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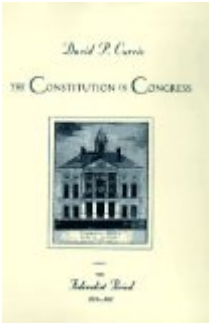
David P. Currie. *The Constitution in Congress: The Federalist Period, 1789-1801.* Chicago: University of Chicago Press, 1997. xv + 327 pp. $39.95 (cloth), ISBN 978-0-226-13114-6.



Reviewed by Alan Rogers (Boston College)
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The Constitution in Congress: The Formative Years

David Currie has written a wonderfully informative and engaging book. *The Constitution in Congress: The Federalist Period, 1789-1801* is an intelligent, often witty, analysis of a myriad of constitutional issues taken up by the First through the Sixth Congresses. Currie invites the reader to participate in a dialogue carried on between the text and the footnotes, a discussion that addresses the historical background of each issue, spells out the constitutional concerns and questions raised by opposing Congressmen, and concludes, where appropriate, by linking Congress's resolution of a particular issue to later interpretations of the Constitution by the Supreme Court. The result is a rich, lively discourse that credits Congress or the president for creating nearly all our constitutional law before 1800.

Currie, the Edward H. Levi Distinguished Service Professor of Law at the University of Chicago, argues that the first few Congresses were a "sort of continuing constitutional convention" (p. 3), which took up the challenge of giving meaning to the governmental framework. Congressmen understood that every act established important precedents, so they moved deliberately, but unhesitatingly. Although vigorous, the debates throughout the Federalist period were characterized by an astonishing display of impartiality, knowledge and commitment to "true principles" (p. 4, n. 7), as Washington put it. Currie marshals dozens of examples to demonstrate this argument. A handful of examples will suffice for this review. In the First Congress, a question arose about the extent of congressional powers of investigation. It was proposed that the conduct of the former Superintendent of Finance be examined. While the Senate dodged the constitutional issue by proposing that the president create a commission for the purpose, the House appointed an investigative committee. Elbridge Gerry protested, arguing that the House had only legislative powers and that the supervision of executive conduct was entrusted exclusively to the President. Madison countered Gerry, claiming that the House had the right to inform itself in order "to doing justice to the country and to public officers" (p. 21). Although no explicit authority for conducting investigations was delegated either to the House or the Senate by the Constitution, the House lay claim to broad investigative powers. Nearly one hundred years later, the Supreme Court ruled that "doing justice" was not enough to justify congressional inquiry. In Kilbourn v. Thompson (1881), Currie notes, the Court held that investigations designed merely to determine the existence of past wrongdoing were not part of any legitimate congressional function.

Washington's "Violent fret" (p. 24) over the Senate's insistence that it debate the merits of a treaty with the Southern Indians (without the president's presence) before fulfilling its constitutional role to advise and consent, Currie writes, led to the resolution of three important questions regarding the Senate's authority with respect to treaties. First, both the Senate and the president interpreted the power to advise and consent to include discussion in advance of action. Second, while both parties seemed to believe it was good to communicate personally and openly, the outcome of the incident assured the Senate of its autonomy. The third result of the the

confrontation over the treaty with the Southern Indians was to resolve forever a potentially divisive issue about the balance of power between the two departments of government.

Important constitutional precedents often followed from small matters. One provision of the Whiskey Act (1791) raised interesting questions about the government's power to restrict its agents' freedom of speech. Representative Jackson worried that the tax collectors would use their power to further their own political goals. He proposed they be forbidden to participate in elections, other than to cast their own vote. The representative from Delaware objected, saying that the proposal was unconstitutional, because it would deprive the agents of the right of "speaking and writing their minds" (p. 62). The proposal was decisively defeated. At the conclusion of his discussion, Currie reminds us that similar arguments were made many years later with regard to the constitutionality of the Hatch Act. According to Currie, Congress's attention to the Constitution and the Bill of Rights in enacting the whiskey tax, as well as other pieces of legislation debated in the 1790s, ensured that the Court had a healthy respect for the lawmakers' work and usually deferred to legislative precedents. For this reason, most of the early Congress's constitutional interpretations prevailed, including, unfortunately, its belief that in times of crisis it might legislate in sweeping terms against the supposed enemy within. The Alien and Sedition Acts–like the Espionage Act, the internment of Japanese-Americans, and the witch hunts launched by Senator Joseph McCarthy–trampled on civil liberties. It was all there in 1798: every independent government has a right to protect itself, said Boston Brahmin Harrison Gray Otis; libels against the government, its officers, and its acts cannot go unpunished, argued Representative Robert Goodhue Harper; freedom of expression is protected only against previous restraint, added other Federalists. "The proper weapon to combat error," Republican Albert Gallatin contended, "was truth," not suppression. But rational argument was swept aside by politics and passion. The Senate passed the Sedition Act on July 4, 1798. Remarks Currie: "Happy birthday, America!" (p. 262).

As these few examples indicate, Currie, much like the first Congressmen whose words shaped constitutional law in the 1790's, plays upon enduring themes that resonate clearly in the present. The Constitution in Congress is that rare combination, a splendid work of professional history that speaks clearly to twentieth century readers. Currie amuses and instructs us, as a brilliant teacher should.

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