The Defects of the Articles of Confederation, Part 14

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Synopsis: The 14th essay in a series on the Articles of Confederation addresses the fact that the Articles had no provision for an executive or judicial function.

The Articles of Confederation were initially proposed in the wartime emergency of 1775-1776 and were ratified by all the states by 1781; but the structure of the Confederation was not conducive to long-term stability. Congress was granted certain powers under the Articles: a) to determine the amount of requisitions each state was to pay; b) to declare war and make peace; c) to send and receive ambassadors to foreign nations; d) to negotiate and ratify treaties; e) to determine rules for disposition of captures at sea; f) to grant letters of marque (authorizing private piracy on behalf of the U. S.); g) to convene courts for trials of crimes committed at sea; h) to be the appeal of last resort in disputes between the states; i) to regulate coinage issued by Congress or by the states; j) to establish uniform weights and measures throughout the United States; k) to regulate trade with the Indian tribes; l) to create post offices; m) to exercise overall command and control of the military forces; n) to appoint some officers in the army and all in the navy; and o) to commission all officers in the service of the United States.

One major difficulty was that Congress did not have the ability to regularly enforce any of its laws nor the means to punish violations of them. This series of essays has presented considerable evidence to that effect, especially concerning Congress' inability to maintain an army, raise revenue, ensure adherence to treaties, manage territories, respond to foreign policies, or regulate commerce. A stable government must, as a minimum, have an executive function to enforce its laws and a judicial system to punish violations of valid laws and to interpret the law itself.

Alexander Hamilton addressed both of these problems in The Federalist Papers. First, in No. 21, he cites Congress' inability to enforce any of its laws:

> The next most palpable defect of the subsisting Confederation, is the total want of a SANCTION to its laws. The United States, as now composed, have no powers to exact obedience, or punish disobedience to their resolutions, either by pecuniary mulcts, by a suspension or divestiture of privileges, or by any other constitutional mode. There is no express delegation of authority to them to use force against delinquent members; and if such a right should be ascribed to the federal head, as resulting from the nature of the social compact between the States, it must be by inference and construction, in the face of that part of the second article, by which it is declared, "that each State shall retain every power, jurisdiction, and right, not *expressly* delegated to the United States in Congress assembled." There is, doubtless, a striking absurdity in supposing that a right of this kind does not exist, but we are reduced to the dilemma either of embracing that supposition, preposterous as it may seem, or of contravening or explaining away a provision, which has been of late a repeated theme of the eulogies of those who oppose the new Constitution; and the want of which, in that plan, has been the subject of much plausible animadversion, and severe criticism. If we are unwilling to impair the force of this applauded provision, we shall be obliged to conclude, that the United States afford the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws. It will appear, from the specimens which have been cited, that the American Confederacy, in this particular, stands discriminated from every other institution of a similar kind, and exhibits a new and unexampled phenomenon in the political world.

Hamilton then discusses in No. 22, the lack of a judicial system:

> A circumstance which crowns the defects of the Confederation remains yet to be mentioned, -- the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts but the judges of the came court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.

In reviewing the chronicle of the Constitutional Convention, it is interesting to note that there was no serious debate about whether an executive or judicial branch should exist. The need for them was pretty much accepted by all the attendees; the main debates were about the exact form, how they would be constituted, and what specific powers they would have. There were some who thought an executive council would carry out the executive function better than a single officer; some preferred a system by which the judicial system would be combined with the legislative; some thought all proposed laws by the legislative should be reviewed and modified by the executive and judicial branches. In the end, the framers developed a Constitution that created three main branches of the federal government, each with defined powers and the means to defend itself from encroachment by the other two. The framers employed methods to ensure that the executive (President) and judicial branches were separate from each other and independent of the legislative. There are some areas of overlap between the executive and the legislative (power of making treaties), and considerable influence of both of these upon the judicial branch (nomination of judges by the President and confirmation by the Senate).

The powers granted to the President are: a) to be Commander-in-Chief of the military; b) to be the point of contact for all foreign dignitaries as the nominal head of state; c) to negotiate treaties (but not to ratify them); d) to nominate ambassadors, judges, and certain other offices subject to Senate confirmation; e) to serve as chief administrator over the government departments that enforce the laws made by Congress; and f) to make lower-level appointments in his executive branches charged with those enforcement tasks.

The general power granted to the federal judicial system is to hear all cases in law and equity arising from treaties, federal laws, and the Constitution itself. The powers are divided as follows: a) creation of a Supreme Court which is to have original jurisdiction in cases affecting ambassadors, public officials, and when a state is a party; and b) creation of lower federal courts to hear cases for which the Supreme Court does not have original jurisdiction. In all cases, the Supreme Court has an appellate jurisdiction to hear appeals from lower federal courts.