

Richard Labunski, from JAMES MADISON and  
the Struggle for the Bill of Rights

8

## Madison Introduces the Bill of Rights

NEW YORK CITY desperately wanted to be the permanent capital of the new nation. The city had been the home of the Confederation Congress since 1784, and New Yorkers understood that the prestige, access to government officials, and financial benefits that came to the capital would be of great value to the whole state. The city's recovery from seven years of British occupation during the Revolutionary War, when it suffered several major fires and lost half of its population and commerce, was helped significantly by the presence of the federal government. New York was determined to make members of Congress feel welcome when they arrived in April and May of 1789 to form the new government.<sup>1</sup>

Even the state's Anti-Federalists, many of whom had wanted to prevent ratification at the New York convention in July 1788, agreed to approve the Constitution only because Federalists had strongly hinted that the city would likely become the permanent seat of government.<sup>2</sup> Anti-Federalists knew that if New York did not join the union, its largest city would have no chance of hosting the new government.

New York officials worried, with good reason, that Philadelphia would persuade lawmakers to return to that city, which was the home of the First Continental Congress in 1774 and where the Confederation Congress had met for nine years. Representative John Page of Virginia said that New York "is not half so large as Philadelphia; nor in any man-

ner to be compared to it for Beauty & Elegance." Benjamin Rush, a prominent Philadelphia physician, wrote a long letter to John Adams in early spring to remind him of his home city's many amenities and virtues, including that "Philadelphia is the centre State of the Union: she is wholly & highly federal."<sup>3</sup> Another Pennsylvanian, Timothy Pickering, said that "In Philadelphia, the Congress will find convenient lodgings & public buildings—provisions good, elegant, plenty & cheap—and the most extensive libraries adapted to the use of public bodies, that are to be found on the Continent."<sup>4</sup> Those libraries appealed to John Adams, who as vice president would be expected to be involved in the selection of a permanent capital. He told Benjamin Rush that "I love Philadelphia quite as well as New York, and the noble Libraries there [in Philadelphia] would be a Strong temptation to me."<sup>5</sup>

Some southern officials were unenthusiastic about Philadelphia as the permanent capital, but they were even less willing to send their representatives as far north as New York. Traveling to New York often required long journeys over land and water. When the weather was dry, a trip from Boston took up to four days, with twelve passengers crammed into a stagecoach—with three sitting on each bench—and on the road from 4:00 A.M. to 10:00 P.M. each day. Those who could not endure the hardship of a stagecoach trip ventured to New York by boat. For members of Congress from Connecticut and other New England states, seasickness was a common malady. After long days at sea, at the end of the journey, those travelers had to endure "Hell's Gate," the turbulent whirlpool where Long Island Sound met the East River.

Members traveling from New Jersey and other mid-Atlantic states had to change coaches several times and endure as many as five ferry crossings. During the first few years of Congress, legislators from Georgia and South Carolina were delayed going to New York and back home when their ships foundered off the Delaware coast.<sup>6</sup> The dispute over the location of the nation's capital was finally resolved in 1790 by a compromise that created the District of Columbia, but as the First Congress met, those negotiations were still in the future.<sup>7</sup>

As members of the new House and Senate arrived in New York, they were greeted by cheering crowds, banquets and tributes hosted by city officials, and invitations to social gatherings. Streets had been repaved, new docks were constructed on the Hudson and East rivers, and homes that had been burned during the war were rebuilt. Newspapers urged the city to install better street lighting and employ a larger police force for what was called the "seat of the American empire."<sup>8</sup> Senator Oliver

Ellsworth of Connecticut told his wife that "No pains have been spared by the inhabitants of this place to provide for the reception of Congress & to render their stay here agreeable."<sup>9</sup>

The massive renovation—which had begun the previous September as soon as Congress chose New York as the temporary capital—was possible in such a short time because the city was still very small, only a tiny fraction of its size today, occupying the southernmost tip of Manhattan. It extended from the Battery northward barely one-third of the way to Greenwich Village and east along the East River only as far as the present site of the Manhattan Bridge, although city streets were platted up to the site of the Williamsburg Bridge. Even Greenwich Village, where Senator Richard Henry Lee of Virginia lived during the congressional sessions, was considered out of town.<sup>10</sup>

The revitalized city did not impress everyone. Representative Elias Boudinot of New Jersey told his wife that "we arrived safe in this dirty City [New York]—The difference of the wholesome Country Air, from the Stench of the filthy Streets was so apparent, as to effect our smelling Faculties greatly."<sup>11</sup> Representative George Clymer of Philadelphia said that for the first month he was in New York, he was "not in good health, from the extreme badness and unwholesomeness of the air."<sup>12</sup> Representative Michael Jenifer Stone of Maryland also complained about the unhealthy conditions, telling Trench Coxe that "I have been sick Ever since I came to New Yorke—The air—The Water—and the Scents of the Town have made War upon my weakly Frame."<sup>13</sup> Senator William Maclay of Pennsylvania was convinced that New York's weather had damaged his health: "I never had a series of worse health than since I came here . . . One of my knees is now swelled a third above the common Size with the Rheumatism, a disorder for which, I am told, this place is famous."<sup>14</sup>

The heat and humidity also bothered legislators as the summer wore on. Representative Clymer said in early July, "I am yet to be convinced that a New York summer is cooler than our own [in Philadelphia] having scarce ever felt hotter weather any where than we have had for a week past—perhaps it is the effect of greater moisture in the air upon my constitution to render me less able to bear heat than at home." He later noted that the "thermometer has daily stood from 88 to 91 the effect of which together with the fumes of a non-elastic air has been fatal to many people."<sup>15</sup> Clymer was not the only person to say that people had died because of the warm temperatures and humid air. A merchant from Maine, who was doing business in New York during the hottest summer months, said in mid-August, "Such has been the intenseness of the heat in this city . . . [for the

last week] that several people (I believe 6 or 8) have dropped dead in the street, either by its direct influence, or by the consequence of drinking too freely of cold water . . . [At 91 degrees it is] several degrees hotter than was ever known here by the oldest person living."<sup>16</sup>

Even the streets, which New York officials had tried to improve before Congress began its work, received low marks from some legislators. John Page said that "the Streets here are badly paved, very dirty & narrow as well as crooked."<sup>17</sup> Senator Maclay complained about having to navigate New York's streets while fulfilling social obligations almost every night: "I really found considerable difficulty in discharging [social] obligations of this Kind, by hunting up thro all the Winding Alleys (a Pennsylvanian cannot call them Streets) of this crooked Town."<sup>18</sup>

Not every member of Congress was unhappy about New York. Many appreciated the overall quality of the boardinghouses and food, as well as the theaters and other entertainment venues. New York's John Street Theater was a favorite place of amusement for many legislators and local citizens. In 1789, the theater offered seventy-four comedies, farces, comic operas, tragedies, and other entertainment, which many members of Congress could not see at home.<sup>19</sup>

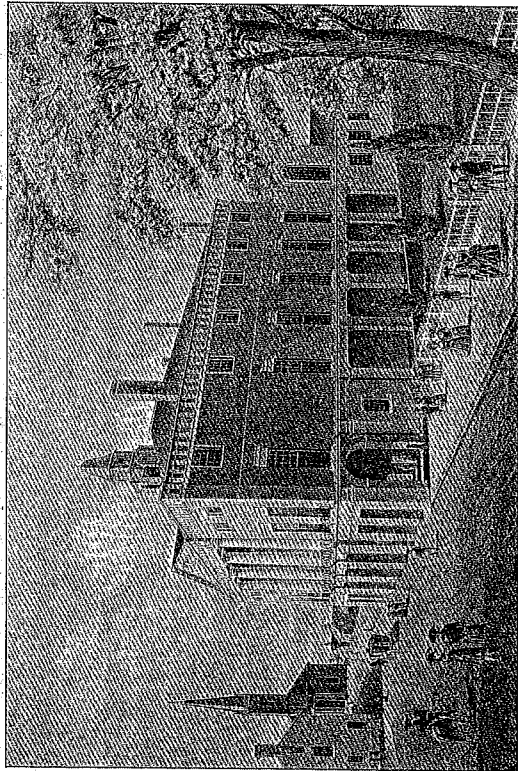
At the same time that the city offered entertainment, it was also described by some as a respectful and solemn place. Senator Ellsworth observed that "there are here not only many churches, for every denomination of christians, but, so far as I have visited them, which is pretty extensively, they are well filled." The senator also noted that "what has added much to my pleasure has been the great decency & appearance of devotion with which divine service is attended."<sup>20</sup>

Ellsworth was impressed with how religiously devout many women were in New York. He thought his wife would enjoy hearing more about the women in the city: "You will naturally enough conclude from the favourable opinion I entertain of the New York Ladies that my acquaintance with them is not a universal one. There are many I confess of whom I shall never be able to give you any account." A New Hampshire senator noticed the clothes New York women wore, explaining to one of his daughters that "I do not know of any new fashions in this place. The ladies dress much as they did last year, excepting the crowns of their hats are raised a story or two higher."<sup>21</sup>

About half of the legislators had left their wives and children at home.<sup>22</sup> In their correspondence, some members of Congress expressed sadness at being away from their families. Representative Boudinot of New Jersey wrote to his wife, Hannah, at midnight after a long day of

work, and said he wished she were in New York so he could share the day's events with her: "Had I my charming Wife to repay me, by her tenderness when the business of the day was done, it would add an invaluable pleasure to all my Engagements." A week later, he wrote an affectionate note to Hannah on their anniversary: "This Evening I am alone, and the important Day could not pass without Serious Reflections of Gratitude & Praise—I congratulate my beloved Wife, on the anniversary of one of the most happy Transactions of my Life—Twenty five Years have not induced repentance—Twenty five revolving Suns have not changed the Joy nor lessened the Prize."<sup>23</sup>

What impressed most of the arriving legislators was the transformation of what had been City Hall into a grand federal building. The enlargement of the eighty-five-year-old structure at the corner of Wall and Nassau streets was supervised by the architect Pierre L'Enfant. It was the largest construction project in New York City at the time. Two hundred artisans, carpenters, and unskilled laborers worked for almost eight months on the project.<sup>24</sup> Senator William Paterson of New Jersey told his wife that the building was "elegant" and that it "far exceeds any Thing of the Kind I have seen; and all join in declaring, that there is Nothing equal to it in this Country." The French minister to the United States, Comte de Moustier, described it as "a monument that can serve as

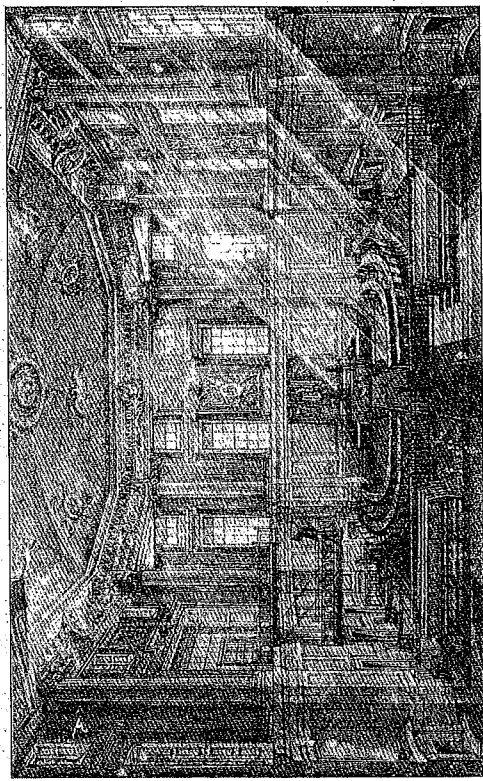


Federal Hall, at the corner of Wall and Nassau streets in lower Manhattan. It was here that the First Congress met and the Bill of Rights was proposed. (*Library of Congress*)

an allegory for the new Constitution . . . Both have been entirely changed by their framers."<sup>25</sup> The three-story building—which measured 95 feet in width and 145 feet at its longest point—had a great history, having hosted the trial of newspaper editor John Peter Zenger in 1735, the Stamp Act Congress in 1765, and later, the Continental and Confederation congresses. George Washington took the presidential oath on its balcony.

Visitors using the main entrance walked onto the marble floor—with the marble "very lofty and well finished"—into the three-story vestibule and could see above an "ornamented" skylight under a cupola.<sup>26</sup> Off the vestibule was the chamber of the House of Representatives, a two-story, richly decorated octagonal room. The Senate chamber, also two stories, was forty by thirty feet. Two staircases in the front lobby, one of them reserved for members of Congress, provided access to the upper floors. L'Enfant had apparently done an excellent job of renovating the building while preserving its older features.<sup>27</sup>

The House and Senate were supposed to convene in the first week of March, but it took a month before enough members arrived to form a quorum. Those who were on time became increasingly apprehensive as each day passed with only a few congressmen and senators trickling into the city. They wondered why it was taking so long for members of the new government to arrive. All but three states—New York, North Carolina, and Rhode Island—had conducted elections during the time period set by the Confederation Congress in its election law. North Carolina and



Chamber of U.S. House of Representatives, Federal Hall, 1789. (*Library of Congress*)

Rhode Island had not joined the union, and New York's delay was caused by a stalemate in its General Assembly, whose two houses were controlled by opposing factions.<sup>28</sup> On March 4, the day Congress was to convene, only eight senators (out of twenty-two) and thirteen representatives (out of fifty-nine) took their seats.<sup>29</sup> A week later, no additional senators had arrived. Members worried that the nation would think the newly elected federal representatives did not take their positions or the new government seriously. Representative Fisher Ames of Massachusetts—who played a prominent role in the first session—complained that “we lose £1,000 a day revenue. We lose credit, spirit, every thing. The public will forget the government before it is born.”<sup>30</sup> Members of Congress already in New York wrote letters to governors and their absent colleagues urging them to get to the capital as quickly as they could. In the meantime, Congress—which had so much to do—could not conduct official business.

Finally, on April 1, the House had enough members for a quorum. Ames was impressed with the quality of many of them: “Though I am rather less awed and terrified at the sight of the members than I expected to be, I assure you I like them very well. There are a few shining geniuses; there are many who have experience, the virtues of heart, and the habits of business.”<sup>31</sup>

The House members immediately began work by choosing a Speaker, selecting a staff, and beginning the process of establishing the rules under which they would operate. Five days later, with the arrival of the twelfth senator, the Senate had a quorum. Among the Senate's first duties was to count the electoral votes that would make George Washington the first president.

James Madison knew from past experience that achieving a quorum would take weeks, so he spent time in Virginia before leaving for New York on March 2. After delays caused by bad weather and stops in Baltimore and Philadelphia, he arrived on March 14. Pleasant weather greeted him, with a temperature of forty-one degrees and clear skies. Madison was returning to the place where he had stayed while serving in the Confederation Congress, Vandine and Dorothy Elsworth's boardinghouse at 19 Maiden Lane, near the water at the southern end of the island. Three colleagues from Virginia—John Page, Alexander White, and John Brown—as well as two members from Pennsylvania, also lived there during the new government's first session. White had heard that the Elsworth place was the “best House for Company and Entertainment in the City.”<sup>32</sup>

The House and Senate would operate under different rules, and it did not take long for the Senate to act like the “aristocratic” branch many

had assumed it would be. The Constitution was silent on whether the new Congress must open its doors to the public. The only requirement was for each house to publish a journal of its proceedings. The House voted to open its galleries, including to journalists who would provide important information about the deliberations of the House, while the Senate chose to meet in secret. The Confederation Congress had met behind closed doors for all the years of its existence, as had the Constitutional Convention in Philadelphia. The House's decision to open its galleries so citizens could witness the debates was almost unprecedented among legislative bodies around the world. As late as 1775, the British Parliament still tried to prosecute printers who had dared to publish excerpts of the debate, although visitors were permitted in the gallery. By the time the Constitution was written in 1787, American legislatures allowed access to and publication of their proceedings. The Senate would not open its sessions to the public for five years.<sup>33</sup>

The members of the First Congress had a tremendous amount of work ahead of them. Their first challenge was to approve the rules by which they would conduct themselves. A legislative body cannot function without rules, yet reaching consensus on such matters can be difficult. Although rules largely deal with procedural matters, they also affect what laws will be adopted and the content of those laws. The House and Senate also had to determine how to keep records of their deliberations and votes, to choose officers, to settle disputed elections of some of their members, and to create the committees that would handle much of the business of each chamber.

The new Congress did not have the luxury of time for a long discussion about procedures. The nation's business was pressing. Congress knew that it had to approve a revenue system so the federal government would have enough money to carry out its functions. It needed to pass “impost” laws that taxed imported goods—the primary source of money for the new government—and it had to do so quickly enough to collect taxes on the goods carried on ships arriving during spring and summer, the busiest seasons for such commerce. Although the new nation was in dire need of a stable taxation system, the First Congress took months to enact one, bogged down in such minutiae as whether rum should be taxed higher than molasses. As a result, goods arriving during the busy spring and summer shipping season of 1789 went untaxed, costing the government thousands of dollars.<sup>34</sup>

Congress had to establish executive departments so President Washington would have a cabinet to help him carry out the functions of the

executive branch. It also had to create a system of public credit and payment, and to decide whether the federal government or the states would pay Revolutionary War debts.

The federal court system—of which the Constitution created only the Supreme Court—was still to be formed. Once the court system was in place and judges were confirmed by the Senate, Congress would have to enact federal criminal laws because until it did so, the federal government was unable to punish those committing federal crimes. Laws related to congressional pay, naturalization, patents and copyrights, Indians, pirates, and the location of the permanent seat of government were all to be written.<sup>35</sup> The power of the president to remove executive officials appointed by him and confirmed by the Senate was also going to be debated at length.<sup>36</sup>

The early weeks of the First Congress must have been tiring for many members. The hours seemed reasonable—members of both houses generally met from eleven in the morning until three or four in the afternoon, except when committee meetings were held at 9:00 A.M. or when they had a rare 6:00 P.M. meeting—but the demands on their time and the conditions under which they worked were often exhausting, and they had to work with almost no staff.<sup>37</sup>

Representative Boudinot of New Jersey told his wife of his routine: "I am up at 7 o'clock or a little after; spend an hour in my Room—dress & breakfast by half past 8—in Committee at 9—from thence immediately to the House—adjourn at 3 o'clock—In Committee ag. [again] at 6—return at 8—and write till 12 at Night—This has been my Course for some Time, except when I dine out, which to me is harder Service."<sup>38</sup>

Members were invited, and usually obligated, to attend numerous dinners and social gatherings throughout the week. Some were hosted by prominent political figures including other members of Congress, officials of the executive branch, and influential citizens. President Washington hosted a weekly levee and other engagements. Declining such an invitation could be considered an insult to the host and could negatively affect one's career. These dinners—featuring rich meals and desserts and often substantial amounts of alcohol—could last late into the evening. Someone in a single night could be served hot and cold punch before dinner, turkey, roast beef, other kinds of beef or mutton, oysters and clams, fish, a variety of vegetables, Madeira or Spanish wines, and spruce beer or cider, not to mention buttered toast, cheese, and nuts that may also have been available. Desserts included ice cream, trifle, whipped syllabub, and an array of tarts.<sup>39</sup>

Congressmen or senators fulfilling social obligations might stagger back to the boardinghouse late in the evening, satiated by the huge meal, and slightly or completely inebriated, only to arise the next morning, often at 7:00 A.M., to get dressed, eat breakfast, and then walk or ride to Federal Hall for a 9:00 A.M. committee meeting.

Once at the legislative building, they would encounter constituents from home, fellow members of Congress who wanted to discuss pending legislation, and "lobbyists" interested in the outcome of bills. The members would answer letters, read the newspaper, and then settle in for a day-long debate on, say, the impost bill in what was, during warm weather, a sweltering legislative chamber.<sup>40</sup>

The debates in the House—the only body allowing visitors—quickly became a source of great interest to the public. Some of the most distinguished figures of the founding period were members of the House, and for citizens who had never before had the opportunity to witness a federal legislative body in session, viewing the debates became a pastime and a ritual. The House galleries were packed with people. Though only men could serve in government, many women took a keen interest in the debates. Both women and men crowded the galleries, often talking with their friends for hours at a time or loudly cracking nuts—apparently a favorite snack of Congress-watchers.<sup>41</sup>

Members of the House must have been thinking about all that they had to accomplish when James Madison rose from his seat on May 4, just a month after a quorum was attained, to announce that he would introduce a discussion of amendments to the Constitution on May 25. Madison did not speak for long that day. He wanted to give notice that he would present a list of amendments and participate in the ensuing debate. He recognized that other business before the House might postpone that discussion, but he was hoping that the most urgent matters could be dealt with over the next few weeks so that the body could then concentrate on proposing changes to the Constitution.

In the weeks leading up to Madison's announcement on May 4, he had been busy preparing amendments and helping Washington to establish the executive branch. Washington, who lacked a cabinet when he was inaugurated on April 30, relied heavily on his fellow Virginian, whom he deeply respected and whose intellect he admired.<sup>42</sup> He asked Madison for advice on many important subjects, including matters of presidential style and etiquette, the president's relations with the Senate, and appointments to public office.<sup>43</sup> Madison was so influential that some have described him as "prime minister" during the first six months of the administration.<sup>44</sup>

Washington showed Madison a draft of a speech—it had been written by Washington's secretary, David Humphreys—that he wanted to deliver to Congress as his first inaugural address. The draft was seventy-three pages long and crammed with suggestions for Congress. Delicately, Madison told Washington that the draft was much too long and that it was inappropriate to list specific legislative recommendations. Instead, Madison advised the president to deliver a short address that emphasized his general aspirations for the new republic. Madison did, however, insert into Washington's speech a section that he hoped would launch a successful debate on amendments, helped along by the new president's enormous prestige. Years later, Madison observed that only because of Washington's respect for Humphreys did the president even consider giving the speech: "Nothing but an extreme delicacy towards the author of the Draft, who, no doubt, was Col. Humphreys, can account for the respect shewn to so strange a production."<sup>45</sup>

Washington delivered the address in the Senate chamber to a joint session of Congress on April 30, 1789. His remarks on the subject of amendments were obliquely phrased: "Besides the ordinary objects submitted to your care, it will remain with your judgment to decide how far an exercise of the occasional power delegated by the fifth article [the amending article] of the Constitution, is rendered expedient at the present juncture by the nature of the objections which have been urged against the system, or by the degree of inquietude which has given birth to them."<sup>46</sup>

Washington declined to propose specific changes, telling Congress that "I shall again give way to my entire confidence in your discernment and pursuit of the public good." Like Madison, though, he gave his support to amendments that would enhance personal liberty but leave untouched the basic structure of government. Washington urged legislators to be careful what alterations they proposed: "For I assure myself that whilst you carefully avoid every alteration which might endanger the benefits of an United and effective Government, or which ought to await the future lessons of experience; a reverence for the characteristic rights of freemen, and a regard for public harmony, will sufficiently influence your deliberations on the question."<sup>47</sup>

The low-key approach to amendments in the inaugural address reflected Washington's view that he should not tell Congress what to do. In any case, the president was one of those who did not see the need to amend the Constitution as urgent, though he recognized that some changes might be desirable. He said as much to Madison a few weeks after assuming office, after Madison had shown him the amendments.

"I see nothing exceptionable in the proposed amendments," responded Washington. "Some of them, in my opinion, are importantly necessary, others, though of themselves (in my conception) not very essential, are necessary to quiet the fears of some respectable characters and well-meaning men. Upon the whole, therefore, not foreseeing any evil consequences that can result from their adoption, they have my wishes for a favorable reception in both houses."<sup>48</sup> Although Madison might have wished that Washington's reference to amendments in his inaugural address had been more specific and less tentative and deferential, for his purposes the most important point was that the president had clearly endorsed the concept of revising the Constitution. Having Washington associated with his cause was invaluable to Madison. Later, he would often use the president's letter to help persuade his colleagues that they should follow Washington by supporting amendments.

Members of the House, after hearing Washington's inaugural address, decided they should reply to the president. Probably without knowing that Madison had been involved in writing Washington's speech, the House appointed him to the committee to draft the response, giving Madison the chance to generate additional support for his proposed amendments.

The House's response began with congratulations on Washington's election and compliments for his long service to the nation, and then responded to his call for consideration of amendments: "The question arising out of the fifth article of the Constitution will receive all the attention demanded by its importance; and will, we trust be decided, under the influence of all the considerations to which you allude."<sup>49</sup>

The Senate also wrote a response to Washington's address. The president in turn replied to each chamber. Madison had a hand in Washington's answers, continuing the unusual role of composing both sides of the correspondence. With Madison's help, the new president went on record as supporting amendments.<sup>50</sup>

Madison expected that Washington's endorsement would start the drive to win approval for constitutional amendments. To propose them would require a supermajority, two-thirds in favor in each house, but with both chambers overwhelmingly in Federalist hands—only ten of fifty-nine House members and two of twenty-two senators were confirmed Anti-Federalists—he probably anticipated substantial support.<sup>51</sup>

Early in the session, before amendments were discussed, Madison had to deal with a challenge that would arise repeatedly during the long summer and that threatened to derail his effort to propose amendments: the competing drive to call a second constitutional convention. On May

5, a fellow congressman from Virginia, Theodorick Bland—an ally of Patrick Henry—presented to the House Virginia's petition calling for a second convention to consider "the defects of this Constitution that have been suggested by the state Conventions, and report such amendments thereto, as they shall find best suited to promote our common interests, and secure to ourselves and our latest posterity, the great and unalienable rights of mankind."<sup>52</sup>

Bland was an energetic Anti-Federalist. A doctor from Prince George County who had served in the Confederation Congress and the Virginia House of Delegates, he had voted against ratification at the Virginia convention. He had often opposed Madison and was apparently so popular in his district that Federalists put up only token opposition in his race for Congress.<sup>53</sup>

The next day John Lorraine, a representative from New York City, placed before the House New York's resolution asking for a new convention to propose amendments securing personal rights. He did not explain why a Federalist, who would presumably be opposed to a second convention, introduced the document. Lorraine may have been simply carrying out an obligation he believed he owed the state legislature to deliver the resolution.<sup>54</sup>

The introduction of the two petitions drew Madison into a debate he certainly would have preferred to avoid. His primary purpose in offering amendments was to prevent the calling of another constitutional convention. Now he was faced with having to discuss two petitions for just such a convention, one from his home state, and one from the state that was hosting the national government. Madison had to be careful not to dismiss them too quickly by suggesting that the petitions should simply be filed, without Congress taking any action on them. On the other hand, if Congress took the petitions too seriously, it could encourage other states to submit their own, with the possibility that enough would do so to reach the two-thirds required by Article V for the calling of a convention.

Bland wanted the Virginia petition and list of amendments proposed by the ratifying convention to be submitted to the committee of the whole House so they could be considered along with Madison's amendments. Representative Elias Boudinot, the influential Federalist from New Jersey who had once been the president of the Confederation Congress, argued that the petitions and amendments should be available for members to consult, but that Congress should not take formal action until a sufficient number of states had presented them.<sup>55</sup>

Bland was not satisfied. He argued that whether or not other states "would come forward," if the House had Virginia's petition before it when amendments were considered, "it might have some proper influence in their decision, tho' it were not accompanied by other applications."<sup>56</sup>

Madison said that the House should respect the decision of the Virginia General Assembly to request a second convention, but that any formal action should be consistent with the requirements of the Constitution. He noted that "Congress had no deliberative power with respect to a convention." When two-thirds of states requested such a gathering, Congress was "bound to call one." Until enough states did so, the House and Senate have "no power whatever to enter into the subject—The best mode was to let it [the Virginia petition] lie upon the table till a sufficient number of applications appeared."<sup>57</sup> Considering that Madison had played a significant role in the debate at the Philadelphia Convention that led to the final language of Article V, his reasoning no doubt carried weight with many of the members of the House.

This could have been the end of the discussion, but Bland and Boudinot continued to disagree about what should be done with the petitions. Boudinot did not see how it would be "paying any respect to Virginia to commit their application to a body which had no power to deliberate or decide upon it," while Bland said again that if the House accepted the petitions and considered them along with the proposed amendments, there would be no violation of the Constitution. As the argument continued, Representative Elbridge Gerry of Massachusetts suggested that the debate over the treatment of the petitions should wait until the amendments themselves were discussed.<sup>58</sup> Finally, with Madison and Bland agreeing, the House decided to enter the petitions into the journal and keep the originals on file in the clerk's office, thus taking no immediate action on them.

On May 4, shortly after the legislative session had begun, Madison gave his colleagues notice that on the fourth Monday of the month, he would introduce the proposed amendments.<sup>59</sup> His announcement was greeted with frustration by some citizens in the gallery and probably some legislators as well—because they had a hard time hearing him. Jefferson had said Madison had a difficult time in large forums because of his shyness. Tristram Lowther, a merchant from North Carolina in New York on business, wrote to James Iredell—who would soon be appointed to the Supreme Court—that he had "formed the highest expectation" for Madison, but "I have had very little oppy. [opportunity] of forming an opinion for whenever he has spoke while I have been attending it has

been in so low a tone of voice that I could not well distinguish what he said his voice appears to be too defective to appear to advantage [in] so large a room."<sup>60</sup> That may have been one reason Madison was unhappy about the way his speeches were recorded and reported in newspapers. He complained to Edmund Randolph that "the reasonings on both sides are mutilated, often misapprehended, and not unfrequently reversed."<sup>61</sup>

When May 25 arrived, the scheduled discussion of the amendments was again postponed because of other important business. Even though Madison must have been irritated by the delay, he did not seem too concerned when he wrote to Thomas Jefferson that "The subject of amendments was to have been introduced on Monday last; but is postponed in order that more urgent business may not be delayed." He told Jefferson the House would soon consider a "Bill of rights, incorporated perhaps into the Constitution . . . with a few other alterations most called for by the opponents of the Government and least objectionable to its friends."<sup>62</sup>

This time, Madison was willing to wait only a few weeks. On June 8, he addressed the House at length on the subject of amendments.<sup>63</sup> He had been preparing for this speech for a long time. It reflected his evolution from opposition to a bill of rights, to lukewarm support, to a firm determination to "advocate them [amendments] until they shall be finally adopted or rejected by a constitutional majority in the House."<sup>64</sup>

Madison recognized that the House had much other, pressing business, but he cautioned that if "we continue to postpone [the discussion of amendments] from time to time, and refuse to let the subject come into view, it may occasion suspicions, which, though not well founded, may tend to inflame or prejudice the public mind, against our decisions." He worried that the public would think that "we are not sincere in our desire to incorporate such amendments in the constitution as will secure those rights, which they consider as not sufficiently guarded."<sup>65</sup>

The evidence as to how strongly Madison believed in the amendments he was proposing to Congress is not completely clear, and historians have long debated this issue. For instance, in the outline he prepared for his June 8 address, he wrote, "Bill of Rights—useful—not essential."<sup>66</sup> But this language does not appear in the text of his address. On the contrary, the primary theme of his presentation was that amendments were of vital importance. That phrase in the outline may have been a reference to the view held by others that a bill of rights was not needed, a position that Madison acknowledged several times in his speech: "I am aware, that a great number of the most respectable friends to the government and champions for republican liberty, have thought such a provision, not only unnecessary, but even improper . . . [or] dangerous."<sup>67</sup>



James Madison's notes for his speech on the Bill of Rights in the U.S. House, June 8, 1789. (Library of Congress)



Whatever the speculation about how sincerely he wanted to see a list of rights added to the Constitution, it is clear that Madison's words and actions during those difficult months strongly suggest that by this time he genuinely supported amendments. It is hard to believe that political expediency, keeping his word to local constituents, or a wish to assuage the concerns of those who remained opposed to the new government would be enough to motivate an individual to endure what Madison would go through during the summer of 1789. Only a genuine conviction that such rights were necessary and important could have generated the passion and commitment that Madison poured into his campaign for amendments—an effort that would demand enormous patience, tenacity, and all of his legislative skills.

As he introduced the amendments, Madison said, "[I]t will be proper in itself, and highly politic, for the tranquility of the public mind, and the stability of the government, that we should offer something, in the form I have proposed, to be incorporated into the system of government, as a declaration of the rights of the people."<sup>68</sup> His speech reflected his deeply held belief that in a republic, the people are sovereign, and whatever misgivings Madison may have had about the propriety of adding a bill of rights had to yield to the desire that citizens had expressed during the ratification process for such protection. Madison did not explicitly state in the June 8 address that the amendments themselves were so essential to the nation's well-being that they must be added to the Constitution regardless of how much support they had among citizens. On the contrary, he stressed that the demand for amendments by the nation's citizens required Congress to respond, and that the failure to do so—on such a fundamental issue as this—would make it clear that the new government was not going to operate with the consent of the governed and reflect the will of the people. Madison's decision to enfold the amendments in the principle that they were passionately sought by the people did not indicate a failure on his part to envision the potential of the amendments to greatly enhance individual rights.<sup>69</sup>

Madison moved that the House constitute itself as a committee of the whole so it would have the flexibility to discuss his proposals unencumbered by rules of parliamentary debate. He also wanted to be able to make his own detailed case to every member of the House. If the proposal was sent to a committee, its report—which Madison could not control—would form the basis of discussion when the amendments returned to the House floor.

Madison had barely finished offering his motion—and had not yet even introduced the amendments themselves—before Representative

James Jackson of Georgia, a Federalist, and Representative Aedanus Burke of South Carolina, an Anti-Federalist, vigorously objected on the grounds that it was "improper to enter on such a subject till the government was perfectly organized and in operation."<sup>70</sup> They argued that discussion of the amendments would take too much time and delay other important business such as the establishment of the judiciary, the executive departments, and the revenue system. They were joined by Representative William Loughton Smith of South Carolina, a Federalist, who stressed that enacting a revenue law required "constant and uninterrupted attention till completed" and suggested that a select committee be appointed to consider amendments. He said that Madison "had done his duty. He had supported his motion with ability and candor, and if he did not succeed he was not to blame."<sup>71</sup>

These objections meant trouble for Madison. Jackson, a lawyer from Savannah, was elected as a Federalist and thus might be expected to join Madison's efforts. Instead, Jackson echoed the views of many of his colleagues by arguing that it made no sense to amend the Constitution until "we have some experience of its good or bad qualities." He added that "The Constitution may be compared to a ship that has never yet put to sea—she is now laying in the dock—we have had no trial as yet; we do not know how she may steer . . . Upon experiment she may prove faultless, or her defects may be very obvious—but the present is not the time for alterations." Without a stable system of raising revenue, Jackson argued, the Constitution would be "of very little importance in itself."<sup>72</sup> Ironically, Madison would have made a similar argument himself prior to his conversion to the view that amendments were now needed.

To Madison's insistence that the American people expected the First Congress to deal immediately with amendments protecting personal liberty, Jackson replied that citizens would be irritated by the delay caused by such a discussion: "Should amendments now be taken up, it will be months perhaps before we can get through with them—mean time the important interests of our constituents are sacrificed."<sup>73</sup>

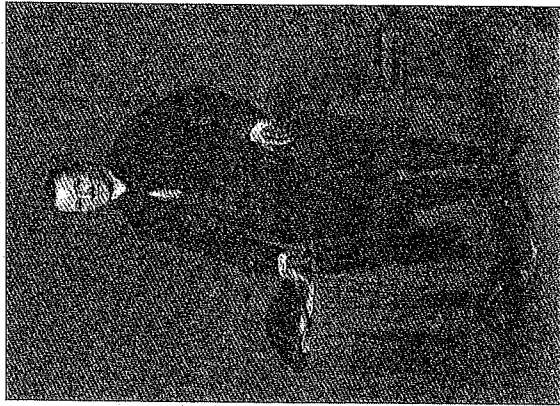
Other members of the House also objected to considering amendments for many of the same reasons. Representative Roger Sherman of Connecticut, who had played a prominent role at the Philadelphia convention and had actively supported ratification, argued that "taking up the subject of amendments at this time would alarm more persons than would have their apprehensions quieted thereby."<sup>74</sup>

Sherman served in the Continental Congress and on the committees that drafted the Declaration of Independence and the Articles of

Confederation. Although he had no formal education, he published on such subjects as astronomy, philosophy, and poetry and studied law. He was later a member of the Connecticut legislature and a judge. Following his one term in the U.S. House, he was a senator until his death in 1793.<sup>75</sup>

Representative John Vining, an influential Federalist from Delaware who had served in the Confederation Congress, wanted the House to finish discussing the revenue and judiciary systems before considering amendments. He believed that the American people were eager for the government to begin functioning and would be extremely disappointed if laws carrying out basic responsibilities were not approved first. He went so far as to argue that Article V required that two-thirds of House members favor the consideration of amendments before they were debated. Representative Benjamin Goodhue, a Federalist from Salem, Massachusetts, was another House member who held it unnecessary to take up amendments so soon.<sup>76</sup>

Madison must have been alarmed by the comments of his Federalist colleagues, from whom he had expected more support. He noted with asperity that Jackson was "certainly right in his opposition to my motion for going into the committee of the whole, because he is unfriendly to the object I have in contemplation."<sup>77</sup> He urged his colleagues to begin the debate, reminding the House that states had submitted amendments approved at their ratifying conventions that they wanted considered, and many citizens had supported ratification only because they were told the First Congress would immediately take up amendments. Citizens who remained actively opposed to the new government, Madison cautioned his colleagues, could create many problems during the nation's formative years if they believed their concerns about a bill of rights were not taken seriously.<sup>78</sup>



Roger Sherman, an influential member of the Constitutional Convention, later served in the First Congress and urged his colleagues not to add amendments to the Constitution. (*Library of Congress*)

Jackson offered a motion to postpone consideration of amendments until March of the following year. That motion was withdrawn when Madison agreed to have his proposal referred to a select committee that would report within a few weeks to the full House. He doubtless resented having to make that compromise, but he could see that it was the lesser of two evils. It would, however, be only a temporary setback. By the end of the day, the House would agree to debate the amendments in the committee of the whole.<sup>79</sup>

Representative Alexander White, a Virginia colleague, was the first to voice at least partial support for Madison. White thought that the subject of amendments should be postponed "till the more pressing business is dispatched," but he added that "I hope we shall not dismiss it altogether; because I think a majority of the people, who have ratified the constitution, did it under an expectation that congress would, at some convenient time, examine its texture, and point out where it was defective, in order that it might be judiciously amended." White was speaking not for his own constituents, because "I believe a majority of the district which elected me do not require alterations," but he added, "I know there are people in other parts who will not be satisfied unless some amendments are proposed." Even if Congress ended up not proposing amendments, explained White, those who desired amendments would be satisfied because they would know their views were at least discussed.<sup>80</sup>

Madison had to make a quick decision. He could wait to make his presentation to the committee—of which he would be a member—and let the House resume its debate on the revenue bill. But Madison was holding the floor now, and this would be his best opportunity to make his case for amendments to the whole House, without the intermediation of a committee report. For the next several hours, he began the long process of persuading two-thirds of his colleagues that amendments should be approved and forwarded to the Senate.

As a result of the procedural debate that had just taken place, Madison had a better idea of what was ahead. The resistance to amendments—ranging from indifference and inertia to outright antagonism—would be formidable. Furthermore, the popular demand for amendments was not confined to the issue of personal liberty. The ratifying conventions of Virginia, New York, and other states had also demanded that Congress offer amendments to change key provisions of the Constitution to reduce the power of the federal government. If the First Congress added amendments dealing with individual rights but did not make significant alterations in the structure of the new government by returning

of the House were not expecting, and which was adapted from the opening paragraph of the Virginia Declaration of Rights—affirmed the nation's commitment to the principle that "all power is vested in, and consequently derived from the people. That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety."<sup>85</sup> Further, echoing the words of the Declaration of Independence, Madison's preamble guaranteed that the "people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution."<sup>86</sup>

Madison's list of amendments included enlarging the size of the House; protecting freedom of religion, speech, and the press and the right to trial by jury in both civil and criminal cases; and prohibiting arbitrary searches, excessive bail, and double jeopardy. Many of these were drawn from the two hundred amendments recommended by Massachusetts, South Carolina, New Hampshire, Virginia, and New York, which, when duplicates were eliminated, offered about seventy-five distinct amendments.<sup>87</sup>

Not surprisingly, Madison drew heavily on the amendments suggested by his state's ratifying convention and those listed in the Virginia Declaration of Rights. He did not propose amendments that would alter the structure of the Constitution; he believed that the amendments he recommended would be the least objectionable and the most likely to be approved by Congress and the states.

One of the arguments that Federalists had used in making the case that a bill of rights was unnecessary was that protections for personal liberty in state constitutions had not been repealed, and thus even after the Constitution was ratified, citizens would continue to enjoy the rights they previously had been granted. In referring to the rights granted under state constitutions, Madison noted that "it has been said, that a bill of rights is not necessary," because the new Constitution has not "repealed those declarations of rights which are added to the several state constitutions."<sup>88</sup>

What Federalists often failed to discuss was that many state constitutions and declarations of rights omitted protections that others would consider fundamental. Therefore, when Madison looked for sources for his list of rights, state constitutions were of limited value. Six states had no bill of rights, and none had a comprehensive list of guarantees. Although each one secured the right to trial by jury in criminal cases and

power to the states, those still suspicious of the new Constitution might move ahead with plans for a second convention.

Supporters of the Constitution, Madison argued, needed to demonstrate that they were "as firm friends to liberty as those who had opposed it." Amendments could be approved without "effecting the essential principles of the Constitution." He recognized that many citizens were concerned about the potentially sweeping powers that Congress would have under the Constitution, and that a bill of rights "to quiet the minds of people . . . may be salutary."<sup>81</sup>

Before outlining the amendments, Madison offered a statement of deference to his colleagues: "I am sorry to be accessory to the loss of a single moment of time by the house." He said that if "congress will devote but one day to this subject, so far as to satisfy the public that we do not disregard their wishes, it will have a salutary influence . . . and prepare the way for a favorable reception of our future measures." Madison promised to confine his list of proposed amendments to those which are "intrinsicly proper . . . or proper because [they] are wished for by a respectable number of my fellow citizens."<sup>82</sup>

As he introduced the amendments, Madison explained, as he had during the months leading up to the congressional election, that "I have never considered this provision [a bill of rights] so essential to the federal constitution, as to make it improper to ratify it." But now, he added, "I will candidly acknowledge that . . . the Constitution may be amended; that is to say, if all power is subject to abuse, that then it is possible the abuse of the powers of the general government may be guarded against in a more secure manner than is now done . . . We have in this way something to gain, and, if we proceed with caution, nothing to lose . . . The people of many states, have thought it necessary to raise barriers against power in all forms and departments of government, and I am inclined to believe, if once bills of rights are established in all the states as well as the federal constitution, we shall find that altho' some of them are rather unimportant, yet, upon the whole, they will have a salutary tendency."<sup>83</sup>

Although he recognized the need for amendments, he warned his colleagues about going too far: "It is necessary to proceed with caution; for while we all feel all these inducements to go into a revival of the constitution, we must feel for the constitution itself, and make that revisional a moderate one."<sup>84</sup>

Madison then proposed a new preamble to the Constitution—one that emphasized natural rights—and nineteen amendments divided into nine articles. The preamble offered by Madison—which the members

protected religious liberty, five either permitted or provided for establishment of religion. Two states had no guarantee of a free press. Four did not ban excessive fines of bail and did not prohibit self-incrimination or general search warrants. Five states did not include protection for rights of assembly, petition, counsel, and trial by jury in civil cases. Seven did not prohibit *ex post facto* laws, and nine failed to provide for grand jury proceedings. Ten had no protection for freedom of speech, while eleven had no prohibition on double jeopardy.<sup>89</sup>

Even the Virginia Declaration of Rights, long touted as a breakthrough in the long struggle for human dignity, did not include several of the rights that became part of the first ten amendments. While the Declaration recognized the free exercise of religion and freedom of the press, it did not mention freedom of speech, assembly, and petition; the right to the writ of habeas corpus (a judicial order requiring authorities to show that someone is being held for a legitimate reason); grand jury proceedings; the right to counsel; or freedom from double jeopardy. Federalists had argued that because individuals enjoyed natural rights that could not be abridged by government—rights that were never surrendered—it was not necessary to include all such protections.<sup>90</sup>

Madison's address demonstrated his knowledge of government, his sense of what was needed to make the new constitutional system work, and his commitment to republican principles. But it also showed that he was not infallible, as he made one of the most serious misjudgments of his career.

Madison recommended that the list of rights he presented on June 8 be incorporated into the body of the Constitution and not added at the end. He believed that if amendments were added at the end, it would not be clear which sections of the Constitution had been modified. In his view, a supplemental list of amendments would not be treated as a permanent part of the Constitution but would instead be a potentially ignored appendix, leading to an endless debate over whether the amendments had actually altered the Constitution. He argued that because each amendment would modify a specific section of the Constitution, the new language should be inserted in the relevant section itself.

Today, far from being regarded as a mere footnote or afterthought to the Constitution, the amendments that make up the Bill of Rights hold a near sacred status in America—perhaps revered even more than the original Constitution itself. Yet had Madison's suggestion to insert amendments into the original text been adopted, the "Bill of Rights" as we know it would not exist.

The long-term implications of his proposal were troublesome enough. In the short run, Madison's plan of interpolating the amendments would surely have made it more difficult to secure the approval of both houses of Congress. With the two-thirds requirement, there was little room for error. Many of Madison's colleagues in the House were firmly opposed to altering the document by adding amendments at all. They would certainly have found the idea of tampering with its original language even more disturbing. For all of Madison's political instincts, it remains one of the few, but also one of the most conspicuous, examples of how wrong he could be.

Roger Sherman, the congressman from Connecticut, insisted that the amendments not be inserted into the Constitution. Sherman, who had opposed amendments from the beginning, argued that if the original words were changed, the Constitution's legitimacy would be damaged. The document would no longer be the one George Washington and the other delegates signed in Philadelphia or the states had ratified at their conventions.

For much of the summer, as the House discussed the amendments, a majority continued to support Madison's proposal that amendments be inserted into the Constitution. Perhaps they did not realize the implications of such an arrangement, or possibly some of those opposed to Madison's plan believed that inserting the amendments would persuade more members of the House and Senate to oppose them all together.

The awkwardness of inserting the amendments into the text of the Constitution became evident with the very first attempt at drafting them. A passage from the House committee's report at the end of July on what would eventually become the first amendment proposed by Congress—on the size of the House of Representatives—showed how unappealing this method was: "Art. 1, Sec. 2, Par. 3—Strike out all between the words, 'direct' and 'and until such,' and instead thereof insert, 'After the first enumeration there shall be one representative . . .'"<sup>91</sup> Several other proposed amendments did not simply insert new words into the body of the Constitution, they also deleted words already there. Sherman and several colleagues eventually convinced the House, with Madison's grudging acceptance, to place the amendments at the end of the Constitution.

Madison's failure to choose the best place for amendments notwithstanding, his speech of June 8 was thorough, impressive, and compelling, and it laid the groundwork for the eventual debate on the Bill of Rights. He admitted that "paper barriers" were sometimes too weak to protect individuals against a determined government, but he also believed

that the rights included in his list of amendments would have a "tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community." Madison added that highlighting these rights in the Constitution might serve to "controul the majority from those acts to which they might be otherwise inclined."<sup>92</sup>

Madison outlined the major advantages of enacting a bill of rights. He believed it would persuade Anti-Federalists finally to give up their opposition to the new government: "It will be a desirable thing to extinguish from the bosom of every member of the community any apprehensions, that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled."<sup>93</sup> He was careful not to impugn the motives or integrity of those who still opposed the Constitution, but he believed that they would appreciate the "spirit of deference and concession" of those who controlled the government if a bill of rights was offered.

Madison also expected that Rhode Island and North Carolina, which were still holdouts from the union, would quickly agree to join the other states once a bill of rights emerged from Congress.<sup>94</sup> Most people understood that North Carolina in particular was determined to stay out until Congress had recommended a bill of rights.<sup>95</sup>

Madison considered one amendment to be especially important. He knew that state constitutions often failed to provide realistic protection for unpopular speech and religious practice. He had tried at the Philadelphia convention to include in the Constitution authority for the new Congress to "negative" all laws enacted by state legislatures that Congress considered contrary to the federal Constitution.<sup>96</sup> Such a "veto" power, in Madison's view, could be used to prevent states from interfering with the indispensable right of citizens to freely exchange information and criticize government, and to learn through the press what the government was doing, all of which were essential if the people had to replace unresponsive or oppressive public officials. His colleagues at the Philadelphia convention had rejected the proposal, which would have granted the Congress breathtaking powers and was stunningly impractical. The idea that Congress would have the time or ought to have the authority to review the laws enacted by every state legislature—and in the process exercise quasi-judicial authority, thus violating separation of powers—deserved the negative response it received.

Although his proposal was defeated in Philadelphia, Madison saw the chance to resurrect it on a smaller scale in the First Congress. The

fifth article in his list of amendments read in part, "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."<sup>97</sup> In other words, these fundamental rights would be protected not only against abuses by the national government but against abuses by state governments as well. Madison explained that because the Constitution already prohibited states from passing a bill of attainder (a criminal charge brought by a legislative body) or an ex post facto law (punishing an act that was not criminal at the time it was committed), it made sense to further extend the restrictions on states' powers. The states would thus be prohibited from interfering with rights that would eventually become part of the First Amendment and the right to a jury trial in criminal cases. Although his House colleagues eventually gave their support, the amendment was deleted by the Senate.

This had been one of the most important speeches in the nation's history. If Madison had any sense of the eventual importance of the bill of rights, he would have expected at least some approbation from his colleagues. He had put his heart and soul into this address, having worked so hard to get elected to the First Congress and then preparing for months for this moment. How disheartening it must have been for him that, after engaging the attention of his fellow House members for several hours, Madison had barely resumed his seat when one member after another denounced his proposals—primarily arguing that amendments were unnecessary, premature, and certainly less important than other legislative business.

He had heard many of the same comments earlier in the day, before introducing the amendments. Now, as those arguments were repeated, it was as if his colleagues had already decided not to consider the potential value of the amendments themselves. Representative Jackson of Georgia immediately stated that he was "against inserting a declaration of rights in the constitution . . . and if such an addition is not dangerous or improper, it is at least unnecessary." He asked why Madison would seek to protect freedom of the press: "[P]ray, how is this in danger? There is no power given to congress [in the Constitution] to regulate this subject as they can commerce, or peace, or war."<sup>98</sup>

Jackson was especially concerned about the message a prolonged debate about amendments would send to foreign nations, which would view with alarm additional delays in creating a stable government. He noted that such nations will "treat us with the contempt we have hitherto borne by reason of the imbecility of our government. Can we expect to enter into a commercial competition with any of them, while

our system is incomplete? and how long it will remain in such a situation, if we enter upon amendments, God only knows. Our instability will make us objects of scorn.<sup>99</sup>

Jackson repeated his earlier point that it was too soon to propose amendments until more experience was gained with the nation's affairs, and because additional amendments would likely be recommended by the states or Congress, the Constitution would be deprived of the stability it needed: "This is not the time for bringing forward amendments; and, notwithstanding the honorable gentleman's ingenious arguments on that point, I am now more strongly persuaded it is wrong . . . The imperfections of the government are now unknown; let it have a fair trial . . . then we can tell where to apply the remedy."<sup>100</sup> He thought it might take a year for the House to deal thoroughly with the subject of amendments.<sup>101</sup>

Representative Samuel Livermore, a Federalist from New Hampshire, said he would consider amendments at a later time. He recommended that the Senate be consulted to see whether it was willing to discuss amendments, because if senators were unenthusiastic about the subject, it made no sense for the House to continue: "If they opposed the measure, all the house did would be a mere waste of time."<sup>102</sup>

The influential Roger Sherman spoke next. He was firmly against considering amendments because he did not see how they could, at this point, improve the Constitution. He argued that since the plan of government had been approved by most ratifying conventions without recommendations for amendments, it was viewed favorably by a majority of citizens. He also doubted whether states that had not offered amendments would vote to ratify them if proposed by Congress: "We shall not be able to propose any alterations that are likely to be adopted by nine states . . . Those states that have not recommended alterations will hardly adopt them, unless it is clear that they tend to make the constitution better."<sup>103</sup> Because the nation had so little experience with the Constitution, no one could know, Sherman argued, how to improve it. He urged his colleagues to find a way to "get rid of the subject," and he recommended against sending it to a special committee, presumably hoping that the committee of the whole would put an end to the discussion.

The previous December, Sherman—writing as a "Citizen of New Haven" in the *Connecticut Courant* in Hartford—argued that the Constitution, without amendments, would protect individual rights because the authority of the states was preserved. He wrote that "the immediate security of the civil and domestic rights of the people will be in the government of the particular states." Sherman added that the "powers vested in

the federal government are particularly defined, so that each State still retains its sovereignty in what concerns its own internal government."<sup>104</sup>

Representative William Smith of South Carolina estimated that it would take "three weeks or a month" to resolve the subject of amendments. During that discussion, "every other business must be suspended, because we cannot proceed with accuracy or dispatch when the mind is perpetually shifted from one subject to another." Federalist John Vining of Delaware argued that a bill of rights was "unnecessary in a government deriving its powers from the people," especially in a document that begins "We the people do ordain and establish." If Congress were to take up amendments, Vining believed, it would be the equivalent of "suspending the operations of government, and may be productive of its ruin."<sup>105</sup>

As the afternoon wore on, it must have seemed to Madison that the House might not even take up amendments in its first session, much less approve any of them by a two-thirds vote. Yet if he was dismayed by the resistance of his Federalist colleagues, he might have taken heart that his effort attracted support from some who had earlier opposed the new government. Gerry of Massachusetts had objected so strongly to the proposed Constitution that he refused to sign it at the Philadelphia convention. Now he agreed with those who said it was "improper to take up the business [of amendments] at this time, when our attention is occupied by other important objects." Unlike some of his colleagues, however, he considered the matter to be of great urgency, and he proposed that amendments be the focus of the House's attention on July 1, a few weeks in the future. Gerry agreed with Madison that if the First Congress did not seem serious about considering amendments, more state legislatures would join the call of New York and Virginia for a second constitutional convention. Despite his earlier opposition, Gerry had pragmatically concluded that the current Constitution was as good as the new nation was likely to get: "I am not, sir, one of those blind admirers of this system, who think it all perfection; nor am I so blind as not to see its beauties. The truth is, it partakes of humanity; in it is blended virtue and vice, errors and excellence." If amendments were proposed by a second convention, "we run the risk of losing some of its best properties."<sup>106</sup>

Gerry had a long and distinguished record of public service. He was a member of the Continental Congress—where he signed the Declaration of Independence—and the Confederation Congress. His refusal to sign the Constitution had cost him a seat in the Massachusetts ratifying convention because his hometown of Cambridge solidly supported the plan, but he was invited to attend the convention so he could answer questions

about the deliberations at the Philadelphia convention.<sup>107</sup> After his House service ended in 1793 and he served on a diplomatic mission to France for President Adams, Gerry became governor from 1810 to 1812. He and Madison eventually resolved enough of their differences for Gerry to serve as Madison's second vice president in 1813 and 1814, until his death.

Gerry's refusal to sign the Constitution had incurred the wrath of some important people in Massachusetts, including Abigail Adams, whose husband was presiding over the Senate as vice president. She wrote to Cotton Tufts, her uncle, a physician in Weymouth, Massachusetts, about Gerry after the First Congress had met for several months: "[W]hat can I say, you see him always in the minority, you see him very frequently wrong and the poor man looks gastly."<sup>108</sup>

When Gerry sought election to the House, he published a letter in a Boston newspaper. He said that "some have endeavoured to hold me up as an enemy of the Constitution, than which, nothing is more remote from the truth. Since the commencement of the Revolution, I have been ever solicitous for an efficient Federal Government, conceiving that without it, we must be a divided, an unhappy people." He explained that he supported amendments because they "will remove the just apprehensions of the people, and secure their confidence in, and affection for the new Government."<sup>109</sup>

Gerry believed that amendments protecting individual liberty would enhance the stability of the new government because they would remove much of the opposition to it and allay anxiety about its potential for abuse of power. He wanted the House as a whole to debate amendments, and he believed that sending them to a special committee would be an attempt to "amuse [our fellow citizens] with trifles." They would realize that Congress was not truly committed to proposing such amendments, in Gerry's view. He reminded his colleagues that ratification of the Constitution would never have taken place in several states had delegates to those conventions not been assured that Congress would consider amendments with the " candor and attention which their importance requires."<sup>110</sup>

Another Anti-Federalist who rallied to Madison's cause was Thomas Sumter of South Carolina. Sumter, who had opposed the Constitution at his ratifying convention, said, "I consider the subject of amendments of such great importance to the Union, that I should be glad to see it undertaken in any manner." He believed that referring the subject to a select committee would be "treating the applications of the state conventions rather slightly," and he preferred the full House consider the subject. Sumter worried about what would happen if amend-

ments were not proposed: "I think it will give fresh cause for jealousy; it will rouse the alarm which is now suspended, and the people will become clamorous for amendments." At that point, Sumter added, people would no longer apply to Congress for amendments; they would "resort to the other alternative [a convention] pointed out in the constitution."<sup>111</sup>

Madison's colleague from Virginia, John Page, argued strenuously that if Congress did not act, the people and their legislatures would think seriously about petitioning for a second convention. "How dangerous such an expedient would be, I need not mention," he said, "but I venture to affirm, that unless you take early notice of this subject, you will not have the power to deliberate. The people will clamor for a new convention, they will not trust the house any longer."<sup>112</sup>

After the extended discussion on June 8, the House reversed its previous decision to assign the amendments to a select committee and agreed to consider them in a committee of the whole, but they postponed the debate until July 21. During those five weeks and beyond, the lively debate over Madison's proposals continued in letters among his colleagues, their friends, and constituents. If Madison had been shown some of the letters written in reaction to the June 8 address, he would have been even more pessimistic about the chances for amendments to make it through the legislature than he was based only on the debate.

Representative George Clymer of Philadelphia, who had attended the Constitutional Convention of 1787, used a derogatory allusion—of several times it would be used during the discussion of amendments—when writing to a friend. In a letter he began before Madison's long address, Clymer wondered whether Madison was serious about proposing essential amendments, or if they were "merely a tub to the whale." The expression came from Jonathan Swift's 1704 story, "Tale of a Tub," and it referred to sailors who, when approached by a whale, would sometimes throw an empty tub into the water to distract and amuse the animal in the hope that it would not damage their ship.<sup>113</sup> Clymer wanted the House to be "strong enough to postpone" amendments. After Madison's speech, he finished the letter, clearly disappointed with the proposed amendments: "Madison's has proved a tub or a number of tubs." He dreaded a long discussion of the subject, noting derisively that Elbridge Gerry planned to "treat us with all the amendments of all the antifederalists in America."<sup>114</sup>

In his correspondence, Representative Fisher Ames, who was a strong supporter of the Constitution, applauded Madison's research in summarizing the amendments proposed by state ratifying conventions, but

he saw a selfish motive in his efforts. Ames wrote to a friend that "Upon the whole, it [the bill of rights] may do good towards quieting men who attend to sounds only, and may get the mover [Madison] some popularity—which he wishes." The next day, Ames wrote to another correspondent that Madison's amendments had little substance: "It [the bill of rights] will stimulate the stomach as little as hasty-pudding. It is rather food than physic. An immense mass of sweet and other herbs and roots for a diet drink."<sup>115</sup>

Ames had even more to say about Madison in a letter to a friend in Boston. He recognized Madison as "a man of sense, reading, address, and integrity . . . He speaks low, his person is little and ordinary. He speaks decently, as to manner, and no more. His language is very pure, perspicuous and to the point." But Ames believed that Madison was not well suited to politics: "Pardon me if I add that I think him a little too much of a book politician and too timid in his politics . . . [He] is afraid of their [Virginia's] state politics and of his popularity there more than I think he should be."<sup>116</sup>

Perhaps no letter would have been more upsetting to Madison than the one written by Representative Theodore Sedgwick, a Massachusetts Federalist and supporter of the Constitution. Just before the House was scheduled to debate the amendments on July 21, he wrote that Madison lacked the courage to see them through their difficult course: "Mr. Madison's talents, respectable as they are will for some time be lost to the public, from his timidity. His is constantly haunted with the ghost [ghost] of Patrick Henry. No man, in my opinion, in this country has more fair and honorable intentions, or more ardently wishes the prosperity of the public, but unfortunately he has not the strength of nerves which will enable him to set at defiance popular and factious clamors." Sedgwick called the work the House faced on the amendments a "water gruel business" and told his correspondent that "those substantial amendments which would have a tendency to



Fisher Ames was a representative from Massachusetts in the First Congress. Although critical of the proposed amendments that became the Bill of Rights, he voted in favor of them. (*Library of Congress*)

produce a more compleat and natural arrangement of the national union we must despair of attaining at present."<sup>117</sup>

If Madison was not haunted by Henry, he certainly was aware that his adversary in Virginia was corresponding with Virginia's senators and other Anti-Federalists, encouraging them to hold out for substantive amendments that would alter the relationship between the states and the federal government. As early as March 31, a few days before Congress was supposed to convene, Henry told Senator William Grayson that he doubted Congress would consider amendments that would deny the new government the authority to tax citizens directly, or modify the treaty power of the Senate, or make other changes, noting that "whether apprehensions will extort concession to any salutary purpose I . . . cannot guess."<sup>118</sup> He was eager to have Grayson tell him what would likely happen on amendments when Congress met.

A few weeks after Madison announced on May 4 that he would introduce amendments, Senator Richard Henry Lee warned Henry that the debate over proposed changes to the Constitution was likely to be disappointing. He expected that "his [Madison's] ideas, and those of our convention [the Virginia ratifying convention], on this subject, are not similar." He promised Henry that he and Grayson would "carefully attend to this; and when the plan comes to the senate, we shall prepare to abridge, or enlarge, so as to effect, if possible, the wishes of our [Virginia's] legislature." Lee expressed the desire that amendments protecting personal liberty be approved, but "from what I hear and see . . . many of our amendments will not succeed." Lee also told Henry that at this point in their lives, "after all the turbulence we have passed through," making sure amendments securing "civil liberty" were approved by Congress "was, I assure you, the sole reason that could have influenced me to come here."<sup>119</sup>



Richard Henry Lee, an influential Anti-Federalist who strongly opposed the Constitution and became one of Virginia's first U.S. senators. (*National Archives*)



Shortly after Madison introduced the amendments to the House on June 8, Senator Grayson broke the bad news to Henry: "I am exceedingly sorry it is out of my power to hold out to you any flattering expectations on the score of amendments; it appears to me that both houses are almost wholly composed of federalists." Grayson criticized those who were willing to sacrifice the amendments that would reduce the power of the federal judiciary, change the taxation power, and make other needed alterations, in order to gain amendments affecting "personal liberty alone." Grayson told Henry that he had heard from some in the House that Madison was so "embarrassed" by the reaction of his colleagues to the introduction of amendments that he thought of withdrawing his motion, and that the House's willingness to discuss amendments was "owing more to personal respect [for Madison] than a love of the subject introduced."<sup>120</sup>

Grayson reported to Henry that he had wanted to introduce amendments favored by the Virginia General Assembly in the Senate while the House was still considering them, but his colleague, Senator Lee, "thinks it is best to wait till they come up from the representatives."<sup>121</sup> Both Lee and Grayson knew they were badly outnumbered in the Senate and that introducing radical amendments on the Senate floor before the House completed its work would not have helped their cause.

Henry was not impressed with Madison's amendments. He said they were intended only "to lull suspicion" and provide "guileful bait" to North Carolina and Rhode Island. Referring to Congress's decision that the president can remove executive branch officials who had been confirmed by the Senate, Henry noted, "See how rapidly power grows; how slowly the means of curbing it." He told Lee, "While impediments are cast in the way of those who wish to retrench the exorbitancy of power granted away by the constitution from the people, a fresh grant . . . is made in the first moments of opportunity."<sup>122</sup>

Madison would not have been surprised to hear that Henry was continuing to criticize the new government, but he was pleased to learn that his efforts to win amendments had begun to generate some support. As early as May 12, Madison's longtime friend Edward Carrington, writing from Virginia, told him that his announcement eight days earlier that the House would take up amendments had reduced the anxiety of those still opposed to the Constitution: "Our Antifederal districts [in Virginia] have become perfectly calm and generally shew a disposition to acquiesce in whatever fate of the proposed alterations [amendments], relying on their meeting with due consideration."<sup>123</sup>

William R. Davie of North Carolina told Madison that his announcement on May 4 that the House would take up amendments had, in his state, "dispersed almost universal pleasure[;] we hold it up as a refutation of the gloomy profecies of the leaders opposition, and the honest part of our Antifederalists have publicly expressed great satisfaction on this event." Davie noted that North Carolina was holding a ratifying convention in November, so it was "extremely important that the Amendments, if any, should be proposed before that time."<sup>124</sup>

The public was also learning more about Madison's proposals. Soon after his June 8 address, his amendments appeared in newspapers, such as the *New York Daily Advertiser* on June 12 and the *Gazette of the United States* on June 13.<sup>125</sup> That generated even more attention and inspired more of Madison's friends and supporters to contact him about the issue.

Tench Coxe, the influential Federalist from Philadelphia, told Madison he had carefully reviewed the amendments, and he was confident that both supporters and honest opponents would be pleased that they would "meliorate the government . . . by heightening and strengthening the barriers between necessary power and indispensable liberty." He believed that citizens would especially appreciate the amendments protecting freedom of the press and "liberty of conscience." He added that the "proposed amendments will greatly tend to promote harmony among the late contending parties and a general confidence in the patriotism of Congress." Coxe also published an anonymous article in the *Philadelphia Federal Gazette* on June 18 praising Madison's amendments.<sup>126</sup>

Even among Madison's friends, however, there was disagreement about how valuable the amendments would be. George Lee Turberville told Madison he was worried that even though the new government was the "result of the reason and deliberation of The People," if a "Despotic government" became oppressive, the "Constitution with all its amendments will be ineffectual to protect (us or) our posterity from the Evils which will inevitably await them."<sup>127</sup>

Madison must have been especially heartened by the effusive comments of longtime supporter Edward Stevens of Virginia. He told Madison that "It affords me no small pleasure to inform you, that your proposition of amendments to the Constitution, among all my acquaintances that I have had communication with, gives general Satisfaction, and I trust if adopted will shut the mouths of many."<sup>128</sup>

John Dawson, who still considered himself an admirer of Madison—although he had voted against ratification at the Virginia convention—told him that "I rejoice to find that you come forward at an early day

with a proposition for amendments, altho I could have wish'd they had been more extensive.<sup>29,129</sup>

Dawson had hoped that more of the amendments recommended by Virginia dealing with such issues as the securing of the western territories and protecting access to the Mississippi River had been included. But Madison had taken care not to propose amendments that would be seen as catering to his home state or that would not command broad support. He knew that obtaining a supermajority in each house would be difficult, and he told several correspondents that he had recommended only the amendments he thought would generate the least controversy. He told Samuel Johnston that he wanted to remove the "fears of the discontented and . . . [avoid] all such alterations as would either displease the adverse side, or endanger the success of the measure." He made the same argument in a letter at the end of June to Thomas Jefferson, telling him that "every thing . . . that might endanger the concurrence of two-thirds of each House and three-fourths of the States was studiously avoided."<sup>29,130</sup>

Most of his supporters realized the fine line Madison was attempting to walk. Joseph Jones told him that the amendments were "calculated to secure the personal rights of the people so far as declarations on paper can effect the purpose, leaving unimpaired the great Powers of the government." Jones understood that Congress was more likely to approve such amendments than those that would reduce the power of the new government.<sup>131</sup>

On the last day of June, Madison heard an encouraging report from Virginia. Former governor Edmund Randolph told him that the proposed amendments "are much approved by the strong federalists here [Williamsburg] and at the Metropolis [Richmond]; being considered as an anodyne to the discontented." Randolph admitted, though, that "not even the abolishment of direct taxation would satisfy those, who are most clamorous."<sup>29,132</sup>

Madison would have about six weeks to prepare for the next round. As he headed back to his boardinghouse, he must have worried that not enough of his colleagues in Congress would agree to propose amendments and keep the promise that had been made to the American people. Madison had confronted unpromising situations before, from the Constitutional Convention to the election in Virginia that brought him to Congress, and his intellect and energy had prevailed. But now he was facing the challenge of securing a two-thirds vote in each House, as required by the Constitution that he helped write two years before. He could hardly have imagined then that he would be in this kind of situation.