

The Debates of the Separation of Powers at the Philadelphia Convention: A Scripted Lesson

Kevin Gleeson
St. Thomas More High School
Milwaukee, Wisconsin

Sources Used to Support the Lesson:

The Debates in the Federal Convention of 1787, which framed the Constitution of the United States of America, reported by James Madison, a delegate from the state of Virginia

Cast

1. Moderator
2. John Dickinson
Considers the need to establish the Legislative, Executive & Judiciary departments as independent
3. Elbridge Gerry
Doubts whether the Judiciary ought to form a part of the federal departments
4. James Wilson
Advocates for a strong central government with separated powers
5. Alexander Hamilton
6. Benjamin Franklin
Concerned about the misuse of an executive negative (veto) based on his experiences
7. James Madison
Concerned with following in the steps of failed historical precedent
8. Rufus King
Advocates for a strong separation, but one which does not enervate the forming government
9. Luther Martin
Cautions of providing judges with a double negative, since in their expository capacity of judges they would have one negative
10. Gouverneur Morris
Argues for protections for the legislature against an overzealous executive
11. Roger Sherman
He disapproved of Judges meddling in politics and parties

Lesson Objectives:

- Students will be exposed to the issues surrounding the Separation of Powers at the Convention in Philadelphia
- Students will be exposed to the range of arguments and viewpoints surrounding the issue
- Students should be able to effectively defend or critique the Separation of Constitutional Powers

Lesson Procedures:

- 1) The day before you want to use the script, you should select and assign the eleven roles to students who will play a role. You should stress that they should read and familiarize themselves with their parts. Students should also have been prepared to interpret the context of the essential vocab, namely, ‘Revisionary Power,’ ‘the Judiciary,’ and ‘Executive Negative.’
- 2) The day of the reading, distribute the graphic organizer to the rest of the class. It will enable them to track through the presentation. You may want to use it as homework or the basis of a discussion after the presentation.

The Issue	Delegates on the Issue	Points Raised	Legitimate or Illegitimate?
Executive Negative (Veto)			
The Judiciary			
Revisionary Power			
Protections from Encroachment			

- 3) After presentation, utilize the organizers to formulate a class discussion on the issue. You should also devote some time to check the observers for their understanding of the performance. You could do this with the class as a whole or by dividing the class into groups of 3-5 students.
- 4) After the class has discussed their findings from their graphic organizers, you could lead a discussion using the following questions:
 - a. In your opinion, which of the issues is most problematic in regards to the Separation of Powers? Which is least problematic?
 - b. What are the advantages of separating the branches of government? The potential disadvantages?
- 5) As an extension activity, you may have students do research on the historical examples of improperly separated powers provided in the script.

Script

Moderator: Good afternoon everyone and welcome to today's show. As you undoubtedly know, there is currently a spirited debate going on in our young country over strengthening the Articles of Confederation and giving Congress or another central entity more powers while decreasing the sovereignty of the states. Among the issues driving this potential change is the division and separation of powers amongst the distinctive branches of the proposed government. While this is no small task, I am pleased to be joined by some of our nation's finest minds on the matter. Welcome to all.

All: Hello, It's good to be here, Thank-you, Greetings, etc. . . .

Moderator: The motion is quite plainly stated: *The branches of power within the newly proposed government should be separated for the longevity of the nation.* First, let's hear from a defender of the motion, John Dickinson, who believes in the merit of separation. Mr. Dickinson, you believe in a firm and distinctive separation of powers. In what way do you look to the states as a model?

John Dickinson: The division of the Country into distinct States formed the other principal source of stability. This division ought therefore to be maintained, and considerable powers to be left with the states. . . . Without this, and in case of a consolidation of the States into one great Republic we might read its fate in the history of smaller ones.

Moderator: So in the same way that the states find strength from their independence, so to might we find similar strength in a government with separated powers?

John Dickinson: [Yes.] We must continue to utilize the strength of historical comparison as a barometer, of sorts, for success. Though a form the most perfect *perhaps* in itself be unattainable, we must not despair. If antient republics have been found to flourish for a moment only & then vanish forever, it only proves that they were badly constituted; and that we ought to seek for every remedy for their diseases. One of these remedies [is the] . . . lucky division of this country into distinct States.

Moderator: So are you saying we must depend upon luck for a properly constituted government? What, then, do you suggest if we are unlucky and are forced to endure yet another intolerable system of laws?

Elbridge Gerry: I believe, if I might add, that Mr. Dickinson would agree that a system of balance must be put in place. It [is] quite foreign from the nature of the [judiciary] to make them judges of the policy of public measures.

Moderator: Meaning what exactly?

Elbridge Gerry: We must not allow the National Executive [to] have a right to negative any Legislative act which shall not be afterwards passed by parts of each branch of the national Legislature.

Moderator: This moves our discussion in another direction, Mr. Gerry. It appears as if you are fearful of a powerful Executive, who might bypass the will of the popularly elected Legislature. If, however, that Executive is elected by the people doesn't that create a deviation from past governments of which you fear?

Elbridge Gerry: Perhaps, but it still permits the opportunity for abuse.

Moderator: Mr. Wilson, you seem to be yearning to share your input. How do you feel about Mr. Gerry's sentiment?

James Wilson: I disagree. We must give the Executive an absolute negative on the laws! There is no danger of such a power being too much exercised!

Alexander Hamilton: I agree with Mr. Wilson. Look no further than the King of Great Britain, who has not exerted his negative since the [American] Revolution!

Moderator: Both valid points, gentlemen. Mr. Gerry, what do you say to their criticism?

Elbridge Gerry: [I] see no necessity for so great a control over the legislature, the best men in the community, [who would be] comprising it.

Moderator: Very well, Mr. Gerry. You also do well to mention the issues that might arise if anyone other than the "best men" wields a significant amount of power in the form of the negative. Does anyone care to support this sentiment?

Benjamin Franklin: [I] had some experience with this Executive check on the Legislature, under the proprietary government of Pennsylvania. The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. An increase in his salary, or some donation, was always made a condition; till at last it became the regular practice, to have orders in his favor on the treasury, presented along with the bills to be signed, so that he might actually receive the former before he should sign the later.

Moderator: Yes, but what of Mr. Hamilton's point that the executive in Great Britain has not made use of this negative since the Revolution?

Benjamin Franklin: It [is] true that the King of Great Britain ha[s] not, as was said, exerted his negative since the Revolution: but that matter was easily explained. The bribes and emoluments now given to the members of parliament rendered it unnecessary, everything being done according to the will of the Ministers. [I] am afraid, if a negative should be given as proposed, that more power and money would be demanded, till at last enough would be gotten to influence and bribe the Legislature into a complete subjection to the will of the Executive.

Moderator: Thank you, Mr. Franklin. You bring up some concerns that plague the minds of us all. So while we now know what is certain to fail, let's move towards the designation of success. Mr. Madison, you have conducted intensive comparative study of republics through out history. Is that correct?

James Madison: [Yes it is.]

Moderator: So in your opinion, what seems to be a guiding measure of success when crafting the division of powers?

James Madison: When comparing all the beauties and defects of ancient Republics with [our situation], the only way to make a Government . . . was to collect the wisdom of its several parts in aid of each other whenever it was necessary. Hence [it is wise to] incorporate the Judicial with the Executive in the revision of the Law . . . and joining the Judges with the Supreme Executive Magistrate. This would by no means interfere with that independence so much to be approved and distinguished in the several departments.

John Dickinson: [I] just cannot agree in blending the national Judicial with the Executive, because the one is the expounder [of the law], and the other the Executor of the Laws.

Moderator: Yes, Mr. Madison while that reasoning is strong there are two consistent objectives that have been made against it. The first is that the Judges ought not to be subject to the bias which a participation in the making of laws might give to the exposition of them. What do you say to those critics?

James Madison: I say that the objection has some weight; but it is diminished by reflecting that a small proportion of the laws coming in question before a Judge [would] be such wherein he had been consulted . . . and that but a few cases [would] probably arise in the life of a Judge under such ambiguous passages. How much good on the other hand [would] proceed from the perspicuity, the conciseness, and the systematic character [which] the Code of laws [would] receive from the Judiciary talents.

Moderator: But what do you say to those who would detract from so close a bond between the Legislature and the Judiciary? Many people suggest that the Judiciary Department ought to be separate and distinct from the other departments.

James Madison: As to that objection, the maxim on which it was founded required a separation of the Executive as well as of the Judiciary from the Legislature and from each other. In short, whether the object of the revisionary power was to restrain the Legislature from encroaching on the other co-ordinate Departments . . . the utility of annexing the wisdom and weight of the judiciary to the Executive seems incontestable.

Moderator: Thank you Mr. Madison. That brings up some interesting perspectives on the misuse of power and misappropriation of influence.

Rufus King: [No kidding.]

Moderator: Mr. King, you seem apprehensive that too much caution in favor of liberty might actually block the Government that we are forming. Don't you think that relaxed calculations might result in a misuse of power? How do you suggest that individuals who misuse their influence should be treated under the proposed system?

Rufus King: It has been said that the Judiciary would be impeachable. But it should have been remembered at the same time that the Judiciary hold their places not for a limited time, but during

good behavior. It is necessary therefore that a forum should be established for trying misbehavior. The Executive was to hold his place for a limited term like the members of the Legislature . . . he would periodically be tried for his behavior by his electors, who would continue or discharge him in trust according to the manner in which he had discharged it. Like them therefore...he ought not to be impeachable unless he hold his office during good behaviour.

Moderator: So you'd prefer to let the population indirectly affirm or deny the merit of an official through elections, and ignore those officials whose term lasts during 'good behaviour' such as the Judiciary? To whom do you believe the responsibility falls to?

Rufus King: Under no circumstances ought he to be impeachable by the Legislature. This would be destructive of his independence and of the principles of the Constitution. The vigor of the Executive [is] a great security for the public liberties.

Moderator: Moving on now to Mr. Madison once more. You seem to hold that focusing on cooperation between the Executive and Judiciary pales in comparison to the threat of a 'vortex like' Legislature. Can you elaborate on why this area of focus requires such great attention?

James Madison: Of course, it would be useful to the Judiciary department by giving it an additional opportunity of defending itself against Legislative encroachments . . . and it would be useful to the Executive by inspiring additional confidence and firmness in exerting the revisionary power . . . it would moreover be useful to the Community at large as an additional check against those unwise and unjust measures which constituted so great a portion of our calamities. [I say] there is [little] ground for this apprehension.

Moderator: Please, go on.

James Madison: It [is] much more to be apprehended that notwithstanding this co-operation of the two departments, the Legislature would still be an overmatch for them. Experience in all the States [has] evinced a powerful tendency in the Legislature to absorb all power into its vortex. This [is] the real source of danger to the American Constitutions; and suggests the necessity of giving every defensive authority to the other departments that was consistent with republican principles!

Moderator: So, what you mean to say is that the Revisionary power is merely to secure the Executive department against legislative encroachment?

James Madison: [Yes, precisely.]

James Wilson: I'd like to add to this, if I may.

Moderator: Of course Mr. Wilson, how do you see this separation?

James Wilson: The separation of the departments does not require that they should have separate objects but that they should act separately on the same objects. It is necessary that the two branches of the Legislature should be separate and distinct, yet they are both to act precisely on the same object.

Moderator: Indeed, so the strength of separation from within the structure of the Legislature might be seen as an example of the intended strength to be derived from the separation of the branches, as well. I must admit, however, that it is becoming a little thick in the weeds, so to speak. Gouverneur Morris, do you have a different way to relate this topic to the audience?

Gouverneur Morris: [Certainly.] Suppose that the three powers, were to be vested in three persons: one was to have power of making, another of executing, and a third of judging, the laws. Would it not be very natural for the two latter . . . to observe, and would not candor oblige the former to admit, that as a security [against] legislative acts of the former . . . [that] the two others ought to be armed with a veto for their own defence? Might it be said that if three neighbours had three distinct farms, a right in each to defend his farm [against] his neighbours, tended to blend the farms together.

Moderator: Thank you, I think that clears it up quite beautifully for our audience. On the other hand, why is it so paramount to protect the legislature against an overzealous Executive?

Gouverneur Morris: A controul over the legislature might have its inconveniences. But view the danger on the other side. The most virtuous citizens will often as members of a legislative body concur in measures which afterwards in their private capacity they will be ashamed of. Encroachments of the popular branch of the Government ought to be guarded against. The Ephori at Sparta . . . and The Report of the Council of Censors in Pennsylvania points out the many invasion of the legislative department on the Executive.

Moderator: And what of England? How do they fit into that model?

Gouverneur Morris: If the Executive be overturned by the popular branch, as happened in England, the tyranny of one man will ensue. In Rome where the Aristocracy overturned the throne, the consequence was different. [We] should consider some more effectual check than requiring 2/3 only to overrule the negative of the Executive.

Moderator: So what, then is the danger of entrusting a Judge with explanatory powers over Legislation?

Roger Sherman: Can one man be trusted better than all the others if they all agree? This [is] neither wise nor safe. . . . [I] disapprove of Judges meddling in politics and parties. We have gone far enough.

James Wilson: Indeed, the prejudices against the Executive resulted from a misapplication of the adage that the parliament was the palladium of liberty. Where the Executive [is] really formidable, *King* and *Tyrant*, [are] naturally associated in the minds of people; not *legislature* and *tyranny*.

Moderator: Astutely stated, Mr. Wilson. While I'm certain our fine panelists could carry on at great length, unfortunately that is all the time that we have today.