Morris, *The Forging of the Union (1781-1789)*, New York 1987 (*New American Nation Series*); A. Furtwangler, *The Authority of Publius. A Reading of the Federalist Papers*, Ithaca 1984; G. Wills, *Explaining America. The Federalist*, Garden City 1981; J. Story, *Commentaries on the Constitution of the United States. With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution*, Boston 1833 (*19th-Century Legal Treatises*); H.C. Lodge (ed.), *The Federalist, a Commentary on the Constitution of the United States: Being a Collection of Essays Written in Support of the Constitution Agreed Upon September 17, 1787, by the Federal Convention*, New York–London 1902; R. Chernow, *Alexander Hamilton*, New York 2004, p. 260.

3 U.S. Constitution, Art. I, Sec. 8, Clauses 1-2.

However, this clause does not mean the Congress may create any agencies, spend money on any objects, or pass any laws which it believes would further the general welfare of the United States or provide for the common defense. This is because Clauses 1 and 2 of Sec. 8 are immediately followed and limited by specific clauses (cl. 3-16) which state what exactly may Congress spend money and legislate on.

If one reviews the list of these powers, one notices that 50% (nine) of these pertain to strictly military issues: raising and supporting Armies, maintaining a Navy, calling forth, organizing, arming, and regulating the militia; supressing rebellions; executing exclusive lawmaking authority on military installations; providing for the construction of such installations; regulating the entire Armed Forces; declaring war; making the laws of war and regulations regarding captures on land and water (including the treatment of captured enemy combatants); and punishing piracy at sea and *offenses against the Law of Nations* (clauses 10-17).

Or, put another way, the Constitution (including amendments later ratified) delegates powers to Congress only in four distinct subject matter areas:

1) War, national defense, foreign policy, and international commerce;
2) Exclusive legislative authority over military bases and the district constituting the seat of the federal government;
3) Domestically, the creation of a uniform commercial system with no barriers to interstate trade, a uniform system of weights and measures, copyright and patent protection, a common currency, a common trade policy with foreign nations and the Indian tribes, and the operation of post offices and post roads; immigration and naturalization; and
4) Protection of civil and voting rights.[4]

Vesting in the Congress the powers to create and maintain a uniform commercial system – and thus to facilitate free interstate trade – was necessary because a single free market cannot exist if there are any barriers to trade between the participants in this market. Interstate tolls and tariffs, different sets of weights and measures, and different, unequal standards of copyright and patent protection would have all impeded the creation of a single market. But, as we shall see below in the Framers' discussion of the Interstate Commerce Clause, it was intended s o l e l y to prevent the erection of any impediments to interstate trade – and for no other purpose.

The forementioned specific enumeration of powers was made in the Constitution by its authors p r e c i s e l y in order to limit the Congress' powers to a short, strictly defined list of activities. This was the Framers' intention from the start, when the Committee on Detail, chaired by John Rutledge, began its work on the Constitution's details, starting from the Virginia Plan formulated by James Madison. Many of the eighteen powers enumerated in Art. I, Sec. 8 were, in fact, copied from the Articles of Confederation by Rutledge.[5] In *Federalist* No. 41, Madison explains how Clauses 3-16 limit the scope of clauses 1-2, and thus, how Congress may legislate and spend money

[4] Ibid., Article I, Sec. 8, Clauses 3-17.

[5] D. Stewart, *The Summer of 1787. The Men Who Invented the Constitution*, New York 2008, p. 169.

on these – and only these – items: *It has been urged and echoed, that the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States," amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare.* [...] *What color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon?* [...] *For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power?* [...][6]

In other words, clauses 1-2 of Sec. 8 of Article I grant the Congress the power to raise taxes and, if need be, borrow money on the United States' credit; clauses 3-16 limit the purposes for which taxes may be raised and on which money may be borrowed and spent by the Congress. Thus, the Congress may not simply spend money on anything which its members believe furthers the general welfare of the United States.

In *Federalist* No. 14, Madison also countered objections that the Federal Government's powers were too broad, again pointing out that: *the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate* [i.e. State – Z.M.] *governments, which can extend their care to all those other subjects which can be separately provided for, will retain their due authority and activity.*[7]

As Madison states, the federal government was not granted broad legislative powers, but merely prerogatives to deal with issues vital to the United States' survival, security, and unity, and unimpeded commerce between all member states of the Union. And what is considered such an issue is explicitly stated in the Constitution. If a power has not been delegated to the federal government, it doesn't have that power.

In *Federalist* No. 39, Madison once again stressed that the federal government's powers' are limited strictly to those enumerated in the Constitution, and those necessary to carry the former out (the capitalization is Madison's): *the proposed government cannot be deemed a NATIONAL one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case.*[8]

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6 Publius [J. Madison], 'General View of the Powers Conferred by The Constitution', *The Independent Journal*, date of original publication unknown, paras. 22-23, Founding Fathers, at <http://www.foundingfathers.info/federalistpapers/fed41.htm>, 3 April 2014.

7 Publius [J. Madison], 'Objections to the Proposed Constitution From Extent of Territory Answered', *The New York Packet*, 30 November 1787, para. 9, Founding Fathers, at <http://www.foundingfathers.info/federalistpapers/fed14.htm>, 3 April 2014.

8 Publius [J. Madison], 'The Conformity of the Plan to Republican Principles', *The Independent Journal*, date of original publication unknown, para. 15, Founding Fathers, at <http://www.foundingfathers.info/federalistpapers/fed39.htm>, 3 April 2014.

In *Federalist* No. 45, Madison wrote explicitly that the Federal Government's powers are few and strictly limited, mostly to external objects and to the country's national defense, while the powers reserved to the states and the people are infinite (all capitalizations are Madison's): *The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. 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 properties of the people, and the internal order, improvement, and prosperity of the State.* [...][9]

Madison's arguments are in complete agreement with what the Constitution itself says. As we saw above, the federal government may only legislate on those few issues which the supreme law of the land authorizes it to make laws about.

There were, however, some critics (most notably, Patrick Henry, the leader of the Anti-Federalists) contending that the Necessary and Proper Clause (i.e. Clause 17 of Art. I, Sec. 8) was a grant of unlimited power.[10] Responding to these accusations, Alexander Hamilton wrote in *Federalist* No. 33 (all capitalizations are Hamilton's) that: *What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the MEANS necessary to its execution?* [...] *What is the power of laying and collecting taxes, but a LEGISLATIVE POWER, or a power of MAKING LAWS, to lay and collect taxes? What are the propermeans of executing such a power, but NECESSARY and PROPER laws?* [...] *A power to lay and collect taxes must be a power to pass all laws NECESSARY and PROPER for the execution of that power* [...].[11]

Thus, the Necessary and Proper Clause only authorized the Congress to make laws and otherwise execute those powers already granted to the Federal Government; it did not vest any new prerogatives in the Federal Government. This clause was necessary since, as James Madison explained in *Federalist* No. 44, the Framers (chiefly James Wilson, who added the clause to the draft later presented to the plenary Convention) were afraid that without it the Constitution would have been a dead letter.[12]

It is hard to disagree with that position. A power for a government agency to oversee an issue must be accompanied by the power to implement all measures necessary and

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[9] Publius [J. Madison], 'The Alleged Danger From the Powers of the Union to the State Governments Considered', *The Independent Journal*, date of original publication unknown, paras. 10-12, Founding Fathers, at <http://www.foundingfathers.info/federalistpapers/fed45.htm>, 4 April 2014.

[10] Originally, it had no specific "name". The first person to refer to it as the Necessary and Proper Clause was Associate Justice Louis Brandeis in *Lambert v. Yellowley*, 272 U.S. 581 (1926).

[11] Publius [A. Hamilton], 'The Same Subject Continued (Concerning the General Powers of Taxation)', *The Daily Advertiser*, 3 January 1788, para. 4, Founding Fathers, at <http://www.foundingfathers.info/federalistpapers/fed33.htm>, 4 April 2014.

[12] Publius [J. Madison], 'Restrictions on the Authority of the Several States', *The New York Packet*, 25 January 1788, paras. 12-13, Founding Fathers, at <http://www.foundingfathers.info/federalistpapers/fed44.htm>, 4 April 2014; W.J. Watkins, *Reclaiming the American Revolution. The Kentucky and Virginia Resolutions and their Legacy*, New York 2004, p. xvi; D. Stewart, *The Summer of 1787...*, pp. 169, 172.

proper for the execution of that power. Without such power, the Constitution would have lacked any "teeth" and would have been a dead letter. No additional substantive power was granted by the Clause.

The interpretation of these clauses by the Supreme Court under John Marshall's leadership d i d n o t, contrary to what is sometimes alleged, broaden the Congress's legislative powers. Regarding the Necessary and Proper Clause, the Court held in *McCulloch v. Maryland* (1819) that while Congress has all the powers necessary to execute its enumerated prerogatives, the object must still be firmly within these prerogatives' scope; the end and the means of legislating must not only be appropriate, but comply with the letter and the spirit of the Constitution. The ruling – which spells out exactly what is Constitutional and what is not, according to the Marshall Court – states: *Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.*[13]

Therefore, the claims of Anti-Federalists such as Patrick Henry that it granted unlimited power to the Federal Government were unfounded. The clause merely authorizes Congress to make laws necessary for the execution of its proper powers; it does not authorize any new lawmaking prerogatives. Without such clause, the Constitution would have been a dead letter, since Congress could legislate e.g. on taxation and spending matters but would not have been able to stand up an agency (e.g., a national bank, the object of controversy in *McCulloch*) to disburse the funds raised through taxation.

Whilst discussing *McCulloch*, let us take note that Chief Justice Marshall himself acknowledged *the Federalist Papers* in that ruling as the most authoritative source on the Constitution's genuine meaning, even though he reserved for the Court *a right to judge of* [sic] *their correctness*: *the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the Constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of* [sic] *their correctness must be retained.*[14]

The third clause which generated much controversy in the ratification period – the Interstate Commerce Clause – was also alleged by some critics to be an unlimited commission of power for the federal government. Alexander Hamilton refuted such charges swiftly, answering in *Federalist* No. 22 that the clause authorizes Congress only to prohibit, and where they may already exist, remove barriers to free, unimpeded interstate commerce (such as interstate tolls): *The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this*

[13] *McCulloch v. Maryland*, 17 U.S. 316 (1819), Cornell University School of Law, Legal Information Institute, at <http://www.law.cornell.edu/supremecourt/text/17/316>, 7 April 2014.

[14] Ibid.; J. Arthur, *Words That Bind. Judicial Review and the Grounds of Modern Constitutional Theory*, Boulder 1995, p. 41.

nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intcrcourse between the different parts of the Confederacy. The commerce of the German Empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandises passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless.[15]

Indeed, at that time, Germany was divided into dozens of small states, many of them controlling some portions of German rivers such as the Rhine and the Elbe. Yet, those sailing these rivers had to pay customs duties while crossing each state's border; this greatly impeded commerce in 18th century Germany. The Framers wanted to prevent a repetition of this situation in the U.S., whereby land, river, and maritime avenues of commerce would be rendered useless if merchants transporting goods from e.g. Georgia to New York were to pay interstate tolls on each state border crossed. If that were allowed to happen, little, if any interstate commerce would occur; importation of goods from one state to another would be very difficult; and the economy of the country as a whole would grind to a halt. Yet, under the previous supreme law of the land – the Articles of Confederation – the Congress of the Confederation had no power to prevent this from happening, or even to limit the amount of tolls any state might levy. The Interstate Commerce Clause was included in the Constitution for this, and only for this, purpose. As we see from *Federalist* No. 22, it does not grant Congress any other powers.

James Madison agreed with Hamilton, writing in *Federalist* No. 42 and providing the same justification as stated above, namely, that: *The defect of power in the existing Confederacy to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience.* [...] *A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter.* [...] *We may be assured by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquillity.*[16]

These were not mere theoretical concerns. This situation actually did happen in the United States prior to the Constitution's ratification, leading the states of New Hampshire, Connecticut, New Jersey, Delaware, and North Carolina to protest against interstate tolls. Apparently at their insistence, the Interstate Commerce Clause was included in the Constitution to prevent such tolls in the future. Alexander Hamilton noted this in the forementioned *Federalist* No. 22, calling it one of the "Defects of the Present Confederation" and in Madison's *Records of the Federal Convention of 1787*: *It would be*

[15] Publius [A. Hamilton], 'The Same Subject Continued (Other Present Defects of the Confederation)', *The New York Packet*, 14 December 1787, para. 5, Founding Fathers, at <http://www.foundingfathers.info/federalistpapers/fed22.htm>, 7 April 2014.

[16] Publius [J. Madison], 'The Powers Conferred by the Constitution Further Considered', *The New York Packet*, 22 January 1788, para. 12, Founding Fathers, at <http://www.foundingfathers.info/federalistpapers/fed42.htm>, 7 April 2014.

unjust to the States whose produce was exported by their neighbours, to leave it subject to be taxed by the latter. This was a grievance which had already filled N. H. Cont. N. Jery. Del: and N. Carolina with loud complaints, as it related to imports, and they would be equally authorized by taxes [by the States] *on exports.*[17]

Again, the Marshall Court took a similar, though slightly less restrained, view of the clause, holding in *Gibbons v. Ogden* (1824) that while the meaning of interstate "commerce" includes the provision of services (and not just the transportation or sale of goods, because services are essentially a non-physical good sold on the market) between the states, it still must occur among the several states (e.g., navigation on interstate waterways, such as the Hudson River). Thus, the Court upheld a 1793 federal law licensing ships for coastal interstate trade under which Thomas Gibbons (the defendant in the case) operated such ships. So while the meaning of "commerce" came to include services and not just goods or their transportation, the power this clause grants the Congress was still understood to be very limited. The dispute at issue in *Gibbons* clearly involved interstate commerce (in this case, the provision of transportation services across state borders), and thus was clearly within Congressional purview under this Clause; furthermore, the monopolies granted by New Jersey and New York to Gibbons' competitors were clearly an obstacle to unimpeded interstate commerce (ferry transit across the river), so the Congress clearly had the power to institute laws to break them up.[18]

Thus, we see that the original Constitution delegated to the Congress only a few limited, enumerated powers; and neither the General Welfare nor the Necessary and Proper Clause can be credibly invoked to give the national legislature any broad powers; nor can the Interstate Commerce Clauses be invoked for that purpose.

We shall now examine the powers vested by the Constitution in the President of the United States.

2. POWERS OF THE PRESIDENT

The executive branch of the Federal Government, headed by a President, likewise has limited, enumerated powers. The President may not make laws, levy taxes, spend (or borrow) money, or declare war and unilaterally involve the country in hostilities. The role of the President and the executive branch he heads is to execute the laws approved by the Congress, hence the name "the executive branch". Specifically, we see that Article II of the Constitution delegates to the President the power to:

1) Act as Commander-in-Chief of the armed forces;
2) Require the written opinion of the principal officer of any executive department on any subject related to that officer's duties;

[17] J. Madison in M. Farrand (ed.), *The Records of the Federal Convention of 1787*, Vol. 1-2, New Haven 1911, I, para. 28, The Online Library of Liberty, at <http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1786&chapter=96058&layout=html&Itemid=27>, 4 April 2014..

[18] *Gibbons v. Ogden*, 22 U.S. 1 (1824), Oyez, IIT Chicago-Kent College of Law, at <http://www.oyez.org/cases/1792-1850/1824/1824_0>, 7 April 2014.

3) Grant reprieves and pardons for offenses against the United States, except in cases of impeachment;
4) To make treaties with the advice and consent of the Senate;
5) To nominate and appoint, with the Senate's consent, ambassadors, other public ministers and consuls, federal judges, and all other officers of the United States whose appointments are not otherwise provided for by the Constitution (although the Congress may by law waive the confirmation requirement for such inferior officers);
6) Nominate, without Senate consent, persons to fill up vacancies which may happen during a recess of the Senate (those appointments, however, expire at the end of the next Senate session);
7) On extraordinary occassions, convene both Houses of Congress, or either of them, and, in case of disagreement between them, adjourn them to such time as he deems proper;
8) Receive foreign ambassadors and public ministers.[19]

Furthermore, Article I, Section 7 of the Constitution grants the President the power to veto bills passed by Congress.

These are the only powers vested in the President. By contrast, when a law is validly and duly made by Congress, the President is obligated to *take care that laws be faithfully enacted*.[20]

Thus, the President must nominate federal officers, judges, ambassadors, ministers, and consuls, and can do so only with Senate consent (unless the Senate is in recess or unless the Law exempts such positions from the requirement of Senate confirmation). The purpose of requiring Senate confirmation is to prevent an unqualified or otherwise undesirable person from holding high office. He must also receive the accreditations of foreign diplomats and act as Commander-in-Chief of the United States Armed Forces. He may make treaties, but they do not become binding on the United States unless ratified by Congress. He may grant clemencies and pardons to those who have violated federal law, but not in cases of impeachment. He may also convene one or both Houses of Congress when these are in recess, or adjourn them if they cannot agree on the time for adjournment. He may also require the opinion of executive department officers on subjects related to their duties.

That last power has generated particular controversy, which began in the times of the ratification debate. It was feared that the President could unilaterally take the country into wars at his whim and make binding treaties by executive fiat without consent of the Senate. But in *Federalist* No. 69, Alexander Hamilton dismissed such fears, writing that: *The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces,*

[19] U.S. Constitution, Article II, Sections 2-3.

[20] Ibid., Sec. 3.

as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature. [...]

The President is to have power, with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description.[21]

American generals and admirals do have some power, but they do not have the power to decide which countries the United States goes to war with or when, nor to raise and maintain armies or navies, nor to appropriate money for them, nor to arm, equip, or disarm them. These responsibilities are the sole prerogative of the Congress and appear only in Art. I, Sec. 8 of the Constitution – which enumerates the powers of the Congress. Also, per the Constitution, the President cannot appoint any high-ranking military officers without Senate confirmation unless Congress, by law, removes the requirement of such confirmation. Nor can the President unilaterally make treaties or agreements on any issue of importance, Hamilton demonstrates – while the British sovereign could unilaterally do all of the above. The King's extensive executive powers were discussed in *the Federalist Papers*, especially in *Federalist* No. 69, precisely to demonstrate how limited the U.S. President's powers are. The requirement that all treaties concluded by the President be submitted to the Senate for advice and consent is further discussed in *Federalist* No. 75: *However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years' duration.* [...] *An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.*[22]

Fears that the President could unilaterally take the country into war were further dispelled by James Madison, who wrote in *the Letter of Helvidius* No. II that: *In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department.* [...] *[T]he trust and the temptation would be too great for any one man.* [...] *In war, a physical force is to be*

[21] Publius [A. Hamilton], 'The Real Character of the Executive', *The New York Packet*, 14 March 1788, Founding Fathers, paras. 7-8, at <http://www.foundingfathers.info/federalistpapers/fed69.htm>, 4 April 2014.

[22] Publius [A. Hamilton], 'The Treaty-Making Power of the Executive', *Independent Journal*, 26 March 1788, paras. 3-4, The Constitution Society, at <http://www.constitution.org/fed/federa75.htm>, 4 April 2014.

created; and it is the executive will, which is to direct it. In war, the public treasuries are to be unlocked; and it is the executive hand which is to dispense them. In war, the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed; and it is the executive brow they are to encircle. [...] *Hence it has grown into an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm the propensity of its influence.*[23]

Thus, we find that not only did the Framers clearly understand the Constitution to vest the sole war-initiating authority in the Congress, but Madison believed that in no part of the Constitution could more wisdom be found than in the War Powers Clause (that is, clause 11 of Article I, Section 8), because the executive branch of any government always shows the most propensity to start wars – because wars increase that branch's powers. Furthermore, Presidents Madison, Polk, McKinley, Wilson, and Roosevelt all asked the Congress for a declaration of war prior to leading the nation into conflict, thus showing they understood that Congressional authorization was required. Thus we see that the President may not unilaterally initiate hostilities against a foreign country; only the Congress can do so. When the Congress does authorize war, or when the United States itself is attacked (and thus a foreign party initiates hostilities), the President has supreme command authority of the military and may direct military operations as he sees fit.

In 1973, Congress, however, adopted a slightly restrictive interpretation by passing the War Powers Resolution (over President Nixon's veto). The resolution authorizes the President to engage the U.S. military in undeclared hostilities only for a duration of 60 days, after which the President must seek Congressional authorization for continuing hostilities *or* withdraw U.S. troops from them. Nonetheless, all Presidents since Nixon have disregarded the Resolution.

The only other significant power vested in the President, of the few enumerated above, is the power of veto. This is the President's exclusive prerogative; he may veto any bill for any reason whatsoever. The Congress may override such veto, but only with a two-thirds majority of both Houses of Congress. The only exception to that requirement is if the bill was returned by the President in 10 or fewer working days before the Congress adjourns. This is known as the pocket veto.

While Presidents have, in the past, attempted to increase their power by taking the country into undeclared wars, or by refusing to spend money appropriated by Congress, these actions were unconstitutional and exceeded the limits placed on the executive branch by the Constitution and explained so ably in *the Federalist Papers*, particularly Nos. 48-49 and 67-77. Thus, Alexander Hamilton was right when he asked, rhetorically, in *Federalist* No. 71, in the last paragraph: *what would be to be feared from an elective magistrate of four years' duration, with the confined authorities of a President*

[23] Helvidius [J. Madison], 'Letters of Helvidius, No. II' in *The Letters of Pacificus and Helvidius (1845) with the Letters of Americanus*, Delmar 1976; G. Healy, T. Lynch, *The Power Surge. The Constitutional Record of George W. Bush*, Washington 2006, pp. 7-8.

of the United States? What, but that he might be unequal to the task which the Constitution assigns him?[24]

Another limitation on the President's powers is his lack of legislative prerogatives: he may not formally propose any new laws. However, today many bills proposed in Congress (when it is controlled by the President's political party) originate from the executive branch's proposals. These proposals often stem from the President's annual State of the Union Address – an obligation on the President to inform the Congress, "from time to time", on the state of the Union and the measures he deems "expedient" to its improvement.

Yet another limit on the executive branch's power (and that of the judicial branch) is oversight of these branches by the Congress. That body has the power to summon anyone at all for testimony before Congress (Department Secretaries and Supreme Court Justices testify before Congress at least once a year) and may impeach and remove from office any official – up to the President and the Chief Justice – who has committed "high crimes and misdemeanors." Indeed, two U.S. Presidents, Andrew Johnson and William J. Clinton, have been impeached by the House, though not convicted by the Senate and thus not removed from office.

The Framers believed in an executive branch of limited powers, and not in a President of dictatorial powers such as those of Roman dictators; however, they also believed in an energetic one, effective in what it is authorized to do. Thus, the Framers rejected proposals to make the head of the executive branch a collective one. They thought that a "collective" executive would be far too tardy in deliberating vital issues and making decisions – and in executing those decisions and the laws made by Congress. If formulating good laws in the Congress requires lengthy, careful deliberation and vigorous debate, their execution requires swift, decisive action, of which only a unitary executive is capable. Thus, Hamilton wrote at the beginning of *Federalist* No. 70: *There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government.* [...] *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.* [...]

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.[25]

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[24] Publius [A. Hamilton], 'The Duration in Office of the Executive', *The New York Packet*, 18 March 1788, para. 8, Founding Fathers, at <http://www.foundingfathers.info/federalistpapers/fed71.htm>, 4 April 2014.

[25] Publius [A. Hamilton], 'The Executive Department Further Considered', *Independent Journal*, 15 March 1788, paras. 2-3, The Constitution Society, at <http://www.constitution.org/fed/federa 70.htm>, 4 April 2014.

3. POWERS OF THE JUDICIAL BRANCH

We shall now examine the powers delegated by the Constitution to the judicial branch in Article III. *The Federalist Papers* explain the design and powers of the judicial branch in essays No. 78 through 83. Of these, the most important ones for the purpose of this article are *Federalist* No. 80 and 81, as these state precisely what the power of the federal judiciary is.

In Article III, Section 1 of the Constitution, we find that: *The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.* Sec. 1 also states that judges on both the Supreme Court and lower courts shall serve during "good behavior". This means that if they display "bad behavior", i.e. abuse office or commit a felony, they may not hold office. This is an important check on the judiciary's power.

Section 2 originally stated that the power of federal courts extended to: *all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects.*[26]

This was amended in 1795, however, to bar a State of the Union from being sued in federal courts by citizens of another State, or citizens or subjects of any foreign country. Even before this amendment, however, the scope of cases that the federal judiciary could hear (and issue rulings in) was very limited, as we see from Section 2. Furthermore, that Section's second paragraph states that in all cases affecting ambassadors, other public ministers, and consuls, and those in which one or more states is a party, the Supreme Court has "original jurisdiction"; in all other cases (of those that the federal judiciary is authorized to hear), the Supreme Court has "appellate jurisdiction", with regard to both law and fact, subject to Congressional regulations.[27] This begs the question: what is "original" and "appellate jurisdiction"?

This term, in judicial parlance, means the jurisdiction – i.e. authority – to hear a given kind of cases. Thus, if a court has "original jurisdiction", it is the first judicial instance that can hear certain cases; if it has "appellate jurisdiction", it cannot be the first court with which a case is filed and merely hears appeals from lower courts. The Supreme Court, as we see, has original jurisdiction (i.e. is the first and last instance) in two types of cases: 1) those involving diplomats; and 2) those in which a State is a party. This is because trying diplomats, or a State of the Union, in a lower court, would have ill-suited their dignity, especially since diplomats represent their sovereign countries. Alexander

[26] U.S. Constitution, Article III, Sec. 2.

[27] Ibid.

Hamilton explained this best in *Federalist* No. 81 (capitalizations are Hamilton's): *Let us now examine in what manner the judicial authority is to be distributed between the supreme and the inferior courts of the Union. The Supreme Court is to be invested with original jurisdiction, only "in cases affecting ambassadors, other public ministers, and consuls, and those in which A STATE shall be a party." Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal. Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds.*[28]

From this paper, we clearly see that the entire judicial branch of the federal government may hear cases related to specific issues only – namely, cases involving the Constitution and laws made in pursuance thereof; ones involving federal officials and foreign ambassadors and ministers; and cases involving one or more states. In addition, cases involving federal and foreign officials, as well as States of the Union, may be heard only by the United States Supreme Court and not by any federal district court or court of appeals. From *Federalist* No. 81, it is clear that the Framers' reason (or more specifically, that of Alexander Hamilton, one of the Constitution's chief authors, along with James Madison) for this arrangement was that trying an official of the U.S. or of a foreign government, or a State of the Union, before any court inferior to the Supreme Court would "ill suit" their dignity. In any case, no institution but the Supreme Court may hear cases involving such persons or entities.

As for the Supreme Court's appellate jurisdiction, it extends to state courts and not merely to federal ones, and the federal judiciary's rulings have supremacy over those of state courts. The Supreme Court affirmed this in *Martin v. Hunter's Lessee*, wherein it ruled that Lord Fairfax, a Loyalist who owned land in Virginia, was entitled to bequeathe it to his nephew Denny Martin under the Jay Treaty (which allowed Britons to own land to the US), even though Virginia's legislature voided that bequest and transferred part of the land to another man, David Hunter. Virginia's courts upheld that transfer, but their rulings were overturned by the Supreme Court. Justice Joseph Story wrote the Court's ruling in that case.[29]

Federalist No. 81 also deals with other questions and concerns surrounding the federal judiciary. For example, while some people in Hamilton's time feared that the Su-

[28] Publius [A. Hamilton], 'The Judiciary Continued, and the Distribution of the Judicial Authority', para. 14, Founding Fathers, at <http://www.foundingfathers.info/federalistpapers/fed81.htm>, 4 April 2014.

[29] *Martin v. Hunter's Lessee*, 14. U.S. 304 (1816), Oyez, IIT Chicago-Kent College of Law, at <http://www.oyez.org/cases/1792-1850/1816/1816_0#sort=ideology>, 7 April 2014.

preme Court would be free to interpret laws in what the Court merely *deems* the spirit of the Constution, and thus to mold it into whatever shape it desires, he refuted such charges thus: *In the first place, there is not a syllable in the plan under consideration which DIRECTLY empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution.*[30]

It is often alleged that there was no principle of judicial review, no "function" (so to speak) of judicial review, for the federal judiciary until *Marbury v. Madison* (1803); that is, it is often alleged that the federal judiciary didn't have the power to overturn acts of the other two branches until *Marbury*. This is utterly wrong; the judicial branch of the federal government has always had the power of "judicial review", i.e. to overturn unconstitutional laws and other actions of the legislative and executive branches that conflict with the Constitution. Again, we look to Alexander Hamilton to demonstrate that "judicial review" is indeed one of the inherent powers of the judicial branch – a check on the other two branches of the federal government – and comes from the Constitution itself, as understood by the Founders, not from the *Marbury* ruling. Says Hamilton in *Federalist* No. 78: *Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.*

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A consti-

[30] Ibid., para. 5.

tution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[31]

5. LIMITATIONS IN OTHER ARTICLES

While it is the first three articles that list – and limit – the Federal Government's powers, further limitations are found in Articles IV and V. Section 3 of Article IV prohibits the Federal Government from creating new states in an existing state's jurisdiction and from merging two or more states, or parts of states, without their consent. Section 4 of the same Article obligates the federal establishment to guarantee a republican (non-monarchical) form of government to all states, and to protect them against invasion and (on the application of the state legislature) against domestic violence.

Last but not least, it is worth noting that the method of ratifying amendments, described in Article V, also limits the Federal Government's power: amendments may either be proposed by two-thirds of each house of Congress, then ratified by three--fourths of the states, or a convention for the purpose of proposing constitutional amendments may be called if two-thirds of the states apply to the Congress to convene one. However, the only Amendment to date to have been ratified this way was the 21st (repealing the 18th Amendment and thus abolishing alcohol prohibition).

CONCLUSIONS

In the 1780s, the Framers crafted a Constitution which authorized a federal government of very limited, enumerated powers. This applies to all branches of that government: the legislative, executive, and judicial branches. That was the understanding of the men who crafted the Constitution and of the state Ratifying Conventions which ratified the document, and was elaborately explained, in greater detail than any one article can contain, by Alexander Hamilton, James Madison, and John Jay in *the Federalist Papers* – a series of essays which soon gained their reputation as the most authoritative explanation of the Constitution's meaning. Although other figures, most notably Chief Justice John Marshall and Associate Justice Joseph Story, were (and still rightly are) also considered a highly credible authority on the subject in their lifetime, they believed themselves that *the Federalist Papers* were the highest authority

[31] Publius [A. Hamilton], 'The Judiciary Department', *Independent Journal*, 14 June 1788, paras. 10-12, The Constitution Society, at <http://www.constitution.org/fed/federa78.htm>, 4 April 2014.

on the matter – a belief widespread in the 19th century and endorsed by UVA's Board of Visitors.

This article has made the case that the United States Constitution authorizes a federal government of limited and enumerated powers only. This, as evidenced by *the Federalist Papers*, was the position of the Framers – the men who wrote the Constitution and understood it best, and is therefore the correct interpretation of the document. Only in rare cases in history do we have the intentions of a text's authors – even in the case of a legal document – spelled out so clearly and in such great detail for posteriority. This, however, is the case for the U.S. Constitution, which makes it easy for historians to discern its crafters intent as to its genuine meaning.

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