

MONDAY, AUGUST 27, 1787.

JOURNAL

Monday August 27. 1787.

It was moved and seconded to insert the words "after conviction" after the words "reprieves and pardons" 2 sect. 10 article. — (Motion withdrawn).

It was moved and seconded to amend the clause giving the command of the militia to the executive to read

"and of the militia of the several States when called into the actual service of the United States"

which passed in the affirmative. [Ayes — 6; noes — 2.]

It was moved and seconded to postpone the consideration of the following clause. 2 section. 10 article

"He shall be removed from his office on impeachment by "the House of representatives, and conviction in the supreme "Court, of treason, bribery, or corruption"

which passed in the affirmative

It was moved and seconded to postpone the last clause of the 2 section, 10 article.

which passed in the affirmative

It was moved and seconded to add the following clause to the oath of office to be taken by the supreme Executive

"and will to the best of my judgment and power, pre-
"serve, protect and defend the Constitution of the United
"States"

which passed in the affirmative [Ayes — 7; noes — 1.]

It was moved and seconded to insert the words

"both in Law and Equity" after the words "United States"
1 line, 1 sect, 11th article

which passed in the affirmative [Ayes — 6; noes — 2.]¹

¹ Detail of Ayes and Noes ascribes the same question to Votes 376 and 377, and

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On the question to agree to the 1st sect. 11 article as amended.
it passed in the affirmative. [Ayes — 6; noes — 2.]¹

It was moved and seconded to add the following clause after the word “behaviour” 2 section. 11 article

“Provided that they may be removed by the Executive on “the application by the Senate and House of representatives” which passed in the negative [Ayes — 1; noes — 7.]

On the question to agree to the 2nd section of the 11 article as reported

it passed in the affirmative²

It was moved and seconded to insert the words

“encreased or” before the word “diminished” in the 2nd section 11th article.

which passed in the negative. [Ayes — 1; noes — 5; divided — 1.]

It was moved and seconded to add the following words to the 2nd section 11 article

“nor encreased by any act of the Legislature, which shall “operate before the expiration of three years after the passing thereof.”

which passed in the negative [Ayes — 2; noes — 5.]

It was moved and seconded to postpone the following clause 3 section 11 article

“to the trial of impeachments of officers of the United “States”

which passed in the affirmative.

It was moved and seconded to add the following words after the word “controversies” 3 sect. 11 article

“to which the United States shall be a Party”

which passed in the affirmative

It was moved and seconded to insert the words “this constitution the” before the word “laws” 2 line 3 sect, 11 article.

which passed in the affirmative

It was moved and seconded to strike out the words “passed

is evidently in error in reading “2 Sect.”, instead of “1 Sect.” Madison gives these same votes at this point in the day’s proceedings, and they are assigned to the two questions in the Journal on Section 1 of Article XI.

² *Journal* (p. 297) ascribes Vote 376, Detail of Ayes and Noes, to this question.

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by the Legislature” and to insert after the words “United States” the words “and treaties made or which shall be made under their authority”

which passed in the affirmative

It was moved and seconded to insert the word “controversies” before the words “between two” or

which passed in the affirmative

It was moved and seconded to postpone the following clause “in cases of impeachment”

which passed in the affirmative

It was moved and seconded to insert the words

“the United States or” before the words “a State shall be a party”

which passed in the affirmative

It was moved and seconded to agree to the following amendment.

In all the other cases beforementioned original jurisdiction shall be in the Courts of the several States but with appeal both as to Law and fact to the courts of the United States, with such exceptions and under such regulations, as the Legislatures shall make.

The last motion being withdrawn,

It was moved and seconded to amend the clause to read

“In cases of impeachment, cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, this jurisdiction shall be original In all the other cases before mentioned it shall be appellate both as to law and fact with such exceptions and under such regulations as the Legislature shall make”

which passed in the affirmative

It was moved and seconded to add the following clause to the last amendment.

“But in cases in which the United States shall be a Party the jurisdiction shall be original or appellate as the Legislature may direct”

[To strike out the words “original or” Ayes — 6; noes — 2.]³

³ Vote 381, Detail of Ayes and Noes, but this is inserted here merely because it is the only place that it seems to fit in with the proceedings.

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which passed in the negative [Ayes — 3; noes — 5.]⁴

On the question to reconsider the 3rd section II article

it passed in the affirmative

It was moved and seconded to strike out the words

“The jurisdiction of the Supreme Court” and to insert the words “The Judicial Power”

which passed in the affirmative

It was moved and seconded to strike out the words “this
“jurisdiction shall be original” and to insert the words “The
“supreme Court shall have original jurisdiction”

which passed in the affirmative

It was moved and seconded to agree to the following amend-
ment

“In all the other cases before mentioned the judicial power
“shall be exercised in such manner as the Legislature shall
“direct”

which passed in the negative [Ayes — 2; noes — 6.]⁵

It was moved and seconded to strike out the last clause of
the 3rd sect. II article

which passed in the affirmative [Ayes — 8; noes — 0.]

It was moved and seconded to insert the words “both in law
and equity” before the word “arising” in the first line, 3rd
section, II article.

which passed in the affirmative.

It was moved and seconded to insert after the words “between
citizens of different States” the words “between Citizens of
the same State claiming lands under grants of different States

which passed in the affirmative

The House adjourned

⁴ Vote 382, Detail of Ayes and Noes, but inserted here merely because of its relative position and that it is a negative vote.

⁵ Vote 383, Detail of Ayes and Noes, but inserted here merely because it is a negative vote preceding Vote 384.

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DETAIL OF AYES AND NOES

	New Hampshire	Massachusetts	Rhode Island	Connecticut	New York	New Jersey	Pennsylvania	Delaware	Maryland	Virginia	No Carolina	So Carolina	Georgia	Questions	ayes	noes	divided
[374]	aye			aye			aye	no	aye	aye		no	aye	To amend the clause giving the command of the militia to the Executive.	6	2	
[375]	aye			aye			aye	no	aye	aye		aye	aye	To amend the oath of office by the President	7	1	
[376]	aye			aye			aye	no	no	aye		aye	aye	To agree to the 2 Sect. 11 art.	6	2	
[377]	aye			aye			aye	no	no	aye		aye	aye				
[378]	no			aye			no	no	no	no		no	no	To agree to the amendt to ye 2 sect. 11 article	1	7	
[379]	no			no			no	no	dd	aye		no		amendt to ye 2 sect. 11 article	1	5	1
[380]	no			no			no	no	aye	aye		no		amendt to ye 2 sect. 11 article	2	5	
[381]	aye			aye			no	no	aye	aye		aye	aye	To strike out the words "original or"	6	2	
[382]	aye			no			aye	aye	no	no		no	no	amendment to 3 sect 11 article	3	5	
[383]	no			no			no	aye	no	aye		no	no	amendmt 3 sect. 11 art.	2	6	
[384]	aye			aye			aye	aye	aye	aye		aye	aye	To strike out the last clause 3 sect			

MADISON

Monday Augst. 27th. 1787. In Convention

Art X. sect. 2. being resumed,⁶

Mr. L. Martin moved to insert the words "after conviction" after the words "reprieves and pardons"

Mr. Wilson objected that pardon before conviction might be necessary in order to obtain the testimony of accomplices. He stated the case of forgeries in which this might particularly happen. — Mr L. Martin withdrew his motion.

Mr. Sherman moved to amend the clause giving the Executive the command of the Militia, so as to read "and of the Militia of the several States, *when called into the actual service of the U—S—*" and on the Question

N—H. ay. Mas. abst. Ct. ay. N—J. abst Pa ay. Del. no.

⁶ Relating to the powers and duties of the President.

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Md ay. Va. ay. N— C. abst. S. C— no. Geo— ay, [Ayes — 6; noes — 2; absent — 3.]⁷

The clause for removing the President on impeachment by the House of Reps and conviction in the supreme Court, of Treason, Bribery or corruption, was postponed nem: con: at the instance of Mr. Govr. Morris, who thought the Tribunal an improper one, particularly, if the first judge was to be of the privy Council.

Mr. Govr. Morris objected also to the President of the Senate being provisional successor to the President, and suggested a designation of the Chief Justice.

Mr. Madison added as a ground of objection that the Senate might retard the appointment of a President in order to carry points whilst the revisionary power was in the President of their own body, but suggested that the Executive powers during a vacancy, be administered by the persons composing the Council to the President.

Mr Williamson suggested that the Legislature ought to have power to provide for occasional successors. & moved that the last clause (of 2 sect. X art:) (relating to a provisional successor to the President) be postponed.

Mr Dickinson 2ded. the postponement. remarking that it was too vague. What is the extent of the term "disability" & who is to be the judge of it?

The postponement was agreed to nem: con:

Col: Mason & Mr. Madison, moved to add to the oath to be taken by the supreme Executive "and will to the best of my judgment and power preserve protect and defend the Constitution of the U. S."

Mr. Wilson thought the general provision for oaths of office, in a subsequent place, rendered the amendment unnecessary —

On the question

N. H. ay— Mas— abst Ct ay— Pa ay. Del. no. Md. ay. Va. ay— N. C. abst S. C. ay. Geo. ay. [Ayes — 7; noes — 1; absent — 2.]

⁷ See also statement by Martin in Appendix A, CLVIII (79).

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Art: XI being taken up.⁸

Doctr. Johnson suggested that the judicial power ought to extend to equity as well as law — and moved to insert the words “both in law and equity” after the words “U. S.” in the 1st line of sect 1.

Mr. Read objected to vesting these powers in the same Court—

On the question

N. H. ay. (Mas. absent) Ct ay. (N. J. abst) P. ay— Del. no. Md no. Virga. ay. (N— C— abst.) S. C. ay. Geo. ay. [Ayes — 6; noes — 2; absent — 3.]

On the question to agree to Sect. 1. art. XI. as amended

N— H— ay— (Mas. abst.) Ct. ay— Pa ay— (N— J— abst) Del. no. Md. no. Va. ay. (N— C— abst) S. C. ay Geo. ay. [Ayes — 6; noes — 2; absent — 3.]

Mr. Dickinson moved as an amendment to sect. 2— art XI⁹ after the words “good behavior” the words “provided that they may be removed by the Executive on the application (by) the Senate and House of Representatives.”

Mr. Gerry 2ded. the motion

Mr Govr. Morris thought it a contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removeable without a trial. Besides it was fundamentally wrong to subject Judges to so arbitrary an authority.

Mr. Sherman saw no contradiction or impropriety if this were made part of the Constitutional regulation of the Judiciary establishment. He observed that a like provision was contained in the British Statutes.

Mr. Rutledge: If the supreme Court is to judge between the U. S. and particular States, this alone is an insuperable objection to the motion.

⁸ Article XI, Sect. 1. “The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.”

⁹ Article XI, Sect. 2. “The Judges of the Supreme Court, and of the Inferior Courts, shall hold their offices during good behaviour. They shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”

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Mr. Wilson considered such a provision in the British Government as less dangerous than here, the House of Lords & House of Commons being less likely to concur on the same occasions. Chief Justice Holt, he remarked, had *successively* offended by his independent conduct, both houses of Parliament. Had this happened at the same time, he would have been ousted. The Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt

Mr. Randolph opposed the motion as weakening too much the independence of the Judges.

Mr Dickinson was not apprehensive that the Legislature composed of different branches constructed on such different principles, would improperly unite for the purpose of displacing a Judge—

On the question for agreeing to Mr. Dickinson's Motion

N. H. no. (Mas. abst) Ct. ay. (N. J. abst) Pa. no. Del. no. Md no. Va. no (N. C. abst). S— C— no— Geo— no. [Ayes — 1; noes — 7; absent — 3.]

(On the question on Sect. 2 art: XI as reported. Del. & Maryd. only no—)¹⁰

Mr. Madison & Mr. McHenry moved to reinstate the words "increased or" before the word "diminished" in the 2d. Sect: art XI.

Mr. Govr. Morris opposed it for reasons urged by him on a former occasion—

Col: Mason contended strenuously for the motion. There was no weight he said in the argument drawn from changes in the value of the metals, because this might be provided for by an increase of salaries so made as not to affect persons in office, and this was the only argument on which much stress seemed to have been laid.

Genl. Pinkney. The importance of the Judiciary will require men of the first talents: large salaries will therefore be necessary, larger than the U. S. can allow in the first instance. He was not satisfied with the expedient mentioned by Col:

¹⁰ Taken from *Journal* which is probably in error as to the vote, see above notes 1 and 2.

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Mason. He did not think it would have a good effect or a good appearance, for new Judges to come in with higher salaries than the old ones.

Mr Govr Morris said the expedient might be evaded & therefore amounted to nothing. Judges might resign, & then be re-appointed to increased salaries.

On the question

N. H. no— Ct no. Pa no. Del. no— Md. divd Va ay— S. C. no— Geo. abst. (also Masts— N. J. & N— C—) [Ayes — 1; noes — 5; divided — 1; absent — 4.]

Mr. Randolph & Mr. Madison then moved to add the following words to sect 2. art XI. “nor increased by any Act of the Legislature which shall operate before the expiration of three years after the passing thereof”

On this question

N. H. no. Ct. no— Pa. no. Del. no. Md ay— Va ay— S. C. no. Geo— abst (also Mas. N. J. & N. C.) [Ayes — 2; noes — 5; absent — 4.]

Sect. 3— art. XI.¹¹ being taken up— the following clause was postponed — viz. “to the trial of impeachments of officers of the U. S.” by which the jurisdiction of the supreme Court was extended to such cases.

Mr Madison & Mr. Govr. Morris moved to insert after the word “controversies” the words “to which the U— S— shall be a party” — which was agreed to nem: con:

Docr. Johnson moved to insert the words “this Constitution and the” before the word “laws”

Mr Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.

The motion of Docr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature—

¹¹ Relating to the jurisdiction of the Supreme Court.

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On motion of Mr Rutledge, the words "passed by the Legislature" were struck out, and after the words "U. S" were inserted nem. con: the words "and treaties made or which shall be made under their authority"—conformably to a preceding amendment in another place.

The clause "in cases of impeachment", was postponed.

Mr. Govr. Morris wished to know what was meant by the words "In all the cases before mentioned it (jurisdiction) shall be appellate with such exceptions &c," whether it extended to matters of fact as well as law — and to cases of Common law as well as Civil law.

Mr. Wilson. The Committee he believed meant facts as well as law & Common as well as Civil law. The jurisdiction of the federal Court of Appeals had he said been so construed.¹²

Mr. Dickinson moved to add after the word "appellate" the words "both as to law & fact which was agreed to nem: con:

Mr. Madison¹³ & Mr. Govr. Morris moved to strike out the beginning of the 3d sect. "The jurisdiction of the supreme Court" & to insert the words "the Judicial power" which was agreed to nem: con:

The following motion was disagreed to, to wit to insert "In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct" (Del. Virga ay

N. H Con. P. M. S. C. G no) [Ayes — 2; noes — 6.]¹⁴

On a question for striking out the last sentence of sect. 3. "The Legislature may assign &c—"

N. H. ay— Ct ay. Pa ay. Del— ay— Md ay— Va ay— S— C. ay— Geo. ay. [Ayes — 8; noes — 0.]

Mr. Sherman moved to insert after the words "between Citizens of different States" the words, "between Citizens of the same State claiming lands under grants of different

¹² See Appendix A, CXXXIV.

¹³ The preceding line was crossed out: "It was moved but disagreed to." This would seem to correspond to Votes 381 and 382, Detail of Ayes and Noes. See above notes 3 and 4.

¹⁴ Taken from *Journal*. See above note 5.

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States" — according to the provision in the 9th. art: of the Confederation — which was agreed to nem: con:¹⁶

Adjourned¹⁶

McHENRY

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Amended the Presidential oath of office — made some other amendments — postponed what follows from the oath to the end.

Agreed to the 1. 2 and 3 sect. of the XI article with amendments.

MASON¹⁷

The judicial power of the United States shall be vested in one Supreme Court and in such Courts of Admiralty as Congress shall establish in any of the States. And also in Courts of Admiralty to be established in such of the States as Congress shall direct.

The jurisdiction of the supreme courts shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party, to controversies between two or more States; between *citizens of the same State* claiming lands of different States, and between *a State and the citizens thereof* and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers

¹⁶ See further Appendix A, CLVIII (83-87), CCVIII, CCXIV, CCXV, CCXXVIII, CCCVI, CCCXIV.

¹⁶ See further Appendix A, XCIV.

¹⁷ This document, not in Mason's handwriting, was found among the Mason Papers. It seems to represent a plan for the organization and jurisdiction of the judiciary, which must have been prepared about this time by some one familiar with the work of the Convention. There is no evidence that it was presented to the Convention. It is reprinted here from K. M. Rowland, *Life of George Mason*, II, 385-386.

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and consuls, and those in which a State shall be a party, and suits between persons claiming lands under grants of different States the Supreme Court shall have original jurisdiction, and in all the other cases before mentioned the Supreme Courts shall have appellate jurisdiction as to law only, except in cases of equity and admiralty and maritime jurisdiction in which last mentioned cases the Supreme Court shall have appellate jurisdiction, both as to law and fact.

In all cases of admiralty and maritime jurisdiction, the Admiralty Courts appointed by Congress shall have original jurisdiction, and an appeal may be made to the Supreme Court of Congress for any sum and in such manner as Congress may by law direct.

In all other cases not otherwise provided for the *Superior* State Courts shall have original jurisdiction, and an appeal may be made to the Supreme federal Court in all cases where the subject in controversy or the decree or judgment of the State court shall be of the value of one thousand dollars and in cases of less value the appeal shall be to the High Court of Appeals, Court of Errors or other Supreme Court of the State where the suit shall be tried.

The trial of all crimes, except in case of impeachment shall be in the Superior Court of that State where the offence shall have been committed in such manner as the Congress shall by law direct except that the trial shall be by a jury. But when the crime shall not have been committed within any one of the United States the trial shall be at such place and in such manner as Congress shall by law direct, except that such trial shall also be by a jury.