FOREWORD BY ANGELA ONWUACHI-WILLIG

UNPUNISHED MURDER

MASSACRE AT COLFAX AND THE QUEST FOR JUSTICE

LAWRENCE GOLDSTONE

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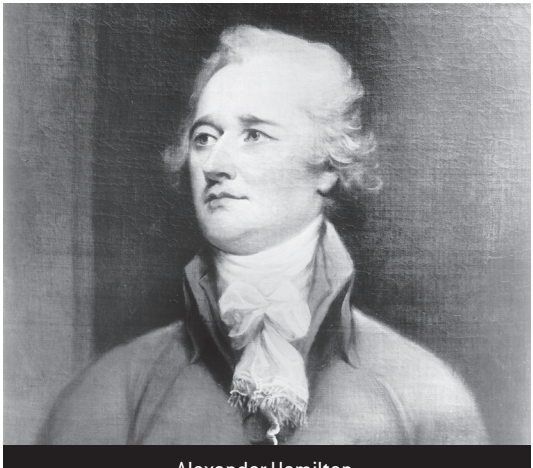
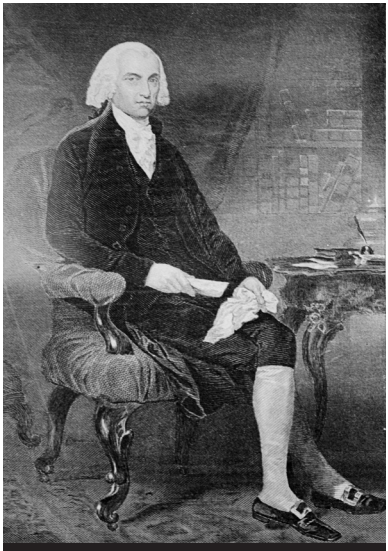
1

A NEW GOVERNMENT—ALEXANDER HAMILTON AND "BRUTUS"

WHEN INDEPENDENCE WAS SECURED by the Treaty of Paris of 1783, the United States was not really united at all. Under America's governing document, the Articles of Confederation, which called itself a "compact of friendship," each state was allowed to operate as almost a separate country—with its own laws, its own militia, even its own money. Such a system could not serve the needs of the new nation, but it would be difficult to change. Most Americans identified more with the state they lived in than with the United States.



Alexander Hamilton.



James Madison.

But some, like James Madison of Virginia and Alexander Hamilton of New York, believed the new nation could not grow, and perhaps not even survive, unless it truly became one. In May 1787, they tricked twelve of the thirteen states into sending delegations to Philadelphia, supposedly to reform the Articles. Rhode Island, nicknamed "Rogue's Island" for its freewheeling style in business, was perfectly happy with the Articles as they were and refused to send anyone to fix them. Once in this "convention," Madison and Hamilton intended to draft an entirely new system of laws and then to persuade the other delegates to accept it. But the odds were not good. The issues that divided the states were stronger than those that bound them together, and no issue divided the states more than slavery. Madison himself said, "The real difference of interests, lay not between large and small, but between the Northern and Southern states. The institution of slavery and its consequences formed a line of discrimination."

The delegates fought for four months behind locked doors, often in sweltering heat, and when the Convention finally

ended, Hamilton, Madison, and their supporters had won. On September 17, 1787, in a ceremony both solemn and joyous, thirty-nine delegates, including the Convention's presiding officer, George Washington, signed the newly drafted Constitution of the United States.

The "Supreme Law of the Land" contained seven major divisions, called "Articles," the first three of which discussed who would govern and what powers those who were elected and appointed would have. Article I dealt with the legislature—Congress—which almost every delegate believed would be the most powerful branch of government. Congress was divided into two chambers, a House of Representatives, which would be elected directly by all those who were allowed to vote, and a Senate, whose members—two per state—would be chosen by state legislatures. (After the Seventeenth Amendment in 1913, senators, too, would be elected by popular vote.) Article I is by far the longest since, with the British Parliament as a model, there was a greater understanding of what a legislature should and should not be able to do.

But the British Parliament never had to deal with whether or not slaves would be counted for representation, while in the United States this question was of equal or even greater importance than anything else the delegates had to decide. The white slaveholding South wanted slaves to be counted to determine how many seats a state would be granted in the House of Representatives; the North, which had almost no slaves, was opposed.

COPIED.

1 — Objections to the present confederation

I Entrusts the great interests of the nation to hands incapable of managing them —

~~Treaties of all kind~~
All matters in which foreigners are concerned —

The care of the publick peace: Debts

Power of treaty without power of execution

Common defence without power to raise troops
have a fleet — raise money

Power to contract debts without the power
to pay —

— Those great interests of the State must be well managed or the publick prosperity must be the victim —

Legislatures upon communities —
Where the Legislatures are to act they will deliberate —

No sanction —

{ To ask money not to call
— & by ~~a~~ unjust means
Legal

989

Alexander Hamilton's June 1787 notes for a speech proposing a plan of government at the Federal Convention.

of their assent to other necessary measures. 3. They could obtrude measures on the majority, by virtue of the peculiar powers which would be vested in the Senate. 4. The evil, instead of being cured by time, would increase with every new state that should be admitted, as they must all be admitted on the principle of equality. 5. The perpetuity it would give to the preponderance of the Northern against the Southern scale, was a serious consideration. It seemed now to be pretty well understood, that the real difference of interests lay, not between the large and small, but between the Northern and Southern, States. The institution of slavery, and its consequences, formed the line of discrimination. There were five states on the Southern, eight on the Northern side of this line. Should a proportional representation take place, it was true, the Northern would still outnumber the other, but not in the same degree, at this time; and every day would tend towards an equilibrium.

Mr. Wilson would add a few words only. If

Madison's July 14 notes, when he acknowledges that slavery is what most divides the nation.

The issue put delegates from both sections in an odd position. White Southerners, who usually insisted slaves were property, had to in this case insist they were people. Northerners, who were equally firm that human beings could not be property, had to here insist they were. In the end, they compromised. For every five slaves, three would be counted for deciding representation. Since slaves could not vote, this of course meant that the vote of a white man from a slaveholding state was worth more than one from a free state. If the North had not given in on this question, however, Southern delegates would have walked out, and the effort to draft a Constitution would have failed. The "Three-Fifths Compromise" became the best known, but not the only, accommodation that the North made in Philadelphia to the slaveholding South.

The delegates next turned to Article II, the election and powers of the president. Drawing up this article was more difficult—it took more than 160 different votes—because, although they knew they didn't want a king or queen, the delegates had no model on which to base an alternative. Deciding whether or not to call the president "Your Excellency" aroused passionate debate, and there were even proposals that the presidency be a council of three. In the end, although the president would be the commander in chief of the army and navy—almost all the delegates assumed the first president would be General Washington—he (and someday she) was not expected to be nearly as powerful as presidents turned out to be.

There was great disagreement on how the president should be elected. Very few of the delegates favored a popular vote, which would mean that each eligible individual voter had the same influence on the outcome as every other voter. Most delegates wanted the states to have the strongest voice. After much debate, the idea of an electoral college was agreed to. Under this system, each state would choose electors equal in number to its combined number of senators (always two) and members of the House of Representatives. With slaves giving Southern states more representatives than they would have been entitled to with only whites counted, this meant that slave states also got a larger voice in selecting a president. Each state was free to choose electors any way they wished, by popular vote, by the state legislature, or by any other formula they decided on.

One area of agreement was that the president should nominate judges to any court that came under federal control, although the Senate would have to ratify—vote to agree to—any appointment. Article II was a bit shorter than Article I, but still extensive.

Article III discussed the federal court system. It was by far the shortest of the first three Articles, and with good reason—most Americans did not want a federal court system at all, and certainly not one that had any real power. There were two main reasons for their distrust. First, in a country that did not even have enough money to afford a modern army and navy, any money spent to pay judges or build courthouses was

thought wasted. But far more important was the fear that citizens of one state would be forced to stand in judgment before citizens of another—in effect, foreigners. Opponents of national courts—and there were many—were certain a national court system would quickly claim powers that were supposed to be reserved to the states.

As a result, Article III was short and extremely vague. While there was mention of a "Supreme Court," Article III did not say exactly how many judges would be on it. Nor did the delegates lay out completely what powers it would have, nor how courts other than the Supreme Court would be organized—or whether they would even exist at all. It was left to Congress to decide these questions after the Constitution was in place.

To get the Constitution in place, however, nine of the thirteen states would have to ratify the plan, and in many states ratification was uncertain. Although with New Hampshire's ratification on June 21, 1788, nine states had agreed and the Constitution was officially adopted, two of the most important states of the original thirteen—Virginia and New York—had yet to agree. Many people believed the new Constitution would be rejected by both. Rejection by either would be difficult to overcome—rejection by both would be a disaster.

In Virginia, the most important supporter was James Madison, and the most vocal opponent, Patrick Henry. Henry, famed for proclaiming, "Give me liberty or give me death,"

was the most brilliant orator in the entire nation. He would often speak for two or three hours before audiences that were so spellbound they barely breathed. He told his fellow Virginians that a national court system was a threat to their way of life. "They'll take your niggers from you," he warned his fellow delegates in the state convention Virginia had called to debate ratification. But Madison, also a slaveholder, was brilliant as well, and eventually, in a very close contest, Virginia agreed to ratify the Constitution.

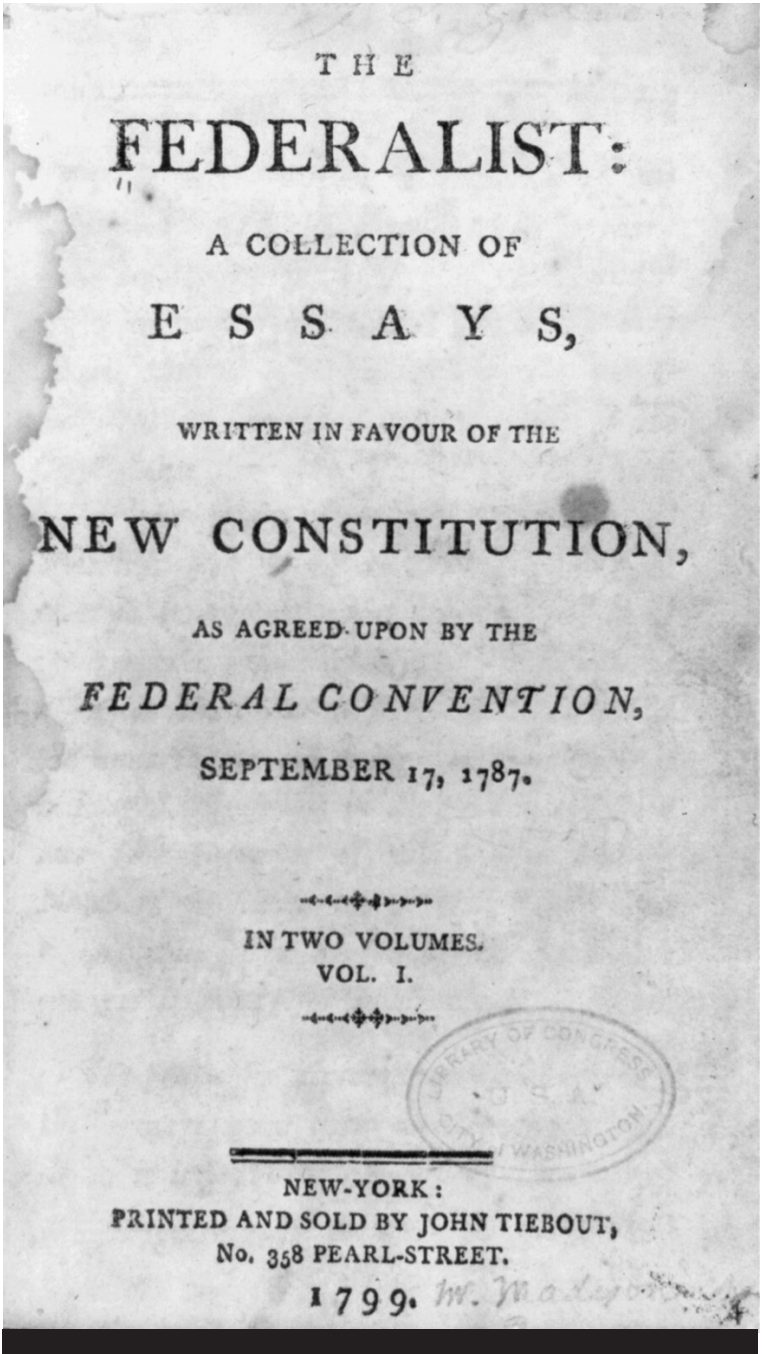
That left New York, where the opposition—although lacking a Patrick Henry—was even more intense. While, in Virginia, the battle between those who favored the Constitution—"Federalists"—and its opponents—"Anti-Federalists"—was fought largely in the ratifying convention, in New York it was also fought in newspapers. In New York City, which was an Anti-Federalist stronghold, an opponent of the Constitution who wrote under the name Brutus published a series of essays—similar to modern op-eds—in which he attacked the Constitution as a document that would surely lead to tyranny. Giving the central government so much power would trample on the rights of the people.

Brutus, whose identity remains unknown, was particularly harsh about the new national court system, claiming it would be a tool with which the rich and powerful could oppress the ordinary citizen. About a Supreme Court whose members would never need to face an election and would serve for life, Brutus wrote, "I question whether the world ever saw a court

of justice invested with such immense powers, and yet placed in a situation so little responsible . . . There is no power above them to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself."

Brutus seemed to be swaying New York against the Constitution, so in response, Alexander Hamilton, James Madison, and John Jay—writing jointly under the name Publius—published their own series of eighty-five essays in a competing newspaper. These essays were later published together as *The Federalist*, now also referred to as *The Federalist Papers*.

It fell to Hamilton to defend the new court system, which he did in one of the most famous of all the essays, *Federalist 78*. Hamilton fiercely denied that the court system would ever aid either of the two other branches in imposing unfair laws on the American people. Quite the reverse. The courts, particularly the Supreme Court, would be the "people's branch" of government, protecting against any attempt by either Congress or the president to pass laws or take action that would oppress ordinary citizens. In addition, Hamilton assured New Yorkers who feared the court system would rob them of their basic rights that the judicial branch of the new government would be "the weakest of the three."


THE

FEDERALIST:

A COLLECTION OF

ESSAYS,

WRITTEN IN FAVOUR OF THE

NEW CONSTITUTION,

AS AGREED UPON BY THE

FEDERAL CONVENTION,

SEPTEMBER 17, 1787.

IN TWO VOLUMES.
VOL. I.

NEW-YORK:
PRINTED AND SOLD BY JOHN TIEBOUT,
No. 358 PEARL-STREET.
1799.

Cover page of *The Federalist*. All eighty-five essays were published together in 1799 and have been in print ever since.

As Madison had in Virginia, Hamilton won the day in New York, and on July 26, 1788, the Constitution was ratified.

Although North Carolina did not ratify until the following year and Rhode Island not until 1790, Madison and Hamilton had won their battle, and the new Constitution had become, as it promises in Article VI, the "Supreme Law of the Land."

2

THE SUPREME COURT IS BORN—JOHN MARSHALL

THE CONSTITUTION HAD TWO major gaps that needed to be filled immediately. During the debates in Philadelphia, the Convention delegates had decided not to include a "Bill of Rights," a document that would protect "the people" from the new national government. They felt that since each state would be responsible for protecting its citizens, no listing of rights of individual Americans would be needed. But in the ratifying conventions, Federalists discovered that distrust of centralized power—the new national government—was greater than they had thought. Ratification would not have been possible without the promise that amendments (additions) to the new Constitution would be drafted as soon as the new government met.

The other requirement was, of course, to expand Article III and define what the federal court system would look like. How many courts would there be, how would their powers be divided, how many justices would sit on the Supreme Court?—all of these questions had been ignored in Philadelphia.

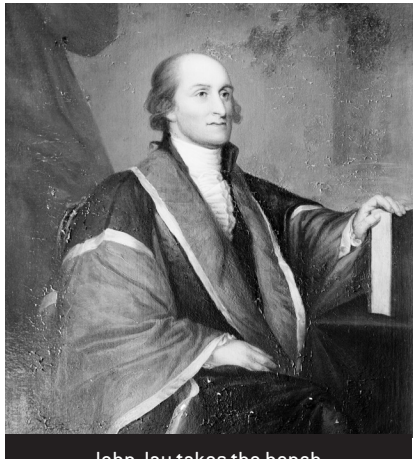
And so, in the 1st Congress, which began in Federal Hall in New York City on March 4, 1789, the same day George Washington took the oath of office to be the nation's first president, the first orders of business were those issues. (Travel was slow in those days, so the real business of governing did not begin until April, when Congress finally had the minimum number present to conduct business, called a "quorum.")

In the Judiciary Act of 1789, Congress declared that the court system would have three layers. At the top would be the Supreme Court, although the number of judges—to be called "justices"—remained undefined. Directly under the Supreme Court would be "circuit courts," which would be responsible for a section of the nation, usually more than one state. To save money, Supreme Court justices would also serve as circuit court judges, "riding circuit" twice a year. In a nation with few good roads and few inns along the way that served decent food, this requirement promised to be extremely unpopular among the justices. In fact, so unpleasant was riding circuit that some men refused appointments to the Supreme Court to avoid the chore. The lowest level of the federal judiciary would be the district courts, which would take cases from sections within states, so that people in a district would not feel that they were going to trial before "foreigners."

The federal courts could hear *only* cases that came under federal law. State courts would continue to hear cases under state law. Since the Constitution was supreme, if state law said one thing and federal law another, federal law would

prevail. Almost every case under federal law would begin in district court. If the parties that lost a case were unhappy with the result and thought the district court had ruled unfairly or had not applied the law properly, they could "appeal" to the circuit court. If the circuit court agreed with the district court's ruling, they would "affirm" the decision. If they disagreed, they would "overturn" it. The same rule applied to circuit court rulings, except the losing party would then appeal to the Supreme Court.

The first Supreme Court consisted of six justices, with John Jay, a contributor to *The Federalist*, as the first chief justice. He would not stay in the job very long. During the Court's first session, the justices had no cases to hear and adjourned—ended the session—after a few minutes of ceremony. As the months progressed, it seemed that Hamilton had been correct—the court system would not only be the weakest of the three, but also the least busy. The Supreme Court continued to have so little to do that Jay accepted an assignment to sail to England on a diplomatic mission while continuing to serve as chief justice. He assumed he would not be missed on the Court, and he was not. Jay resigned



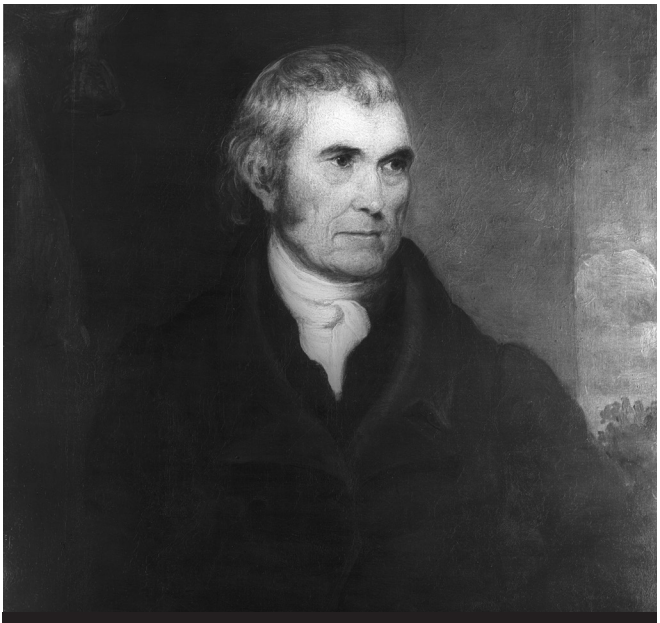
John Jay takes the bench.

soon afterward. His most impressive achievement as chief justice was choosing what robe to wear.

John Rutledge of South Carolina, who had been one of the most unapologetic defenders of slavery at the Constitutional Convention, was appointed by President Washington as Jay's successor. He presided over the Court for a short time before he was officially confirmed, but after rumors spread—possibly true—that he had gone insane, his nomination was rejected by the Senate. Oliver Ellsworth of Connecticut, who had been an important delegate at the Constitutional Convention and who had written the Judiciary Act of 1789, was Washington's next choice. Ellsworth was confirmed, but faced a shortage of work similar to Jay's, and accepted an appointment to travel as a diplomat to France.

Like Jay, Ellsworth resigned—while still in Paris—and President John Adams's secretary of state, Virginia's John Marshall, became chief justice. With Marshall's confirmation, everything changed, including the justices' dress. Marshall adopted simple black robes, a tradition that has remained largely in place until the present day. But in his modest clothing, Marshall became the most important chief justice the nation has ever seen.

In 1803, in *Marbury v. Madison*, considered the most important case the Supreme Court ever decided, Chief Justice Marshall established the concept of "judicial review," which gave the Supreme Court the power to declare a law unconstitutional. Since the Constitution was the supreme law of the land,



John Marshall was not as modest as he appeared.

any law that was in conflict with the Constitution had to be struck down even though Congress had passed it and the president had signed it. And since the Supreme Court, at least according to Marshall, had the power to "say what the law is," it was he and his fellow justices who would decide which laws would be enforced and which overturned. Judicial review turned out to be, by far, the most powerful weapon the Supreme Court could ever wield, and after more than two centuries, John Marshall is still hailed by legal scholars as the "Man Who Made the Court Supreme." Still, after *Marbury v. Madison*, judicial review was not used again to declare a law unconstitutional for more than fifty years, but when it was, it resulted in one of the most infamous decisions in American history.

A NOTE TO READERS:

This book includes quoted material from primary source documents, some of which contains racially offensive language. These passages are presented in their original, unedited form in order to accurately reflect history.

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