CHAPTER 4

The Federal Constitution and the Law of Nations

4.1 The Law of Nations and the Framing of the Constitution

Most accounts of the early history of the United States point to political and constitutional weaknesses of the Confederation as the main impetus for the convening of the Constitutional Convention in Philadelphia in May of 1787, without explicitly emphasizing the importance of issues regarding the enforcement of the law of nations. Many of the Founders identified these as the principal reason why the Confederation did not work. As the previous chapter attempted to show, conflicts over international law in many instances precipitated and exacerbated divisions between the states. Many of these disputes stemmed from questions about jurisdiction and the right to interpret—or even to enforce—the law of nations, and furthered the sense of autonomy among the individual states. In the months leading up to the famous Convention, many of the senior American statesmen had expressed themselves on the state of the union and the need for drastic reform, underlining the need for the new country to be able to better respect and enforce the laws of nations.

Arguably the best-known of the tracts written in this period is James Madison’s *Vices of the Political System of the United States*. If the conclusion of various favorable treaties might have inspired confidence about the future of the union among some, Madison pointed out that such confidence was misplaced, being very concerned about the efficacy of the union up to that point. The main problem was, said Madison, that the states had not faithfully fulfilled their obligations under the law of nations, noting that:

Accordingly not a year has passed without instances of them in some one or other of the States. The Treaty of Peace—the treaty with France—the treaty with Holland have each been violated. (…) The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects. As yet foreign powers have not been rigorous in animadverting on us. This moderation, however cannot be mistaken for a permanent partiality to our faults, or a permanent security against those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the community to bring on the whole.557

According to Madison, the states had neglected their duties in accordance with the law because ignoring or trespassing on the law carried no sanctions to be imposed by the central authorities:

A sanction is essential to the idea of law, as coercion is to that of Government. The federal system being destitute of both, wants the great vital principles of a Political Constitution. Under the form of such a Constitution, it is in fact nothing more than a treaty of amity of commerce and of alliance, between so many independent and Sovereign States. From what cause could so fatal an omission have happened in the articles of Confederation? From a mistaken confidence that the justice, the good faith, the honor, the sound policy, of the several legislative assemblies would render superfluous any appeal to the ordinary motives by which the laws secure the obedience of individuals: a confidence which does honor to the enthusiastic virtue of the compilers, as much as the inexperience of the crisis apologizes for their errors. (…) Even during the war, when external danger supplied in some degree the defect of legal & coercive sanctions, how imperfectly did the States fulfil their obligations to the Union? In time of peace, we see already what is to be expected. How indeed could it be otherwise?

Another reason Madison proffered in explaining the failures to enforce the law was that some states felt that the burden of adherence to the law of nations was shared unequally. Because non-compliance with the law could bring economic benefits, voluntary adherence to the law could not be relied upon. The states were no angels, Madison could have said:

In the first place, every general act of the Union must necessarily bear unequally hard on some particular member or members of it. Secondly the partiality of the members to their own interests and rights, a partiality which will be fostered by the Courtiers of popularity, will naturally exaggerate the inequality where it exists, and even suspect it where it has no existence. Thirdly a distrust of the voluntary compliance of each other may prevent the compliance of any, although it should be the latent disposition of all. Here are causes & pretexts which will never fail to render federal measures abortive. If the laws of the States, were merely

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*Federalist Papers,* James Madison wrote that “[the Articles of Confederation] contain no provision for the case of offences against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the confederacy with foreign nations.” Madison, *The Federalist Papers,* no. xlii, p. 274.