

JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS¹

REVIEWED BY LIEUTENANT COMMANDER DAVID M. GONZALEZ²

*A bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse or rest on inference.*³

Author of the Bill of Rights. Father of the Constitution. Leader of a young nation. Constitutional scholar⁴ Richard Labunski's incisive work, *James Madison and the Struggle for the Bill of Rights (Bill of Rights)*, provides insight into Madison's central role in the introduction and ratification of the Bill of Rights. The timing of this authoritative work could not be better. There are some representatives of the people that seek to deprive citizens of their right of political expression through legislative fiat.⁵ Many citizens are willing to relinquish this right of political expression in order to punish those that desecrate our national symbol – the American flag.⁶ Calls abound for a constitutional amendment to limit flag burning.⁷ These calls have not fallen on deaf ears.⁸ *Bill of Rights* is requisite reading for those that would freely cede their constitutional rights.

In his introduction, Labunski immediately establishes his thesis.⁹ He posits that Madison “played a central role [in] the most important events that shaped the nation’s founding period”¹⁰ While the author does not explicitly state a purpose for writing *Bill of Rights*, his intent is apparent. The book’s theme evinces an endeavor to elevate Madison’s status among the founding fathers.¹¹ Labunski focuses on three pivotal events: the Constitutional Convention, the Virginia ratifying convention, and the First Congress.¹²

Labunski achieves his goal of establishing Madison as a central figure at each of these events. Much of Madison’s role as both an antagonist and proponent of a bill of rights has been lost—until now. Through expansive use of primary sources such as letters and congressional records, Labunski draws the reader into an era in which Madison was near the top of America’s political spectrum.¹³ The author’s ability to vividly recreate seminal events in history bring these episodic moments to life. *Bill of Rights* is highly readable and thought provoking. With few exceptions, the book is a fair rendition of Madison’s role in events germane to the Bill of Rights.

¹ RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* (2006).

² U.S. Navy. Written while assigned as a student, 55th Judge Advocate Officer Graduate Course, The Judge Advocate General’s Legal Center and School, U.S. Army, Charlottesville, Virginia.

³ LABUNSKI, *supra* note 1, at 104 (quoting from a letter from Thomas Jefferson to James Madison (Dec. 20, 1878), in *THE PAPERS OF JAMES MADISON* 10:337 (Robert R. Rutland ed., Univ. Press of Virginia, 1962)).

⁴ Richard Labunski Home Page, <http://www.richardlabunski.com/labunski/Author.htm> (last visited June 13, 2007) (listing Richard Labunski’s numerous books and articles on the Constitution).

⁵ See, e.g., Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (1989), *invalidated* by United States v. Eichman, 496 U.S. 310 (1990) (holding prosecution for burning a U.S. flag inconsistent with the First Amendment); TEX. PENAL CODE ANN. § 42.09(a)(3) (1989), *invalidated* by Texas v. Johnson, 491 U.S. 397 (1989) (holding conviction of protester for burning a flag of the United States inconsistent with the First Amendment).

⁶ USATODAY.com, http://www.usatoday.com/news/washington/2006-06-26-poll-results_x.htm (last visited June 13, 2007) (listing Gallup poll results showing support for a constitutional amendment to make it illegal to burn the American flag).

⁷ See *id.*

⁸ “In the 109th Congress, three ‘flag protection’ amendments have been introduced.” JOHN R. LUCKEY, CONGRESSIONAL RESEARCH SERVICE, FLAG PROTECTION: A BRIEF HISTORY AND SUMMARY OF RECENT SUPREME COURT DECISIONS AND PROPOSED CONSTITUTIONAL AMENDMENT 4 (May 19, 2005).

⁹ See LABUNSKI, *supra* note 1, at 2.

¹⁰ *Id.*

¹¹ See *id.*

¹² *Id.*

¹³ See JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 53 (2002).

The organization of *Bill of Rights* befits Labunski's portrayal of Madison as an early antagonist and subsequent proponent of a bill of rights. By organizing the book in chronological order, the reader can easily follow Madison's vacillating position on the necessity of a bill of rights. Additionally, the organization helps to convey one of the author's boldest opinions, specifically, Labunski opines that Madison "genuinely supported amendments."¹⁴ His decision to articulate this opinion near the end of the book enables him to engender much needed support for this position.¹⁵ Though splendid, the book's organization could be improved through an earlier analysis of issues prior to the Constitutional Convention.

Labunski's decision to limit the scope of *Bill of Rights* assumes too much knowledge on the part of the reader. By beginning his analysis at the Constitutional Convention, Labunski misses an opportunity to articulate Madison's role in calling for a convention.¹⁶ There are many readers with insufficient knowledge of Madison's activities prior to the Constitutional Convention. Such a discussion would provide insight into Madison's staunch advocacy of the Constitution. For instance, as a member of the Continental Congress, Madison "organized . . . delegates from different states to discuss national economic problems."¹⁷ His experiences in the Continental Congress gave rise to his view regarding the inadequacies of the Articles of Confederation.¹⁸ Failure to analyze this aspect of Madison's life results in a missed opportunity to more fully articulate his role in shaping America. Despite this minor critique, the limitation of coverage does not considerably detract from the overall cogency of the book. Instead, *Bill of Rights'* in-depth coverage of critical events during the nation's founding period is a definite strength.

A further strength of *Bill of Rights* is Labunski's ability to bring seminal events to life. By providing vivid detail of events, the author elevates the book's readability. For instance, when discussing the Constitutional Convention, Labunski digresses from the discourse concerning a bill of rights by stating:

James Madison did not sit with the others during the debates. Day after day, for six to seven hours, Madison sat at the front of the room with his back mostly turned to Washington . . . Madison wanted future generations . . . to know why the framers had written the Constitution the way they did.¹⁹

Labunski uses descriptions of such events throughout *Bill of Rights*. This tactic accomplishes two things. First, it allows the reader to visualize the events being analyzed. Second, at times, there is an obvious nexus between the detail provided and the outcome of key events. An example is the depiction of conditions the delegates endured during the convention: "The convention was emotionally and physically draining for the delegates. Despite the summer heat, the windows had to be closed because the noise of carriage wheels and horseshoes hammering against the cobblestone . . . made it difficult for delegates to hear each other."²⁰

This vivid detail supports Labunski's assertion that "[f]atigue was certainly a factor"²¹ in the delegate's refusal to countenance extended discussion on the necessity of a bill of rights.²² While such detail is part of the book's strength, the author overuses this method. For example, the numerous discussions of Madison's bodily functions quickly reach the point of diminishing returns.²³ While initially entertaining, repeated discussion of this issue is devoid of value.

¹⁴ LABUNSKI, *supra* note 1, at 194. Though the author opines that Madison was a genuine proponent of a bill of rights, there is ample historical evidence to suggest that this support was premised on political expediency. See discussion *infra* p. 50.

¹⁵ LABUNSKI, *supra* note 1, at 194.

¹⁶ See ELLIS, *supra* note 13, at 52.

¹⁷ ROBERT K. WRIGHT, SOLDIER-STATESMEN OF THE CONSTITUTION 163 (1987).

¹⁸ See ELLIS, *supra* note 13, at 52.

¹⁹ LABUNSKI, *supra* note 1, at 5.

²⁰ *Id.* at 3.

²¹ *Id.* at 9.

²² See *id.*

²³ See PublishersWeekly.com, <http://reviews.publishersweekly.com/bd.aspx?isbn=0195181050&pub=pw> (last visited Sept. 17, 2006) (book review); see also LABUNSKI, *supra* note 1, at 22, 31, 96-97, 244.

Despite this shortcoming, Labunski succeeds in establishing Madison as a central figure of the nation's founding period. He elevates Madison's status among the founding fathers by using a three-pronged approach. First, he discusses Madison's opposition to a bill of rights at the Constitutional Convention. Second, Labunski examines Madison's defense of the Constitution, focusing specifically on issues germane to Virginia's ratifying convention. Finally, he examines Madison's role in introducing the Bill of Rights during the First Congress.

The opening chapter provides an overview of the Constitutional Convention and the first discourse regarding the necessity of a bill of rights.²⁴ It is in this section that the author first establishes Madison's role in shaping the nation. Labunski observes that Madison was "largely responsible for persuading [George Washington] to attend [the convention]." Washington's significance cannot be overstated. Madison understood that Washington's presence would encourage the attendance of "other political figures whose presence . . . would turn out to be crucial."²⁵ Without Washington, the gathering in Philadelphia might not have occurred.²⁷

Labunski aptly begins his review of the discourse concerning a bill of rights at the Constitutional Convention by observing Madison's behavior during a debate:

Five days before the convention adjourned, [George] Mason²⁸ said he "wished the plan had been prefaced with a Bill of Rights . . . It would give great quiet to the people." And, Mason added, "with the aid of the State declarations [of rights], a bill might be prepared in a few hours."²⁹

In response to Mason's call for an enumerated bill of rights, a debate ensued.³⁰ Labunski notes that "Madison remained silent"³¹ during the ongoing debate. The decision to focus on Madison's silence to establish his view regarding a bill of rights is a great technique. Labunski tacitly alerts readers that Madison opposed a bill of rights.³² Yet, by using this strategy, he forces readers to discern Madison's position on their own.

Madison's silence, standing alone, fails to establish his core belief that a bill of rights was unnecessary. The failure to provide additional detail germane to Madison's antagonism toward a bill of rights understates his opposition. There is ample evidence to establish Madison as more than a silent objector.³³ If anything, he was quite vocal and arguably led the opposition.³⁴ At the Constitutional Convention, "Madison was absolutely opposed to adding some additional time in order to craft a bill of rights."³⁵ Instead, "[h]e insisted that the document . . . made ample provision for the rights of the people."³⁶ Additional detail such as this would provide readers with a better understanding of Madison's adamant opposition to a bill of rights.

²⁴ See LABUNSKI, *supra* note 1, at 8-10.

²⁵ *Id.* at 7.

²⁶ *Id.*

²⁷ *See id.*

²⁸ "One of [Mason's] greatest achievements was his part in writing a declaration of rights that was approved by the Virginia constitutional convention in 1776 . . . Mason's elegant language . . . later influenced other states as they wrote their own bills of rights." *Id.* at 8.

²⁹ *Id.* at 9.

³⁰ *See id.*

³¹ *Id.*

³² *See id.*

³³ See CHARLES A. CERAMI, *YOUNG PATRIOTS: THE REMARKABLE STORY OF TWO MEN, THEIR IMPOSSIBLE PLAN, AND THE REVOLUTION THAT CREATED THE CONSTITUTION* 228 (2005).

³⁴ *See id.*

³⁵ *Id.*

³⁶ *Id.*

Labunski continues his analysis of Madison's role during the nation's founding period by examining his actions after the Constitutional Convention. Each event he examines directly relates to the key role Madison played during the nation's founding period. *Bill of Rights* superbly articulates Madison's status as a central figure at the Virginia ratifying convention.³⁷ Further, the book demonstrates that Madison was indispensable to the nation's very survival.³⁸ Labunski supports these propositions in two ways. First, he analyzes the importance of Madison's campaign to become a delegate to Virginia's ratifying convention. Second, he explains the central role Madison played as a delegate to the convention.

Leading political figures implored Madison to do all he could to become a delegate to Virginia's ratifying convention.³⁹ For example:

[Governor] Randolph [of Virginia] wrote to [Madison] just after the first of the year: "You must come in [to Orange County]. Some people in Orange are opposed to your politicks [sic]. Your election to the convention, is, I believe, sure; but I beg you not to hazard it by being absent at the time [of the election]."⁴⁰

In the end, Madison won the election by decisively defeating the Anti-Federalist candidates.⁴¹ As evidenced by Governor Randolph's concern, Madison's election victory was a critical point in history. Without Madison as a delegate to Virginia's ratifying convention, things might be very different in North America.⁴² Indeed, if Madison would have lost his bid to become a delegate to the convention, Virginia's decision to ratify the Constitution might never have come to fruition. *Bill of Rights* cogently demonstrates the importance of Madison's victory to supporters of both the Constitution and a bill of rights.

During the debates at Virginia's ratifying convention, Madison played a central role in support of the Constitution.⁴³ Though "supported by eloquent and respected Federalists,⁴⁴ . . . the greatest burden of answering [Patrick] Henry's broad charges [against the Constitution] and the detailed criticisms of George Mason and others⁴⁵ [fell] on [Madison's] shoulders."⁴⁶ *Bill of Rights* demonstrates the importance of Madison's superior debate skills.⁴⁷ Madison's ability to persuade others was essential to countering the arguments of opponents to the Constitution.⁴⁸ For example, "Madison challenged Henry's argument that the nation was at peace and capable of prosperity . . ."⁴⁹

I wish sincerely, Sir, this were true. If this be their happy situation, why has every State acknowledged the contrary? Why were deputies from all the States sent to the General Convention? Why have complaints of national and international distresses been echoed and re-echoed throughout the Continent? Why has our General Government been so shamefully disgraced, and our Constitution [the Articles of Confederation] violated?⁵⁰

³⁷ See LABUNSKI, *supra* note 1, at 95.

³⁸ See *id.* at 27-28.

³⁹ See *id.* at 43-46.

⁴⁰ *Id.* at 45.

⁴¹ See *id.* at 47.

⁴² See *id.* at 1-2.

⁴³ See *id.* at 84.

⁴⁴ Madison was "supported by . . . Federalists such as [Governor Edmund] Randolph and [George] Nicholas . . ." *Id.*

⁴⁵ Another well known opponent of the Constitution was James Monroe. See *id.* at 20.

⁴⁶ *Id.* at 84.

⁴⁷ See *id.* at 90.

⁴⁸ See *id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

Madison was able to rebut many of the arguments against the Constitution. However, “[t]he absence of a bill of rights was . . . a factor in the ratification fight.”⁵¹ In order to convince Virginia’s delegates to ratify the Constitution, Madison had to promise to introduce a bill of rights in the First Congress.⁵²

The importance of Madison’s role at this juncture was immense. If the arguments of Patrick Henry and other Anti-Federalists went unchallenged, it is possible that Virginia would not have ratified the Constitution. Virginia’s decision to ratify the Constitution was critical. “If Virginia failed to ratify [the Constitution], . . . no Virginians would be eligible for office . . . , not even George Washington.”⁵³ Without Washington as the President, the nation might have died in infancy.⁵⁴

Labunski’s examination of Madison’s campaign for Congress focuses closely on his “conversion”⁵⁵ from opponent to proponent of a bill rights. As Labunski demonstrates through use of *Federalist Papers* 38, 44, and 48,⁵⁶ “Madison had written disparagingly about a bill of rights for several years.”⁵⁷ Labunski asserts that Madison’s conversion was premised on his wish for stability in the new government.⁵⁸ An enumerated bill of rights would silence many critics and perhaps stymie calls for a second convention.⁵⁹ This is certainly a logical interpretation of facts. However, the same cannot be said regarding the author’s analysis of Madison’s motivation to support a bill of rights in the First Congress.

The weakest part of *Bill of Rights* is Labunski’s analysis of the impetus that led Madison to support a bill of rights in the First Congress.⁶⁰ The author makes the following assertion:

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 [Constitution] would be enough to motivate [Madison]. . . . Only a genuine conviction that such rights were necessary could have generated [Madison’s] passion and commitment⁶¹

Labunski’s analysis is flawed for several reasons. First, there is abundant evidence that Madison’s conversion was premised on political expediency. This point is established by Congressman John Page.⁶² Congressman Page “argued . . . that if Congress did not act, the people and their legislatures would think seriously about petitioning for a second convention.”⁶³ Madison certainly wanted to avoid a second convention.⁶⁴ Madison believed that the changes that were likely to be proposed at a second convention “would drastically alter the relative power of the states and the new federal government. Foreign nations would be hesitant to lend money during a period of such instability, and the danger that some states would form regional confederacies would be increased.”⁶⁵ Next, the view that Madison’s support for a bill of rights

⁵¹ CERAMI, *supra* note 33, at 268.

⁵² *See id.*

⁵³ *See* LABUNSKI, *supra* note 1, at 28.

⁵⁴ *See id.* at 28, 117.

⁵⁵ *Id.* at 161.

⁵⁶ *See* THE FEDERALIST NOS. 38, 44, 48 (James Madison).

⁵⁷ *See* LABUNSKI, *supra* note 1, at 62.

⁵⁸ *See id.* at 161-62.

⁵⁹ *See id.* at 198, 230, 240, 243, 253.

⁶⁰ *See Editorial Review*, PUBLISHERS WKLY., *reprinted at* Amazon.com, <http://www.amazon.com/exec/obidos/ASIN/0195181050/bookstorenow600-20> (last visited June 27, 2007) (book review).

⁶¹ LABUNSKI, *supra* note 1, at 194.

⁶² *See id.* at 207.

⁶³ *Id.*

⁶⁴ *See id.* at 55, 108, 129-30, 198, 230.

⁶⁵ *Id.* at 55 (citation omitted).

was occasioned by a campaign promise has merit. It is entirely logical to conclude that Madison's support for a bill of rights was premised on a campaign promise.

Finally, there is ample evidence that Madison introduced a bill of rights to assuage the concerns of citizens opposed to the Constitution. Madison's statement in the First Congress supports this proposition.⁶⁶ Madison stated: "Citizens who remained actively opposed to the new government . . . could create many problems . . . if they believed their concerns about a bill of rights were not taken seriously."⁶⁷ Madison was likely referring to the possibility that citizens would demand a second convention.

Despite this minute criticism, the author provides a generally well-reasoned and factual recitation of events surrounding the Bill of Rights. Labunski's analysis of the struggles surrounding the Bill of Rights should give pause to those that would freely cede their constitutional rights. An easy, yet scholarly read, Labunski succeeded in elevating Madison's stature among the founding fathers. *Bill of Rights* is not for readers seeking a comprehensive analysis of the many facets of Madison's political life. Those interested in such an expansive analysis should look beyond this work. However, *Bill of Rights* is highly recommended for readers interested in the genesis of the Bill of Rights.

⁶⁶ *See id.* at 196.

⁶⁷ *Id.*