1956

The Formation of the Federal Judiciary System Up to the Judiciary Act of 1789

James William Moore
Loyola University Chicago

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THE FORMATION OF THE FEDERAL JUDICIARY SYSTEM UP TO
THE JUDICIARY ACT
OF 1789

by

James William Moore, S.J.

A Thesis Submitted in Partial Fulfilment
of the Requirements of the Degree
Master of Arts

July
1956
VITA AUCTORIS

James William Moore was born on June 14, 1927, in Trenton, New Jersey. After completing his secondary school education in the Trenton Public School System, he enlisted during the closing months of the Second World War in the United States Naval Reserve. From June 1945 to August 1946, he served on active duty with the Navy; eight months of which were spent aboard the U.S.S. Pocono, flagship of the Atlantic Fleet.

One month after being discharged, he entered the Society of Jesus at the Jesuit Novitiate in Wernersville, Pennsylvania. Here he spent two years in the novitiate and two years in the Juniorate studying the humanities. In the summer of 1950 he went to West Baden College in Indiana, a college affiliated with Loyola University in Chicago, where he studied philosophy for three years. At the end of his first year at West Baden he received his Bachelor of Arts degree. It was also during this time that a major part of his graduate work in history was completed.

In August of 1953, he was sent to St. Joseph's College High School in Philadelphia, Pennsylvania where he taught Latin and English for three years. After completing the research and composition of his history thesis at Fordham University in New York during the summer of 1956, he entered Woodstock College in Maryland the following September to begin his theological studies.
in preparation for ordination to the Catholic priesthood.
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CHAPTER I

INTRODUCTION

An appreciation of how the Federal Judiciary System of the United States came into being could conceivably begin with a study of Roman Civil Law. For a somewhat less comprehensive study, an investigation of English Common Law would provide a suitable beginning. But for a concentrated study of its immediate formation, as this thesis proposes to be, the establishment of state courts during the Revolutionary War, and the secret sessions of the Constitutional Convention following it, adequately include all the first deliberate movements of our founding fathers toward the eventual establishment of the Federal Judiciary System. The summer of 1776, then, will be the terminus a quo of this study, and the terminus ad quem will be the legislative and executive approval of An Act to Establish the Judicial Courts of the United States, more commonly known in American Constitutional History and Law as The Judiciary Act of 1789.

To say that the federal courts were completely and unalterably formed with this momentous piece of legislation would be grossly inaccurate; in the last century and a half numerous
changes have expanded or curtailed its various provisions. Without delving into the Act, an interesting example of these changes can be found in the first sentence of Section I: "That the supreme court of the United States shall consist of a chief justice and five associate justices." As of 1956, that particular provision has been altered six times. In spite of such alterations and other subsequent Judiciary Acts, the basic structure of the Federal Court System today remains founded upon the Judiciary Act of 1789.

The manner of treatment in this study requires some explanation. Making specific provisions for the federal courts of the new government involved many heated and prolonged debates throughout the independent states of America. And, as in all heated debates, there was here a vigorous pro and an obstinate con. The pros came to be known as Federalists because they advocated a strong central government. The cons were made up of Anti-Federalists who, although they accepted the establishment of a federal government, were unwilling to entrust it with any powers whereby it might eventually weaken, or worse abolish, the already organized and functioning state governments. For the most part this study of the formation of the federal courts will be made from the Federalists point of view, or as it were, sitting in on the affirmative side of the debate. Such a treatment will give an opportunity of appreciating more fully the influence exerted
by the Federalists in establishing the courts of the United States. Of course, there is no intention of belittling the efforts of the Anti-Federalists to have their ideas prevail. Careful attention will be given to the restraining influence of these statesmen, both on the contents of the Judiciary Article of the Constitution and the Judiciary Act of 1789. It remains clear, however, that the Federalists, having a well formulated plan for federal courts, pressed their cause more effectively, argued more logically, and eventually succeeded more completely than the Anti-Federalists, in having their plan incorporated into the Constitution and Statutes of the United States. The cart has not been put before the horse; this is actually the conclusion of the thesis.

A second reason for emphasizing the Federalist influence is that a better understanding of this new judicial system can be had by first understanding what were the intentions and purposes of the men who originally formulated, defended, and vindicated its provisions. True, their influence in many instances was not sufficient to win approval of all they intended. Compromises there were but rarely defeats. The Judiciary Act of 1789, filling up the lacunae in the Judiciary Article of the Constitution, must be considered the work of the Federalists rather than a compromise product of the Anti-Federalists.

It is difficult to say whether or not the system of our federal courts would have been superior to the one finally agreed
upon had the Federalists not been opposed by the Anti-Federalists, or to say whether or not the negative influence of the Anti-Federalists had a salutary effect on the make-up of the courts, or even whether or not the Federal Court System would have been better established had all the alterations and limiting amendments of the Anti-Federalists been approved. Perhaps at the conclusion of this thesis some definite answers to such ponderings will be apparent. Certainly it is hoped that the relevant source material presented in the following chapters will at least provide the valid premises from which conclusions to such ponderings can be drawn.
CHAPTER II

JUDICIARY DEVELOPMENTS FROM THE
CONTINENTAL CONGRESS TO THE
CONSTITUTIONAL CONVENTION

Shortly after the outbreak of the American Revolution, a question arose concerning the governmental status of the thirteen colonies. Their commerce was no longer subject to the Board of Trade; their colonial assemblies were no longer subject to Parliament; and their inhabitants were no longer subjects of His Majesty, George III. With the outcome of the Revolution far from certain, the colonies now considered themselves independent states united in a war against the establishment of an absolute tyranny. However, declaring themselves independent and sovereign did not ipso facto provide corresponding independent and sovereign governments. How were such governments to be established?

When the question was put to the Second Continental Congress, its members unanimously agreed upon the following resolution:

Resolved: That it be recommended to the respective assemblies and conventions of the united colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government,
as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.¹

That these thirteen new states were not left completely devoid of government is obvious from the clause stating "where no government sufficient to the exigencies of their affairs has hitherto been established." Even prior to the Revolution, each colony was to some extent self-governing, having its own colonial assembly, a code of law, and a system of courts. With such institutions already organized and functioning, it was only necessary now to re-model them on a sovereign basis.

Following the recommendation of the Continental Congress, state assemblies immediately began the task of drafting constitutions. Some, such as Georgia's, were extremely elaborate and detailed, others were but temporary documents enacted for the duration of the crisis. This latter situation was particularly true of New Hampshire's first Constitution adopted on January 5, 1776.² Connecticut and Rhode Island chose not to form new constitutions at this time but to continue their governments under the provisions of the charters granted them by Charles II in 1662 and 1663


respectively.

A full realization of what the federalist-minded members of the Constitutional Convention undertook to do in legislating their judiciary system into existence requires an understanding of the already existing court systems of the sovereign and independent states. One of the many lessons taught the American rebels by the late tyranny of England was that they should provide very explicitly and completely for an impartial and humane administration of justice so that never again would they or their posterity suffer the abuses of corrupt courts or maladministered laws. Evidence of having learned their lesson well is found in the numerous articles and sections of the newly adopted state constitutions concerned with the establishment of courts and their application of law. These constitutions, for the most part, were hurriedly drawn up during the Revolution years, not a time conducive to pondering and discussing carefully such a serious matter as the enactment of the fundamental law of a state. The fact that the circumstances of the period in which these state documents were composed definitely hindered the writing of more thorough and complete provisions for the governments of the states heightens the importance of all the meticulous details given to the organization of state courts, the extent of their jurisdiction, and the manner of hearing cases. Still further, they latently indicate with what jealous care the states would later seek to protect their constitutionally established courts, especially when they perceive the Federalists'
court system as endangering the jurisdiction, and even the existence, of their state courts.

Later in this chapter and in subsequent chapters it will become evident that many delegates to the Convention intended not only to preserve the jurisdiction of these state courts but even to give them some share in the proposed federal jurisdiction. John Rutledge was but one of several delegates who expressed this attitude when he argued that:

The State tribunals might and ought to be left in all cases to decide in the first instance, the right of appeal to the supreme tribunal being sufficient to secure the national rights and uniformity of judgment.¹

Few encroachments on the governmental powers of a state could be more dangerous to its sovereignty than the subordination and limitation of the jurisdiction of its courts. It is important to remember that the states considered themselves sovereign. Hence it was the existence of these state courts that would stand as an almost insurmountable obstacle to the Federalists' plan for establishing a strong federal judiciary.

Among the fundamental laws of the state constitutions was the unique provision for the separation of legislative, executive, and judicial powers. Five of the eleven new constitutions established this separation; Georgia, North Carolina, Virginia, and Maryland all prior to 1778, and Massachusetts in 1780. The

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¹ The Papers of James Madison, Mobile, 1842, II, 798. Italics not in the original.
wording of the constitutions is quite similar, varying slightly from Maryland's version: "That the legislative, executive, and judicial powers of the government, ought to be forever separate and distinct from each other." The remaining constitutions continued to entrust the greatest power of the government to the state legislatures, making provision also for an executive branch but no specific arrangement for a separate judiciary.

Many state constitutions did not explicitly establish supreme courts. Usually, the wording implied that such courts had previously existed, and now under the state's sovereign status they would continue to function and be governed by certain regulations. New Jersey's Constitution, for example, had no article or section in which a supreme court was established. There was, however, a provision stating "that the Judges of the Supreme Court shall continue in office for seven years." A similar implication was contained in New York's Constitution which said that "judges of the supreme court shall not at the same time, hold any other office, excepting that of Delegate to the General Congress." The constitutions of North Carolina, New Hampshire, Delaware,


Georgia, and Massachusetts also contains references of this type to supreme courts. In other sections of the state constitutions the existence of such a tribunal is supposed where the appointment of judges to the supreme court is numbered among the powers now delegated to the legislature or the executive or both branches of government. Only three of the state constitutions explicitly provided for supreme courts: Maryland, where it was known as the General Court; South Carolina, where it was known as the Court of Chancery; and Virginia, where it was known as the Supreme Court of Appeals. Still further evidence of courts remaining basically unaltered during this period of transition is the often repeated phrase "as heretofore" occurring in connection with the constitutional provisions for judges, courts, and their administration.

During the years prior to the Constitutional Convention, several states placed at the very top of their judicial hierarchy a supreme court of appeals, each uniquely different in its make-up from any other of the constituted courts. In New Jersey this court consisted of the governor and the Council, composed of one representative from each county, and held jurisdiction "in the last resort, in all clauses of law, as heretofore." 7 Article Seventeen of Delaware's Constitution provided for an appeal from the supreme court of the State, in matters of law and equity, to

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a court of seven persons consisting of the president and six others, three chosen by the legislative council and three by the House of Assembly. This court was to have "all the authority and power heretofore given by law in the last resort to the King in council, under the old government." The most unusual of such courts is almost humorously described in the fortieth section of Georgia's Constitution. After establishing a supreme court consisting of a chief justice and three other justices, the section concluded

... if any plaintiff or defendant in civil causes shall be dissatisfied with the determination of the jury, then, and in that case, they shall be at liberty, within three days, to enter an appeal from that verdict, and demand a new trial by a special jury, to be nominated as follows, viz: each party, plaintiff and defendant, shall choose six, six more names shall be taken indifferently out of a box provided for that purpose, and the whole eighteen to be summoned, and their names put together into a box, and the first twelve that are drawn out, being present, shall be the special jury to try the cause, and from which there shall be no appeal.

In addition to these higher courts, many others were constitutionally founded in the various states. Occasionally the names of the courts differed but their jurisdiction remained about the same. All of the states provided for county courts which seem


in most cases already to have existed before the Revolution. Two exceptions were South Carolina, whose Constitution declared that the whole State was to be divided into districts and counties, and county courts established;\textsuperscript{10} and Georgia, where provision was made not only for the establishment of county courts, but also for a courthouse and jail to be "erected at public expense in each county."\textsuperscript{11}

Dating from the earliest days of the Revolution, courts of admiralty, American style, were organized to handle jurisdiction over captures at sea. Throughout the state constitutions references are made to admiralty courts and admiralty judges, guaranteeing them in many instances a fixed salary and tenure in office during good behavior.

Chancery courts were common in all the states though they were sometimes called inferior courts of chancery, courts of equity or, as Georgia alone referred to them, courts of conscience. Two states, Pennsylvania and Delaware, gave the court of common pleas the powers of a court of chancery. Equally common in the states were probate courts or orphan courts. A few constitutions, in addition to the courts they established, gave the legi-

\textsuperscript{10} "Constitution of South Carolina," The Federal and State Constitutions, II, 1627.

\textsuperscript{11} "Constitution of Georgia, Sec. 55," The Federal and State Constitutions, I, 383.
latures power to erect whatever courts might be found necessary in the future. New Hampshire, for example, gave its legislature "full power and authority to erect and constitute judicatories and courts of record, or other courts" for the administration of justice.¹² New York's Constitution forbade the legislature to institute any new court or courts "but such as shall proceed according to the course of common law."¹³ Ten years hence it will be a similar grant of power proposed for the legislative branch of the federal government that will bring a storm of protest from Anti-Federalists who saw in such power a threat to the judicial systems of the states.

The structure of the courts was still further detailed in the state constitutions by provisions for justices of the peace, sheriffs or constables, marshalls of admiralty courts, and clerks of various other courts. From such an array of judicial details, there can be little doubt that each of the new state governments had sought to equip itself with as efficient a set of courts for the administration of justice as past experience and present exigencies required.

Besides establishing numerous courts, the newly formed

state constitutions also had something to say about the manner in which justice was to be administered. Within the lifetime of the authors of these documents, there had been flagrant abuses of judicial processes by the English Government. Some of the constitutional regulations, therefore, would be guarantees against suffering these abuses ever again. However, tradition in law rather than any abuse of it, is responsible for most of the articles governing judicial processes. New York, New Jersey, Maryland, and Delaware all made explicit provision for the continuation of English Common Law. It was declared in New York's Convention

that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State. . . 14

Characteristic of English Common Law is the use of trial by jury. From the days of Magna Carta, jury trials had been a cherished right of all Englishmen and former Englishmen. Assurance that such a right was to continue was penned into the Declarations of Rights issued in conjunction with, or as a part of, the state constitutions. Severe criticism was voiced both in the ratifying conventions and in the First Congress, of the want of sufficient guarantees for jury trials in all cases, civil as well

as criminal. An investigation of the extent to which such guarantees were already given in the state constitutions will be helpful to clarify the reasons for these criticisms and to show the omission, immaterial in the eyes of many Federalists, which occurs in the Third Article of the Federal Constitution, and which to some extent was compensated for by certain amendments to the Judiciary Act of 1789.

This Third Article as adopted by the Constitutional Convention, has only one guarantee for a trial by jury. Paragraph three in Section Two of the Article provides that the trial of all crimes, except in cases of impeachment, is to be by jury, and these trials are to be held in the State where the crimes are committed. In eight of the state constitutions jury trials were explicitly provided for in two types of cases: criminal and those concerning property or suits between man and man. At a time when property boundaries were inadequately and often arbitrarily determined, trials concerning them were of great importance and the decision might vary greatly depending upon whether it was given by a jury of one's neighbors or by a federal judge. States usually provided for the former method in their bill of rights. For example, the eleventh right listed in Pennsylvania's Bill guaranteed "that in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be
held sacred."\textsuperscript{15} It was this right which the Anti-Federalists failed to find in the proposed Federal Constitution, and so it became one of their heaviest and most often wielded sticks in beating down the adoption of the Constitution. The ways in which the Federalists defended the omission of this right and the compromises they eventually made upon it will be treated in the following chapters.

The frequency with which references to jury trials are made in the state constitutions, guaranteeing them, providing for their impartial formation, or just exalting them, sharply contrasts with the single provision for juries in the proposed Federal Constitution. Slightly more than typical of such references is New Jersey's constitutional assurance "that the inestimable right of trial by jury shall remain confirmed, as a part of the law of this State without repeal, forever."\textsuperscript{16} For the new Federal Government to guarantee this right only in criminal cases, and to remain silent about it in all others, will cause much conflict whenever the Federal Judiciary is debated in the ratifying conventions and Congress.

Closely allied to this conflict over jury trials was the issue of having trials of fact held in the vicinity where they

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\textsuperscript{15} "Constitution of Pennsylvania, Declaration of Rights, Art. XI," The Federal and State Constitutions, II, 1542. \\
\end{flushleft}
happened. Shortly before the Revolution, several abuses in this regard occurred and were no doubt still fresh in the minds of the men who wrote the state constitutions. Six of these documents made express provision for trials of fact to be held in the vicinity where they occurred proclaiming, in the words of Maryland's Constitution, that the trial of facts where they arose was one of the greatest securities of the lives, liberties, and estates of the people.17 In connection with this right a practical difficulty arose when attempting to define the word "vicinage." It is apparent from the wording in some of the state constitutions that vicinage meant the county in which the crime occurred. For example, New Hampshire's Bill of Rights stated that

In criminal prosecutions, the trial of facts in the vicinity where they happen is so essential to the security, liberty, and estates of the citizens, that no crime or offence ought to be tried in any other county than that in which it is committed.18

Trial by a jury of the vicinity in which the question of fact arose was accepted practice in the states whether or not it was written into their constitutions. Judging from the written expressions of this right and from the debates in the state conventions and Congress it is clear that in the legal parlance of the day, vicinage was equated at least with the county. This question


was later involved in the proposed Constitution's judiciary article, section two, the third paragraph. It provides for criminal trials to be held in the state where the crimes were committed. Was the right of vicinage destroyed by expanding its meaning from county to the whole state? In large states such as Pennsylvania and New York this could make a difference, and to convince the Anti-Federalists otherwise would be no easy task for the Federalists.

This analysis of courts and procedure as found in the fundamental laws of the sovereign states, prior to the Constitutional Convention, leaves one major innovational development in America's judiciary system to be considered: the Federal Court of Appeals. Having thus far observed at some length the firm determination of the states to preserve justice by jury, it is an interesting phenomenon to find a court, functioning without a jury, and giving decisions on cases appealed from the sovereign states. Such was the United States Court of Appeals in Cases of Capture established by the United States Continental Congress and holding sessions through the years of Confederation down to the eve of the Constitutional Convention. Several American historians hold that this Court was of great value in educating the people away from almost universal trial by jury and toward consent to its
The history of this Court of Appeals begins in Massachusetts in 1775 when Elbridge Gerry succeeded in having an act passed by the State Legislature establishing courts for the condemnation of prizes taken from the British. Accounts of successful American privateering in the Boston area during Washington's siege inclines one to believe this was a very handy court to have. However, it led to some confusion. If the frigate or sloop making the capture was completely under the jurisdiction of Massachusetts this newly instituted court could handle the matter. But, if the vessel was in the service of the American Government, the case had to be brought before General Washington for a decision. The handling of these cases in addition to the command of the Continental Army was more than Washington could manage. In February 1776 he wrote to the Continental Congress enclosing a copy of the Massachusetts statute providing courts for the condemnation of prizes taken at sea and urged Congress to establish similar courts to try cases of capture by vessels in the employ of the American Government.

The decisions of Congress on this matter came in the spring of 1776. Their resolution stated that in order to handle

19 Francis Regis Noel, "Vestiges of a Supreme Court Among the Colonies and Under the Articles of Confederation," Columbia Historical Society, New York, 1898, 127.
prizes of war subject to judicial condemnation, the several legislatures should erect courts of justice, or give jurisdiction to courts already in being, for the purpose of determining all cases of capture, and provide that all trials be had by jury under such qualifications as should seem meet. The last provision of the resolution eventually was to pave the way to a national judiciary. It provided that in all cases an appeal should be allowed to Congress, or such persons as they should appoint for the trial of appeals.20

A very significant development in the Congressional Court of Appeals, or as it was then known, the Standing Committee on Appeals, occurred when, in 1778, the Pennsylvania Admiralty Court refused to accept a reversed decision of the Congressional Court regarding the sloop Active. This was a test case for Congress. The Articles of Confederation were not yet in operation and the necessity of maintaining some semblance of union among the now sovereign and independent states was imperative if their cooperative effort at revolution was to succeed. For many days the Committee on Appeals labored over a report to Congress. Briefly stated, their closely knit argument contended that since Congress was invested with the supreme sovereign power of war and peace, it followed that Congress must have all that was essential to this power. The minor premise might be stated: questions rela-

tive to capture on the high seas are to be decided by the Law of Nations. And the conclusion: therefore the jurisdiction over captures on the high seas, because they pertain to the Law of Nations, must originate from the sovereign supreme power of war and peace, which in these united independent states was the Continental Congress. After the report had been debated, a formal resolution was presented to Congress on March 6, 1779, which, when it was put to a vote, was approved by all the members of Congress except the five representing Pennsylvania, and Witherspoon of New Jersey.

Such almost unanimous agreement on the right of Congress to control appeals in order to insure a just and uniform execution of the Law of Nations prepared the way in the next decade for the acceptance of Section 25 in the Judiciary Act of 1789. By it appellate jurisdiction was granted to the Supreme Court in all cases where the decision of the highest court of law or equity in a state was against the validity of a treaty or a statute of, or an authority exercised under the United States. These provisions were a part of the regulations agreed upon by the First Congress for the appellate jurisdiction of the Supreme Court as authorized by Article Three of the Constitution.

Shortly after the Continental Congress vindicated its

21 Ibid., XIII, 134-137.

22 United States Statutes at Large, Boston, 1845, 185.
right to control appeals in matters of admiralty, a further development occurred, perhaps one of the most momentous, in the growth of the American Judiciary System. Robert Morris, Thomas Fitzsimons, and James Wilson, all three be it carefully noted were in time to serve as ardent Federalists in the Constitutional Convention, and later in the first years of the new Federal Government, sent a petition to Congress complaining that the present Court of Appeals was continually fluctuating with the same judges seldom acting for more than a few months. Such procedure, they claimed, prevented the establishment of fixed principles or precedents. They further claimed that because the present Court of Appeals was composed of members of Congress, it could never sit in any other place than where Congress resided; a situation which involved great inconveniences of travel, expense and time for those seeking appeals. The constructive suggestion of the petition pointed out "the propriety of nominating Judges of Appeal, who, not being members of Congress, would have more leisure for the discharge of their employment." The outcome of this petition is recorded in the resolution agreed upon by Congress recommending that each of the states enact a law vesting in Congress the sole and exclusive right and power of establishing courts for receiving and determining finally appeals in all cases of captures. The

resolution concluded, "provided, that no member of Congress shall be appointed a Judge of any of the said courts."24

On August 26, 1779, Congress appointed a committee to report a plan for the establishment of one or more supreme courts of appeal in all maritime causes involving the United States. Among their proposals to Congress were that the states should be divided into districts for the administration of justice in admiralty cases; that trials in admiralty courts in cases of capture be according to the usage of nations and not by jury; finally, that a court be established for the trial of appeals from the state admiralty courts to consist of three judges learned in the law.25 None of the clauses in this proposed resolution was discussed with more vehemence than the one providing that courts of admiralty be held according to the usage of nations and not by jury. These debates marked the beginning of a long struggle by men favoring a strong central government to have federal courts hear cases without juries. Though the outcome will end in a compromise, the present encounter met in a momentary defeat for the Federalists when the committee's resolution managed to receive the approval of only half the states, and so was lost.

Immediately a new committee of four was appointed to prepare another plan for establishing a court of appeals. There

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the Federalists won a quiet but significant victory because the men chosen were Oliver Ellsworth, the man whom William Maclay was later to accuse of pushing the Judiciary Act of 1789 through Congress, Thomas McKean, William Houston, and William Livingston. All of these men had voted in favor of the resolution just defeated and later they would join the Federalist ranks to plead for the adoption of the Constitution. Their report to Congress was substantially the same as that of the previous committee. Only a few minor changes were made such as the salaries provided for judges. Besides recommending to the states, which is all the Continental Congress could do, that they make laws authorizing and directing the courts of admiralty to carry into full and speedy execution the final decrees of the Court of Appeals, it also recommended that the states authorize the Court of Admiralty therein, who are not so authorized already, to decide without a Jury on all cases, where the civil law, the law of nations, and the resolutions of Congress are the rules of their proceeding and adjudication.25

This time Congress approved the resolution but it was not till some months later that the Congress provided that all matters respecting appeals in cases of capture, now pending before the Congress or the Commission on Appeals, be referred to the newly erected Court of Appeals.

26 Ibid., XVI, 62.
Although the scope of jurisdiction for this Court was limited to maritime cases, it established several noteworthy precedents in our American Judiciary System, all of them reflecting the Federalists' concept of a federal court system, and all of them vigorously supported by Federalists. The first of these precedents was the institution of a court separate from the otherwise all-embracing legislative body of the Government. Next, this Court was accepted by the sovereign states as a court of last resort. Finally, the precedent of trying cases without a jury in the various admiralty courts was undoubtedly a major step toward breaking down the people's obstinate determination to have universal trial by jury.

After completing these considerations of courts as established by the independent states and by the Continental Congress, the next development to be treated in the formation of the American Judiciary System occurred in the Constitutional Convention. Here the debates on the contents of the Judiciary Article will help to present clearly the two distinct and opposing positions of the Federalists and Anti-Federalists.

The first mention of a strong Federal Judiciary came, ironically enough, from Edmund Randolph, Governor of Virginia. In the ninth resolution of the Virginia Plan, which he presented to the Convention, provision was made for a national judiciary consisting of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature. The jurisdic-
tion of these tribunals would consist of hearing and determining in the first instance all cases involving piracy and felonies on the high seas, captures from an enemy, cases where foreigners or citizens of other States apply to such jurisdictions, or which concern the collection of a national revenue, impeachments of any National officers, and questions involving national peace and harmony.27 The supreme tribunal would hear and determine these cases in the last resort.

In considering this resolution, the Convention delegates voted unanimously to accept the first clause, that a national judiciary be established. It was then moved and seconded that to the words of this clause be added "to consist of one supreme tribunal, and of one or more inferior tribunals." At this time the motion was passed in the affirmative.28 At the outset, therefore, the form of the judiciary was tranquilly shaped along Federalist lines. This tranquility, however, was soon disturbed when John Rutledge of South Carolina moved that the words "and of one or more inferior tribunals" be expunged. In his opinion state tribunals, already established, might and ought in all cases be left to decide in the first instance. The right of appeal to the supreme national tribunal was, he thought, sufficient to secure

28 Ibid., 124
national rights and uniformity of decision.\textsuperscript{29} When the motion was put to a vote, Connecticut, North Carolina, South Carolina, New Jersey, and Georgia voted aye: Pennsylvania, Delaware, Maryland, and Virginia voted no; Massachusetts and New York were divided. This almost even split is the first indication that acceptance of inferior federal tribunals would not easily be obtained.

Immediately after the defeat for the provision establishing inferior federal courts, Wilson of Pennsylvania and Madison of Virginia motioned that the following words be added to the original resolution: "that the National Legislature be empowered to institute inferior tribunals."\textsuperscript{30} Pierce Butler of South Carolina warned that the people would not bear such innovations and would revolt at such encroachments. Later he will continue his opposition by vigorously attacking Sections Two and Three of the Judiciary Act of 1789, providing for district and circuit courts. His remarks on this occasion were of no avail because the Committee's vote on Wilson and Madison's motion was eight ayes, two noes, and New York again divided. In addition to the noes of Connecticut and South Carolina, the printed \textit{Journal of Congress} also registers New Jersey as voting no. Robert Yates, in his notes, gave the vote as being seven for, three against and New

\begin{itemize}
  \item \textsuperscript{29} \textit{Ibid.}, 124
  \item \textsuperscript{30} \textit{Ibid.}, 124
\end{itemize}
York divided.31

Upon examining this compromise, some inferences might be made as to why the second resolution was more acceptable to those who had opposed the first. What safeguard would be found for the state courts by allowing the National Legislature to be empowered to institute inferior tribunals but not in the establishment of one supreme tribunal and of inferior tribunals to be chosen by the National Legislature? The distinction made between the two clauses was that the former would have established such tribunals absolutely, while the latter left it to the discretion of the Legislature to establish or not establish them. When the Constitution was finally drawn up, the section regarding inferior federal courts will resemble Wilson and Madison's motion: "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."32

The Federalists by this compromise were forced to bide their time until the Constitution was ratified by the states. Counting on a strong representation of pro-constitutional men, they could then write their own act bringing the inferior courts into existence. The Anti-Federalists, on the other hand, acceded to the

31 Ibid., 125
32 Constitution of the United States, Art. III, Sec 1. Italics not in the original.
compromise supposing that with the establishment of inferior courts left to the discretion of the Legislature, the States' Rights members of the Legislative Body could easily prevent abuses or infringements on state jurisdictions. It will later be seen in the debates of the House on the Judiciary Bill that the Anti-Federalists interpreted the words "may from time to time ordain and establish" as meaning there was no compulsion to do so, while the Federalists interpreted them as meaning a power which the Legislature must exercise. Considered in the light of the Judiciary Act of 1789, by which the Federalists succeeded in creating inferior tribunals, Wilson and Madison's motion at this time was a very fortunate and wise bit of political maneuvering.

By the time the Convention's Committee of the Whole had finished their debates on the resolutions of the Virginia Plan as presented by Randolph, the resolutions on the Judiciary read as follows:

11 Resolved, that a National Judiciary be established, to consist of one supreme tribunal, The Judges of which to be appointed by the 2nd Branch of the National Legislature, to hold their offices during good behavior, & to receive punctually at stated times a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution.

12 Resolved, that the Natl. Legislature be empowered to appoint inferior tribunals.

13 Resolved, that the jurisdiction of the Natl. Judiciary shall extend to all cases which respect the collection of the Natl. revenue, impeachments of any Natl. Officers,
and questions which involve the national peace & harmony.33 These provisions for the judiciary more closely conformed to the Federalists' plans than to those of the Anti-Federalists.

Two days later, on June 15th, another plan of government was submitted to the Convention, setting forth provisions more in accord with the views of men who opposed a strong central government. It was referred to as The Paterson Resolutions or The New Jersey Plan and contained what were now coming to be known as the Anti-Federalist plans for the central government. Its resolutions concerning the judiciary differed from the Virginia Plan in that the judges of the supreme tribunal were to be appointed by the Execution Branch and there were no provisions whatever for inferior tribunals.34 In an earlier resolution dealing with the powers vested in Congress, it stated in connection with the acts passed for the regulation of trade and commerce, that all punishments, fines, forfeitures, and penalties incurred by violating these acts shall be determined by the Common Law Judiciaries of the state in which the offense occurred. The resolution then provided that all such suits were subject, for the correction of all errors, both in law and fact, to an appeal to the Judiciary of the United States.35 Few points were more heavily stressed by

34 Ibid., 249
35 Ibid., 243
the Anti-Federalists than the fact that state judiciary systems already functioning were entirely sufficient for handling all federal jurisdiction in the first instance and therefore obviated the need of inferior federal courts.

On June 19, 1787, it was moved and seconded that the Committee of the Whole report to the House that they did not agree to the propositions offered by Mr. Paterson, and that they report the resolutions offered by Randolph. The vote of the Committee was seven ayes, three noes, and one divided. New York, New Jersey, and Delaware voted no and Maryland was the divided state.36

When the time came one month later to discuss the judiciary resolutions in the Convention, there was unanimous agreement on the establishment of a supreme tribunal, but the resolution empowering the National Legislature to appoint inferior tribunals again raised vehement objections from the Anti-Federalists in spite of the compromise they had already agreed to. Pierce Butler still insisted that such tribunals were unnecessary because the state courts were capable of handling the cases. Luther Martin reiterated the same argument. The Federalists, however, would compromise no further on this issue. Nathaniel Gorham of Massachusetts pointed out that there were already federal courts in the states having jurisdiction over piracies committed on the seas, and, he noted, no complaints had been made by the states or the courts of

36 Ibid., 313
the states. Now it becomes evident how the Federal Admiralty Courts of Continental Congress days proved a powerful precedent for the Federalists to point to. Randolph argued effectively that state courts could not be trusted with the administration of national laws since the objects of jurisdiction were such as would often place the general and local policy at variance. Strangely enough, even Mason, later to oppose this judiciary provision, now argued in its favor, saying that circumstances might some day render such a power absolutely necessary. When the resolution was finally put to a vote, eleven were in favor of it, none opposed.

After all the resolutions had been heard, it was unanimously agreed to appoint a committee to prepare and report a constitution conformable to the proceedings of the Convention. The five members of the committee, known as the Committee on Detail, were Mr. Rutledge, Mr. Randolph, Mr. Gorham, Mr. Ellsworth, and Mr. Wilson. Of these men only Rutledge had voiced any opposition to the basic structure of the judiciary as proposed in the resolutions. In addition to the provisions already mentioned, the Committee in writing the judiciary article outlined more extensively the jurisdiction of the Supreme Court. Here for the first time is found Supreme Court jurisdiction specified in controversies between states, a state and a citizen or citizens of another state, and between citizens of different states. Here also for the first

time is the original jurisdiction of the Supreme Court limited to cases of impeachment of ambassadors and other public officials. In all the other before-mentioned cases it was to have appellate jurisdiction. An added detail, not hitherto mentioned, which was to provide Anti-Federalists with a strong opposing argument was the guarantee that all criminal cases would be tried by a jury in the state, not the county, where committed.\textsuperscript{38}

The first of the judiciary details to be assailed when the Committee's report was submitted to the Convention, was the tenure of office for the Supreme Court Justices. Dickinson thought they should hold office during good behavior "provided they may be removed by the Executive on the application by the Senate and House of Representatives."\textsuperscript{39} Such an amendment would seriously weaken the position of federal judges and could possibly have an effect on their decisions. Sherman and Gerry supported the motion. The apparent contradiction that judges should hold office during good behavior and yet could be removed without a trial was pointed out by Gouverneur Morris. Wilson feared the judges would be placed in a dangerous position if made to depend on every gust of faction which might prevail in the two branches of the Government. When Dickinson's motion was finally put to a vote, only one state, Connecticut, was in favor of it.

\textsuperscript{38} Ibid., 172-173.

\textsuperscript{39} Ibid., 428
In a later discussion Morris asked to have the nature of the Supreme Court's appellate jurisdiction clarified. Did it extend to matters of fact as well as law, to cases of common law and civil law alike? If this was the nature of its appellate jurisdiction, it meant that such cases could be tried without a jury, a situation rarely known in the states. In giving the Committee's opinion, Wilson said he believed the jurisdiction included facts as well as law, common as well as civil, and again the precedent cited for such an opinion was the jurisdiction of the Federal Court of Appeals.  

The Journal of the Convention records one subtle attempt to amend this same section. Without naming the proponent, it states that a motion was made and seconded to amend section three of the judiciary article so that it would read:

"In all the other cases beforementioned, original jurisdiction shall be in the Courts of the Several States, but with appeal both as to Law as to fact to the courts of the United States."  

Such an arrangement would have greatly reduced the need of inferior federal courts and would have given the state courts federal jurisdiction in the first instance, a plan previously advocated by Rutledge and Mason. The motion, however, was withdrawn and a substitute motion was offered simply stating that "in all other cases beforementioned, it shall be appellate both as to law and

40 Ibid., 431.
41 Ibid., 424.
fact with such exceptions and under such regulations as the Legislature shall make." The attempt to bring state courts into the Federal Judiciary System failed when this last proposed amendment passed in the affirmative.

The drafted constitution was finally approved on September 17, 1787. Only three of the delegates present refused to sign: Randolph, Gerry, and Mason. Among the objections penned by Mason on the back of his draft copy was the statement that the Judiciary of the United States is so constructed and extended, as to absorb and destroy the judiciaries of the several States; thereby rendering law as tedious, intricate, and expensive, and justice as unobtainable, by a great part of the community, as in England, and enabling the rich to oppress and ruin the poor.

This was but a hint to the Federalists, before the Convention adjourned, that opposition to their work would continue in the state ratifying conventions.

42 Ibid., 424.
43 Ibid., 639.
CHAPTER III

DEBATES ON THE JUDICIARY ARTICLE IN
THE STATE RATIFYING CONVENTIONS

When the proposed Constitution was submitted to the
Continental Congress, then sitting in New York, it was unanimously
resolved that Congress, without expressing approval or disapproval,
should transmit the report to the state legislatures. The legis-
latures were then to submit it in turn to a convention of delegates
chosen in each state by the people thereof in conformity with the
resolves of the Constitutional Convention provided for such a pur-
pose.

It was not until this time that actual party divisions
became pronounced throughout the sovereign states. All the de-
liberations of the Philadelphia Convention were held in secret,
and the two highly antagonistic constitutional factions which had
developed within Independence Hall had not yet brought the citi-
zens of the states under their magnetic influence. Until the day
the proposed Constitution was made public, there existed but the
nuclei around which would soon revolve two powerful political
parties. Those who would favor ratification of the Constitution
were known as Federalists, and those who opposed ratification, or
favored only a conditional ratification, came to be called Anti-Federalists.

The plan for a federal judiciary system, the final steps of which were to be taken in the Judiciary Act of 1789, underwent its most crucial tests during the months in which state ratifying conventions picked apart each of its clauses and exposed it to sharp criticism. Federalist influence was just as important and even as brilliant in the sessions of these conventions as it was in the committee meetings or on the floor of Congress during the drafting of the Judiciary Act. Most of the ratifying conventions whose debates and proceedings were recorded, found in the Judiciary Article of the proposed Constitution a source of bitter contention. It was not, however, the central or most heatedly debated question.

The Judiciary Article was not a small and large state quarrel, it was rather a quarrel between those fighting to retain state power and sovereignty, and those seeking to make the federal government as strong as the exigencies of the times required. In Maryland and Pennsylvania, the Federalists took a cowardly advantage of their decidedly majority support. In Pennsylvania physical force was used to bring Anti-Federalists into the Legislature in order to have a quorum for the business of calling a state ratifying convention. This happened on September 29th; an election of delegates was held on November 6th; and the Convention on
November 21st. It was almost impossible to get the propaganda machinery working in time to influence the delegates one way or the other. The Federalists, in complete control, prohibited voting on the proposed Constitution by articles; a procedure followed in most other conventions, prohibited the adoption of amendments, and finally prohibited reasons for dissent from being entered upon the minutes. This adequately explains why Jonathan Elliot, in giving the text of the Pennsylvania Convention, devoted ninety-six pages to the arguments of James Wilson for the Federalist position.

A similar questionable procedure was followed by the Maryland Convention where the delegation consisted of twelve Anti-Federalists and sixty-two Federalists. Before the Convention met the Federalists held a caucus in which it was decided that discussion of the Constitution by parts would be prohibited. Relying on their numbers, the Federalists remained silent to the minority's arguments feeling there was no point in protracting the mere formality of ratification which they believed was the wish of their constituents. In a fragmentary report on the Maryland Convention, it was disclosed that advocates of the government, although repeatedly called

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2 Ibid., 461.
on, and earnestly requested, to answer the objections, if not just, remained inflexibly silent and called for the question, that the convention assent to and ratify the proposed plan of federal government for the United States.3

The vote for ratification was carried in the affirmative, sixty-three to eleven.

New Hampshire's Convention experienced a reversal of this procedure. There the large number of delegates from the upper part of the State were opposed to adoption at first. However, upon hearing the sound and convincing arguments of such Federalists as John Sullivan, Samuel Livermore, and John Langdon, these delegates changed their opinion but confessed that they felt bound, in conformity with the instructions from their constituents, to vote against ratification.4

The simple fact that the Constitution was ratified within approximately nine months after being submitted to the states tends to obscure the intense opposition to it of a very large segment of the states' population. Actually, the hopes for adoption were none too bright in the winter of 1788. In Massachusetts, New York, Virginia, and North Carolina, the majority of the delegates to the state conventions were Anti-Federalists. In New Hampshire, the first session of the ratifying convention almost

4 Ibid., 28
ended in defeat for the Federalists. Fortunately, John Langdon succeeded in having his motion to recess the convention carried by a vote of fifty-six to fifty-one. North Carolina's first convention, in spite of James Iredell's efforts, voted 184 to 84 against ratification. It required some political maneuvering with John Hancock as the deciding pawn, to win ratification in Massachusetts where the majority had been Anti-Federalist. The none-to-comfortable ratifying vote there was 187 to 168. In New York, even after nine states had voted for ratification, thus putting the Constitution into effect, ratification was obtained by the slim margin of thirty to twenty-seven. That the Constitution did win ratification in the face of so much opposition is due in large part to the influence of zealous Federalist leaders, and to a degree their victory depended on their success in defending the proposed Judiciary Article. The debates, therefore, in the state ratifying conventions are of decided importance in the formation of the Federal Judiciary System, and a study of arguments presented in them will make the Federalists' influence on this formation more evident.

Ordinarily the procedure in these state conventions was to take the Constitution paragraph by paragraph and carefully con-

5 Ibid., 29
sider each clause, after which the delegates would voice their approval or disapproval. To the first clause of Section One in the Judiciary Article, there was universal agreement on its provision for one Supreme Court. The only possible exception which might be cited was the unusual amendment proposed and adopted in New York's Convention. Rather than have the Supreme Court at the very top of all judicial power, as the wording of the clause was interpreted, New York's Convention proposed an amendment that

the person aggrieved by any judgment, sentence or decree of the supreme court of the United States, with such exceptions, and under such regulations, as the congress shall make concerning the same, ought, upon application, to have a commission, to be issued by the president of the United States to such learned men as he shall nominate, and by and with the consent of the senate, appoint, not less than seven, authorizing such commissioners, or any seven or more of them, to correct the errors in such judgment, or to review such sentence and decree, as the case may be, and to do justice to the parties in the premises. 7

The approval of this cumbrous and unnecessary amendment was obtained over objections of Chancellor Livingston and Hamilton. Livingston feared that a court appointed by the legislature would be under the same influence as the legislature and was therefore to be avoided. Hamilton was of the same opinion. 8 William Jones

7 Journal of the Convention of the State of New York, Poughkeepsie, 1788, 81.

8 MSS., Notes taken by Gilbert Livingston during a committee meeting in the New York State Convention, July 22, 1788, in the New York Public Library.
defended the amendment by stressing the need for security. He feared what was to be America's great judicial innovation: a totally independent court, and he wished "some mode to remedy the evil." Hamilton held to the Federalist plan by asserting that if there must be a court in the last resort, why not have it safely placed in the Supreme Court rather than in an adventitious court or in the senate. Jones replied that this procedure had long been in use in their former mother country and was being used there to this day without complaint. Hamilton, strangely enough, said that he would not so strongly oppose the amendment if it applied only to causes in which the Supreme Court had original jurisdiction, but if it applied to causes brought before the Supreme Court on appeal, then he strenuously dissented. Upon explanation that only causes in which the Supreme Court had original jurisdiction were contemplated, the amendment was approved. No subsequent action was ever taken upon it either in New York or in the newly established Congress, and so William Jones' security measure is now innocuously recorded in history simply as the eighth resolution proposed by the New York Convention as an amendment to the Federal Constitution.

After the vehement objections over a complete guarantee for jury trials, there was no more heatedly debated subject in the

9 Ibid.
10 Ibid.
Judiciary Article than the clause providing for "such inferior courts as Congress may from time to time ordain and establish."

It was noted in the last chapter that the wording of this clause amounted to a compromise from the original Federalist provision that a national judiciary be established to consist of one supreme tribunal and of one or more inferior tribunals. Allowing the absolute power of establishing inferior tribunals to yield to their being established at the discretion of Congress was intended to placate those fearing too powerful a Constitution. If the compromise served the purpose of smoothing over a possible rupture in the Constitutional Convention, its effectiveness in serving the same purpose in the state conventions was all but lost. Back in Virginia, Madison found the provision he helped to formulate for inferior courts sharply attacked by George Mason. He visioned these courts being made as numerous as the Congress thought proper, and when he considered the nature of their jurisdiction, he was compelled to conclude that "their effect and operation will be utterly to destroy the state governments." In the same convention, William Grayson objected that the federal and state judiciaries would conflict, that there was no superintending power to keep order between the two jurisdictions. In Grayson's mind, this objection was unanswerable in its nature. Both Madison and Edmund

Pendleton sought to lessen the hostility to the inferior courts by suggesting that the state courts might serve in place of the federal courts. Pendleton went so far as to think out loud that it was highly probable that their (Congress) first experiment will be, to appoint the state courts to have inferior federal jurisdictions; because it would be best calculated to give general satisfaction.\textsuperscript{12}

There is no reason to doubt Pendleton's sincerity in making such a speculation, but it would have been difficult to find many other Federalists who shared his sentiments. In fact, in another year, almost to the day, newspapers will be telling of the new Judiciary Act, drawn up mostly by Federalists, and providing for thirteen district and three circuit federal courts.

An argument which carried much weight among the Anti-Federalists, and was often to be reiterated in debates over the Judiciary Bill, centered around the great expense of maintaining these federal courts. Samuel Spenser, in North Carolina's Convention, emphasized the "immense expense" involved in the appointment of judges, especially the large number needed for inferior courts in every district and county, and the corresponding number of officers.\textsuperscript{13} Here again the Federalists sought to pacify the opposition by assuring them that the laws, in general, could be executed by the officers of the states, that the state courts

\textsuperscript{12} Ibid., 472.

\textsuperscript{13} Ibid., IV, 148
could probably answer the purposes of Congress as well as any others. These were dangerous observations for a Federalist to make because actually they did not fit into the Federalist plan for a strong independent judiciary. While such assurances may have allayed the fears of the Anti-Federalists in the state conventions, their ultimate effect was to arouse the opposition to more violent protestations when provisions for federal inferior courts, contained in the Judiciary Act, were debated in the First Congress.

New York's Convention seems to have spent little time debating the Judiciary Article, although several of its proposed amendments concerned the Judiciary. Gilbert Livingston records one interesting incident on the subject though no mention is made of it in Elliot's Debates. During a committee meeting on Tuesday, July 22nd, the day before New York ratified the Constitution, the proposed amendments were reconsidered. According to Livingston's notes one amendment stated that "Congress shall not establish any inferior court."\(^{14}\) Hamilton, perhaps confident of the outcome of the Convention, simply observed that such a provision would increase appeals; then Livingston noted, "but does not much oppose\(^ {15}\) In fact, the aristocratic Hamilton only objected that such an amendment might "operate to the prejudice of the poor." When the

\(^{14}\) MSS. Livingston
\(^{15}\) Ibid.
question of accepting the amendment was put to a vote, thirty-seven were in favor and only sixteen opposed.

Few objections were raised to the provisions for federal judges holding office during good behavior and for receiving compensation for their services. These matters were carefully treated and defended by Hamilton in the seventy-eighth and seventy-ninth letters of The Federalist, propaganda matter with which the delegates to the Convention were undoubtedly familiar. There were, besides, similar statements in many of the state constitutions. The concluding clause, however, guaranteeing no diminution in salary during a judge's continuance in office was foreseen by Grayson in the Virginia Convention as endangering the independency of the judges. The judiciary, Grayson claimed, was on as corrupt a basis as the art of men can place it. The salaries of judges could be augmented, and "augmentation of salary is the only method that can be taken to corrupt a judge."16 He then went on to show how the pages of history were filled with instances where judges have been corrupted by hope of reward. Grayson apparently wanted a return to the original proposal of the Virginia Plan stipulating that "no increase or diminution (in salary) shall be made so as to affect the person actually in office at the time of such increase or diminution." The Federalists' answer here, as well as in the Constitutional Convention, was uniformly

16 Elliot's Debates, III, 511.
the same and seemed to satisfy most delegates. Since a judge might hold office for a long period of time, and since the money standards were not stable, it was necessary to allow for a salary increase lest the judge be embarrassed by not being able to live according to the dignity of his position.

The first paragraph of Section Two in the Judiciary Article defining in general the scope of federal jurisdiction caused a clash between Federalists and Anti-Federalists in most of the state conventions. It is apparent from the amendments recommended by the state conventions that much dissatisfaction was aroused by the extent of the Federal Government's judicial powers. Although the Anti-Federalists in Pennsylvania were not able to have their objections printed in the Convention's journal, they later published them in The Pennsylvania Packet And Daily Advertiser. Of their fourteen propositions offered to the Convention, the last one read in part:

The judiciary power of the United States shall be confined to cases affecting ambassadors, other public ministers and consuls, to cases of admiralty and maritime jurisdiction; to controversies between two or more states, between a State and citizens of different States, between citizens claiming lands under grants of different States, and between a State or the citizens thereof and foreign States.17

By such a restrictive measure, the Anti-Federalists sought to

17 Pennsylvania Pack and Daily Advertiser, December 18, 1787.
deprive the federal courts of judicial power in cases of law and equity arising under the Constitution, laws of the United States, and treaties made under its authority. In Maryland a committee was appointed after the Constitution had been ratified, to draw up a set of amendments. The first seven of these were added limitations on federal judicial power and the reason for their proposal, the committee said, was "to prevent an extension of federal jurisdiction, which may, and in all probability will, swallow up the state jurisdictions." New York and Pennsylvania also offered amendments by which the proposed judicial power of the federal courts would be carefully curbed.

One of the strongest attacks against these powers came from George Mason in the Virginia Convention. Besides depriving federal courts of jurisdiction in cases arising under the Constitution or the laws of the United States, he also wanted to take away their jurisdiction in controversies between citizens of different states. The proposed measure would, in his opinion, only involve the people in trouble and needless expense. As for controversies between a state and the citizens of another state, Mason feared the number of claims against Virginia which would go before a federal court. "Is this not disgraceful?" he asked. "Is this State to be brought before a bar of justice like a delinquent

18 Elliot's Debates, II, 511.
individual? Is the sovereignty of the State to be arraigned like a culprit, or private offender?"19 Mason did not even believe that controversies between a state or its citizens, and foreign states, citizens, or subjects should come under the cognizance of federal jurisdiction. To him, this was an innovation utterly unheard of and unprecedented, and again he asked the Convention, "Cannot we trust the state courts with disputes between a Frenchman, or an Englishman, and a citizen; or even with disputes between two Frenchmen?"20 In Mason's mind all these federal jurisdictions were not merely unnecessary but positively tended to impair, and ultimately destroy, the state judiciaries.

Although long established precedents in courts now make these objections and criticisms seem slightly senseless, they were nevertheless seriously intended at the time of the state ratifying conventions. They represent in one limited aspect the efforts of the Anti-Federalists to harness the unbridled attempts of the Federalists to bring their plan of a strong federal government into full reality. That these extreme limitations on judicial power were never made the condition of state ratifications, nor the subject of further agitations by the Anti-Federalists, can be attributed largely to the successful refutations made by Federalists in these same state conventions.

19 Ibid., III, 480.
20 Ibid., 481
If George Mason seriously sought answers to the questions he proposed, he directed them to the right audience. Madison, Pendleton, and John Marshall, each in turn, replied to Mason's speech. Madison did not believe state sovereignty was endangered by the federal courts' jurisdiction in controversies between a state and citizens of another state because it would not be in the power of an individual to call any state into court. He further added that if a state should bring a suit against a citizen, the use of federal jurisdiction would prevent the citizen on whom the state had the claim from pleading injustice because the state used its own court to try the case. Madison was almost indifferent as to jurisdiction in cases between citizens of different states. In fact, he said it might be left to the states' courts. He did foresee, however, the possibility of injustice being done where a strong prejudice existed in the state whose court tried the case. Finally, Madison argued that disputes between an American State or citizen and foreign states or citizens ought to be tried by a national tribunal because it was the safest way of avoiding controversies with foreign powers. The alternative of granting this power to a member of the Union by which it could then drag the whole country into war seemed unreasonable.

Madison's almost apologetic manner of defending federal jurisdiction was quickly taken advantage of by the eloquent Anti-Federalist, Patrick Henry. Federal jurisdiction in cases between
citizens of different states, a point on which Madison seemed indifferent, was attacked by Henry who thought it would be productive of serious inconvenience to the citizens of bordering states who had frequent dealings with one another. 21 Henry's most effective argument came when he questioned Madison's construction of controversies between a state and citizens of another state. He saw nothing to warrant Madison's assertion that only a state may be a plaintiff. Referring to a text of the proposed Constitution, he observed that no discrimination was made between plaintiff and defendant in controversies between a state and citizens of another state. 22 Henry had the eminent Federalist on the horns of a dilemma. If Madison conceded that a state might be a defendant, then its sovereignty would be abused; if he maintained his original construction, then it would appear that justice in such cases could be done to the state but not to the citizen. Still worse, it meant that Federalists could take the liberty of placing whatever construction they pleased on the provisions of the Constitution. It is interesting to note that when Pendleton rose to refute the fiery arguments of Patrick Henry, he carefully avoided any references to the dilemma Henry took great pains to make apparent.

21 Ibid., 493.
22 Ibid., 494
It was not until the future precedent maker for the Supreme Court, John Marshall, took the floor of the Convention that a seemingly adequate reply was given to Henry's weighty objection. Facing the dilemma, Marshall said it was not rational to suppose that the sovereign power could be dragged before a court. In justifying his own construction as being warranted by the words of the Constitution, he claimed this judicial power was intended "to enable states to recover claims of individuals residing in other states." As for the consequent injustice of not allowing a state to be defendant, and so preventing an individual's obtaining judgment against it, Marshall simply admitted, "It is necessary to be so, and cannot be avoided." Further insurance that state sovereignty would not be imperiled appeared in *The Federalist*.

In one of his letters, Hamilton wrote:

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the Government of every State in the Union. Unless therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States, and the danger intimated must be merely ideal.

Such personal constructions and assurances that any contrary pro-

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procedure would be irrational did not ultimately satisfy the Anti-Federalists' objection that sovereignty of the states was being endangered by this particular grant of judicial power. Not even the Judiciary Act of 1789 was to clear up the difficulty. Instead of assuring the Anti-Federalists that states could only be plaintiffs and not defendants, the Act retained the same troublesome wording of the Constitution's Judiciary Article. Failure to insist on a state's immunity from being a defendant in a case led some ten years later to an embarrassing situation in a Supreme Court ruling in the case of Chisholm vs. Georgia. It was only then that the Constitution was amended to conform with Madison's and Marshall's personal constructions. The Eleventh Amendment to the Constitution provided that

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.26

If the failure to clarify this immunity of the states, either at the time of the Constitution's adoption or in the provisions of the Judiciary Act, was due to Federalist influence, the victory was but momentary and, in the light of history, a dubious one.

Questionable as was Marshall's defense against this particularly well stated Anti-Federalist objection, his other arguments on behalf of federal judicial powers were most logical and

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26 Constitution of the United States, Article XI.
convincing. Acting almost as his own precursor, Marshall's basic defense of these powers was founded on the supposition that Federal Courts should not be feared as instruments of injustice and aristocratic ambition which would in time destroy state courts. As previously noted, this attitude and foreboding was no small factor in motivating the Anti-Federalists in their opposition. To allay their fears, Marshall repeatedly asked if the Government of the United States had power to make laws on every subject so that its jurisdiction would consequently be universal, or if there were any words in the Constitution which excluded state courts from cases they already possessed. He then made the prophetic statement that state courts would not lose the jurisdiction of causes they now decide, and that they would have a concurrence of jurisdiction with the federal courts in those cases in which the latter had cognizance. Therefore, he did not think the right to try controversies between citizens of different states had to be exclusive, though such jurisdiction might be necessary with respect to laws and regulations of commerce made by Congress or in cases of debt. As for where the court would be held, Marshall, relying on his legal training, assured the skeptical Anti-Federalists that it would be in the state where the defendant resides, and the matter would be determined by the laws of the state where the contract was made.

27 Elliot's Debates, III, 503.
No other state convention has left such complete details of debates on the Judiciary Article as Virginia. For the historian this is very fortunate because no other convention saw so many outstanding statesmen, both Federalist and Anti-Federalist, rise to object or defend the Constitution proposed by the Philadelphia Convention. The arguments presented here were to be voiced again in the other conventions, in propaganda pamphlets, and in the meetings of the First Congress where, in some instances, they were more effectively resolved.

In the Pennsylvania Convention a small but vehement group of Anti-Federalists also objected to the extent of federal judicial power. Though no detailed record of their arguments has been preserved, the fact that James Wilson spoke at some length in defense of these powers indicates that the objections must have been well made. The substance of one of these objections was that the sovereignty of a State was destroyed, if it should be engaged in a controversy with the United States, because the suitor in the court must acknowledge the jurisdiction of that court, and this was incompatible with its sovereignty. Wilson's reply was brief, simple, and sharp. "The answer," he said, "is plain and easy: The government of each State ought to subordinate to the government of the United States."28

As to the jurisdiction between a state and citizens of another state, Wilson apparently was not aware that here too, state sovereignty was endangered by a failure to grant immunity to a state from being a defendant. He was more concerned with the possibility of injustice being done to a citizen, and so he thought the extent of this judicial power was just because, even in disputes where a state and a citizen of another state were concerned, "there ought to be a tribunal where both parties may stand on a just and equal footing." Such thoughtfulness might have succeeded in making the federal judiciary acceptable to the individual citizen, but it antagonized those who were anxiously concerned about the sovereignty of the states.

Federal jurisdiction in cases between citizens of different states or between a state and a foreign state was defended by Wilson on rather firm ground. First of all, he pointed out that the power was not exclusively given to the federal courts. It was a concurrent power. Therefore, parties involved were free to commence suits either in a state or a federal court. He justified the necessity of having the federal courts share this jurisdiction by the need of having a just and impartial tribunal to which foreigners as well as American citizens may resort. This would be an effective means, he thought, of restoring public and private credit. Further, he believed this power would provide the

29 Ibid., 356.
proper security for the regular discharge of contracts which in turn would encourage American manufacturers and commerce. Finally, Wilson saw federal jurisdiction over regulations governing domestic navigation as a means of improving trade between the states. These economic reasons for justifying the judiciary powers of the Constitution could well serve as an argument for the contention that the provisions of the Constitution were determined largely by economic factors.

In the North Carolina Convention the only objection recorded against the judicial powers paragraph came from an ill-informed delegate who objected to the "exclusive jurisdiction" of the federal courts in all cases of law and equity arising under the Constitution of laws of the United States. Governor Johnston attempted to correct this personal interpretation by saying that he had been of the opinion that federal courts would have only concurrent and not exclusive jurisdiction in the above named cases. This reply, in answering one difficulty, gave rise to another. Mr. Bloodworth, an Anti-Federalist delegate, asked the Convention to reflect on what would be the consequences, if the courts of the state and the federal courts should have concurrent jurisdictions. Trial by jury, one of the greatest rights of the people, would be cut off if causes were taken into federal courts.

30 Ibid., 357.

31 Elliot's Debates, IV, 153.
True, in criminal cases the Constitution provides for juries, but Bloodworth contended,

there is no provision for having civil causes tried by jury. This concurrent jurisdiction is inconsistent with the security of that great right. If it be not, I would wish to hear how it is secured. 32

It will be seen that this argument was thoroughly refuted, both in the state conventions, where it frequently came up, and in the various forms of Federalist Propaganda. The most thorough refutations appeared in The Federalist, and will be treated in the next chapter.

Opposition to the last paragraph in Section Two of the Judiciary Article, as synthesized from the debates in the various state conventions, centered around the following points. The judicial power of the proposed Constitution was founded on principles of civil law. This was apparent from the fact that the trial by jury, an essential characteristic of common law, was provided for in the Constitution only in criminal cases, leaving civil cases without such a guarantee. Use of civil law was further evident from the fact that appeal, both from law and fact, was expressly established in the Judiciary Article, and this also, the Anti-Federalists claimed was inconsistent with the common law traditions which the Americans had come to associate with their very way of life. Nor was the procedure of the Federal Court of Appeals

32 Ibid., 154.
a refutation of their position, because, as George Mason carefully distinguished, in admiralty cases the depositions were committed to record and therefore on appeal the whole fact went before the court to which it was appealed. But since in courts of common law the evidence was given at the time *viva voce*, if matters of fact were appealed, new witnesses could be introduced and the parties concerned would have to bring their other witnesses to the new court, perhaps from great distances.

Opposition was also voiced against the failure to guarantee the co-related rights of a jury trial. Often the demands were carried to extremes as when a delegate in the Massachusetts Convention protested because the Constitution did not tell

> who this jury is to be, how qualified, where to live, how appointed, or by what rules to regulate their procedure... whether they are to live in the county where the trial is.\(^3^3\)

Such provisions were not even made in many of the state constitutions. His last demand, however, was common to a number of Anti-Federalist arguments on the right of jury trial. The right of vicinage was not adequately provided for. Virginia's Grayson considered the only vicinage given by Congress to be the state, and this was contrary to his idea of vicinage where a man was tried by his neighbors. A similar protest was made by the minority dele-

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33 *Debates and Proceedings in the Convention of the Commonwealth of Massachusetts*, Boston, 1836, 212.
gates in Pennsylvania. After noting that the Constitution made no provision for the trial of a criminal case by a jury of the neighborhood or county, they concluded: "Thus an inhabitant of Pittsburgh, on a charge of a crime committed on the banks of the Ohio, may be obliged to defend himself at the side of the Delaware, and so vice versa." A North Carolina delegate reminded the Convention of that State that a trial by a jury of the vicinage was one of the greatest securities of property. If causes should be decided at a great distance, the poor and even the man of common circumstances, would be oppressed.

In brief, then, the Anti-Federalists wanted trial by jury in civil cases guaranteed, no appeal in trials of fact, and the right of trial by jury in the vicinage where the cause of action arose.

The defense of these judicial provisions regarding jury trials was made mostly by Federalists who helped to formulate them as delegates to the Constitutional Convention. This undoubtedly explains the uniformity of the answers given in the widely separated states.

Most notable of such uniform answers was their reply to the objection that while provision was made for trial by jury in

criminal cases, there was no such provision made for civil cases. James Wilson, in the Pennsylvania Convention, frankly admitted that trial by jury was not mentioned in civil cases, but the inference that it was therefore not meant to exist under the proposed government, he denied. He then went on to explain the omission in terms similar to those used by other Federalists who made the same defense in other conventions, in newspapers, and in pamphlets.

By the constitutions of the different states, it will be found that no particular mode of trial by jury could be discovered that would suit them all. The manner of summoning jurors, their qualifications, of whom they should consist, and the course of their proceedings is different in the different states; and I presume it will be allowed a good general principle, that in carrying into effect the laws of the general government by the judicial department, it will be proper to make the regulations as agreeable to the habits and wishes of the particular states as possible: and it is easily discovered that it would have been impracticable by any general regulation, to have given satisfaction to all.35

The obvious solution, therefore, was to leave the matter to the representatives of the people in Congress who could from time to time make the proper regulations. Stressing the advantage of such an arrangement, James Iredell, in the North Carolina Convention, pointed out that if a provision in this regard had been made in the Constitution, and experience found it to be inconvenient, the difficulty of having it changed by an amendment to the Constitution would be considerable. Whereas, if it were regulated by law,

35 Elliot's Debates, II, 453.
it could easily be altered to suit the convenience of the people.

The danger still remained that the regulations of Congress could quite possibly omit the use of a jury trial altogether in a civil case. To leave the matter to the discretion of Congress was by no means an implied guarantee. This possibility of omitting the use of jury trials was taken up by John Marshall in the Virginia Convention where he cited several instances in Virginia's judicial regulations in which civil cases were decided by courts without the intervention of a jury. He pointed out that their own Legislature did not give a trial by jury where it was not thought necessary, but only where it was expedient. Making the transition to the proposed government, he asked, "Does it exclude the legislative body from giving a trial by jury in civil cases? If it does not forbid its exclusion, it is on the same footing on which your state government now stands."36

The unfortunate experiences of having extremely partial juries in the admiralty courts of the states caused many Federalists to question the high regard in which trial by jury was held. During the previous decade numerous cases sent to the Federal Court of Appeals, had to be reversed because the verdicts previously given had been swayed by local considerations and sectional prejudices. Each claimant of a prize had naturally

36 Ibid., III, 510.
sought the courts of his native state and there secured the favorable action of his fellow-citizens in the face of sometimes overwhelming adverse proof.\(^37\) Recollection of such occurrences prompted Wilson to remark in the Pennsylvania Convention that the protection of appeal to a court possessed of authority to reconsider and set aside the verdict of juries was necessary, due to "the ample experience we have had in the courts of admiralty with regard to captures."\(^38\) Wilson further justified appellate jurisdiction in which juries would not be used by the need of giving citizens of foreign States full opportunity to obtain justice. Guaranteeing equal justice to foreigners would, he believed, restore their country's credit with many foreign States.

The debates referred to in this chapter might be called formal as opposed to the informal ones waged outside the state convention halls. The topic was the same, and often enough the arguments, as will be seen in the next chapter.


\(^{38}\) *Elliott's Debates*, II, 458.
CHAPTER IV

FEDERALIST AND ANTI-FEDERALIST PROPAGANDA

Simultaneous with the ratifying convention debates, there appeared scores of pamphlets and public letters in newspapers. Here again the merits of the Constitution's Judiciary Article were carefully, and sometimes not so carefully, weighed. Some pamphlets were printed expressly to influence the delegates in the various ratifying conventions; others sought to stir up the general public to defense of, or opposition to, the proposed Constitution. Most of this propaganda material was widely circulated and even commented upon by the statesmen of the day. The letters of Cato, Agrippa, Cassius, a Federal Farmer, and others in gazettes, packets, journals, and advertisers throughout the thirteen states were the early American counterpart of modern syndicated news columnists. Without attempting to estimate the influence exerted by all this propaganda on the formation of the Federal Judiciary System, some consideration of the more outstanding articles concerned with this federal court plan will add new arguments to the debate, bolster up old ones, or at least help to show how the Federalist and Anti-Federalist factions were becoming more pro-
nounced in their views. In many instances, the arguments cited prompted those already referred to in the state conventions. Whether they preceded or followed the state convention debates, the criticisms contained in them, both constructive and destructive, were of later value to the men chosen to draft the Judiciary Act of 1789. This is particularly true of the letters of Publius, the common pen-name for Alexander Hamilton, John Jay, and James Madison.

Among the Anti-Federalists who printed their opposition to the proposed judiciary plan were four prominent statesmen: Richard Henry Lee, who signed his letters "A Federal Farmer," George Mason, Luther Martin, and James Winthrop, whom historians credit with writing the "Letters of Agrippa."1 Appealing to their fellow citizens' sense of state sovereignty, these propagandists dwelt on the danger of state judiciary systems being swallowed up by the proposed Federal Judiciary. George Mason, who refused to sign the Constitution, warned Virginians that

[T]he judiciary of the United States is so constructed and extended, as to absorb and destroy the judicatures of the several states; thereby rendering laws as tedious, intricate, and expensive, and justice as unattainable by a great part of the community, as in England; and enabling the rich to oppress and ruin the poor.2

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The fifth letter of Agrippa developed the argument still further by supposing that a continental court was not bound to try a cause between citizens of different states according to the local laws where the controversy arose. Therefore, the rules governing the continental court would be made by the court itself or by Congress. In either case, the writer concluded, the power of the states in such causes has been taken away.\(^3\) Agrippa's fear was valid at the time, and similar sentiments would not be stilled till Congress, in the Judiciary Act of 1789, stipulated in Section Thirty-four:

\[T]\text{hat the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.}\(^4\)

Still another usurpation of power was foreseen by Agrippa in the Sixth Article of the Constitution requiring all state judges to be bound by the supreme law of the land, anything in the state constitutions or laws notwithstanding. The judges of the states, therefore, were to execute the continental laws in their own departments within the state. Since the only jurisdiction left for the state courts was in cases between the citizens of the same state, and in these cases the judges were bound by the laws of Congress, it clearly followed, so Agrippa thought, that

\(^4\) United States Statutes at Large, I, 92.
all issues between the citizens of the same state would be decided by the general laws and not by local ones. The Anti-Federalists who were forced to remain in the Pennsylvania Convention expressed this same foreboding in a statement published in the Pennsylvania Packet protesting the proposed Constitution.

This fear of judicial power as granted to the Federal Government in the proposed Constitution, was based on a sound political axiom. Pointing it out to the people of New York, Melancthon Smith, a member of the Continental Congress, warned that the history of the world taught that in forming a government, care should be taken not to confer powers which it will be necessary to take back; but rather, if an error is to be made at all, let it be on the contrary side, because it is much easier, as well as safer, to enlarge the powers of governments, if they should not prove sufficiently extensive, than it is to abridge them if they should be too great.

The difficult alternative, therefore, was to restrict the powers of the proposed Federal Judiciary while at the same time allowing it to have powers co-extensive with the Federal Legislature. Richard Henry Lee offered such an alternative in his

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6 *Pennsylvania Packet and Daily Advertiser*, October 4, 1787.

7 *Pamphlets on the Constitution*, 92-93.
widely published and unusually popular "Letters of a Federal Farmer. In his second letter, he attempted to show how the state courts were better organized to administer justice than a single Federal Judiciary whose supreme court "could only set in the center of the union, and move once a year into the center of the eastern and southern extremes of it." As for federal inferior courts, though they could be more widely scattered, their appellate jurisdiction, Lee believed, would be intolerable and expensive.⁸

Lee's next letter questioned the extension of federal jurisdiction to cases between a state and citizens of another state, between citizens of different states, between a state or the citizens thereof and a foreign state, citizen, or subject. At the time of his writing, such cases were brought and finally determined in the courts of the separate states. Under the proposed Constitution, the federal courts would have concurrent jurisdiction with state courts and there would be an ultimate appeal to the Federal Supreme Court. Lee feared the federal courts would try such cases without a jury since the Constitution guaranteed a jury trial only in criminal cases.

Luther Martin foresaw a still graver problem. Allowing for an appeal in cases both as to law and fact, from inferior courts, a dangerous power was involved, namely

⁸ Ibid., 289-290.
that of setting at nought the verdict of a jury, and having the same facts which they had determined, without any regard or respect to their determination, examined and ultimately decided by the judges themselves, and that by judges immediately appointed by the government. 9

Anti-Federalist concern over trial by jury in civil cases was as vehemently expressed in pamphlets and newspapers as it was on the floor of the state conventions, but the arguments were essentially the same. Lee sought to bolster the case for jury trials by telling his readers that juries in the judicial department, and their representatives in the legislative, were the wisest and most fit means for protecting themselves in the community, for learning about the affairs of government and society, and for being sentinels and guardians of each other. 10

An attempt was made by some Anti-Federalists to widen the breach still further on this issue. They distinguished between the court and the jury. Their purpose in doing so was to show how the federal courts, by the provisions of the Constitution, could hear appeals without summoning a jury. "By court," Lee wrote, "is understood a court consisting of judges; and the idea of a jury is excluded." Melancthon Smith of New York wrote

[T]he court are the judges ( sic ); every man in the country, who has served as a juror, knows, that there is a difference between the court and the jury, and the lawyers in their pleading, make the distinction.

9 Essays on the Constitution, 362.
10 Pamphlets on the Constitution, 315-316.
If the court, upon appeals, are to determine both the law and the fact, there is no room for a jury, and the right of trial in this mode is taken away.  

There was little danger that the people could forget the possibility of civil cases being tried without a jury under the proposed Constitution. Besides the writers cited above, the letters of Agrippa, a Centinel, a Democratic Federalist, and others, repeated the objection over and over, obviously taking advantage of a point on which the people were very sensitive.

These various criticisms of the Anti-Federalists were intended to bring about alterations in the proposed Constitution before it was adopted. Only one of the pamphleteers resorted to the extreme position of rejecting the Constitution altogether, proposing in its place amendments to the Articles of Confederation. Agrippa, believed to be James Winthrop of Massachusetts, exhorted the citizens to reject every part of the proposed plan and to make certain additions to the Articles of Confederation. In regard to the judiciary, he wrote:

And for the more convenient exercise of the powers hereby and by the former articles given, the United States shall have authority to constitute judicatories, whether supreme or subordinate, with power to try all piracies and felonies done on the high seas, and also all civil causes in which a foreign state, or subject thereof, actually resident in a foreign country and not being British absentees, shall be one of the parties. They shall also have authority to try all causes in which ambassadors shall be concerned.

11 Ibid., 114.
All these trials shall be by jury and in some sea-port town.12

The fact that the Constitution was adopted, was in no small way due to the aggressive counter-propaganda of the Federalists. Theirs was the burden of answering these numerous criticisms, and of justifying the proposed document, both to the delegates of the state conventions and the citizens of the sovereign states. Among the Federalists who came forward with pamphlets and letters were Tench Coxe, James Iredell, Pelatiah Webster, Noah Webster, Alexander Hanson, James Wilson, and the authors of The Federalist, Hamilton, Jay, and Madison.

Seeking to refute the contention that the proposed judiciary with its appellate jurisdiction would destroy state courts, Federalist writers were quick to point out that state courts would have concurrent original jurisdiction in cases where there was an appeal to the Supreme Court; that in state inferior courts an appeal in all cases would lie to their own courts of appeal. Alexander Hanson of Maryland even went so far as to guarantee that, if an action were brought in a state court, it could not in any manner be transferred to the supreme or inferior federal courts.13 Noah Webster wrote off this fear of state courts being abolished as mere suspicion without the least foundation.

12 Essays on the Constitution, 85.
13 Pamphlets on the Constitution, 237.
Worth strongly favored a complete federal judiciary system. The careful details of the first three sections of the Judiciary Act, establishing district and circuit courts, if not drawn up by him, must have had his ardent support.

To the often repeated objection that the proposed Constitution failed to guarantee trial by jury in civil causes, the Federalists' answer was uniform, carefully stated, and convincing. The concerns of the proposed Constitution were not to be limited to the views and customs of a single state, but were to comprehend and be coextensive with the views and customs of thirteen states, independent and sovereign. The problem, therefore, of civil causes being open to a jury trial was particularly difficult to solve since procedure differed in the different states. In some, causes before courts of admiralty and even courts of equity did not require juries. How, then, was a general law to be established? James Iredell noted that if the Convention had interfered on this point, it must have done so by entering into a detail highly unsuitable to a fundamental constitution of government. If the Convention sought to please some states in this matter, it must have displeased others. And so, rather than endanger everything by attempting too much, the Convention left the complicated business of detail to the regulation of a future legislature.15

This complicated business of detail took concrete form in the

15 Ibid., 361-362.
Judiciary Act of 1789. Iredell's only misconception of the situation was his anticipation of a future legislature adjusting this problem "coolly and at ease."

The writings of James Wilson, Tench Coxe, and Alexander Hanson expressed substantially these same ideas. Wilson also sought to placate adversaries of the judicial provisions by assuring them that "no danger could possibly ensue, since the proceedings of the supreme court are to be regulated by the congress, which is a faithful representation of the people."16 Noah Webster alone settled for an ad hominem argument by claiming the insinuation that trials by jury are to be abolished, is groundless, and beyond conception, wicked. It must be wicked, because the circulation of a barefaced falsehood, respecting a privilege dear to freemen, can proceed only from a depraved heart and the worst intentions.17

Effective as these writings were in defending the proposed judiciary for the new government, none of them were as widely read, as penetrating in their arguments, as influential, or as likely to become immortal as The Federalist, a compilation of eighty-five letters, all signed "Publius," but actually authored by three famous Federalists, Alexander Hamilton, John Jay, and James Madison. These letters, published in 1787 and 1788, were intended as propaganda to win approval for the proposed Constitu-

16 Ibid., 157
17 Ibid., 52.
tion, especially in New York. The odds against ratification here were very high, and New York newspapers of the day gave much space to the letters of Cato, Brutus, a Centinel, all of them Anti-Federalist propagandists. Against such opposition the letters of Publius waged a noiseless but vehement battle of words.

A study of those letters which pertain to the judiciary will be of definite value because they not only were instrumental in winning acceptance for the Judiciary Article of the Constitution, but their sagacious perception of the functions and needs of the judiciary for the new nation were to influence the writing of the Judiciary Act of 1789. The precise extent of this influence cannot be measured, but instances where the Judiciary Act makes explicit provision for judicial principles expounded in The Federalist leads one to believe it was considerable. Perhaps it was this similarity of judicial doctrines that prompted two constitutional historians to write, "It would be interesting to know to what extent The Federalist served as a guidebook for the congressmen who wrote the Judiciary Act of 1789."18

Six letters in The Federalist treat of the Judiciary Article, and their particular authorship has been attributed to Hamilton.19 Unlike other Federalist writers on the subject, Hamil...

19 "Historical Introduction," The Federalist, xxvi-xxvii.
ton's methodical approach involved discussing and defending each section of the Article so that he would not just be answering actual objections, but would also anticipate possible arguments which might at the time only be taking form in the minds of the delegates in ratifying conventions.

Evidence of this procedure appears in the first letter on the judiciary where Hamilton upholds the tenure by which judges should hold their office. Outside the Constitutional Convention, this had not as yet become a controversial point. Nevertheless, Hamilton stressed the need of having judges hold office during good behavior, and so separate them from the other branches of the government. This was in conformity with his belief that there was no liberty, if the power of judging was not separated from the legislative and executive powers. Hamilton considered the judiciary by far the weakest of the three departments of government, and he thought nothing could contribute more to making it firm and independent than the permanency in office of its judges. This independence was essential, he thought, in a limited constitutional government where there were certain specific exceptions to legislative authority, and reservations of particular rights and privileges. Acts contrary to such exceptions could only be declared void by a judiciary independent of the rest of the government.

21 Ibid., 541.
Hamilton then took up the question of whether or not the right of the courts to declare legislative acts void would make the judiciary power superior to the legislative. His opinion on this point anticipated more fully than the men of his time realized the power to be granted the Supreme Court in the Twenty-fifth Section of the Judiciary Act. This famous controversial section gave the Supreme Court the right to re-examine, and reverse or affirm, a decision of the highest court of law or equity of a State where the validity of a treaty, statute, or authority exercised by the United States, is called into question and the decision is against that validity, or where the validity of a State statute or authority is questioned on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States and the decision is in favor of their validity. This last section was later interpreted as extending not only to statutes of a State but even to acts of Congress.

This interpretation Hamilton apparently foresaw. In The Federalist he defended this right by first asserting the principle that every act of a delegated authority, contrary to the will of the commission under which it is exercised, is void. The simple conclusion, therefore, was that no legislative act contrary to the Constitution could be valid, otherwise the representatives

22 United States Statutes at Large, I, 85.
of the people would be superior to the people themselves. Since interpreting laws, including the fundamental law, was the peculiar province of the courts, it therefore belonged to them to ascertain the meaning of these laws as well as the acts of the Legislature. Hamilton then concluded

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.

The answer to the original question of whether or not the power of the judiciary was superior to the legislative power was given in a datur tertium: the will of the people is superior to both. Where the will of the legislature, declared in its statutes, is opposed to the will of the people, declared in the Constitution, the judiciary ought to be governed by the will of the people rather than the will of the legislature. Hamilton was arguing for a stronger judiciary than even the Federalists conceived. Nor does it appear from the contents of the Judiciary Act that the Federalists intended to entrust the Judiciary with the power of declaring acts of Congress void. Had they wanted it so, its provision would undoubtedly have been made explicit in the Act. As it was, such a power, perhaps feared by some Federalists as going beyond their

23 Hamilton, The Federalist, 541.
24 Ibid., 542.
intended plans, was only implied.

The result was that what Hamilton supposed would be an ordinary function of the Federal Judiciary, actually evolved as one of the most interesting paradoxes in American Constitutional History or Law. An Act of Congress enabled the Supreme Court to declare subsequent acts of Congress void, if contrary to the Constitution. The Supreme Court, therefore, was given this right, not by constitutional grant, but by an act of Congress, which act the Congress might at any time, without the process of amendment, repeal and thus deprive the Supreme Court of its right to be the ultimate interpreter of the Constitution.

This problem of the Supreme Court's right to void an act of Congress, important as it was, nevertheless remained but a part of the still greater and more general problem of the extent of the Federal Judiciary's powers. In an effort to simplify his analysis of this question, Hamilton divided into five groups the cases over which he believed the Federal Judiciary's authority could hardly be disputed. Concerning most of the groupings there could be little dispute, such as cases arising out of the laws of the United States, cases concerned with provisions expressly stated in the Constitution, or cases where the United States was a party. The fourth and fifth groupings, subject to broad interpretation, could, and in fact were, disputed. These extended to cases involving the peace of the Confederacy, whether relating to
intercourse between the United States and a foreign State, or between the States themselves, and finally to cases of admiralty and as Hamilton nonchalantly expressed it, "to all those in which the State tribunals cannot be supposed to be impartial and unbiased." It is well to remember at this point that Hamilton was addressing people who were already citizens of sovereign states. Recalling the debates in the Constitutional and state ratifying conventions on these two spheres of federal jurisdiction, it can be expected that a very careful and convincing defense will be needed to make them acceptable to the Anti-Federalists.

Federal jurisdiction in cases involving the peace of the Confederacy was necessary, Hamilton wrote, because the Union would undoubtedly be answerable to foreign powers for the conduct of its members, and therefore the responsibility for any injury which a member might cause ought also to be accompanied with the faculty of preventing it. Considering the past prejudices of various state courts, especially their courts of admiralty, it is understandable why Hamilton should want federal jurisdiction of causes involving citizens of foreign countries; causes in which the denial or perversion of justice by courts in the past had been a just cause of war.

Still more unacceptable to the Anti-Federalists was

25 Ibid., 552.
26 Ibid., 553.
federal jurisdiction over cases where state tribunals would not be impartial or unbiased. Granted that a man is never a good judge in his own cause or, as Hamilton extended it, "in any causes, in respect to which he has the least interest or bias," there is still the question of who is to do the supposing that state tribunals would be biased or partial. In many cases the supposition could easily be made, but in others, particularly those involving the citizens of the same state, there was grave danger to state sovereignty. While it is true that the Constitution restricts these last named cases to land claims under different states, nevertheless, Hamilton considered these land claim cases as only a type of those cases between the citizens of the same state which would come under federal jurisdiction. He even felt obliged to point out that in these instances the proposed Constitution directly contemplated the cognizance of disputes between citizens of the same state. As justification for such cognizance, Hamilton stressed the difficulty state courts would have in remaining unbiased, due either to the very nature of the case, or to state laws forcing a favorable decision for the state. The problem was eventually settled by Section Twelve of the Judiciary Act granting the Federal Circuit Courts original but concurrent jurisdiction with state courts over disputed land grants where the value

27 Ibid., 558.
28 Ibid., 556.
exceeds $500, and the parties are citizens of the same state. 29

The power of constituting inferior courts was intended to obviate the necessity of resorting to the Supreme Court in every case of federal cognizance. These courts would be empowered to determine matters of federal jurisdiction within certain defined areas. The objection of the Anti-Federalists, frequently referred to, that state courts could handle this jurisdiction, was given a triple refutation by Hamilton. First, there was too much of what Hamilton called "local spirit" among the states to qualify their tribunals for jurisdiction of federal cases. The danger of partiality and bias working against the more sovereign state was too great. His apparent disapproval of some state courts was reflected in an added comment: "whilst every man may discover, the courts constituted like those of some states would be improper channels of the Judicial authority of the Union." 30

Hamilton's second reason against using state courts was based on the fact that state judges held their office only during the pleasure of those who appointed them, or for a certain limited number of years, thus endangering an "inflexible execution" of federal laws. Finally, Hamilton believed that "in proportion to the grounds of confidence in, or distrust of the subordinate tri-

29 United States Statutes at Large, I, 78-80.

bunals, ought to be the facility or difficulty of appeals.\textsuperscript{31} Since the author distrusted the state courts, he believed the facility for appeals would have to be very great, but at the same time he considered an unrestrained recourse to appeals a source of public and private inconvenience. To avoid such inconvenience, he advised against using the state courts.

The first direct reference to district courts as a type of federal inferior court, appears in one of Hamilton's Federalist letters. While remaining somewhat noncommittal, he thought the United States should be divided into a number of districts, possibly a half dozen, and each district should have its own court. Hamilton preferred this to a federal court in every state. The judges of these courts, with the help of state judges, could then travel to various parts of their districts to administer justice.\textsuperscript{32} Such a plan was comparatively modest when placed alongside of Sections Two, Three, and Four of the Judiciary Act. Here provision was made, not for half a dozen districts and their courts, but for thirteen of them, and in addition, these districts would be grouped into three circuits with another set of federal courts.\textsuperscript{33} The circuit courts, as actually established, seem to be more in accord with Hamilton's district courts than the district

\textsuperscript{31} Ibid., 565.

\textsuperscript{32} Ibid., 566.

\textsuperscript{33} \textit{United States Statutes at Large}, I, 73-74.
courts of the Judiciary Act. These latter courts had but one judge while the circuit courts were presided over by any two Supreme Court Justices and a district court Judge within the circuit. In place of Supreme Court Justices, Hamilton had proposed state court judges to aid the district court judges.

The preceding chapters have frequently mentioned the Anti-Federalists' concern over the encroachments on state court jurisdiction by the Federal Judiciary. Not a few compromising answers were given on those occasions. None of them fully faced up to the problem as Hamilton did in *The Federalist*. His penetrating analysis of the relationship between state and federal courts, and his judicial principles, were of great value in solving this particular difficulty. Before delving into the technical points, Hamilton emphasized the fact that state courts would retain all preexisting authority which may not be delegated to the Federal Judiciary.34 As for the constitutional clause stating "The Judicial Power of the United States shall be vested in one Supreme Court etc.," Hamilton believed it could be interpreted in one of two ways: that the Supreme Court and subordinate courts would alone have jurisdiction over the causes enumerated, or simply that the national jurisdiction should consist of one Supreme Court and as many subordinate courts as Congress thought proper. The difference between the two interpretations, Hamilton wrote,

was that

The first excludes, the last admits, the concurrent jurisdiction of the State tribunals; and as the first would amount to an alienation of State power by implication, the last appears to me the most natural and the most defensible construction.35

This more defensible construction found its way into the Judiciary Act which granted concurrent jurisdiction for the district and circuit courts with the state courts in all suits of a civil nature at common law or equity where the sum of the matter disputed exceeds $500, and in suits where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.36

The only exclusive jurisdiction reserved to these federal inferior courts concerns crimes and offences cognizable under the authority of the United States. Hamilton admitted that perhaps in time cases growing out of, or being peculiar to the Constitution, would also come under the exclusive cognizance of federal courts, but, he added, "not to allow the State Courts a right of jurisdiction in such cases, can hardly be considered as the abridgment of a preexisting authority."37

The more difficult task of defining the relationship between the federal and state courts in these instances of concurrent jurisdiction was also undertaken by Hamilton. Here,

35 Ibid., 573.
36 United States Statutes at Large, I, 76 and 78.
37 Hamilton, The Federalist, 573.
however, his judicial ideas are not reflected in the Judiciary Act as clearly or completely as some of his other ideas. Hamilton was certain that appeals would lie from federal inferior and state courts to the Supreme Court, since the Constitution explicitly granted this appellate jurisdiction in all cases of federal cognizance.

In answer to the question of whether or not an appeal could be made from a state court to an inferior federal court, Hamilton favored an affirmative reply. He pointed out that the Constitution, in providing for inferior courts, did not specify whether their authority in regard to cases of federal cognizance was to be original, appellate, or both. Therefore it was left to the discretion of the Legislature. Hamilton believed the Legislature should allow for such appeals because it would diminish the motives for multiplying federal courts, contract the appellate jurisdiction of the Supreme Court, and leave the state courts with greater charge of federal cases. The First Congress did not agree with Hamilton in this regard. Nowhere in the Judiciary Act is any provision found for appeals from state courts to inferior federal courts. In several instances, such as in admiralty and maritime cases, appeals are provided for from district courts.

38 Ibid., 575.
39 Ibid., 576.
to circuit courts, but up to this time appeals from state courts were provided only to the Supreme Court of the United States. Later the wisdom of Hamilton's plan will be recognized and accepted by Congress.

If the amount of print devoted to answering an objection against the proposed Constitution is any criterion of the objection's importance, then the guarantee of trial by jury in civil cases was the most important objection of all, at least in Hamilton's eyes. Of the eighty-five Federalist Letters, the longest by far was the eighty-third, treating what Hamilton considered the objection which had "met with most success in the State, and perhaps in several of the other States." The opposition's stand concerning jury trials for civil cases was briefly stated by Hamilton as a surmise that a thing which is only not provided for is entirely abolished. Actually, the Anti-Federalists did not maintain this extreme position. They were afraid to leave this mode of trial to the discretion of the Federal Legislature, which might not be available to them at a time when they would want it. Hamilton's answer, therefore, that the Constitution left the use of juries to the liberty of Congress, either to adopt them or to leave them alone, was not satisfactory.

It has been mentioned several times in this chapter and

40 Ibid., 576.
41 Ibid., 578.
in the preceding one that the Federalist reply to this objection was uniform throughout the states, in that the essential reason given for not defining the mode of trial in civil cases was the great diversity of procedures among the states, rendering any general law, agreeable to all, impossible. Hamilton used this same argument, but, with the forcefulness of a professional propagandist, he concretized this great diversity of procedure by enumerating the different usages of jury trials for civil cases in each of the thirteen states. Although it's an inponderable, the convincing power of such a technique must have been considerable.

Assurances that jury trials would not be abolished, did not therefore mean they would be used in all cases. Hamilton made several reservations in this regard. For cases involving the law of nations, such as admiralty and maritime jurisdictions, he thought a jury was impracticable. He also considered equity jurisdictions, since they were intended to give relief in cases which were exceptions to the general rule, to be too intricate for the deliberations of a jury.\(^{42}\) Even in questions of property, Hamilton thought some other mode of trial might in time be found preferable due to changes continually occurring in the affairs of society. This last named possible exception to jury trial was not insisted on by Hamilton. The two which he firmly believed should

be beyond the intervention of juries, were later made exceptions in the Judiciary Act. Section Nine of the Act provides for civil cases of admiralty and maritime jurisdiction to be tried in district courts without juries;\(^43\) Section Twelve makes the same provision for the circuit courts, adding suits of equity - a jurisdiction not shared with the district courts, as exceptions to trial by jury.\(^44\)

The sound reasoning in *The Federalist*, a quality not too often found in other pamphlets and letters of the day, made it an effective propaganda weapon. Hamilton and his co-authors, fully conscious that it was intended to be such, attempted to make the proposed Constitution as acceptable as possible to the people, and allowed some of the harsher aspects of a strong central government to be lightly treated. However, in the letters just examined, it has been seen that Hamilton unreservedly advocated and defended a strong Federal Judiciary, stronger than what many Federalists desired. If this proposed government was to survive, a strong judiciary was needed, and Hamilton made no effort to disguise the fact.

Both the ratifying conventions and the propaganda material frequently indicated that the seeming defects of the Constitution's Judiciary Article would be cleared up once the

\(^{43}\) *United States Statutes at Large*, I, 77.

\(^{44}\) Ibid., 80.
government was established and Congress was able to enact legislation completing those parts of the Federal Judiciary left vague or undetermined by the Constitution. One step, therefore, still remains to be considered in the formation of the Federal Judiciary System: the deliberations of the First Congress on an act which would supplement the Judiciary Article of the Constitution, and bring into full operation the Judiciary Department of the United States Government.
CHAPTER V

DEBATES ON THE JUDICIARY BILL

IN THE FIRST CONGRESS

Ratification of the Constitution and the establishment of the Federal Government did not ipso facto solve all the vigorously debated judicial questions of the past two years. To supply answers to them and so complete the plan for a Judiciary would be the work of the First Congress. The responsibility was tremendous. The formation of the Government was still in progress, especially its judiciary branch, and whether or not the plan for it would continue to develop along Federalist lines or be modified by Anti-Federalists, depended now on the members of the First Congress. Fully appreciating the importance of the representative and senatorial appointments about to be made, Washington wrote to a friend:

As the period is now rapidly approaching which must decide the fate of the new Constitution, as to the manner of its being carried into execution, and probably as to its usefulness, it is not wonderful that we should all feel an unusual degree of anxiety on the occasion.¹

In the same letter Washington warned that if advocates of the Constitution relaxed their exertions, appointments of Anti-Federalist men would take place, and endanger the success of the Federalists' work.

Government growth now will be largely a matter of legislative enactment without being subjected to the expediency of compromise or subordinated to the approval of state conventions. Understanding, therefore, the convictions and political attitudes of the men appointed to the First Congress is necessary for appreciating much of the "how" and "why" in the future formation of the Government's Judiciary. Though Wednesday, March 4, 1789, was the opening day of Congress, it was not till Monday, April 6th, when Richard Henry Lee arrived from Virginia, that a quorum of senators was present for the enactment of business. During the Senate debates on the Judiciary Bill twenty senators were in attendance; Rufus King and Philip Schuyler of New York did not arrive until July 25th and 27th respectively, about eight days after the senate work on the Judiciary Bill had been completed. North Carolina's senators did not arrive until 1790. Of the twenty senators present, ten had participated in the Constitutional Convention. Among their number were such ardent Federalists as Caleb Strong of Massachusetts, Oliver Ellsworth of Connecticut,

2 The Debates and Proceedings of the Congress of the United States, Washington, 1834, 1, 52. This volume will henceforth be referred to as The Annals of Congress.
Pierce Butler of South Carolina, and Charles Carroll of Maryland. At least thirteen of the twenty were known to be Federalists. In the House, where the Judiciary Bill was severely challenged, the membership was still more predominantly Federalist. Fifty-five representatives from eleven States attended the first session which finally attained a quorum on April 1st. Of these fifty-five, only nine helped to draft the Constitution, but approximately two-thirds of them were staunch Federalists such as Madison of Virginia, Fisher Ames of Massachusetts, William Smith of South Carolina, and Daniel Carroll of Maryland. Charles Beard observed that of the forty-four members of the First Congress "who had been instrumental in the formation and adoption of the Constitution, thirty-seven were reckoned as its advocates and champions."³

This Federalist majority was a major factor in the formation of the Judiciary Act; not that it met with no opposition, but that in spite of vigorous opposition, when the time came for a show down, it was numbers that counted.

On the second day of the Senate session a committee was appointed to bring in a bill for organizing the Judiciary of the United States. Those appointed were Ellsworth, Paterson, Maclay, Strong, Lee, Bassett, Few and Wingate. Two days later Charles Carroll of Maryland and Ralph Izard of South Carolina were added

to the committee. Of these men, Ellsworth, Paterson, Strong, Bassett, Few, Carroll, and Izard had definite Federalist leanings.

Unfortunate for historians, the procedure adopted by the Senate, after bills had been given a second reading, was to consider them "in the same manner as if the Senate were in a meeting of the whole, before they shall be taken up and proceeded upon by the Senate." The discussions and debates, therefore, were not recorded, and so little is known of the arguments presented. This much general information is in the *Annals of Congress*. Better than two months were taken up by the committee appointed to draft the Judiciary Bill. On June 12th, Richard Henry Lee, ironically enough, reported to the Senate a bill to establish the courts of the United States. The second reading of the Bill was on June 22nd, after which began the unrecorded meetings of the committee of the whole. The only information given out on these meetings of the next eighteen days is "after progress, adjourned," or "after debate, adjourned." On these days the sole business of the Senate was the consideration of the Judiciary Bill. Finally, after a third reading, the bill was recommitted. Then, on July 17th, the engrossed Bill was read to the Senate, and when the question was asked, "Shall the bill pass?" the vote was as follows:


Interest in the content of the Judiciary Bill ran high, not only in Congress, but also among the general public. Although the Draft Bill was unusually long, it was published in several newspapers shortly after submission to the Senate. The Pennsylvania Packet and Daily Advertiser of June 29, 1789, printed the complete text under the title "A Bill to establish the Judicial Courts of the United States."

In the early part of this century, Charles Warren discovered some valuable documents which help to supply some of the information which the Annals of Congress fail to do. Among them he lists an original draft of the Judiciary Bill as introduced into the Senate, the original amendments to the Draft Bill submitted during the committee and Senate debates, and finally a copy of the Bill as it passed by the Senate and sent to the House. These reveal a number of alterations which the Bill underwent, some of them of major importance, and this contrary to the assumption of earlier constitutional historians.

The original draft made provision in cases between citizens of the same state claiming lands under grants of different states, for the defendant only to remove such cases into a federal circuit court. The Draft Bill was amended in the Senate so as to

6 Ibid.
allow either defendant or plaintiff to transfer the case to the federal court. Under the original provision, if the defendant's land claim was from the state in which the case was tried, and the decision of the court, possibly inclined to be partial to its own state, favored the defendant, there was nothing the plaintiff could do. By the Senate amendment a more just procedure for handling such cases was made whereby either party, fearing the partiality of the state court, could remove the case to a federal circuit court. Hamilton's warning on partial or biased state courts was being heeded.

One of the most significant changes made by the Senate concerned the jurisdiction of the Supreme Court. A constitutional provision gave this tribunal original jurisdiction in cases where a State shall be a party; in cases between a State or the citizens of a State and a foreign State the Supreme Court was given appellate jurisdiction, allowing for exceptions and regulations to be made by Congress. The Senate Draft Bill, then, sought to regulate the Supreme Court's jurisdiction by granting it exclusive jurisdiction in all cases of a civil nature where a state or a foreign State was a party. The term "exclusive jurisdiction" never appears in the Constitution's Judiciary Article. It was this cognizance of cases involving a State which had caused George Mason to cry out

in the Virginia Convention, "Is this State to be brought before a bar of justice like a delinquent individual?" Everywhere Anti-Federalists tried to prevent this judicial encroachment on state sovereignty. Now, in the final state of the Federal courts' formation, they succeeded in limiting what they feared would be a judicial power to end all other judicial powers. This limitation was accomplished in two ways. The words "or a foreign State" were deleted from the Draft Bill, and after the word "party" the words "except between a State and its citizens" were inserted. The final reading of the Judiciary Bill's thirteenth section thus read:

That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which case it shall have original but not exclusive jurisdiction.

A still further limitation on federal judicial power confined much of the appellate jurisdictions to "writs of error", and so restricted appeals to questions of law.

The fear expressed in several state conventions that trial by jury in the vicinage was not safeguarded by the Constitution was alleviated by another change in the original Draft Bill. Lee and Grayson of Virginia proposed an amendment in the Senate

8 Ibid., 93
9 United States Statutes at Large, I, 80.
that "in criminal cases when the punishment is capital, the petit jury shall come from the body of the county where the fact was committed." Their amendment was defeated in the Senate, but when the Bill came back from the House, a slightly modified version of it was included.

The original Draft Bill also limited the district courts by confining their jurisdiction to "crimes and offences that shall be cognizable under the authority of the United States, and defined by the limits of the same." This last phrase meant that criminal jurisdiction would be limited to those specifically defined by Congress, thus excluding federal jurisdiction from common law crimes and crimes under the law of nations. This limiting phrase does not appear in the text of the Judiciary Act. Instead, it provides only that "district courts shall have cognizance, exclusively of the courts of the several states, of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas."12

Another attempt on the part of the Anti-Federalists to alter the federal court procedures was the proposal of an amendment providing for a jury trial of facts "on any hearing of a

11 Ibid., 105-106.
12 United States Statutes at Large, I, 76-77.
cause in equity in a Circuit Court." Had this amendment been accepted, it would have revolutionized equity procedure in the courts. Here again the Senate refused to have the federal judicial power restrained and defeated the amendment.

Opposition to federal jurisdiction in controversies between citizens of different states had won much sympathy in the course of the state conventions and propaganda battles. Fear of setting aside state laws had been expressed by several orators and writers. Actually, the purpose of this jurisdiction, as already noted, was to afford a tribunal in which a foreigner or citizen of another state might have the law administered free from local prejudices or passions which might prevail in a state court, and so prevent discrimination against such people in the application of justice. There appears to have been no intention of putting aside state laws in favor of Federal, but to allay any apprehensions to the contrary, the Senate amended the Draft Bill by adding Section Thirty-four which stated

That the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.14

These various modifications of the judiciary plan, at


14 United States Statutes at Large, I, 92.
least insofar as they remained a part of the Draft Bill in the Senate committee debates, prompted Richard Henry Lee to write to a fellow Anti-Federalist, Patrick Henry, on May 28th that in the Senate, a plan is forming for establishing the judiciary system. So far as this has gone, I am satisfied to see a spirit prevailing that promises to send this system out free of the vexations and abuses that might have been warranted by the terms of the constitution.¹⁵

Besides the valuable information supplied by Charles Warren on the Senate debates over the proposed Judiciary Bill, little else is known about it. William Maclay of Pennsylvania has left a few interesting observations in his personal sketches of the first Senate debates. Maclay was both a member of the Senate and of the committee appointed to draw up the Judiciary Bill. While professing to dislike the Bill very much, he wrote that he had sought to make it as perfect as possible by amending it. "But," he wrote, "it was fabricated by a knot of lawyers, who join hue and cry to run down any person who will venture to say one word about it."¹⁶ Allowing for Maclay's strong prejudice, it is quite likely the knot of lawyers to whom he referred were the Federalist members of the committee. On another occasion Maclay commented, "The bill is a child of his (Ellsworth), and he defends it with


¹⁶ William Maclay, Sketches of Debates in the First Senate of the United States, George W. Harris, ed., Harrisburg, 1880, 93.
the care of a parent, even with wrath and anger."17 Another confirmation of the major part played by Ellsworth in drafting the Judiciary Act appeared in a letter many years later. Joseph Wood, a son-in-law of Ellsworth, wrote to James Madison requesting information for a biography he was writing of his father-in-law. While Madison, at this time a man of eighty-five years, was unable to supply much definite information, he did believe "that the bill for organizing the Judicial Department originated in his draft, and it was not materially changed in its passage into a law."18 Warren's findings have since made Madison's last remark somewhat inaccurate, but his naming Ellsworth as the main drafter of the Bill has not been questioned.

On Friday, July 17th, the Senate Judiciary Bill was sent to the House for concurrence. The following Monday the Bill was read to the House and then ordered to be committed to a Committee of the Whole House on the following Monday. Due, however, to several other pressing matters before the House, such as constitutional amendments and Indian Treaties, it did not come up for discussion until August 24th.

At the very outset of the House discussions on the Bill, Samuel Livermore of New Hampshire, boldly sought to strike out the

17 Ibid., 90.

18 Letters and Other Writings of James Madison, New York, 1884, IV, 428.
whole clause establishing Judges of a Supreme Court, claiming that such a provision would "lead to an entirely new system of jurisprudence, and fill every State in the Union with two kinds of courts for the trial of many causes." A few days later he attempted to strike out the section providing for district courts. Livermore predicted that the fate of the whole Bill depended upon the fate of this clause. He contended that the expense of paying salaries to thirteen district judges and for buildings to accommodate them, would be a considerable burden. Further he believed that justice could as well be administered in the state courts as in the district courts, but if there was some apprehension of partiality in their decisions, there could be an appeal to the Federal Supreme Court, which in his opinion afforded sufficient security.20

Replied to Livermore, William Smith of South Carolina followed very much the line of reasoning of Hamilton in The Federalist. He pointed out that if state courts had cognizance of causes which by the Constitution are granted to the judicial courts of the United States, then an appeal from these state courts to the Supreme Court would be indispensable for maintaining uniformity of decisions and bringing them into one focus.21 Such constant con-

20 Pennsylvania Gazette, September 2, 1789.
trol of the Federal Supreme Court over the adjudications of the state courts would, Smith thought, dissatisfy the people and weaken the importance and authority of the state judges.

As a second reason for retaining the district court clause, Smith declared that the Constitution had vested the judicial power of the United States "in one supreme and in such inferior courts as Congress shall from time to time establish."22 He therefore maintained that Congress had no discretion in the matter but had to establish inferior courts. James Jackson of Georgia immediately came to Livermore's defense. He wisely pointed out that the Constitution did not absolutely require inferior jurisdictions. Correcting Smith, he said the Constitution vested judicial power in one supreme court and in such inferior courts as Congress may from time to time ordain and establish. The latter reading of may and not shall, is found in the Constitution. Jackson then claimed the word "may" was not positive; that it left Congress free to determine whether or not inferior courts were necessary or expedient. Most important, he argued, there was no obligation to establish them. As far as expediency was concerned, he believed "the State courts would answer every judiciary purpose."23 Jackson also considered the added system of courts vexatious, depriving an offender of many judicial rights he was at

22 Ibid., 801. Italics not in the original.
23 Ibid., 302.
present enjoying in state courts. Only if experience showed an absolute necessity for inferior courts, would he agree to them, but he refused to oppress his fellow citizens without first being taught by experience. 24

Egbert Benson of New York apparently discounted Jackson’s distinction between the meaning of "shall" and "may". Claiming the Legislature had no choice whether or not to adopt the judicial system before the House, he said, "the words of the Constitution are plain and full, and must be carried into operation." 25 Benson then concluded in true Federalist fashion by saying that whether or not the inferior courts would interfere with the state judiciaries was a matter that only experience could determine; possibly the provisions of the clause would even involve the assumption of the whole judicial power; nevertheless, he was convinced that the clause did nothing more than take up the letter and spirit of the Constitution. 26

This problem of the Constitution leaving the establishment of inferior courts to the discretion of Congress, or imposing the task upon it, was never objectively resolved. Smith sought to justify his position by later claiming that the Constitution's

24 Ibid., 804.
25 Ibid.
26 Pennsylvania Packet and Daily Advertiser, September 12, 1789.
words "in such inferior courts as the Congress" etc., apply to the number and quality of these courts, and not to the possibility of excluding them altogether.27 That Congress must establish some inferior courts was to Smith's mind beyond doubt.

At the next meeting of the committee, Stone of Maryland challenged Smith's argument that the Constitution commanded the establishment of inferior courts. If that were true, then, he retorted, the words "from time to time" were meaningless and left nothing to the discretion of Congress. Moreover, he claimed that it was not the idea of the Constitutional Convention that the Federal Judiciary's power should be so extended as positively to take in all the cases enumerated; had it been, explicit provision would have been made. Stone interpreted this power as potential, Congress could extend Federal jurisdiction to these cases, but was not compelled to do so.28

In quick succession indignant Federalists came to the defense of their plan. Theodore Sedgwick of Massachusetts asked if it was not essential that a government possess within itself the power necessary to carry its laws into execution. To propose to leave this business to a foreign authority, totally independent of Congress, was in his opinion, imprudent.29 Another Massachu-

28 Ibid., 823.
29 Ibid., 805
setts Representative, Fisher Ames, felt that until miracles became more common than ordinary events, it would be

a wonderful felicity of invention to propose the expedient of hiring out our judicial power, and employing courts not amenable to our laws, instead of instituting them ourselves as the Constitution requires.30

While admitting that state courts would not be deprived of jurisdictions they had exercised prior to the adoption of the Constitution, Ames asked who would try cases against the statutes of the United States or actions created de novo. He firmly believed these were of exclusive Federal jurisdiction and should be tried only by judges commissioned to do so. Cognizance of these matters along with admiralty jurisdictions would, he thought, constitute the principle powers of the district courts.31

Reserving actions which arise de novo to Federal judges posed a difficulty to Stone. Judges, he said, were bound not only to act upon laws passed, but to obey all that may hereafter pass. If, as Fisher Ames asserted, judges cannot take cognizance of laws de novo, then they cannot take notice of the adoption of the Federal Constitution or any law passed after their appointment.32 Such an attempt at a reductio ad absurdum reveals rather the obstinate opposition of the Anti-Federalists than any effort to resolve the

30 Ibid., 807.
31 Ibid., 808.
32 Ibid., 825.
difficulty. Ames erred in thinking that actions de novo should be reserved exclusively to Federal jurisdiction; Stone overlooked, by accident or design, the fact that the action de novo referred to pertained to a new government, not to the government of the state, and so jurisdictions over which state judges had not been given cognizance might be involved.

A Federalist attempt to push the Bill through the House by calling the question was thwarted by Stone of Maryland who insisted the Bill had not yet undergone sufficient discussion. Before he could reconcile himself to the proposed plan, he wanted to be convinced that it was now essential to establish inferior Federal courts. Returning to Jackson's argument, he concurred in the opinion that Congress may establish courts from time to time meant that Congress may establish such courts when it thought proper. Stone did not believe the time was yet proper since the state courts were capable of handling all jurisdictions other than those of admiralty. Allowing for the possibility that someday a state court would not execute the judicial power entrusted to it, he nevertheless was opposed to establishing a system which presupposed such a situation.33

James Madison, who had been largely responsible for writing the inferior court provision into the Constitution, discounted

33 Ibid., 811.
any use of state courts because too many of them were so constituted as to be dependent on state legislatures, and so were unsuitable for the jurisdiction of Federal laws.\textsuperscript{34}

Refusing to abandon the fight against inferior courts, Jackson attempted to refute each of the Federalists just mentioned. He concentrated on Madison's assertion that state courts ought not to have jurisdiction of Federal laws. Both the eleventh and twenty-fifth sections of the Bill before the House had, he claimed, already given state courts such jurisdictions, either by allowing for concurrent jurisdiction with Federal courts in specified cases, or by appeals permitted from State courts to the Supreme Court in certain matters involving the Federal Government.\textsuperscript{35} While using the twenty-fifth section to justify his claim, Jackson also took the occasion to oppose it, saying "the extent of its power, even supposing the District and Circuit courts abolished, swallows up every shadow of a State Judiciary."\textsuperscript{36} The futility of such well intended refutations is indicated in a short dialogue between Gerry of Massachusetts and Burke of South Carolina. Gerry politely reprimanded Burke for giving up his opposition to the proposed plan, saying he should not tire out like a jury. Burke's reply is very suggestive of the Federalist control of the House. He

\begin{itemize}
\item \textsuperscript{34} Ibid., 813.
\item \textsuperscript{35} Ibid., 814.
\item \textsuperscript{36} Ibid., 815.
\end{itemize}
said that he was not tired with the discussion, "but was satisfied that the opposition must be unsuccessful."37

Elbridge Gerry of Massachusetts, a delegate to the Constitutional Convention who refused to sign the completed document, took something of a fatalistic attitude toward developments. Although foreseeing a clash between the Federal and state judiciaries, he opposed striking out the district court clause because he believed Congress was bound to support and administer the Constitution, which included the establishment of these inferior courts "let what will be the consequence."38 For all his strong Anti-Federalist tendencies, Gerry could not see how the state courts could be made Federal courts. The constitutional provisions of these governments were so completely opposed that he considered this alone an insuperable bar to the alternate plan proposed by his fellow Anti-Federalists. This particular problem was nonexistent for Livermore because he believed the Sixth Article of the Constitution binding the judicial officers of the Federal and state governments to support the Constitution and laws of the United States would prevent any possible conflict.39

At every turn the Anti-Federalists were prepared to counter the attempts to establish inferior Federal courts. The

37 Ibid., 819-820.
38 Ibid., 829.
39 Ibid., 831.
cautious position taken by many as the debates wore on seemed not to be one of unalterable opposition to these courts, but rather a hopeful delaying action; delaying in that they wanted to wait and see if such courts would be absolutely necessary for the operation of the Government, hopeful in that they trusted future events would prove there was no absolute necessity. Thomas Sumpter of South Carolina injected still another reason for this cautious position. Knowing the sentiments of his fellow South Carolinians, he feared these courts would be too oppressive and expensive to be agreeable to them. This he felt was an important consideration since the Constitution had been adopted but by a small majority of the people, if any majority at all, and therefore it would be dangerous for the Government now to assume an authority for which there was not an absolute need. 40

The last attempt to prevent approval of these courts came from Burke of South Carolina. In words suggestive of desperation, he told the Congress that he trusted Livermore's motion to strike out the third clause regarding district courts was tantamount to throwing out the whole Bill, and he strongly favored the idea because, in addition to the reasons he had already offered against the Bill, he believed the twenty-ninth section of it would deprive citizens of the right of jury trial in the vicinage of where the action was committed. Burke's description of the in-

40 Ibid., 832-833.
justices consequent upon neglecting such a right succeeded in bringing about a notable amendment to this section similar to that of Lee and Grayson rejected in the Senate. The amendment approved by the House provided that an offender in cases of capital punishment be tried in the county where the offense was committed.41

When Livermore's motion to strike out the third clause of the Judiciary Bill was finally put to a vote, eleven members of the House signified approval and thirty-one opposed it.

Discussion of the Bill continued at intervals through the first two weeks of September. Little is known of what was debated, as neither the Journal of the House nor the Annals of Congress nor newspaper accounts yield much information. On September 14th, the Committee of the Whole reported the Judiciary Bill to the House with an estimated sixty-three amendments, mostly verbal or concerned with the details of technical sections.42

On September 17th, the Judiciary Bill finally came before the House for a vote. There was little doubt of whether or not it would be approved, but before officially bowing in defeat, Mr. Gerry, as a spokesman for the Anti-Federalists, observed that as it was acknowledged the Bill was an experiment, and as it had been

41 Pennsylvania Packet, September 18, 1789.

percipitated through the House, he wished, if it did pass, that a
clause to limit its duration might be added. In true conformity
to the rules of debating, the affirmative and not the negative was
given the last rebuttal. Replying to Gerry, Madison said that all
legislative acts were necessarily experimental and must be so until
mankind possesses perfect wisdom and foreknowledge. Admitting
that experience might reveal the Bill's defects, and even that it
was not entirely agreeable to his mind, he still believed it was
as perfect as could be formed at this time. Madison concluded by
remarking that had the Bill been enacted in the form in which it
came from the Senate, he would have been bound to vote against it.
However, he now believed the amendments made by the House had re-
moved the principle objections to it. When the Judiciary Bill
was put to a vote, the Annals of Congress simply records that it
"was read a third time and passed." The votes as recorded in the
New York Journal were:

Ayes - Ames, Baldwin, Benson, Boudinot, Brown, Cadwallader,
Carroll, Clymer, Contee, Fitzsimons, Foster, Gale,
Gilman, Goodhue, Griffin, Hartley, Heister, Huntington,
Lawrence, Lee, Madison, Moore, P. Muhlenberg,
Page, Schurman, Sherman, Scott, Sylvester, Sinnick-
sin, Smith (Md.), Smith (S.C.), Thatcher, Trumbull,
Vining, Wadsworth, White, Wynkoop.

Noes - Bland, Burke, Coles, Floyd, Gerry, Grout, Harthorn,

43 New York Journal, September 24, 1789.
44 Ibid.,
45 Pennsylvania Gazette, September 23, 1789.
Jackson, Livermore, Matthews, Parker, Van Rensselaer, Seney, Stone, Sumpter, Tucker. 46

The Federalists had triumphed. Better than two-thirds of the House voiced approval of their plan for completing the Federal Judiciary System begun with the Judiciary Article of the Constitution.

45 New York Journal, September 24, 1789.
CHAPTER VI

CONCLUSION

On September 24, 1789, the Judiciary Bill was approved by President Washington and became a part of the statute law of the United States. Besides establishing Federal District and Circuit Courts, defining their jurisdictions, prescribing their manner of procedure, and detailing the make-up of the Supreme Court and its jurisdictions more definitely than the provisions of the Constitution, the Act also instituted in its last section the office of Attorney General. Never in the proceedings of the First Congress was this particular section assailed, although the Anti-Federalists' complaint about the oppressive expense of the system must certainly have included the salaries to be paid to thirteen United States attorneys in each of the thirteen districts, and one Attorney General and his staff. It is little wonder that, reflecting upon the contents of this Act, Chief Justice Hughes, in an address before Congress at its sesquicentennial celebration, called it "a statute which is a monument of wisdom, one of the most satisfactory in the long history of notable congressional legislation," and which could "take rank in our annals as next in
importance to the Constitution itself.\(^1\)

Stepping back now for a moment to review this gradual formation of the Federal Judiciary System, a few pertinent observations can be made. The first concerns the element of compromise in the Act just considered. Charles Warren, after analyzing the judiciary documents which he had located, was strongly convinced that the Judiciary Act was a compromise measure. "Its provisions," he wrote, "completely satisfied no one, though they pleased the Anti-Federalists more than the Federalists."\(^2\) This opinion seems to have been too much affected by his documentary findings which, it must be remembered, pertained mostly to the Bill's formation in the Senate. While it may be granted that the Bill underwent many insertions and deletions, it would be erroneous to consider all these changes synonymous with compromises. The Federalists themselves sought and obtained many changes. The question, therefore, is not whether or not the Judiciary Act was a compromise measure, but to what extent was it a compromise, and who benefited most by the compromise.

Federalists efforts to invest the inferior courts with all the judicial powers granted by the Constitution were diametri-


cally opposed by the Anti-Federalist efforts to eliminate inferior courts and retain all Federal jurisdictions in the first instance in the state courts. The result was a compromise. State courts were given concurrent jurisdiction with Federal courts over many causes of Federal jurisdictions. Few sections of the Judiciary Act contain more fundamental provisions for the Federal Judiciary than those establishing inferior courts. In the House the most concentrated opposition to the Bill was against these courts. To keep the provisions for them at the expense of sharing some of their jurisdictions, while considered a compromise, still strengthened the Federalist plan. Other points on which compromises were made regarded limitations of Federal jurisdictions, especially in reference to causes involving a State and its citizens, and the extent of appellate jurisdiction. In two other instances their opposition to the Bill resulted with insertions of much importance. The Anti-Federalists succeeded in having the right of trial by jury in the vicinage made explicit and they insured the use of state laws by Federal Courts in trials at common law by adding section thirty-four to the Bill.

It was not, however, a matter of yielding to whatever the Anti-Federalists demanded in order to obtain the passage of the Bill. Efforts to have the offenses cognizable under the authority of the United States defined and limited by Congress were defeated, as were the attempts to require juries in hearing
causes in equity. The only instance where the Journal of the Senate gives any details on the Senate debates occurs in connection with the Anti-Federalist endeavors to have circuit courts put in writing the facts on which they based their decisions, and to prevent a Justice who had presided at a case in a circuit court from participating in rendering a decision on the same case in the Supreme Court. In both instances the Journal records the motions were "passed in the negative."³

Preserving the essential parts of the Bill from alteration and consenting to certain changes, some of which many Federalists had previously been on record as advocating, was a cause of much satisfaction to the Federalists inside and outside of Congress, certainly more so than to the Anti-Federalists. This is no mere conjecture, it stems from the final content of the Act and the reactions of the parties involved.

Taking a still broader view of the Judiciary System's formation, it becomes still more manifest that credit for the positive work done is due to the Federalist faction. It was their basic plan for a judiciary as put forth in the Virginia Plan, which the Constitutional Convention chose to consider. It was their defense of the plan in this same Convention which finally succeeded in having it written into the Constitution. It was their con-

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continued defense of the plan against numerous weighty objections in the state ratifying conventions which won acceptance of its provisions and contributed to the ratification of the Constitution. It was their sustained efforts in various forms of propaganda which made this plan understood by, and agreeable to, the citizens of the states. Finally, it was their Senate members who were responsible for the detailed completion of the plan as it appeared in the Judiciary Bill.

Three unsuccessful attempts to change the judiciary system would seem, in retrospect, to have been advantageous if they had been adopted. One was Hamilton's interpretation of the Supreme Court's jurisdiction as extending even to voiding acts of Congress as being unconstitutional. In later years this extension would come about as an application of the twenty-fifth section of the Judiciary Act, but only after much confusion over judicial review had been aroused. A second change which it now appears would have improved the judicial system, was the Anti-Federalist determination to keep Federal jurisdiction of many causes in the first instance in the hands of state courts. By this is not meant that the Federal inferior courts should not have been established, but that more jurisdiction should have been shared with state courts, or have been given their cognizance in the first instance with the right of appeal to a Federal district or circuit courts as Hamilton had advocated in The Federalist. Such develop-
ments, since the end of the eighteenth century, have been necessitated by the vast increase of Federal jurisdictions. Yet it must be allowed to the credit of the framers of the judiciary system that such provisions were not made because at the time too many state courts were poorly constituted, and dominated less by a sense of Federal union than by state sovereignty. Had these men been confronted with the reputable judiciaries and learned jurists of the states in the twentieth century, they would perhaps have been more yielding to the insistent demands of the Anti-Federalists.

The last change which could easily have been incorporated into the Judiciary Act, but for some unexplainable reason was never openly discussed except in the Virginia Ratifying Convention, concerns the guarantee that a State could not be brought before the Supreme Court as a defendant. Neither Madison, Marshall, or Pendleton were able to offer satisfactory explanations to Mason and Patrick Henry at the time this encroachment on state sovereignty was debated. Still a remedy against such an infringement was never provided or even offered in subsequent discussions of the judiciary in the Senate or House sessions. As a result, when an actual attempt to bring a state as a defendant before the Supreme Court occurred in 1793, in the famous Chisholm vs. Georgia Case, the problem turned into a heated national issue which was not resolved until the eleventh amendment was added to the Constitution.

To view the formation of the Federal Judiciary System as
solely the work of Federalists except for certain compromises, would be misjudging the work as much as to call it a compromise product of the Anti-Federalists. The opposition in se was invalu­able. It caused Federalists to proceed more cautiously, to be more sensitive to the rights of the people and the states, to guard their plan more carefully against alterations which might render it unworkable, to defend and make acceptable its provisions in conventions, in Congress, in newspapers and marketplaces. Throughout this long debate the staunch opposition of Anti-Federalists seldom permitted Federalists to become lax, indifferent, or tyrannical, and it prevented the establishment of a strong Federal Ju­diciary at the expense of justice. Paradoxically, the opposition of the Anti-Federalists played no small part in the ultimate suc­cess of the Federalist plan.

One last consideration must be made in the interest of historical accuracy. Much of the material used in the last chap­ter on the debates in Congress is subject to some bias. Not only the newspaper accounts but even the contents of the Annals of Con­gress were reported by men whose impartiality toward the political factions of the time was questioned. In many places the arguments given in the Annals of Congress are the same, even in wording, as those in the newspapers. This similarity inclines one to believe that the "authentic materials" from which Joseph Gales, Sr. com­plied the Annals of Congress were actually taken from such accounts
as were found in the Congressional Register, the Gazette of the United States, and the newspapers which copied them. Regular advertisements appeared in the New York Journal notifying the public that another issue of the Congressional Register or the Debates in Congress "taken in Short Hand by Thomas Lloyd" was published and ready for sale.⁴

Suspicion of bias and partiality has been cast on these and other accounts by an article which appeared in the New York Journal on September 24, 1789, the same day the Judiciary Bill became law. By way of an introductory remark, the article said:

The following motion made Monday, in the House of Representatives of the United States, which is supposed to respect Francis Childs, printer of the Daily Advertiser, John Feno, printer of the Gazette of the United States, and Thomas Lloyd, editor of the Congressional Register, was laid on the table for consideration of the members.⁵

The motion was made by Burke of South Carolina and read in part:

Resolved: That the several persons who have published the debates of this House in the Congressional Register and in newspapers of this city, have misrepresented those debates, in the most glaring divergences from the truth - Often distorting the arguments of members from the true meaning - imputing to some gentlemen arguments, contradictory or foreign to the subject, and which were never advanced - to others, remarks and observations never made, and in a great many instances mutilating, and not infrequently suppressing whole arguments upon subjects of greatest moment - and thus throwing over the whole proceedings a thick veil of misrepresentation and error.⁶

⁴ New York Journal, September 3, 1789.
⁵ Ibid., September 24, 1789.
⁶ Ibid.
When the House considered Burke's resolution on the following Saturday, the only comment given by the newspapers was that "a warm debate ensued, after which Mr. Burke withdrew his motion." Even this bit of reporting was contested in later issues of the paper by an indignant eyewitness who claimed that Burke did not withdraw his motion but said he would renew discussion of it at a later session when there was more time.

For such a motion even to have been made, there must have been some foundation in fact; how much, it is impossible to determine because there are no other records with which these newspaper accounts can be compared and because the matter, being highly charged with political prejudice, has rendered the task of determining where the truth ends and the distortions begin a hopeless one. If Burke's accusations were in any degree correct, then to a corresponding degree some injustice was done in the last chapter in evaluating the Anti-Federalist position during the First Session of Congress.

Even when allowance has been made for such unintentional injustice, the final decision of this momentous debate must be awarded, not ex aequo to the participating parties, but decidedly to those who defended the Federalist position.

7 Ibid., October 1, 1789.
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APPROVAL SHEET

The thesis submitted by Mr. James William Moore, S.J., has been read and approved by three members of the Department of History.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the degree of Master of Arts.

March 10, 1957
Date

Charles H. Metzger, S.J.
Signature of Advisor