

James Madison in the Virginia Convention, 20 June 1788

Mr. Chairman.—Permit me to make a few observations which may place this part in a more favourable light than the Gentleman [George Mason] placed it in yesterday. It may be proper to remark, that the organization of the General Government for the United States, was, in all its parts, very difficult.—There was a peculiar difficulty in that of the Executive.—Every thing incident to it, must have participated of that difficulty.—That mode which was judged most expedient was adopted, till experience should point out one more eligible.—This part was also attended with difficulties. It claims the indulgence of a fair and liberal interpretation. I will not deny that, according to my view of the subject, a more accurate attention might place it in terms which would exclude some of the objections now made to it. But if we take a liberal construction, I think we shall find nothing dangerous or inadmissible in it. In compositions of this kind, it is difficult to avoid technical terms which have the same meaning. An attention to this may satisfy Gentlemen, that precision was not so easily obtained as may be imagined. I will illustrate this by one thing in the Constitution.—There is a general power to provide Courts to try felonies and piracies committed on the high seas.—*Piracy* is a word which may be considered as a term of the law of nations.—*Felony* is a word unknown to the law of nations, and is to be found in the British laws, and from thence adopted in the laws of these States. It was thought dishonorable to have recourse to that standard. A technical term of the law of nations is therefore used, that we should find ourselves authorised to introduce it into the laws of the United States. The first question which I shall consider, is, whether the subjects of its cognizance be proper subjects of a federal jurisdiction. The second will be, whether the provisions respecting it be consistent with safety and propriety, will answer the purposes intended, and suit local circumstances. The first class of cases to which its jurisdiction extends, are those which may arise under the Constitution; and this is to extend to equity as well as law. It may be no misfortune that in organizing any Government, the explication of its authority should be left to any of its co-ordinate branches. There is no example in any country where it is otherwise.—There is a new policy in submitting it to the Judiciary of the United States. That causes of a federal nature will arise, will be obvious to every Gentleman, who will recollect that the States are laid under restrictions; and that the rights of the Union are secured by these restrictions. They may involve equitable as well as legal controversies. With respect to the laws of the Union, it is so necessary and expedient that the Judicial power should correspond with the Legislative, that it has not been objected to. With respect to treaties, there is a peculiar propriety in the Judiciary expounding them.—These may involve us in controversies with foreign nations. It is necessary therefore, that they should be determined in the Courts of the General Government. There are strong reasons why there should be a Supreme Court to decide such disputes. If in any case uniformity be necessary, it must be in the exposition of treaties. The establishment of one revisionary superintending power, can alone secure such uniformity.—The same principles hold with respect to cases affecting Ambassadors, and foreign Ministers.—To the same principles may also be referred their cognizance in Admiralty and maritime cases. As our intercourse with foreign nations will be affected by decisions of this kind, they ought to be uniform. This can only be done by giving the Federal Judiciary exclusive jurisdiction. Controversies affecting the interest of the United States, ought to be determined by their own Judiciary, and not be left to partial local tribunals.

The next case, where two or more States are the parties, is not objected to. Provision is made for this by the existing articles of Confederation; and there can be no impropriety in referring such disputes to this tribunal.

Its jurisdiction in controversies between a State and citizens of another State, is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into Court. The only operation it can have, is, that if a State should wish to bring suit against a citizen, it must be brought before the Federal Court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim, being dissatisfied with the State Courts. It is a case which cannot often happen, and if it should be found improper, it will be altered. But it may be attended with good effects. This may be illustrated by other cases. It is provided, that citizens of different States may be carried to the Federal Court.—But this will not go beyond the cases where they may be parties. A *feme covert* may be a citizen of another State, but cannot be a party in this Court. A subject of a foreign power having a dispute with a citizen of this State, may carry it to the Federal Court; but an alien enemy cannot bring suit at all. It appears to me, that this can have no operation but this—to give a citizen a right to be heard in the Federal Court; and if a State should condescend to be a party, this Court may take cognizance of it.

As to its cognizance of disputes between citizens of different States, I will not say it is a matter of such importance. Perhaps it might be left to the State Courts. But I sincerely believe this provision will be rather salutary, than otherwise. It may happen that a strong prejudice may arise in some States, against the citizens of others, who may have claims against them. We know what tardy, and even defective administration of justice, has happened in some States. A citizen of another State might not chance to get justice in a State Court, and at all events he might think himself injured.

To the next clause there is no objection.

The next case provides for disputes between a foreign State, and one of our States, should such a case ever arise; and between a citizen and a foreign citizen or subject. I do not conceive that any controversy can ever be decided in these Courts, between an American State and a foreign State, without the consent of the parties. If they consent, provision is here made. The disputes ought to be tried by the national tribunal. This is consonant to the law of nations. Could there be a more favourable or eligible provision to avoid controversies with foreign powers? Ought it to be put in the power of a member of the Union to drag the whole community into war? As the national tribunal is to decide, justice will be done. It appears to me from this review, that, though on some of the subjects of this jurisdiction, it may seldom or never operate, and though others be of inferior consideration, yet they are mostly of great importance, and indispensably necessary.

The second question which I proposed to consider, was, whether such organization be made as would be safe and convenient for the States and the people at large. Let us suppose that the subjects of its jurisdiction had been only enumerated, and power given to the general

Legislature to establish such Courts as might be judged necessary and expedient; I do not think that in that case any rational objection could be made to it, any more than would be made to a general power of legislation in certain enumerated cases.—If that would be safe, this appears to me better and more restrictive, so far as it might be abused by an extension of power.—The most material part is the discrimination of superior and inferior jurisdiction, and the arrangement of its powers; as, *where* it shall have original, and where appellate cognizance. Where it speaks of appellate jurisdiction, it expressly provides, that such regulations will be made as will accommodate every citizen, so far as is practicable in any Government. The principal criticism which has been made, was against the appellate cognizance, as well of fact as law. I am happy that the Honorable Member who presides [Edmund Pendleton], and who is familiarly acquainted with the subject, does not think it involves any thing unnecessarily dangerous. I think that the distinction of fact as well as law, may be satisfied by the discrimination of the civil and common law. But if Gentlemen should contend, that appeals as to fact can be extended to jury cases, I contend, that by the word *regulations*, it is in the power of Congress to prevent it, or prescribe such a mode as will secure the privilege of jury trial.—They may make a regulation to prevent such appeals entirely:—Or they may remand the fact, or send it to an inferior contiguous Court, to be tried; or otherwise preserve that ancient and important trial. Let me observe, that so far as the Judicial power may extend to controversies between citizens of different States, and so far as it gives them power to correct by another trial, a verdict obtained by local prejudices, it is favourable to those States who carry on commerce. There are a number of commercial States, who carry on trade for other States.—Should the States in debt to them make unjust regulations, the justice that would be obtained by the creditors, might be merely imaginary and nominal.—It might be either entirely denied, or partially granted.—This is no imaginary evil.—Before the war, New-York was to a great amount a creditor of Connecticut:—While it depended on the laws and regulations of Connecticut, she might with-hold payment. If I be not misinformed, there were reasons to complain. These illiberal regulations and causes of complaint, obstruct commerce. So far as this power may be exercised, Virginia will be benefited by it. It appears to me from the most correct view, that by the word *regulations*, authority is given them to provide against all inconveniences; and so far as it is exceptionable, they can remedy it.—This they will do if they be worthy of the trust we put in them.—I think them worthy of that confidence which that paper puts in them. Were I to select a power which might be given with confidence, it would be Judicial power. This power cannot be abused, without raising the indignation of all the people of the States. I cannot conceive that they would encounter this odium. Leaving behind them their characters and friends, and carrying with them local prejudices, I cannot think they would run such a risk.—That men should be brought from all parts of the Union to the seat of Government, on trivial occasions, cannot reasonably be supposed.—It is a species of possibility; but there is every degree of probability against it. I would as soon believe, that by virtue of the power of collecting taxes or customs, they would compel every man to go and pay the money for his taxes with his own hands to the federal Treasurer, as I would believe this.—If they would not do the one, they would not the other.

I am of opinion, and my reasoning and conclusions are drawn from facts, that as far as the power of Congress can extend, the Judicial power will be accommodated to every part of

America.—Under this conviction, I conclude, that the Legislature, instead of making the Supreme Federal Court absolutely stationary, will fix it in different parts of the Continent, to render it more convenient.—I think this idea perfectly warrantable. There is an example within our knowledge which illustrates it.—By the Confederation, Congress have an exclusive right of establishing rules for deciding in all cases, what captures should be legal, and establishing Courts for determining such cases finally. A Court was established for that purpose, which was at first stationary.—Experience, and the desire of accommodating the decisions of this Court to the convenience of the citizens of the different parts of America, had this effect—it soon became a regulation, that this Court should be held in different parts of America, and was held so accordingly. If such a regulation was made, when only the interest of the small number of people who are concerned with captures was affected, will not the public convenience be consulted, when that of a very considerable proportion of the people of America will be concerned? It will be also in the power of Congress to vest this power in the State Courts, both Inferior and Superior. This they will do, when they find the tribunals of the States established on a good footing. Another example will illustrate this subject further.—By the Confederation, Congress are authorised to establish Courts for trying piracies and felonies committed on the high seas. Did they multiply Courts unnecessarily in this case?—No, Sir, they invested the Admiralty Courts of each State with this jurisdiction. Now, Sir, if there will be as much sympathy between Congress and the people, as now, we may fairly conclude, that the Federal cognizance will be vested in the local tribunals.

I have observed, that Gentlemen suppose, that the General Legislature will do every mischief they possibly can, and that they will omit to do every good which they are authorised to do. If this were a reasonable supposition, their objections would be good. I consider it reasonable to conclude, that they will as readily do their duty, as deviate from it:—Nor do I go on the grounds mentioned by Gentlemen on the other side—that we are to place unlimited confidence in them, and expect nothing but the most exalted integrity and sublime virtue.—But I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us?—If there be not, we are in a wretched situation. No theoretical checks—no form of Government, can render us secure. To suppose that any form of Government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men. So that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them. Having taken this general view of the subject, I will now advert to what has fallen from the Honorable Gentleman who presides [Edmund Pendleton]. His criticism is, that the Judiciary has not been guarded from an increase of the salary of the Judges. I wished myself, to insert a restraint on the augmentation as well as diminution of their compensation; and supported it in the Convention.—But I was overruled. I must state the reasons which were urged.—They had great weight.—The business must increase. If there was no power to increase their pay, according to the increase of business, during the life of the Judges, it might happen, that there would be such an accumulation of business, as would reduce the pay to a most trivial consideration. This reason does not hold as to the President. For in the short period which he presides, this cannot happen. His salary ought not therefore to be increased. It was objected yesterday, that there

was no provision for a jury from the vicinage. If it could have been done with safety, it would not have been opposed. It might so happen, that a trial would be impracticable in the county. Suppose a rebellion in a whole district, would it not be impossible to get a jury? The trial by jury is held as sacred in England as in America. There are deviations of it in England; yet greater deviations have happened here since we established our independence, than have taken place there for a long time, though it be left to the Legislative discretion. It is a misfortune in any case that this trial should be departed from, yet in some cases it is necessary.—It must be therefore left to the discretion of the Legislature to modify it according to circumstances. This is a complete and satisfactory answer.

It was objected, that this jurisdiction would extend to all cases, and annihilate the State Courts. At this moment of time it might happen, that there are many disputes between citizens of different States. But in the ordinary state of things I believe that any Gentleman will think, that the far greater number of causes—ninety-nine out of an hundred, will remain with the State Judiciaries. All controversies directly between citizen and citizen, will still remain with the local Courts. The number of cases within the jurisdiction of these Courts are very small when compared to those in which the local tribunals will have cognizance. No accurate calculation can be made, but I think that any Gentleman who will contemplate the subject at all, must be struck with this truth.—(Here Mr. *Madison* spoke too low to be understood.)

As to vexatious appeals, they can be remedied by Congress. It would seldom happen that mere wantonness would produce such an appeal, or induce a man to sue unjustly.—If the Courts were on a good footing in the States, what can induce them to take so much trouble? I have frequently in the discussion of this subject, been struck with one remark. It has been urged, that this would be oppressive to those who by imprudence, or otherwise, are under the denomination of debtors. I know not how this can be conceived. I will venture one observation. If this system should have the effect of establishing universal justice, and accelerating it throughout America, it will be one of the most fortunate circumstances that could happen for those men. With respect to that class of citizens, compassion is their due. To those, however, who are involved in such incumbrances, relief cannot be granted. Industry and œconomy are their only resources. It is in vain to wait for money, or temporise. The great desiderata are public and private confidence. No country in the world can do without them. Let the influx of money be ever so great, if there be no confidence, property will sink in value, and there will be no inducements or emulation to industry. The circulation of confidence is better than the circulation of money. Compare the situation of nations in Europe, where justice is administered with celerity, to that of those where it is refused, or administered tardily. Confidence produces the best effects in the former. The establishment of confidence will raise the value of property, and relieve those who are so unhappy as to be involved in debts. If this be maturely considered, I think it will be found, that as far as it will establish uniformity of justice, it will be of real advantage to such persons. I will not enter into those considerations which the Honorable Gentleman [George Mason] added. I hope some other Gentleman will undertake to answer him.

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