

Lesson Five: *The Debate over the Branches of Government*

BACKGROUND INFORMATION FOR INSTRUCTOR

The Debate over the House of Representatives

During the Revolution all of the American states established republican forms of government where people chose representatives to attend state legislatures. The lower houses of the legislatures were always the center of power.

The Constitution called for a bicameral Congress composed of a House of Representatives and a Senate. Representation in the House was proportionately based on population, while the states were equally represented in the Senate. Small-state Antifederalists opposed proportional representation in the House. They maintained the states had always been distinct and sovereign political units, as such, they should be represented equally. Large-state Antifederalists favored the proportional representation in the House but opposed the equal state representation in the Senate. Antifederalist also maintained that the House of Representatives was too small to adequately represent all segments of the American society because the first U.S. House of Representatives would be composed of only 65 members (if all 13 states ratified). They cited the fact that many of the lower houses of the state legislatures had more members than would serve in the House under the proposed Constitution. Antifederalists also attacked the biennial elections of representatives. Under the Articles of Confederation, delegates to Congress had one-year terms, were subject to recall, and could only serve three years within a six-year period. The Constitution did not have recall or rotation in office provisions. The Constitution was also criticized for neglecting to grant treaty-making powers to the House of Representatives even though treaties would be the law of the land. Although they liked the requirement that money bills would originate in the lower house, Antifederalists criticized the Senate's power to amend money bills. In Parliament, the House of Lords could only accept or reject money bills. Antifederalists belittled the House's power to impeach government officials, saying no convictions and removals would take place in trials held in the Senate.

Federalists countered these criticisms forcefully. Under the Articles of Confederation, state legislatures determined how their delegates to Congress were elected. All but Rhode Island and Connecticut opted that the state legislatures did the electing. Under the Constitution, voters qualified to vote for members of their state assemblies could vote for U.S. Representatives. Federalists argued that this meant the House of Representatives was more democratic than the Confederation Congress.

In countering Antifederalist qualms about representation, "An American Citizen" III noted that proportional representation in the proposed Constitution "accords with reason and the true principles of liberty . . . and is one more great step towards the perfection of equal liberty and genuine republicanism in America." Federalists also countered concerns that the House was too small pointing out that it would enlarge as the nation's population increased. Additionally, they argued that the two-year term would create a degree of continuity. Representatives from distant states would find a one-year term difficult simply because much of their time would be spent in transit or running for office detracting them from pressing national affairs. Federalists also argued that although the House of Representatives had no direct involvement in treaty-making, it still had influence through its control over the appropriation of funds. In addition, its impeachment powers gave it considerable powers in all governmental affairs.

The Debate over the Senate

Because most states had bicameral legislatures, there was little debate at the Philadelphia Convention over the establishment of a bicameral legislature that would replace the unicameral Confederation Congress. However, there was considerable debate over representation in each house.

During the debate over ratification, large-state Antifederalists attacked the equal state representation in the Senate as inequitable. If Delaware, with less than ten percent of Virginia's population, had the same representation as the Old Dominion in the Senate, how could anyone imagine that Virginians were fairly represented? Antifederalists also denounced the aristocratic nature of the Senate. Senators were to be elected by their state legislatures to six-year terms. Because Senators did not face mandatory rotation in office and were not subject to recall (as was the case in the Confederation Congress), Antifederalists feared they would serve for life.

Antifederalists also objected to the Senate's blended functions with the executive branch in appointments and making treaties that violated the principle of separation of powers between the branches of government. Additional concerns centered on the Vice-President serving as the president of the Senate with voting powers in the event of a deadlock. Antifederalists were also critical of the Senate's role in judicial nominations as well as in the impeachment process. Because of this blending of powers, they speculated that the Senate would not convict anyone who was impeached.

Large-state Federalists justified the equality of the states in the Senate largely on the basis of expediency. Without this concession to the small states at the Philadelphia Convention, consensus would have been impossible. Furthermore, the different constituency of the Senate, coupled with the six-year term with one-third of the Senators being elected every two years, promised greater stability for Congress as a whole. The Senate's role in advising the President was justified in several ways. It was argued that the Senate would be a repository of experience and wisdom, and as such, should be made available to the President. To counter the charge that the Senate would be aristocratic, Federalists pointed out that it could do nothing by itself. In passing legislation, the Senate needed the agreement of the House. In treaty-making and appointments, the Senate acted in conjunction with, and most probably in response to, the actions of the President. If Senators violated their trust, they would not be re-elected by their state legislatures.

The Debate over the Executive Branch

Americans had considerable experience with executives—they had lived under the British king, who although less powerful than in previous times, still had broad powers. The Articles of Confederation provided for no separate executive, but the Congress did elect its own president who acted more or less like the Speaker of a legislative body. Charles Thomson of Pennsylvania served as secretary of Congress from 1774 to 1789 and handled some executive functions. After a couple of years, Congress realized that it could not effectively deal with all executive matters in committees, therefore several departments were created: Finance, War, Foreign Affairs in addition to the Post Office. The Post Office had originally been established under the Continental Congress. Superintendent of Finance Robert Morris initially served as defacto prime minister. When Morris resigned, Secretary for Foreign Affairs John Jay filled the political vacuum and served as defacto prime minister. All states had relatively weak governors with the exception of New York and Massachusetts, who served as the best models for the Constitutional Convention when creating the American Presidency.

Soon after it convened, the Constitutional Convention agreed to have a single executive as opposed to a plural executive which was favored by a few delegates who feared the reestablishment of a monarchy. Greater disagreements persisted on the manner of electing the executive. Some

wanted the President to be elected by Congress for a long term but ineligible for reelection. Others favored direct election by the people for a shorter term with no restriction on the number of consecutive terms. A compromise eventually provided that the President would be elected for a four-year term by electors chosen in a manner prescribed by the state legislatures. Each state would have the number of electors equivalent to its members of U.S. Representatives and Senators. No restrictions were placed on the President's eligibility for reelection.

During the ratification debates, Antifederalists charged that the President would become a king—in fact, he would be the worst kind of king— an elected one. They charged that cabals and intrigues would certainly develop over the reelection of the incumbent. Antifederalists also charged that the Constitution was defective in that it denied the commonly held belief that the three branches of government ought to be separate. The mixture of power and responsibility over appointments to offices and treaty-making bothered many Americans. Since treaties were to be the supreme law of the land, and the House was excluded from the process, Antifederalists saw a dangerous combination between the Executive and the Senate and in turn advocated that a privy council be created to assist the President in appointments and treaty-making. If the Privy Council offered faulty advice, they could be held accountable. Antifederalists also alleged that the Executive held too much power over legislation through the veto. The pardoning power of the President was alleged to be a dangerous feature in the proposed Constitution. The President could conspire with others in treasonable activities and guarantee his co-conspirators pardons if their activities were discovered.

Federalists praised the Presidency. They pointed to the weaknesses of the Confederation and state governments with their nearly powerless executives. For Federalists, America needed a separate President with executive powers to enforce federal laws and conduct foreign policy effectively. Federalists contrasted the American Presidency with the British monarchy. They argued that the former had limited power checked by the two other branches whereas the latter had almost unlimited power. Federalists maintained that the President would be accountable to both the people and Congress. If he failed to satisfy the people, he would not be reelected; if he committed crimes, he could be impeached by Congress. Furthermore, everyone realized that George Washington would be elected the first President. Washington had previously rejected total power in 1783, preferring retirement. He could be expected to follow a similar course of action after he set in motion the new government under the Constitution. Federalists argued that this example would be followed by his successors.

The Debate over the Judicial Branch

Antifederalists viewed the federal judiciary as a source of danger to individual liberty, the state judiciaries, and the future existence of the states themselves. The Constitution guaranteed jury trials in criminal cases, but it said nothing about civil cases. Thus, Antifederalists were concerned that the judicial power of the United States would compromise the right to jury trials in civil cases. They also noted that in criminal cases, juries of vicinage (local juries) were not guaranteed. This meant that individuals might need to travel great distances to federal courts placing undue hardship on them and their witnesses. In cases that would come before the Supreme Court, travel could be more than a thousand miles. Additionally, Antifederalists worried that the jurisdiction of the federal courts was too broad, and as federal power grew, which they believed was inevitable, more cases would be taken to federal courts rather than state courts, thus reducing the importance of and need for state judiciaries. Since federal judges would be the interpreters of the ambiguities of the Constitution, the federal courts would accrue more power as they allowed federal power to expand at state expense.

Federalists responded that of the three branches, the judicial branch was “least dangerous,” because it only had the power of judgment. The judges had to interpret laws passed by Congress, and then the executive would enforce the decisions of the judges. Federalists denied that jury trials were always necessary or were endangered, either by the silence of the Constitution on civil cases or by the appellate jurisdiction of federal courts in matters of fact. They defended the jurisdiction of the federal courts as the only means to provide justice in foreign and interstate cases, and uniformity in interpreting the Constitution and federal law.

Federalists viewed the courts as the intermediary between the people and Congress and the Presidency. The courts, through judicial review, would uphold the Constitution against attempts by Congress or the President to enlarge their powers. As such, the judiciary was a protector of the people, not a danger to their liberties.

Judicial review was not heavily debated because both Federalists and Antifederalists recognized that the judiciary would exercise this power under the new Constitution. The precedents of courts exercising the power of judicial review were well known to the Founders. However, during the ratification period, the debate centered on whether judicial review was synonymous with judicial supremacy.

Federal courts in the proposed Constitution were uniquely independent from the other branches of government. In England the Law Lords served as a court of last resort. In both the colonial and post-Revolutionary years, some legislative councils continued this tradition. In New York, the Court of Error and Impeachment had appellate jurisdiction and impeachment power. This independence, when coupled with the power of judicial review, was central in the debates between Federalists and Antifederalists. Publius in *The Federalist 78* suggested that having judicial review was advantageous because it afforded federal judges “an essential safeguard against the effects of occasional ill humours in the society.” Antifederalist Brutus argued that federal judges would be “independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.”

PRIMARY SOURCE DOCUMENT EXCERPTS

QUOTATIONS ABOUT THE HOUSE OF REPRESENTATIVES

An American Citizen III: On the Federal Government, Philadelphia *Independent Gazetteer*, 29 September 1787

“Each member of this truly popular assembly will be chosen by about six thousand electors, *by the poor as well as the rich.*”

Cato V, *New York Journal*, 22 November 1787

“Bi-ennial elections for representatives are a departure from the safe democratical principles of annual ones.”

Publius: The Federalist 53, *New York Independent Journal*, 9 February 1788

“Biennial elections will be as useful to the affairs of the public, as we have seen that they will be safe to the liberties of the people.”

George Mason Speech: Virginia Ratifying Convention, 4 June 1788

“Sixty-five members cannot possibly know the situation and circumstances of all the inhabitants of this immense continent.”

“Suppose Congress should say, that we should have one for every 200,000, will not the Constitution be complied with? For one for every 200,000 does not exceed one for every 30,000.”

QUOTATIONS ABOUT THE SENATE

An American Citizen II: On the Federal Government, Philadelphia *Independent Gazetteer*, 28 September 1787

“They possess *a much smaller share of the judicial power* than the upper house in Britain, for they are not, as there, the highest court in civil affairs. Impeachments *alone* are the cases cognizable before them.”

“No ambitious, undeserving or unexperienced *youth* can acquire a seat in this house by means of the most enormous wealth or most powerful connections, *till thirty years have ripened his abilities and fully discovered his merits to his country.*”

Brutus XVI, *New York Journal*, 10 April 1788

“They are to be elected by the legislatures of the States and not by the people, and each State is to be represented by an equal number.”

“They should not be so long in office as to be likely to forget the hand that formed them. They will for the most part of the time be absent from the state they represent, and associate with such company as will possess very little of the feelings of the middling class of people.

“They are a branch of the executive in the appointment of ambassadors and public ministers, and in the appointment of all other officers, not otherwise provided for; whether the forming of treaties, in which they are joined with the president.”

“They are part of the judicial, for they form the court of impeachments.”

QUOTATIONS ABOUT THE EXECUTIVE

**An American Citizen I: On the Federal Government, Philadelphia
Independent Gazetteer, 26 September 1787**

“The president is to be one of the people at the end of his short term, so will he and his fellow citizens remember, *that he was originally one of the people; and that he is created by their breath.*”

An Old Whig V, Philadelphia *Independent Gazetteer*, 1 November 1787

“The office of President . . . is in reality to be a king as much *a King as the King of Great Britain*, and a King too of the worst kind;—an elective King.”

Philadelphiensis IX, Philadelphia *Freeman’s Journal*, 6 February 1788

“The great powers of the president, that of his *negative* upon the laws, is one of the most inconsiderable, indeed it is more a sound than any thing else.”

“The two branches of the legislature, will be at his service; no law contrary to his sentiments, however salutary in its operation, dare be mentioned by them. As a body, and as individuals, they will be his sycophants and flatterers.

Publius: The Federalist 69, *New York Packet*, 14 March 1788

“The President of the United States would be liable to be impeached, tried, and upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office.”

“The President will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union.”

Publius: The Federalist 73, *New York Packet*, 21 March 1788

“[The veto] not only serves as a shield to the executive, but it furnishes an additional security against the enactment of improper laws.”

QUOTATIONS ABOUT THE JUDICIARY

***Federal Farmer, Letters to the Republican*, 8 November 1787**

“It would be impracticable to derive these advantages from one judiciary—the one supreme court at most could only set in the centre of the union, and move once a year into the centre of the eastern and southern extremes of it—and, in this case, each citizen, on an average, would travel 150 or 200 miles to find this court.”

Luther Martin: Genuine Information X, Baltimore *Maryland Gazette*, 1 February 1788

“The proposed constitution *not only* makes *no provision for the trial by jury* in the *first* instance, but by its appellate jurisdiction *absolutely takes away that inestimable privilege*, since it expressly declares the supreme court shall have appellate jurisdiction both as to law and *fact*.”

Brutus XV, *New York Journal*, 20 March 1788

“The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behaviour, without following the constitution of England, in instituting a tribunal in which their errors may be corrected.”

“There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven.”

Publius: The Federalist 78, New York, 28 May 1788

“The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment.”

Publius: The Federalist 80, New York, 28 May 1788

“The power of determining causes between two states, between one state and the citizens of another, and between the citizens of different states, is perhaps not less essential to the peace of the union than that which has been just examined.”

“Controversies between the nation and its members or citizens, can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum.”

THE LESSON PLAN—You Make the Call.

OBJECTIVES OF THE LESSON

- * Students should be able to apply ideas from the Federalist/Antifederalist debate to interpret quotations from essayists who either supported or opposed the Constitution.
- * Students will consider the basic assumptions of the Federalists and Antifederalists in regards to government power and human nature.
- * Student should be able to make a reasoned argument as to which view they think is most convincing?

THE LESSON

* This lesson can be used as an extension activity after the students have covered the Federalist/Antifederalist Debates. Student will be asked to apply their knowledge of the arguments and viewpoints of the Federalists and Antifederalists.

1. Divide the class into groups of 3-5 students.
2. Distribute to each student a copy of the Student Quotation Worksheet.
3. The teacher can distribute, read or display the Selected Federalist/Antifederalist Quotations page.
4. Have the groups as they read or listen to the quotations student should use the worksheet to decide:
 - a) Which branch is being addressed in each of the excerpts?
 - b) Whether each excerpt is something a Federalist or an Antifederalist would say?
 - c) List the key words or phrases that are clues that influenced their decisions.
5. After each group has completed all of the items on the worksheet, have a student from each group report their findings.
6. You may want to conclude the lesson by leading a discussion using the following questions.
 - a) What do the excerpts of the Antifederalists reveal about their attitude about the powers of government?
 - b) What do the excerpts of the Federalists reveal about their attitude about the powers of government?
 - c) In your view, what are the assumptions of each group about human nature?
 - d) What criticisms of the Antifederalist seem most valid? What Federalist arguments seem most convincing?
 - e) If you were at a state ratification convention, which view would you have taken?

Selected Federalist/Antifederalist Quotations

1. “[The veto] not only serves as a shield to the executive, but it furnishes an additional security against the enactment of improper laws.”
2. “Each member of this truly popular assembly will be chosen by about six thousand electors, *by the poor as well as the rich.*”
3. “No ambitious, undeserving or unexperienced *youth* can acquire a seat in this house by means of the most enormous wealth or most powerful connections, *till thirty years have ripened his abilities and fully discovered his merits to his country.*”
4. “The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behaviour, without following the constitution of England, in instituting a tribunal in which their errors may be corrected”
5. “The president is to be one of the people at the end of his short term, so will he and his fellow citizens remember, *that he was originally one of the people; and that he is created by their breath.*”
6. “Bi-ennial elections for representatives are a departure from the safe democratical principles of annual ones.”
7. “They are to be elected by the legislatures of the States and not by the people, and each State is to be represented by an equal number.”
8. “The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment”
9. “The President will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union.”
10. “The two branches of the legislature, will be at his service; no law contrary to his sentiments, however salutary in its operation, dare be mentioned by them. As a body, and as individuals, they will be his sycophants and flatterers.”
11. “Biennial elections will be as useful to the affairs of the public, as we have seen that they will be safe to the liberties of the people.”
12. “They are a branch of the executive in the appointment of ambassadors and public ministers, and in the appointment of all other officers, not otherwise provided for; whether the forming of treaties, in which they are joined with the president.”
13. “The one supreme court at most could only set in the centre of the union, and move once a year into the centre of the eastern and southern extremes of it—and, in this case, each citizen, on an average, would travel 150 or 200 miles to find this court.”

14. "They possess *a much smaller share of the judicial power* than the upper house in Britain, for they are not, as there, the highest court in civil affairs. Impeachments *alone* are the cases cognizable before them."

15. "They are part of the judicial, for they form the court of impeachments."

16. "The power of determining causes between two states, between one state and the citizens of another, and between the citizens of different states, is perhaps not less essential to the peace of the union than that which has been just examined."

17. "The proposed constitution *not only* makes *no provision for the trial by jury* in the *first* instance, but by its appellate jurisdiction *absolutely takes away that inestimable privilege*, since it expressly declares the supreme court shall have appellate jurisdiction both as to law and *fact*."

18. "Suppose Congress should say, that we should have one for every 200,000, will not the Constitution be complied with? For one for every 200,000 does not exceed one for every 30,000."

19. "The office of President . . . is in reality to be a king as much *a King as the King of Great Britain*, and a King too of the worst kind;—an elective King."

20. "Sixty-five members cannot possibly know the situation and circumstances of all the inhabitants of this immense continent."

21. "They should not be so long in office as to be likely to forget the hand that formed them. They will for the most part of the time be absent from the state they represent, and associate with such company as will possess very little of the feelings of the middling class of people."

22. "Controversies between the nation and its members or citizens, can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum."

23. "The President of the United States would be liable to be impeached, tried, and upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office."

24. "The great powers . . . that of his *negative* upon the laws, is one of the most inconsiderable, indeed it is more a sound than any thing else."

25. "There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven."

Student Quotation Worksheet

The Quotation	Which Branch?	Key Words	Federalist/Antifederalist?
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Teacher Guide for Student Quotation Worksheet

Source	Which Branch?	Key Words	Federalist/Antifederalist?
1. Federalist 73	Executive		Federalist
2. An American Citizen III	House		Federalist
3. An American Citizen II	Senate		Federalist
4. Brutus XV	Judiciary		Antifederalist
5. An American Citizen I	Executive		Federalist
6. Cato V	House		Antifederalist
7. Brutus XVI	Senate		Antifederalist
8. Federalist 78	Judiciary		Federalist
9. Federalist 69	Executive		Federalist
10. Philadelphiensis IX	Executive		Antifederalist
11. Federalist 53	House		Federalist
12. Brutus XVI	Senate		Antifederalist
13. Federal Farmer	Judiciary		Antifederalist
14. An American Citizen II	Senate		Federalist
15. Brutus XVI	Senate		Antifederalist
16. Federalist 80	Judiciary		Federalist
17. Luther Martin	Judiciary		Antifederalist
18. George Mason	House		Antifederalist
19. An Old Whig V	Executive		Antifederalist
20. George Mason	House		Antifederalist
21. Brutus XVI	Senate		Antifederalist
22. Federalist 80	Judiciary		Federalist
23. Federalist 69	Executive		Federalist
24. Brutus XV	Judiciary		Antifederalist
25. Philadelphiensis IX	Executive		Antifederalist

