

# OUR CONSTITUTIONAL LOGIC

## PART II: Washington's Oath

Hoofbeats announce the arrival of our guest.

“Should I make myself scarce?” I ask Jefferson.

“I’m not going to call out the cites myself,” Jefferson replies.

The three of us settle into the shade of an Albemarle County evening.

“I suppose,” The General mops his brow, “we should all be thankful for this hot weather. After that volcano in Iceland blew up – ”

“Seventeen eighty-three,” Jefferson footnotes this disaster.

“You don’t think Congress,” the General pulls at his mint julep, “will let Iceland into the union, do you?” he asks me.

“Alaska has more volcanoes,” I reply, “but their names can be pronounced without personal injury.”

“The floor is yours,” Jefferson urges the General.

“You’ll remember the Philadelphia convention elected me President. Unanimously.”

“May 25, 1787,” I whip out the first volume of Farrand’s Records. “Page 2, if I may cite to the Journal of the ‘Fœderal Convention’.”

“And we all agreed,” Washington concedes, “that ‘nothing spoken in the House be printed, or otherwise published, or communicated without leave’.”

“May 29<sup>th</sup>, if 1 Farrand 15 be our guide,” I add and ask the General, “Did you really find a copy of the proposals for the federal constitution in the Pennsylvania State House?”

OUR CONSTITUTIONAL LOGIC  
Part II: Washington's Oath

---

“Some damn fool left his papers there, and when General Mifflin brought them to my attention I – ”

“You announced to the delegates, ‘let him who owns it take it.’ If I may finish your narrative for you.”

“Farrand relates the anecdote in more detail, General,” Jefferson cites to 3:86. “You admonished the delegates ‘with a dignity so severe that every Person seemed alarmed’.”

“I can have that effect on people. Especially when I ‘drop the bomb’ on them. ‘One member of this Body has been so neglectful of the secrets of the Convention – ’ and so forth.”

Washington drops his head into his hands.

“And now I must suffer the consequences of my own recklessness.”

“This brings us to *your* improvident disclosure of the secret Journal of the Convention,” I state. “March 19, 1796. 3 Farrand 370.”

“Let’s back up,” Jefferson counsels. “What exactly did you promise the convention?”

“September 17, 1787,” I flip to the end of volume 2. “The President having asked the Convention [what] should be done with the Journals ... It was resolved nem: con: ‘that he retain the Journal and other papers, subject to the order of Congress, if ever formed under the Constitution’.”

“You’re off the hook, General,” Jefferson tops off our drinks. “Congress ordered the Journal published in 1818.”

“That cheap?” Washington stares down Jefferson. “I don’t think so.”

“In fairness to the General,” I pick up the thread, “Washington turned the papers over – ”

OUR CONSTITUTIONAL LOGIC  
Part II: Washington's Oath

---

“On March 19, 1796,” Washington adds. “Somewhat in advance of getting permission from Congress.” He gathers himself together. “Look, does the name Bertrand Russell mean anything to you?”

“Do you have that much time on your hands?” I ask the General.

“I’m still waiting for my crypt under the Rotunda,” Washington replies.

“You want to be buried with Congress?” Jefferson asks.

“A promise is a promise,” the General shrugs.

“You’re referring to Lady Washington’s gift of your mortal remains, at John Adams’ request, to the nation?”

“That would have been something,” Washington muses, “altho’ my will insists that there be no ‘parade or funeral Oration’.”

“Back to Russell,” Jefferson directs traffic. “What have you got, Aschenbrenner?”

“ ‘This sentence is not true’,” I reply.

“That applies here,” Washington asks. “Doesn’t it?”

“Good point, General,” I reply. “You want answers to constitutional questions. A worthy American quest. You seek out an oracle. You tip the priests who guard the foggy orifice, and they, so silvered, direct you to the inner sanctum. You tremble your question. The oracle answers. ‘I am not an oracle.’ *That* is the answer you receive.”

“I figured as much,” Washington sighs. “Damnation to Sir Bertrand Russell.”

“The Earl,” I ahem his correct salutation, “of Russell.”

OUR CONSTITUTIONAL LOGIC  
Part II: Washington's Oath

---

“And that’s the answer Madison gave you,” Jefferson answers Washington. “Background us,” he instructs me.

“Washington got cheesed at Madison’s assertion,” I read from 3 Farrand 374, “and this is during the debate in the Senate over Jay’s Treaty, that the House – well, here’s what Madison said: ‘Where Legislative objects are embraced by Treaties, dot dot dot, no Treaty shall be operative without a law to sanction it’.”

“That’s what Madison argued. And what a foolish position that is,” Washington exclaims. “Who would contend that a treaty is non-self-executing? That treaties require acts of Congress or executive action to carry them into effect?”

“Mr. J.,” I pass the laptop, “take the wheel.”

“Let me cite you to 552 U.S. 492 (2008),” Jefferson directs the General’s attention to *Medellin’s* case. “At page 528.”

Washington studies the text on the shimmering screen.

“The Supreme Court sided with Madison? Whoa, that’s rich,” the General exclaims. “The Chief Justice cites to *Federalist* No. 47: ‘[U]nder our constitutional system of checks and balances, the magistrate in whom the whole executive power resides cannot of himself make a law.’ That would, however, seem an apt description of the asserted executive authority unilaterally to give the effect of domestic law to obligations under a [treaty that requires Congressional fulfillment, i.e., a ] non-self-executing treaty’.”

“The Supreme Court,” Jefferson revels in the irony, “quotes Madison’s 1788 *Federalist* essay (above cited), which demonstrates that Madison’s 1788 position varies from that which Madison intoned on the floor of the House in 1796.”

“Isn’t there another problem here?” I ask Washington. “You disclosed the convention’s papers on March 19, 1796; your purpose was to premise your argument on this point: the Convention voted down a proposal arguably inconsistent with text it later adopted.”

OUR CONSTITUTIONAL LOGIC  
Part II: Washington's Oath

---

“The fallacy of the excluded middle!” Jefferson guffaws. “If you want to know what text A says, latch onto the convention’s rejection of a neighboring proposition, reverse the sense of same, and voilà!, that expands your understanding of A!”

“He’s kidding?” Washington turns to me.

“Actually, Mr. J’s right, General. It’s officially recognized. You can check it out on WikiParadox.”

“One at a time,” the General rules *Jeff ’n’ me* out of order. “Let’s get back to the self-denying oracle.”

“Was Madison’s reading of the Constitution so unreasonable?” Jefferson asks. “Wasn’t the Supreme Court right in *Medellin’s* case? There are treaties of peace, self-executing if you will, and there are non-self-executing treaties, where the President might as well bring forward a bill to fulfill the treaty’s purpose at the same time that the Senate considers ratification.”

“Wow, Mr. J.,” I gush. “You proposed a constitutional amendment as accompaniment to the Senate’s consideration of the Louisiana Purchase.”

“Which you turned into an article in *The Bar Rag*, Aschenbrenner,” the General notes. “Are you going to the Library of Congress to read the papers I deposited with Pickering?”

“I’ve got my request on file,” I reply.

Jefferson refreshes Washington’s drink.

“If I may get back to the oracular theory of constitutional interpretation.”

“I don’t come out looking very good, do I?” our first President asks our third.

OUR CONSTITUTIONAL LOGIC  
Part II: Washington's Oath

---

“ ‘According to my memory & that of others,’ Madison lettered me on April 4<sup>th</sup>,” Jefferson replies, “ ‘the Journal of the Convention was, by vote, deposited with the P[resident of the Convention], to be kept sacred until called for by some competent authority. How can this be reconciled with the use he has made of it?’ ”

“Great!” Washington wails. “Just great. Upended by the Liar’s paradox, and that’s thanks to the Earl of Russell.”

“Actually,” I point out, “St. Paul was unhorsed in the first century.”

“On the same grounds,” Jefferson winks at me. “Titus, chapter one, verses twelve and thirteen spoil’d his day. That’s *Liars and Lawyers*, right?”

“Allow me,” I wave off Jefferson, “as I have my Farrand handy. Here is Madison on the floor of the House, and this is April 6<sup>th</sup>. ‘Neither himself nor the other members who had belonged to the Federal Convention, could be under any particular obligation ... to answer ... the intention of the whole body ... [T]here would not be much delicacy in the undertaking ... ’.”

“And Madison went on,” Jefferson picks up the thread, “to say that as the Constitution emerged from the convention, ‘it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions’.”

“Funny you should ask,” I blurt, altho’ no one asked my opinion. “Not one of the one hundred and eleven justices of the Supreme Court has ever quoted Madison’s: ‘the sense of [the Convention] could never be regarded as the oracular guide in expounding the Constitution’.”

“I’m not out of the woods yet.” Washington mops his brow. “What about my my Message to the House of March 30, 1796.”

“There’s one hit,” I bang away at my laptop. “From 1949. *National Mutual v. Tidewater*, 337 U.S. 582, 631-632.”

“You’re telling me that in – ”

OUR CONSTITUTIONAL LOGIC  
Part II: Washington's Oath

---

“We’re up to 2010,” Jefferson helps out the General. “That’s 228 years of Supreme Court decision-making, General.”

“In all this time, only *one* crummy Supreme Court decision quotes me?”

“It’s only a footnote,” I correct the General. “Here it is. ‘The propriety of considering the proposals and debates of the Constitutional Convention was long ago considered by those most intimately concerned with its formulation. Washington, in his message to the House of Representatives refusing the demands of that body for the papers relating to Jay’s treaty, stated – ’ And so back to your Message to the House.’”

“I break my promise to the Convention in 1787 and I get a citation in 1949?”

“It was a dissent,” I offer the best consolation I can, “and written by Felix Frankfurter.”

“Hot dog!” Washington sighs. “He turns me into the avatar of propriety even when I blindside Madison. Call it the curse of Washington’s ‘cherry tree’.”

“That *was* a fable, wasn’t it?” I ask.

“It has enjoyed wide circulation,” Washington studies his nails. “I surely don’t know who could have started such a fantastic rumour.”

“You did notice,” I point to the *National Mutual* dissent, “that ‘those most intimately concerned with [the Constitution’s] formulation’ can serve as oracles.”

“We’ve been over this ground. The last man living can speak for his dead colleagues, and without contradiction,” Washington sighs. “So how many times did the Supreme Court fall for it?”

“A hundred and eighty three times,” I point to the result screen. “*Intent! /10 founder! framer!*”

OUR CONSTITUTIONAL LOGIC  
Part II: Washington's Oath

---

“Great,” Washington retorts. “Everyone’s in on it.”

Washington paces along the boardwalk, taking in Monticello’s magnificent views of the Blue Ridge Mountains.

“You try to do the wrong thing, just once, and what do you get? Veneration. You’d think Americans – especially lawyers and judges – would notice that I screwed up. Big time. Did Frankfurter have his Farrand at hand?”

“He cites The Records of the Federal Convention,” I offer Washington a view of the offending dissent. “He just didn’t read it.”

“Aschenbrenner,” Jefferson instructs me, “go through some of those early citations. Who was the first justice to argue from the founder’s intent?”

“That was in Hylton’s appeal,” I reply. “The case challenging the tax on carriages, opinion by Justice Paterson.”

“3 U.S. 171, 176 (1796),” Jefferson ahems the citation.

“ ‘It was, however, obviously the intention of the framers of the Constitution’,” I quote, “ ‘that Congress should possess full power over every species of taxable property ... ’ and so forth and so on.”

“And the exact date of the decision?” Jefferson winks at Washington.

“That’s amazing Mr. J.,” I gasp. “That’s the day Ellsworth was sworn in as Chief. March 8, 1796.”

“So that would be,” Washington picks up the thread, “eleven days before I turned the Convention’s papers over to Pickering. Your successor as Secretary of State. But where does that get us?” Washington asks me.

“Congress published the Journal papers in 1819. See its resolution of March 27, 1818,” I declare. “After that, you’re free and clear.”

OUR CONSTITUTIONAL LOGIC  
Part II: Washington's Oath

---

“As far as the Muse of History is concerned,” Jefferson adds. “With whom,” Jefferson winks at me, “I am on the most intimate terms.”

“What do you think, Mr. J?” I ask. “As for redeeming General Washington, I’m going with literary hoax.”

“Could be,” Jefferson refills our glasses. “But I’m thinking more along the lines of paradox.”

“What do you have in mind?” Washington asks. “One Virginian to another.”

“Try this angle. You’re an arrogant, proud man, aren’t you, General?”

“With a lot to be proud of,” Washington returns a frosty glare.

“Oh, that’s rich,” I respond. “You lifted that from Winston Churchill.”

“Madison skewered you on two grounds, General,” Jefferson ignores my gaffe. “First, you were a promise breaker – the man entrusted with the secrets of the Convention – and, second, you were a fool to believe in the oracular theory of the Constitution.”

“You were going to redeem me,” Washington answers Jefferson. “If I recall your expressed intentions, sir.”

“Eleven days after Justice Paterson, in Hylton’s case, relied on the intentions of the convention delegates, and he was one of them,” Jefferson lays out his cunning plan, “you corrected him by proving that it was the intention of the framers that a framer’s surmise as to other framer’s intentions *not* be treated as oracular.”

“Perhaps,” the General ponders the angle. “So by disclosing the Journal, I disclosed the delegates’ promise – a promise made in secret – not to argue from anyone’s – or everyone’s – intent.”

“You upended your own Supreme Court! And they never noticed it!”

OUR CONSTITUTIONAL LOGIC  
Part II: Washington's Oath

---

“Well played, sir!” Jefferson grasps Washington's hand.

“That about wraps things up,” I blurt.

“But what Madison?” Washington wonders his second thoughts. “A little revenge would be nice.”

“You got Jay's treaty through the Senate,” Jefferson replies, “on a vote of 20-10. Not a single vote to spare.”

“Aschenbrenner,” Washington addresses me. “You're an Alaskan. You understand grudges. What'ya got?”

“Following Madison's own ineluctable logic,” I explain, “he supported legislation to fulfill Jay's treaty, and saved your administration from defeat.”

“Ah!” Washington's face lights up. “Congress fulfilled its obligations under Jay's Treaty by paying British creditors six hundred thousand pounds sterling.”

“On account of purchases Americans made before the revolution,” Jefferson recounts the sordid history. “In patriotic fervor, they refused to pay for the goods they ordered from British merchants!”

“Free Chippendale for middle-class Americans!” Washington beams.

He fixes me with a steely glance.

“Aschenbrenner,” he asks. “You'll make sure this gets around. Right? Especially the part about me being smarter than James Madison.”

OUR CONSTITUTIONAL LOGIC  
Part II: Washington's Oath

---

*Apparatus*

Author: Peter J. Aschenbrenner  
First Published: The Alaska Bar Rag  
Revisions: Minor.  
Copyright Notice: ©2010, 2011 Peter J. Aschenbrenner.  
The moral rights of the author are reserved.  
Our Server Version: 24 - Our Constitutional Logic Part II