

# CONSOURCE



## *The Constitutional Sources Project*

### CONSTITUTIONAL CONVENTION SIMULATION

### FINE TUNING THE BALANCE OF POWERS

#### TIME AND GRADE LEVEL

**One** 45 or 50 minute class period in a **Grade 9-12** US history, civics, or government course.

#### PURPOSE AND CRITICAL ENGAGEMENT QUESTIONS

History is the chronicle of choices made by actors/agents/protagonists in specific contexts. This simulation places students in the midst of the Constitutional Convention, after the Committee of Detail has submitted its draft for a new Constitution on August 6. With that draft's concrete proposals on the floor, students will ponder: Is this the Constitution we want? Are the people adequately represented? Are the branches well structured? Have governmental powers been distributed among them to achieve a workable balance? Are there specific ways in which a better balance might be achieved? By engaging with these questions mid-stream, before the Convention reached its final conclusions, students will experience the Constitutional Convention as *process*, a supreme example of collective decision-making. Further, by engaging with nuts-and-bolts details, they will gain a more intimate appreciation for the framers' efforts to construct an efficient and durable governmental structure in which powers are broadly distributed.

#### LESSON OBJECTIVES

\*Students will be able to explain why the framers created a governmental structure that distributed powers broadly and provided internal checks, so no one person or group could exercise *all* the powers of a central government.

\*Students will be able to elucidate arguments for alternate scenarios that were entertained at the Convention: Who should hold appointive powers? Who should hold war-making powers? Who should hold treaty-making powers? Should Congress be able to override a presidential veto, and if so, what should be the appropriate super-majority?

\*Students will be able to cite specific examples of reversals: why the framers altered early drafts of the Constitution.

## **OVERVIEW OF THE LESSON**

### **Prefatory homework:**

Handout A, *“Committee of Detail draft: Highlights.”*

### **In class:**

1. Homework review: 10-15 minutes
2. Discussion groups consider possible changes to the Committee of Detail draft: 15 minutes
3. Student Convention approves or alters the Committee of Detail draft: 15 minutes
4. Presentation of the historical outcome — changes to the Committee of Detail draft adopted into the United States Constitution: 5-10 minutes

Summary homework / Extended activities

## **MATERIALS**

### *Background Handouts*

- A. Committee of Detail draft: Highlights

### *Classroom Handouts*

- B. George Mason’s Executive Council [OPTIONAL]
- C. Balance of Powers Class Decisions
- D. Balance of Powers Historical Outcomes: Major changes to the Committee of Detail draft adopted into the United States Constitution
- E. United States Constitution, approved by the Convention on Sept. 17, 1787
- F. Vocabulary List

### *Teacher Resources*

- T-A. Infrastructure for the Constitutional Convention Simulation
- T-B. Timeline for the Federal Convention of 1787

### *Links*

A. [Complete Committee of Detail Draft](#)

B. Madison's *Notes of Debates* [August 6](#), [August 7](#), [August 8](#), [August 9](#), [August 10](#), [August 11](#), [August 13](#), [August 14](#), [August 15](#), [August 16](#), [August 17](#), [August 18](#), [August 20](#), [August 21](#), [August 22](#), [August 23](#), [August 24](#), [August 25](#), [August 27](#), [August 28](#), [August 29](#), [August 30](#), [August 31](#), [September 1](#), [September 3](#), [September 4](#), [September 5](#), [September 6](#), [September 7](#), [September 8](#), [September 10](#), [September 11](#), [September 12](#), [September 13](#), [September 14](#), [September 15](#), [September 17](#)

C. [United States Constitution](#)

## PREFATORY HOMEWORK

Students read and follow the instructions on Handout A: “**Committee of Detail draft: Highlights.**”

### CLASS ACTIVITIES: 45-50 MINUTES

#### 1. HOMEWORK REVIEW: 10-15 minutes

Before working through the draft, go over a few key issues so students can understand the framers' thinking. Guided question possibilities:

*Why do senators get appointed by the states rather than by the people, and why do they serve longer terms?*

Response: Delegates wanted one branch of the legislature to be able to check the popular will, so they made senators not directly dependent on the people. You might then ask students if they think the American people will object to this. [During the ratification debates, many complained that the Senate was too “aristocratic.”]

*Which special powers belong to the House? What do you think was the reasoning behind this choice?*

Response: Initiating taxation and the appropriation [spending] of money. Having fought the Revolution, in part, because of “taxation without representation,” delegates wanted to insure that people could *only* be taxed by their direct representatives, and they wanted their direct representatives to take the lead in spending their tax dollars.

*Which special powers belong to the Senate? What do you think was the reasoning behind this choice?*

Response: Making treaties and appointments. Delegates didn't want the people's direct representatives to determine foreign policy, nor did delegates want the choice of ambassadors and judges to be affected by the popular will.

*Did the Committee of Detail consider treaty making to be an executive or legislative function?*

Response: Legislative, since this power was granted to the Senate. The framers regarded treaties as akin to laws, since any treaty that the United States agreed to must be honored by its citizens.

*Did the Committee of Detail consider making appointments to be an executive or legislative function?*

Response: Legislative, since this power was granted to the Senate.

Possible comment on this: Do you think negotiating treaties and making appointments are legislative? We won't be discussing this now, although you might want to in your D & D groups.

**OPTIONAL AT THIS POINT:** Distribute Handout B, “George Mason’s Executive Council,” a proposal he made on September 7 that received no support. Questions to consider in D & D groups are at the end of this sheet.

*What is the very first power granted to Congress? Why do you think the committee listed this first?*

Response: The overarching weakness of the Articles of Confederation, which inspired this Convention, was Congress’s inability to generate its own funds. That above all had to be remedied.

*Who had the power to “make war” and “raise armies”? Why?*

Response: Both houses of Congress. To commit “blood and treasure” (a popular saying of the times), the people’s representatives in the House needed to be onboard, but the Senate, presumably composed of more seasoned leaders, also had to approve. Note that once war was declared, the president would be “commander in chief.”

*Do you agree with a presidential veto? Should it be absolute, or subject to being overridden by Congress? If the latter, is 2/3 (66.7%) the right super-majority? Should it be 3/5 (60%) or 3/4 (75%)?*

Responses will vary, of course. Let students briefly air their ideas, then tell them they can discuss these further in their D & D groups if they would like.

*For Supreme Court justices, what does “during good behavior” mean?*

Response: indefinitely, unless action was taken against a particular judge. Note that the committee did not state who would determine whether justices were *not* conforming to “good behavior.” Presumably, it would be Senate, since that was the body that appointed them.

*Why do you think delegates thought Supreme Court justices should serve indefinitely?*

Response: they thought justices should be entirely independent and that they would gain by experience.

**OPTIONAL:** *According to this draft, who decides whether a law is “constitutional”?*

Response: The Committee of Detail did not address this issue. Unfortunately, for the class to discuss this matter in depth would likely preclude discussions of other “balance of power” questions. For now, simply note that delegates did not address what we now

call “judicial review.” See ConSource’s lesson plan “Should Judges Judge Laws?” for a full treatment.

*Query: Does anybody have other questions about what things mean, before we discuss possible revisions in our D & D groups?*

## **2. DISCUSSION GROUPS CONSIDER POSSIBLE CHANGES TO THE COMMITTEE OF DETAIL DRAFT: 15 minutes**

Instructions to students: From August 6, when the Committee of Detail presented its draft, till mid-September, delegates considered the document item-by-item. We too will fine-tune the committee’s draft. Consult the Committee of Detail you annotated for your homework. In your D & D groups, present your ideas and discuss them. Try to focus on items you marked with both “I” (particularly important) and “C” (items you think should be changed). The Convention devoted six weeks to this, we only have this class period. You don’t need to come to any conclusions in your D & D groups, but use this time to work out your thoughts. Then, when we reconvene as a class, you can make your motions for the convention to vote on.

## **3. STUDENT CONVENTION TO APPROVE OR ALTER THE COMMITTEE OF DETAIL DRAFT: 15 minutes**

Distribute Handout C, “**Balance of Powers Class Decisions.**” Tell students that as each vote is taken, they should record it on this sheet.

Remind students that all votes will be done by state delegation, and since multiple votes will be taken, they need to be situated within their delegations.

Class management for offering resolutions/amendments is up to teacher discretion. Full class debate on each one, however, will necessarily be limited, perhaps one pro and one con for each. Alternately, if major issues are raised that present teachable moments, it might be better to allow full debates and tackle fewer issues. There is no predicting where students might take this or how it will go! Note, however, that the Convention was also unpredictable: nobody knew how it would all turn out.

## **4. PRESENTATION OF HISTORICAL OUTCOME — CHANGES TO THE COMMITTEE OF DETAIL DRAFT INCORPORATED INTO THE CONSTITUTION: 5-10 minutes**

Class can engage in one or both of these activities:

A. Distribute Handout E, “**United States Constitution, approved by the Convention on Sept. 17, 1787.**” For each *change* on the “Class Decisions” sheet, students record whether or not that change, agreed to by the class, was adopted into the United States Constitution. This can be done together as a class or as a summary homework

assignment. OPTIONAL: If a change was incorporated into the Constitution, instruct students to cite the article, section, and clause, as indicated on that sheet.

B. Distribute Handout D, “**Balance of Powers Historical Outcomes: Major changes to the Committee of Detail draft adopted into the United States Constitution,**” which outlines the major changes to the Committee of Detail draft that were adopted into the United States Constitution and explains each one. This can be used in various ways:

\*As prefatory homework for a separate class session on balancing powers, in which students engage with these issues in greater depth.

\*Students can write about one or more of the items listed. In this essay, they can present the arguments of all sides of an issue, take a position, and support that position by rebutting arguments that contradict it.

\*If class time does not permit going into these issues in such depth, teachers can use this material as a resource. As students discuss possible changes, teachers might call upon some of this material to demonstrate the complexities and interconnectivity of these issues.

### **SUMMARY HOMEWORK / EXTENDED ACTIVITIES**

In addition to the activities listed above, the proceedings of the student convention will present other possibilities:

\*If some students did not get a chance to offer their amendments, they can do so in writing, with an explanatory argument in their defense.

\*Students can give pro-or-con arguments for any of the votes taken.

\*Students can conjecture how any action taken by the student convention might have altered the course of history.

Further ideas for student research and/or essays:

\*If this lesson is used as a stand-alone, not within the Constitutional Simulation unit, students can receive the Executive Branch: Historical Decisions sheet (from Consource lesson plan “Creating an Executive”) and compare the Committee of Detail draft with the final Constitution. Why the change? Has it worked? Related topics are listed in the “Extended Activities” section of that lesson plan.

\*Did the Constitution create too much balance, leading to the fractured government we have been experiencing lately? Or does our recent experience prove that balance is a good thing, since no branch is able to assert control?

\*In a parliamentary system of government, the legislature chooses the chief executive, commonly called the “Prime Minister.” When the Prime Minister no longer has majority support within the legislature, new elections are held for members of the parliament and the new parliament then chooses a Prime Minister. This avoids a split or broken government, but is it preferable to our presidential system, in which the chief executive is responsible directly to the people and has to stand for re-election after four years? Is it better to hold elections at regular intervals, as in our system, or when the government loses the confidence of the people? Although a parliamentary system is more immediately responsive to popular discontent, might it increase the possibility of turmoil or complete breakdown? And if so, is it worth the risk? (This question also appears in the ConSource lesson “Creating an Executive.”)

## Balance of Powers Handout A: Committee of Detail Draft

In his *Spirit of the Laws*, published in 1748, the French philosopher Montesquieu divided the functions of government into three spheres: legislative (making the laws), executive (implementing the laws), and judicial (determining whether people obey the laws). Governments would be more stable, and people better served, if these three functions were lodged in separate bodies, each checking the other's powers, he asserted. American statesmen of the Founding Era had read Montesquieu and other writers who followed that line of thinking.

On April 16, 1787, shortly before the Convention, James Madison wrote to Washington: "A Government composed of such extensive powers should be well *organized* and *balanced*." By the end of July, the Convention was well on its way to *organizing* three distinct branches so no single individual or group could exercise all the new powers of government, but it was not yet clear what each branch would do. While most delegates took a two-week recess, a Committee of Detail composed of five delegates worked out a full draft of the new Constitution, summarizing what the Convention had decided so far and *balancing* the various powers among the different branches. It also prohibited the states from exercising certain powers of government. "Balance of powers" was not to weaken the Federal government but to distribute powers broadly and provide internal checks, so no one person or group could exercise *all* the newfound powers.

Below are highlights of the Committee of Detail draft, reported to the Convention on [August 6](#). Read through it first to get the full picture. **Then go back and highlight or circle features you think are particularly important—mark "I" next to these. Also highlight or circle features you might consider changing—mark "C" next to these.** In particular, are there powers you think should be lodged elsewhere to alter the balance of powers?

At the end, **jot down any amendments to this draft you would like to propose.** At the Student Convention tomorrow, you will use your marked copy to suggest revisions the Committee of Detail draft or propose additional provisions of your own.

### LEGISLATIVE BRANCH

#### Article II, Section 2:

The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate; each of which shall in all cases have a negative on the other.

#### Article IV, Sections 1 and 4:

The members of the House of Representatives shall be chosen every second year, by the people of the several States comprehended within this Union.... The Legislature shall ... regulate the number of representatives by the number of inhabitants [in each state].



**Article V, Sections 1 and 2:**

The Senate of the United States shall be chosen by the Legislatures of the several States. Each Legislature shall chuse two members.... The Senators shall be chosen for six years. [SUMMARY OF REMAINING TEXT: Senatorial elections will be staggered, with one-third of the members being chosen every two years.]

**Article VII, Section 1:**

The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises;

To regulate commerce with foreign nations, and among the several States;

To establish an uniform rule of naturalization throughout the United States;

To coin money;

To regulate the value of foreign coin;

To fix the standard of weights and measures;

To establish Post-offices;

To borrow money, and emit bills on the credit of the United States;

To appoint a Treasurer by ballot;

To constitute tribunals inferior to the Supreme Court;

To make rules concerning captures on land and water;

To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations;

To subdue a rebellion in any State, on the application of its legislature;

To make war;

To raise armies;

To build and equip fleets;

To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions;

And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the government of the United States, or in any department or officer thereof.

**Special powers of the House of Representatives****Article IV, Section 5:**

All bills for raising or appropriating money, and for fixing the salaries of the officers of Government, shall originate in the House of Representatives, and shall not be altered or amended by the Senate. No money shall be drawn from the Public Treasury, but in pursuance of appropriations that shall originate in the House of Representatives.

**Special powers of the Senate****Article IX, Section 1:**

The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court.

## EXECUTIVE BRANCH

### Article X, Section 1:

The Executive Power of the United States shall be vested in a single person. His title shall be, “The President of the United States of America;” and his title shall be, “His Excellency.” He shall be elected by ballot by the Legislature. He shall hold his office during the term of seven years; but shall not be elected a second time.

### Article X, Section 2:

He shall, from time to time, give information to the Legislature, of the state of the Union;

he may recommend to their consideration such measures as he shall judge necessary, and expedient;

he shall take care that the laws of the United States be duly and faithfully executed:

he shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution.

He shall receive Ambassadors, and may correspond with the supreme Executives of the several States.

He shall have power to grant reprieves and pardons...

He shall be commander in chief of the Army and Navy of the United States, and of the militia of the several States...

He shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery, or corruption.

## POWERS SHARED BY THE LEGISLATIVE AND EXECUTIVE BRANCHES

### Article VI, Section 13:

Every bill, which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States for his revision: if, upon such revision, he approve of it, he shall signify his approbation by signing it. But if, upon such revision, it shall appear to him improper for being passed into a law, he shall return it, together with his objections against it, to that House in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider the bill. But if after such reconsideration, two thirds of that House shall, notwithstanding the objections of the President, agree to pass it, it shall together with his objections, be sent to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of the other House also, it shall become a law.

[SUMMARY OF REMAINING TEXT: If the president signs a bill, it becomes law; if he vetoes it, it does not—but it two-thirds of each house vote to override his veto, the bill becomes law. Note that in this draft, the president has the opportunity to make revisions before signing it.]

## JUDICIAL BRANCH

### Article XI, Sections 1 and 2:

The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States... The Judges of the Supreme Court, and of the Inferior Courts, shall hold their offices during good behaviour.

**Article XI, Section 3:**

The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects...

In all the other cases, ... it shall be appellate. [SUMMARY OF REMAINING TEXT: It can serve as an appeals court, but without "original" jurisdiction.]

**POWERS *PROHIBITED* TO THE STATES**

**Articles XII and XIII:**

No State shall coin money; nor grant letters of marque and reprisal; nor enter into any Treaty, alliance, or confederation; nor grant any title of Nobility.

No State, without the consent of the Legislature of the United States, shall emit bills of credit, or make any thing but specie a tender in payment of debts; nor lay imposts or duties on imports; nor keep troops or ships of war in time of peace; nor enter into any agreement or compact with another State, or with any foreign power; nor engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent, as not to admit of a delay, until the Legislature of the United States can be consulted.

**Balance of Powers Handout B: George Mason's Executive Council,  
proposed on [September 7](#)**

Mr. MASON (George Mason, Virginia): The Legislative & Executive ... as well as the Judiciary departments, ought to be kept as separate as possible. He took occasion to express his dislike of any reference whatever of the power to make appointments to either branch of the Legislature. On the other hand he was averse to vest so dangerous a power in the President alone. As a method for avoiding both, he suggested that a privy Council of six members to the president should be established; to be chosen for six years by the Senate, two out of the Eastern two out of the middle, and two out of the Southern quarters of the Union, & to go out in rotation two every second year... This would prevent the constant sitting of the Senate which he thought dangerous, as well as keep the departments separate & distinct. It would also save the expence of constant sessions of the Senate. He had he said always considered the Senate as too unwieldy & expensive for appointing officers, especially the smallest, such as tide waiters &c.

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Do you agree with Mason? Are appointments executive or legislative? Who do *you* think should make appointments? Do you think a separate executive council should be added? If so, do you like his method for selecting members, or can you think of an alternate method?

**Balance of Powers Handout C: Balance of Powers Class Decisions**

1. List the changes the class made to the Committee of Detail Draft.

2. After each item listed above, state whether this change was adopted into the United States Constitution. If it was, cite the article, section, and clause. Use the standard notation for citing the Constitution:

Articles — roman numerals

Sections — numbers

Clauses — the paragraph within each section

For example, the age requirement for the president is in Article II, Section 1, Clause 5.

## Balance of Powers Handout D: Historical Outcomes

### Major changes to the Committee of Detail draft adopted into the United States Constitution.

**1. Committee of Detail Article VII, Section 1: “The Legislature of the United States shall have the power... to make war.”**

The Convention changed the words “make war” to “declare War” (Article 1, Section 8, Clause 11 of the Constitution.)

**2. Committee of Detail Article IX, Section 1: “The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court.”**

The convention gave these powers to the president, with the “advice and consent” of the Senate. Ratification of treaties required a two-thirds super majority. (Article II, Section 2, Clause 2 of the Constitution).

**3. Committee of Detail Article X, Section 1: “The Executive Power of the United States shall be vested in a single person.... He shall be elected by ballot by the Legislature. He shall hold his office during the term of seven years; but shall not be elected a second time.”**

The Convention kept the single executive but altered the rest. According to Article 2, Section 1, Clauses 1-3 of the Constitution, the president is elected by special electors for a four-year term and is not prohibited from repeating in office. Each state legislature chooses in any manner it wishes (by popular vote or the legislature; by districts or statewide) a number of electors equal to the total number of members that state has in Congress (House + Senate). Each elector casts two votes. The person receiving the most votes is president, and the runner-up is vice president. If no person receives a majority, the House of Representatives chooses the president from among the top five candidates. Voting in the House is by state delegations.

**4. Committee of Detail Article X, Section 2: The president “shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery, or corruption.”**

The Convention changed the venue for impeachment trials from the Supreme Court to the Senate. (Article 1, Section 3, Clause 6 of the Constitution.)

**5. Committee of Detail Article VI, Section 13: Two-thirds of each house of Congress can override a presidential veto.**

On [August 15](#), by a vote of 6 states to 4, with one divided, the Convention raised the hurdle for Congress to override a presidential veto from two-thirds to three-quarters. On

[September 12](#), however, it lowered it back to two-thirds. Although there was no change in the end, this demonstrate how carefully delegates calibrated the balance of powers. (Article I, Section 7, Clause 2 of the Constitution.)

***6. Addition of the office of vice-president; there was no such office in the Committee of Detail draft.***

The Vice President, the person receiving the second most votes from presidential electors, would preside over the Senate but vote only in case of a tie. (Article 1, Section 3, Clause 4 and Article II, Section 1, Clause 3 of the Constitution.)

## **Explanations for these changes**

### **1. “Make war” to “declare war”**

On [August 17](#), delegates addressed Congress’s power “to make war,” as stipulated in the Committee of Detail’s draft. Charles Pinckney thought “the House of Representatives would be too numerous for such deliberations.” It met “but once a year,” and “its proceedings were too slow.” So who should be empowered to make war? “The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions,” Pinckney said. Since the Senate, though its authority to make treaties, already possessed the “power of peace,” it should have the “power of war” as well.

But Pierce Butler, Pinckney’s colleague from South Carolina, observed that “the objections against the legislature lie in great degree against the Senate.” The president, on the other hand, would always be on the job. He could work quickly. He “will have all the requisite qualities, and will not make war but when the Nation will support it.” Butler was likely recalling the problems he faced as adjutant general for South Carolina in 1779, when his state struggled to mobilize against an immanent British invasion. Surely, a single leader at that point would have performed more efficiently than any deliberative body.

Butler’s proposal for vesting the president with the power “to make war” drew immediate and heated responses. Elbridge Gerry was shocked and dismayed. From Madison’s notes: “Mr. GERRY never expected to hear in a republic a motion to empower the Executive alone to declare war.” At the outset of the convention, Gerry admitted he had been “too republican heretofore,” but Butler’s retreat from republican values was going too far even for him. Only the people, through their representatives, could ever possess the power of war.

For Oliver Ellsworth, allowing one man to lead the nation into war made war too easy: “There is a material difference between the cases of making war and making peace. It should be more easy to get out of war, than into it. War also is a simple and overt declaration, peace attended with intricate & secret negotiations.” George Mason followed

up on this theme: “Mr. MASON was against giving the power of war to the Executive, because not safely to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace.”

No delegate supported Butler. Like Alexander Hamilton, Butler had established an outer limit to acceptable discourse. Indeed, Hamilton himself, in the plan he offered two months earlier, had granted the executive only the “direction of war, when authorized or begun.” Despite his own disclaimers on republicanism, Hamilton had ceded that only Congress could take the monumental and irreversible step of initiating a war.

Still, Butler did pose one valid question. How could the nation defend itself against an invasion while Congress was not in session?

Madison and Gerry offered a solution. Congress would be granted exclusive authority to “declare” war, not “make” war, thus “leaving to the Executive the power to repel sudden attacks.” Rufus King explained the differences in word connotations. To “make” war could be construed as to “conduct” war, and that was the province of the president, the Commander-in-Chief of the armed forces. To “declare” war, on the other hand, was to set the nation on a course of action that included the expenditure of blood and treasure, and only the people’s direct representatives should be authorized to do that. Only one state, New Hampshire, opposed the change from “make” to “declare.” This decision, precise but not insignificant, confirmed the overarching sense of the convention. Although the president would be granted powers sufficient to make government more efficient, only Congress could set lasting policy.

## ***2. Treaty making and appointive powers transferred from the Senate to the president, with the “advice and consent” of the Senate.***

These two changes, suggested late in the game by the Committee on Remaining Matters on [September 4](#), signaled a marked increase in executive powers. Most delegates considered these executive matters, not legislative. They had been lodged with the Senate because that body was viewed as fulfilling the role of an executive council. On [September 7](#) they rejected George Mason’s proposal for an executive council. (Mason’s proposal appears on a separate page in this lesson.) Instead, they checked presidential overreach by requiring the “advice and consent” of the Senate.

Also on [September 7](#), James Wilson proposed that the House of Representative, in addition to the Senate, must approve a president’s treaties, but Wilson’s protestations on the part the people’s direct representatives was soundly defeated, ten states to one.

Another challenge that day came from Madison, who preferred a low hurdle for treaties of peace. According to the committee recommendation, two-thirds of the Senate would have to approve all treaties, but Madison thought one-half should suffice for “treaties of peace.” Without a single speaker for or against, Madison’s motion passed “nem con,” without dissent.



Immediately, Madison followed with a more striking proposal: two-thirds of the Senate could “make treaties of peace, without the concurrence of the President.” Most shocking of all, in retrospect, was this future president’s reasoning. “The President would necessarily derive so much power and importance from a state of war that he might be tempted, if authorised, to impede a treaty of peace.” If a war-happy president did not want peace, a peace-loving Senate could override him. Gouverneur Morris disagreed. He assured his fellow delegates that “the power of the president in this case [was] harmless,” and that “no peace ought to be made without concurrence of the president, who was the general Guardian of the National interests.” In Morris’s view, the president — one man, above the political fray — could serve the nation better than those who represented specific interests. In a similar vein, Elbridge Gerry cautioned that the Senate might sell out the nation’s “dearest interests,” such as “fisheries, territory, etc.” By eight states to three, the convention denied the Senate authority to make peace on its own. The president would still have to take the initiative in negotiating a peace treaty.

The following day, [September 8](#), as the first order of business, Rufus King moved to reestablish the two-thirds requirement for Senate ratification of peace treaties. Hugh Williamson, supporting King, noted that if only a bare quorum were present, one-half of the Senate might be only eight men, possibly from the smallest states. Gouverneur Morris, offering one of the strangest arguments of the convention, came down on the side of Madison and the minimum one-half requirement for treaties of peace. While Madison and others who favored the lower hurdle did so because peace is preferable to war, Morris preferred that option because it would *encourage* the waging of war to pursue national interests. He reasoned that the two-thirds requirement would make peace treaties more difficult, and if Congress thought peace would be more difficult to obtain, it would be “unwilling to make war for that reason.” Facilitating peace would facilitate war, and war, for Morris, had the beneficial effect of making people willing to tolerate a strong, central government. This convoluted argument failed to convince, and Madison’s motion was overturned, eight states to three. Morris’s preference for war, though, was in fact reflected in the latest draft, soon to become the final document. To this day, it takes a simple majority of Congress to declare war, but a super majority of the Senate to end one.

By [September 8](#), the two new presidential powers had been confirmed, exactly according to the committee’s recommendations. Collectively, they gave more power to the president than they did singularly, for the authority to appoint ambassadors and make treaties signaled a strong executive presence in the shaping of foreign policy. With less than ten days to go the delegates, following the Committee of Remaining Matters, overturned the sense of the convention that had prevailed for over three months: matters of war and peace should be lodged squarely with Congress. Perhaps, the way the pendulum kept swinging that summer, another ten days might have produced yet one more reversal, and these powers would have reverted back to the Senate or been apportioned in some other combination. But the convention ended when it did, with presidential powers ascendant.

***3. One chief executive, called the president, chosen by special electors to serve a 4-year term and be eligible for re-election.***

On [August 31](#) the Convention appointed one member from each state to a committee that would address remaining unsettled matters, which we call today the Committee on Remaining Matters. Even though selection of the president *had* been settled, this committee took up the problematic issue once again. To establish independence from Congress, yet not hand it over to the people, the committee devised a complex system of electors. These electors would serve for the sole purpose of selecting a president. Presumably, they would be chosen for their wisdom and discretion. They were expected to make their selection free of political bias.

Then, since the president would no longer be dependent on the support of congressmen, the committee said he should be eligible for re-election. Further, since he could be re-elected, they opted for a shorter term. They did think Congress should be able to remove him for wrongdoing, however, so they empowered the Senate, instead of the Supreme Court, to try his impeachment.

When the committee reported its suggestions on [September 4](#), other delegates were surprised—but they were also fatigued after more than three months of deliberations. There was minimal discussion and only one change: at the insistence of small states, each state delegation in the House would cast only one vote in the case of a runoff election. (Otherwise, runoffs would be heavily influenced by large states because of proportional representation.) Delegates approved the new plan just days before they adjourned.

***4. Impeachments tried by the Senate rather than the Supreme Court.***

Once the Committee on Remaining Matters had shifted treaty-making and appointive powers from the Senate to the President, the president would be appointing Supreme Court justices. It made little sense for a sitting president's appointees to preside over that president's impeachment trial.

***5. Super majority to override a presidential veto.***

On [August 15](#), when the Convention raised the hurdle to override a presidential veto from two-thirds to three-quarters, the president was elected by Congress and the Senate held treaty-making and appointive powers. Congress at that point seemed more powerful than the president; to achieve a better balance, delegates decided to make it more difficult to overturn a presidential veto. But on [September 12](#) North Carolina's Hugh Williamson moved "to reconsider the clause requiring three fourths of each House to overrule the negative of the President," lowering the hurdle back to its original two-thirds. The higher number, he said, "puts too much in the power of the President." This must have surprised any delegates who recalled that the motion made four weeks past — to change from two-thirds to three-quarters — was made by none other than Hugh Williamson. Back then, Williamson and others had feared the legislature was gaining too much power; now, after the series of recent changes that strengthened the president and made him independent of

Congress, he wanted to take a small step in the other direction. Other delegates agreed. In a close battle between fractions, six state delegations voted for two-thirds and four for three-fourths, thereby lessening the presidential veto power by one-twelfth.

### ***6. Addition of the office of vice-president.***

The Committee on Remaining Matters wanted each presidential elector to cast two ballots, one of whom could not be from the elector's home state. (They worried that electors from a large state would unite behind a candidate from their own state; since large state had more electors, that candidate would have an unfair advantage.) But the second ballot created a problem: there was no appropriate office for that man fill. Undaunted, this committee conjured a new position so electors could vote for two candidates. Hugh Williamson, a committee member, explained to the convention: "such an officer as vice-President was not wanted. He was introduced only for the sake of a valuable mode of election which required two to be chosen at the same time."

The creation of this new office did address the problem of succession. For the first two months of the Convention, nobody had paid any attention to what would happen if a president were killed, incapacitated, or impeached and convicted; if a president could no longer serve, Congress would simply choose another. But what if Congress was not then in session? On August 6 the Committee of Detail solved this technical problem by specifying that the president of the Senate would fill the office temporarily "until another President of the United States be chosen, or until the disability or the President be removed." But that did not sit well with Gouverneur Morris, always wary of Congress's influence over the presidency. As James Madison, who shared Morris's concern, pointed out on August 27, "the Senate might retard the appointment of a President in order to carry points whilst the revisionary power [veto] was in the President of their own body."

Who, then, *should* succeed a president, if only temporarily? Morris suggested the chief justice, but he found no backers. Madison offered up "the persons composing the Council to the President," which would have made more sense if the president *had* a council, but none existed. Williamson then suggested that determining the "provisional successor to the President be postponed," and his motion carried the day.

The problem of succession was solved by the Committee on Remaining Matters. The committee wanted presidential electors to select two candidates, and fortuitously, that second candidate would fill a vacant niche in the new scheme. The elector scheme created a successor to the president, the vice-president, who was independent of Congress.

But what would the vice-president *do*? That was a puzzle. The best the committee could come up with was "ex-officio President of the Senate," with the power to break a tie vote. This assignment angered George Mason, who complained that the vice-president's role, artificially manufactured by the Committee on Remaining Matters, was "an encroachment on the rights of the Senate" and violated the principle of separation of powers. Elbridge Gerry agreed. It was "improper," he said, to give the new office a

function within the legislature, because of “the close intimacy that must subsist between the President & vice-president.” To which Gouverneur Morris responded wittily: “The vice-president then will be the first heir apparent that ever loved his father.”

The committee’s suggestion prevailed, with only two states voting against the vice president’s minimal job description. What we regard today as the second highest office in the land was a fluke of circumstance, an inadvertent last-minute addition. Had they not felt rushed, delegates might have taken more care and assigned the infant office more definite tasks. But they were worn out, and they discussed the matter no further. The vice-president was the bastard son of the Convention, which did not have a firm grasp on that office.

**Balance of Powers Handout E: United States Constitution, approved by the Federal Convention on Sept. 17, 1787**

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3.

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

#### Section. 4.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

#### Section. 5.

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

#### Section. 6.

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

#### Section. 7.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States. If he approve; he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

## Section. 8.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;  
To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;  
To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;



To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

#### Section. 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

#### Section. 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## Article. II.

### Section. 1.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

#### Section. 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

#### Section. 3.

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and

expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

#### Section. 4.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

### Article III.

#### Section. 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

#### Section. 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

#### Section. 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of

Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

#### Article. IV.

##### Section. 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

##### Section. 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

##### Section. 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

##### Section. 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

#### Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

#### Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

#### Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

### **Balance of Powers Handout F. Vocabulary List**

1. Appellate: of or relating to the review of a decision of a lower court by a higher court.
2. Appropriation: a sum of money or total of assets devoted to a special purpose.
3. Bribery: the offering, giving, receiving, or soliciting of any item of value to influence the actions of an official or other person in charge of a public or legal duty.
4. Commerce: an interchange of goods and commodities.
5. Constitutional: allowed by a country's Constitution.
6. Excises: a tax levied on certain goods and commodities produced or sold within a country and on licenses for certain activities.
7. Ex-Officio: A member of a body who is part of it by virtue of holding another office.
8. Imposts: a tax or similarly compulsory payment.
9. Impeachment: A process in which an official is accused of unlawful activity, the outcome of which may include removal of that person from office.
10. Insurrections: a violent uprising against an authority or government.
11. Judicial Review: review by the United States Supreme Court of the constitutional validity of a legislative act or executive action.
12. Jurisdiction: The extent of the power to make legal decisions and judgments.
13. Naturalization: the process by which citizenship is granted to a foreign citizen after he or she fulfills the requirements established by Congress.
14. Pardons: an act officially saying that someone who was judged guilty of a crime will be allowed to go free and will not be punished.
15. Piracies: The practice of attacking or robbing ships at sea.
16. Ratification: the official way to confirm something, usually by vote.
17. Reprieves: to cancel or postpone the punishment of someone.
18. Succession: the coming of one person or thing after another in order, sequence, or in the course of events.
19. Treason: the crime of betraying one's country.
20. Treaties: A formally concluded and ratified agreement between countries.
21. Veto: the rejection of a piece of legislation made by a law-making body.

## **T-A. INFRASTRUCTURE FOR THE CONSTITUTIONAL CONVENTION SIMULATION**

These eight lessons can be used individually or as a unit. In either case, here are basic rules of operation:

Assign each student to a state delegation that participated in the 1787 Federal Convention in Philadelphia. (Alternately, you could allow students to choose their states or have a lottery, but this will add an extra step.) Please note that delegates from Rhode Island did not attend.

The numbers in each state delegation will vary by class size. For classes with 24 or more students, there should be two or more in each delegation. (Add delegates in rough proportion to size of states. For instance, in a class of 25, Virginia will have three, the other states two each.) If fewer than 24, you can combine states of similar size and regional interests so each group has more than one delegate. Possible state combinations, in order of preference: DE and NJ (small and free), GA and NC (small/medium and slave), NH and CT (small and free), MA and NY (large/medium and free), VA and MD (large/medium and slave). To facilitate classroom management, students should sit with their fellow state delegates.

Breakout groups, called “**discussion and debate**” (**D &D**) **groups**, will be composed of several state delegations from *diverse* regions: lower South, upper South, mid-Atlantic, New England. These should be small enough to allow each student to participate—the size of each, and therefore the number of state delegations in each, will vary by class size and teacher preference. Again, to facilitate movement, state delegations in each D & D group will sit proximate to each other. For small classes, teachers might choose to conduct all deliberations with the full class—for historical authenticity, you can call this the “**committee of the whole.**”

Each time students meet in their D & D groups, they should be reminded that these are for deliberations only. The groups do not have to come to any agreement. Students will not yet be casting their votes.

Inform students that all votes will be by state delegations—one vote for each state delegation, just as it was at the Federal Convention of 1787. When students do meet with their delegation to determine its vote, they are not to discuss the issue at length—they’ve already done that in their D & D groups. They simply vote and report the state’s preference to the committee of the whole. If delegates of any state are evenly divided on an issue, they report “divided” as their state’s vote.



If you are teaching the full unit, you might want a secretary (it can be the teacher) to keep track of class decisions. You should also stress the importance of retaining all handouts. In extended activities, students will be asked to compare their personal choices, class decisions, and historical decisions of the actual Convention and project how alternate outcomes might have altered the course of history.

If the units are used in a unit, here is the suggested order:

- 1. Reform or Revolution?** (one-day and two-day options)
- 2. Composition of Congress** (one-day and two-day options)
- 3. Creating an Executive** (one-day and two-day options)
- 4. Should Judges Judge Laws?** (one-day lesson)
- 5. Fine Tuning the Balance of Powers** (one-day and two-day options)
- 6. Slavery at the Constitutional Convention** (two-day lesson)
- 7. Amendments and Ratification** (one-day and two-day options)
- 8. To Sign or Not To Sign**
  - Option A: The Historical Constitution** (one-day lesson)
  - Option B: The Student-Generated Constitution** (one-day lesson)

Throughout these lessons, students need to understand key features of the Articles of Confederation:

\*The United States under the Articles was a “confederacy” of sovereign states.

\*There was only one branch, Congress, where each state had one vote. There were no separate executive and judicial branches.

\*Congress was not a “government” as we view it today. It engaged only with states, not citizens. It passed no laws bearing directly on citizens and had no enforcement powers.

\*Congress had no powers of taxation. It raised money by requisitioning the states, but it lacked the authority to force states to pay.

\*Amendments required unanimous approval of the states.

These are highlighted in the first lesson and will be brought into play in the appropriate lessons.

### **Premise for engagement:**

History is the chronicle of choices made by actors/agents/protagonists in specific contexts. Students understand choices – they make them all the time. These lessons

involve students by placing them in the shoes of historical people and asking: “What might you do in such instances?”

For these exercises to be historical (more than affirmations of individual whims), we need to provide context: what was the issue, the problem to be solved? What were the existing realities/constraints that limited possibilities? With those in mind, what were the available options? For each option, how did people view the possibilities for a desired outcome? What were the potential dangers? When studying battles, we see how generals evaluate troop strengths, positioning, logistics, morale, and so on. In fact, all historical actors do this—not just leading political figures, but ordinary people and collective bodies. In Revolutionary times, people often made decisions in groups, both indoors (town meetings, caucuses, conventions, congresses) and “out-of-doors,” as they said at the times, informal gatherings that protested authority or enforced popular will. The Federal Convention of 1787, known today as the Constitutional Convention, provides a perfect example of historical actors making consequential decisions in a group context. When coupled with a study of ratification of the Constitution, it shows the interrelation between political decisions made “in chambers,” as they said at the time, with politics “out-of-doors.”

**Basic structure for choice-centered lessons, including but not limited to these Constitutional Convention simulations:**

(Some lessons include two or even three of the cycles outlined here; others have only a single round. For complex simulations with multiple rounds, more than one class period might be appropriate, at teacher discretion.)

1. *Formulate the problem*, the issue at hand. Define the players: who will be making the choices, deciding which path to take? Provide *context*, including any *constraints* that would limit their actions, with documents when possible. Without context, we will be operating in our world, not theirs.
2. Outline and discuss the *available options*, including possible outcomes of each – that, after all, is what the participants had to do. This is sometimes done as a class, sometimes in breakout groups of two or more students. The size and composition of breakout groups is left to teacher discretion.
  - 2A. After breakout groups, in some lessons, the class will reconvene to share, compare, and evaluate what they came up with. When, historically, the decision was up to a body (a congress or convention), the class will always reconvene as that body—but if no group decision was involved, once students have discussed options in groups, they can continue to the next step.

3. Individuals or bodies make and reveal their choices.
4. Presentation of the *historical outcome*: the choice actually made by the player(s) – use documents when possible.
5. Discuss with full class the *consequences* that did in fact ensue from that choice, including *further* issues raised by the outcome. Sometimes those issues, in turn, provide the “catch” for a subsequent lesson.

To summarize: the opening for each lesson—the catch—is the crossroad, the choice to be made. Then, in turn, come the *context and constraints, discussion of options, decision making, presentation of historical outcomes, and analysis of those outcomes*, including where they might lead next. In these lessons, students actually *engage* in the historical process. **By exercising individual and group decision-making skills within political contexts, they prepare for civic life. When the time comes for them to make history, they will be well rehearsed in making reasoned choices.**

### T-B. TIMELINE FOR THE FEDERAL CONVENTION OF 1787

September 11-14, 1786: Twelve delegates from 5 states, meeting at Annapolis, call for a larger convention the following year.

February 21, 1787: Congress endorses the Annapolis Convention's call for a convention, slated to meet in Philadelphia on May 14.

May 14: Delegates from only Pennsylvania and Virginia are present in Philadelphia. This did not constitute a quorum according to the standards of the Continental Congress.

May 25: With 29 delegates from 9 states present, the Convention begins. George Washington is chosen to preside.

May 29: Rule of secrecy adopted. Edmund Randolph presents the Virginia Plan.

May 30: Delegates start debating the Virginia Plan. The Delaware delegation threatens "to retire from the Convention" if all states do not have an equal vote in Congress. Convention resolves: "A *national* government ought to be established consisting of a *supreme* legislative, executive & judiciary."

June 2: Convention stipulates that the executive "be chosen by the national legislature for the term of seven years." This is rescinded on July 19 but reaffirmed on July 26.

June 4: Convention decides on a single executive, 7 states to 3.

June 15: William Paterson introduces the New Jersey Plan, which proposes only to amend the Articles of Confederation and maintains Congress as a unicameral body, each state having one vote.

June 18: Hamilton proposes that the chief executive and senators serve for life, with the executive having absolute veto power over all legislation. He receives no support.

June 19: Virginia Plan, as amended, defeats New Jersey Plan, 7-3 with one divided.

July 12: Convention finalizes the compromise on representation in the House: each slave counts as three-fifths of a person. Vote: 6-2-2.

July 16: Convention finalizes the "Great Compromise": proportional representation in the House; equal representation of states in the Senate; all money bills originate in the House. Vote: 5-4-1.

July 23: Convention resolves to send its proposed plan to Congress, with a recommendation that it be sent to "assemblies chosen by the people" in each state for ratification. Vote: 9-1.

[July 24](#): Convention appoints a five-member committee “to report a Constitution conformable to the Resolutions passed by the Convention.” (Committee of Detail.)

July 27-August 5: Convention recesses. Committee of Detail prepares the first full draft of the Constitution.

[August 6](#): Committee of Detail submits its report, which enumerates the powers of each branch. Debate on this draft commences.

[August 21, 22, 23, and 24](#): Convention debates whether Congress can prohibit the importation of slaves.

[August 24](#): Popular election of the president is defeated a final time. Vote: 9-2.

[August 25](#): Convention decides there can be no ban on slave importation until 1808. Vote: 7-4.

[August 30](#): Convention decides that ratification by nine states will suffice to place the Constitution into effect. Vote: 8-3.

[August 31](#): Convention appoints an eleven-member committee (one from each state delegation) to consider “such parts of the Constitution as have been postponed, and such parts of Reports as have not been acted on.” (Committee on Remaining Matters.)

[September 4](#): Committee of Remaining Matters issues its report, reversing key provisions that had already been decided: special electors, not Congress choose the president; the president, not the Senate, has treaty-making and appointive powers; a newly created vice-president presides over the Senate.

[September 8](#): Convention approves the Committee of Remaining Matters report with only minor revisions. Convention appoints a five-member committee “to revise the style of and arrange the articles which had been agreed to by the House.” (Committee of Style.)

[September 12](#): Committee of Style submits its almost-final draft of the Constitution. George Mason and Elbridge Gerry propose “a Committee to prepare a Bill of Rights.” The motion fails, 0-10.

[September 15](#): The Convention approves the Constitution, with all states present voting in favor.

[September 17](#): 39 of the 42 members present sign the Constitution. Congress sends it to Congress.

September 28: Congress sends the Constitution to the state legislatures with instructions to call conventions to consider ratification, as stipulated by the Federal Convention.

