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## Our First Constitution: The Articles of Confederation

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The "united States in Congress assembled" came into being 200 years ago with ratification of the Articles of Confederation.

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By William F. Swindler

THE period of the nation's bicentennial, from independence to the final implementation of the federal government under the Constitution to be observed in 1987-89, includes several events less familiar in history but significant in their own place and time. In 1979 was the bicentennial of legal education marked by the founding of the chair of law at the College of William and Mary on December 4, 1779 (see 64 A.B.A.J. 1872). In 1981 will come two events — the final ratification of the Articles of Confederation in March and the final victory of the Revolution at Yorktown in October.

Of these two, it is safe to say that the Yorktown event will be more widely recognized. But as a milestone in the unique experiment in government that became the United States of America, the quiet happening at Philadelphia on March 1, 1781, may be more significant in constitutional history. For with that event — the final adoption by the 13 states of the Articles of Confederation — the American people moved toward identity as a nation. This was the vital transitional step from the ad hoc Continental Congress to "the united States in Congress assembled" to the ultimate drafting of the Constitution and "the more perfect union" of a federal form of government.

The drafting and approval of the "Articles of Confederation and Perpetual Union" did not come easily. A confederation was first formally proposed in May, 1776, when Richard Henry Lee of Virginia offered his famous resolution, "That these United Colonies are, and of

right ought to be, free and independent States." This resolution was in fact one of three related proposals, the second calling for the seeking of foreign alliances for the coming war with Great Britain, and the third stating "That a plan of confederation be proposed and transmitted to the respective Colonies for their consideration and approbation."

These resolutions in themselves marked a transitional step in American constitutional thought. The famous Declaration of Independence, which followed in July, was actually the third in a series of declarations by the Continental Congress, which, as the years passed, had moved the 13 colonies slowly and reluctantly toward independence. In 1774 the First Continental Congress had published its Declaration and Resolves, which called on the mother country to ensure to the colonists their rights as Englishmen. When Parliament ignored this representation, the Second Continental Congress in 1775 issued its Declaration on the Reasons for Taking Up Arms — in defense of the inalienable rights of Englishmen. Thus the Declaration of 1776 was the final step in an inexorable process: in order to secure their rights as Englishmen, the English colonists now declared that they had to be independent of England itself.

There were, literally speaking, only two Continental Congresses. The first met from September 5 to October 26, 1774. The Second, which opened May 10, 1775, continued until it was converted into the permanent organ of a



national government by the final adoption of the Articles on March 1, 1781. The use of the title, Continental Congress, actually continued throughout the confederation period until the new Constitution went into effect in April, 1789.

The idea of an intercolonial parliamentary union had appeared recurrently in American colonial history. The New England Confederation of 1643 was a regional version of the con-

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LEFT: Charles Thomson (courtesy of National Portrait Gallery, Smithsonian Institution). CENTER: John Hancock (courtesy of Bettman Archive, Inc.). RIGHT: William Paca (courtesy of Maryland Historical Society)

cept, largely in reaction to the civil war then raging in the mother country. In 1697 William Penn had proposed a federation for all the then existing colonies, and in 1754 the Albany Congress, convened at the encouragement of the mother country to mobilize colonial efforts for the French and Indian War, had debated a formal "plan of union." All of these assumed the ultimate supremacy of the British government, and in the first two sessions of the Continental Congress a similar proposal for a confederation of the colonies was offered as an alternative to the radical proposal for complete independence.

With the Declaration of 1776, however, the issue had fundamentally changed. For the immediate and war-time present, the Continental Congress existed of necessity to co-ordinate — poor though the co-ordination was — colonial or state efforts to carry on the

War of Independence. The postwar question obviously was: assuming that there should be some continuing forum for the exchange of information and for co-ordinating activities of the sovereign states, how should it be organized?

A central government, whether in London or Philadelphia, was seen as a restraint on the freedom of local legislatures and hence to be resisted by radicals like Sam and John Adams of Massachusetts, or Thomas Jefferson or Patrick Henry of Virginia. Somewhat self-consciously, men like these in these two most militant of the erstwhile colonies came to call their new governments commonwealths, after the form of government during the English Revolution. It was perhaps that equally zealous radical, Benjamin Franklin, who persuaded Pennsylvania to follow the same example. The fourth commonwealth of the modern Union—Kentucky—inherited the tradition from its parent state, Virginia.

In the debate over Lee's threefold resolutions of May, 1776, in fact, there was some argument that confederation should precede independence. How, it was asked, could 13 separate colonies legally declare their joint or simultaneous independence and make the declaration recognized as valid by the society of nations? On the other hand, some of the erstwhile colonies, like Virginia, were making their own declarations part of their new state constitutions.

John Dickinson, from the "three lower counties" of Pennsylvania (Delaware), was the first draftsman of a plan for confederation, prepared by a committee made up of a delegate from each of the colonies, with the draft being reported back to Congress a week after the formal proclamation of the Declaration of Independence. When debate on the details of the draft began, the divisions among the states immediately manifested themselves and became so sharp that Joseph Hewes from North Carolina gloomily predicted that "we shall never modell it so as to be agreed to by all the Colonies."

A month later the debate was broken off, primarily because of the overriding concerns of the developing military action of the Revolution. It would be the following April before the subject was put back on the calendar, at which time it was agreed that two days a week should be spent in debate on the articles until final agreement on an instrument could be reached. That came in November, when the final form was

approved and the articles submitted to the states for action.

The major concerns that had to be resolved in this quasi-convention of April–November, 1777, involved the preservation of all but complete independence or sovereignty for the individual states, equality of representation or voting power among the delegations of the several states to the Continental Congress, apportionment of costs of supporting the national government, and — knottiest of all — disposition of the great tracts of land held by some states as against the “landlessness” of the others.

The opening article of the 13 finally agreed on simply stated: “The stile of this confederacy shall be ‘The United States of America.’” The official designation of the new government, however, was always expressed as “the united States, in Congress assembled.” The small “u” told the story: this government only took on valid character when the independent states came together to act in concert on those matters the other articles empowered them to address. The matter of state status within this “confederacy” was firmly declared by the second article: “Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the united States, in Congress assembled.”

Herein, of course, lay two seeds of future constitutional dispute, which have continued to the present day. The retention of ultimate sovereignty always has been the crux of the argument of the “states’ rights” school of constitutional theory. And the words “expressly delegated” always have been strenuously argued by this school to have been implied in the creation of the new government under the Constitution of 1787.

As for representation in Congress, it was understood almost from the outset that the unit rule of one vote per state, which had been practiced from the First Continental Congress, would obtain. Each state was entitled, under Article V, to not less than two nor more than seven delegates, who would have to agree among themselves as to how their state’s vote was to be cast. Delegates served a three-year term and were not eligible for re-election until after a term’s interval. Each state bore the expenses of its own delegation.

Throughout the history of the Continental Congress, there were only two

continuing offices, a secretary and a president. The secretary, who was Charles Thomson of Philadelphia, was elected at the opening session in 1774 and served until all the affairs of the old government were wound up and its papers delivered to the new government under the Constitution in 1789. It is to Thomson that we owe most of our knowledge and all of our surviving documentation of this first national government. Often working without any clerical assistance, and never having but a token staff, Thomson managed to keep a journal of every session of Congress, copies of reports of all committees, records of correspondence, expenses, official papers of military and diplomatic activity, and bits and pieces of everything else.

He deserved better of his country. The emerging nation he served paid him only the dubious honor of continuing him in office throughout these formative 15 years: When he finally turned over to the new federal government the complete papers of the confederation, he was given neither special recognition nor the offer of a place in the national agencies then being organized.

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### Charles Thomson is the forgotten man of history

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Thomson bore all of this with equanimity. An Irish orphan of ten when he was put ashore with five brothers and sisters at New Castle, Delaware, in 1739, he gained enough education to support himself as a schoolmaster until he was able to turn to trade, where he quickly proved his abilities in business. By 1757 he was so well known for his fairness and integrity that the Indian tribes named him “the man who speaks truth” and made him their representative at the Treaty of Easton. By the time of the First Continental Congress he was known as “the Sam Adams of Philadelphia, the life of the cause of liberty.” In July, 1789, when he retired from public service, he took up a scholarly life on his estate near Philadelphia, producing a well-endorsed four-volume study of the Bible. He died at the age of 95 in 1824, still little recognized or honored.

As for the presidents of the Congress, they came and went, and are little more remembered than is Thomson, being merely chairmen of the general sessions of the body. The most notable, by

accident of the fact that he held the office in the summer of 1776, was John Hancock of Massachusetts, who signed his name first on the final Declaration of Independence in a hand large enough, he said, that King George could read it without his spectacles. Fourteen men held the office for varying lengths of time, including John Jay, who was to become the first chief justice under the Constitution. Jay’s presidency was short, since he was needed for more important diplomatic assignments abroad. In 1784 Jay became secretary of foreign affairs under the confederation, the only other government office purporting to be permanent.

Many of the proposed powers of government set out in the articles were to be repeated, some *in haec verba*, in the later Constitution. Full faith and credit, jurisdiction over interstate commerce, power of coinage, operation of a postal service, authority to set standards of weights and measures, even training and disciplining of military forces (saving various state prerogatives). The Achilles heel was the provision in Article VIII that all expenses of government were to be paid from a “common treasury, which shall be supplied by the several states,” the legislatures of which would levy special taxes to meet their proportionate share of the costs. If this were not enough to lay a fatal impediment on the national government, the sixth clause of Article IX took away most of what appeared to be granted by the first five clauses, by stipulating that with respect to conducting or financing national defense (the supposed primary concern of an interparliamentary union) Congress was not to act without the consent of at least nine of the 13 states.

There was also, interestingly enough, an ad hoc judicial process provided by Article IX, to hear two types of interstate disputes — boundaries or land claims, on the one hand, and maritime prize cases appealed from the state admiralty courts, on the other. In an elaborate legislative formula, this article provided for a commission to be drawn from Congress’s membership to hear the land dispute whenever the states that were parties to the action should submit to adjudication. This procedure had a rather poor track record. Of half a dozen potential cases noted in the journals of Congress, only one was pursued to final judgment, another never reached a point where the congressional commission could take jurisdiction, and the others were either

dropped or settled by direct negotiations between the states affected.

The two cases in which issues were or could have been joined involved the Wyoming Valley lands in Pennsylvania, claimed by Connecticut under a prior charter, and the "Hampshire grants" disputed by New Hampshire and New York, an issue that finally became moot when the area was admitted to the Union as the state of Vermont. The Wyoming case involved conflicting claims by Pennsylvania under its charter of 1681 and the Connecticut charter of 1662. It came to a head following the massacre of settlers by a joint force of Tories and Indians in the summer and fall of 1778. When the survivors began to make plans for resettling, Pennsylvania sought to forestall a renewal of Connecticut's allegation of jurisdiction by petitioning Congress to create a special commission to hear the arguments of both sides. When Connecticut agreed to the jurisdiction, a five-man court was sworn in at Trenton where, after 42 days of hearing testimony, a unanimous judgment was rendered in favor of Pennsylvania.

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### First national court was established in 1780

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As for the prize appeals, the problem of interstate judicial review was recognized by George Washington as early as November, 1775, nearly eight months before independence and on his recommendation Congress later that year set up a special committee to formulate a procedure to deal with the matter. When 12 of the states had created their own admiralty courts (New York, with its only seaport occupied by the British throughout the war, never had occasion to do so), a standing committee of Congress was established to hear appeals from them. The volume of business was such that in May, 1780, the first statute creating a national court was passed by Congress, setting up the special Court of Appeals in Cases of Capture. This court, with the first "federal" judges (William Paca of Maryland, Cyrus Griffin of Virginia, George Read of Delaware, and John Lowell of Massachusetts), heard 118 appeals from the various states, affirming 39 and reversing 45. The records for the remainder are too fragmentary for one to determine their disposition. (For a definitive study, see Henry J. Bourgonon's *The First Federal Court*, published by

the American Philosophical Society in 1977.)

Ratification of the Articles of Confederation began fairly expeditiously, and by July 9, 1778, enough states had favorably instructed their delegates in Congress to encourage that body to draft a form of ratification and open it to signature. Eight states thereupon affixed their names—Connecticut, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina, and Virginia. By February, 1779, four more had signified their approval: Delaware, Georgia, New Jersey, and North Carolina. But one state, Maryland, was holding out, and without unanimous approval, the articles could not go into effect.

Maryland's opposition went to the most fundamental of the issues hampering the birth of the nation — the Western lands.

Early colonial charters had been vague as to geography; several of them made grants, between specified lines of latitude, from the "western shores of the Atlantic" to the "South Seas." Eventually the Mississippi River became tacitly accepted as the major body of water marking the western boundaries for the colonies of Georgia, North Carolina, and Virginia. Massachusetts and Connecticut had claims to smaller strips to the west, but both saw these claims gradually extinguished until Connecticut retained only a "Western Reserve" on the shores of Lake Erie for the resettlement of the victims of the "firelands" — coastal regions ravaged by British naval bombardment. New York and Pennsylvania had such vast territories that they made little effort to add to them until others, principally the Ohio Company of Virginia, pre-empted the area that became the "old Northwest." Rhode Island and Delaware, for various historical reasons, had no basis for claiming territories beyond the seaboard. New Jersey and South Carolina were geographically hemmed in, so their demands that Western lands be ceded to the new nation were matters of principle or at least pro forma. New Hampshire's interest had been in the "Hampshire grants."

Maryland was left as the sole holdout against the three major "landed" states to the south, and particularly against its old rival and neighbor, Virginia. Indeed, Virginia did present a monolithic threat. In addition to the huge jurisdictions represented in its District of Kentucky and its "county" of Illinois, its Ohio Company had taken out patents

for great tracts on which it proposed to promote settlements in what were to become the states of Ohio, Indiana, Michigan, Wisconsin, and part of Minnesota. With the capture of Vincennes by its own troops under George Rogers Clark early in the Revolution, Virginia further asserted claim to the entire area by right of conquest.

In lieu of a tax power, the Continental Congress could anticipate a significant asset, convertible into bounties for Revolutionary veterans, in the form of the land cessions. The national interest also pointed to a progressive expansion of new states to be created from these lands and added to the Union. And it is worth noting that the one major legislative accomplishment of the Confederation was the enactment, in its declining months, of the famous Northwest Ordinance of 1787, which offered a kind of constitutional bridge between the ineffective Articles of Confederation and the Constitution that the Philadelphia Convention at that same time was bringing to final form. The ordinance was to be incorporated into the statutes of the First Federal Congress and would serve as the model for territorial organization throughout most of the national history.

When Virginia finally gave in to Maryland's insistence, early in 1781, the last obstacle to ratification of the Articles of Confederation was removed. By February the unanimous adoption of the new frame of government was certified, and one month later the new government formally came into being. There were no stirring speeches, or anything to mark the event at the time. The Congress continued as it had before, although the community celebration outside the legislative halls made up for the prosaic course of business within. John Paul Jones's warship, the *Ariel*, fired off salutes in the harbor, and these were answered by fireworks from the city. The evening was filled with receptions, dinners, and "collations" in celebration.

It had taken three years of effort to achieve the adoption of the Articles of Confederation. They would last for eight more.

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