

Lesson 3

Balancing the Power



Key Terms

appellate jurisdiction
apportioned
balance of power
bills of attainder
electoral college
electors
enumerated powers
equal representation
executive power
executive departments
ex post facto laws
fugitive slave clause

The Great Compromise
impeach
judicial review
legislative power
necessary and proper clause
original jurisdiction
proportional representation
separated powers
supremacy clause
treason
veto

What You Will Learn to Do

- Categorize the powers granted to the legislative, judicial and executive branches of government

Linked Core Abilities

- Communicate using verbal, non-verbal, visual, and written techniques
- Apply critical thinking techniques

Skills and Knowledge You Will Gain Along the Way

- Explain how and why the Framers developed the present system of representation in Congress and the advantages and disadvantages of this system
- Describe how Article 1 of the Constitution delegates explicit powers to the Congress and limits the powers of both the national and state governments
- Describe the “three-fifths clause” and the “fugitive slave clause” and explain what issues they were intended to resolve
- Defend positions on disagreements at the Philadelphia Convention over representation and slavery

Chapter 3

- Explain the basic organization of the executive and judicial branches set forth in Articles II and III of the Constitution
- Describe the limitations on the powers of the executive and judicial branches
- Explain why the Framers developed the electoral college as the method for selecting the president
- Defend positions on the influence of the presidency over legislation
- Define key words contained in this lesson

Introduction

The Framers of the Constitution addressed a variety of concerns, issues and problems as they worked to establish the national government. Specific powers were granted and denied to each of the three branches of government: the legislative branch, the executive branch, and the judicial branch. This distribution of power resulted in a **balance of power** designed to keep any one branch from becoming too powerful. In this learning plan you will explore how the Framers addressed a variety of issues and concerns facing them as they established the national government and how they distributed power among the three branches of government.

Key Note Term

balance of power—the division of governmental powers in such a way that no one individual or group can dominate or control the exercise of power by others

Organizing the Legislative Branch

After agreeing to use James Madison's Virginia Plan as the starting point for discussion of a new constitution, the Framers still faced two major decisions: they had to decide what powers to give the new government and how to organize the new government.

The Framers believed that the most important role would be held by the legislative branch. That is why Article I of the Constitution deals with the legislative branch. The first debates, therefore, were about the duties and powers that should be given to Congress and how it should be organized. The Framers encountered problems in developing Article I that are still being debated today.

Disagreements about Representation

Continuing the British and colonial practice of two-house legislatures, every state except Pennsylvania had a legislative branch with two houses. There also was a widespread belief that a two-house legislature would be less likely to violate the people's rights. Each house could serve as a check on the other.

The Virginia Plan's proposal to create a two-house Congress was not controversial. What was controversial in the plan was the principle of **proportional representation**. James Madison, James Wilson, Rufus King, and others who represented states with large populations, thought that the number of members in both houses should be based on the number of people they would represent.

They argued that because the new government would operate directly on the people, it was only fair that a state with a larger number of people should have a greater voice, that is, more votes, in the national government.

Key Note Term

proportional representation—the electoral system in which the number of representatives of a state in the house of representatives is based on the number of people who live in that state

The delegates from states with smaller populations were afraid that proportional representation would result in a national government dominated by the more populated states. They argued that each state should have the same number of representatives in Congress, equal representation. These delegates also were convinced that the people of their states would never approve the Constitution if it did not preserve equality among the states.

On July 2, the Framers voted on whether there should be **equal representation** in the upper house of Congress. The result was a tie, five states to five, with Georgia divided. Neither side seemed willing to compromise, and delegates began to fear that the convention would end in disagreement and failure. Then a special committee, composed of one delegate from each state, was formed. This committee was responsible for developing a plan to save the situation. Some supporters of the Virginia Plan, including James Madison and James Wilson, were against giving this responsibility to a committee. Most of the Framers disagreed with them, however, and the committee went to work.

Key Note Term

equal representation—equal voting power for each state

Developing and Defending Plans for Representation

Your class should be divided into committees of about five students each. Each committee should have some students who represent small states and some who represent large states. The task of each committee is as follows:

1. Develop a plan for how many representatives each state should be allowed to send to the Senate and to the House of Representatives. Your committee may decide, of course, that there is no need for a two-house Congress and that a single house will represent the people most effectively.
2. Select a spokesperson to present your committee's plan to the entire class. Then all members of the committee may help to defend its plan against criticisms by members of other committees.
3. Following the presentation of all the plans, each committee may revise its original plan if it wishes.

The entire class should then examine the plans made by all the committees and try to reach agreement on a plan. Compare the plans of the committees and the final class plan with the plan of the Framers described in the next section.

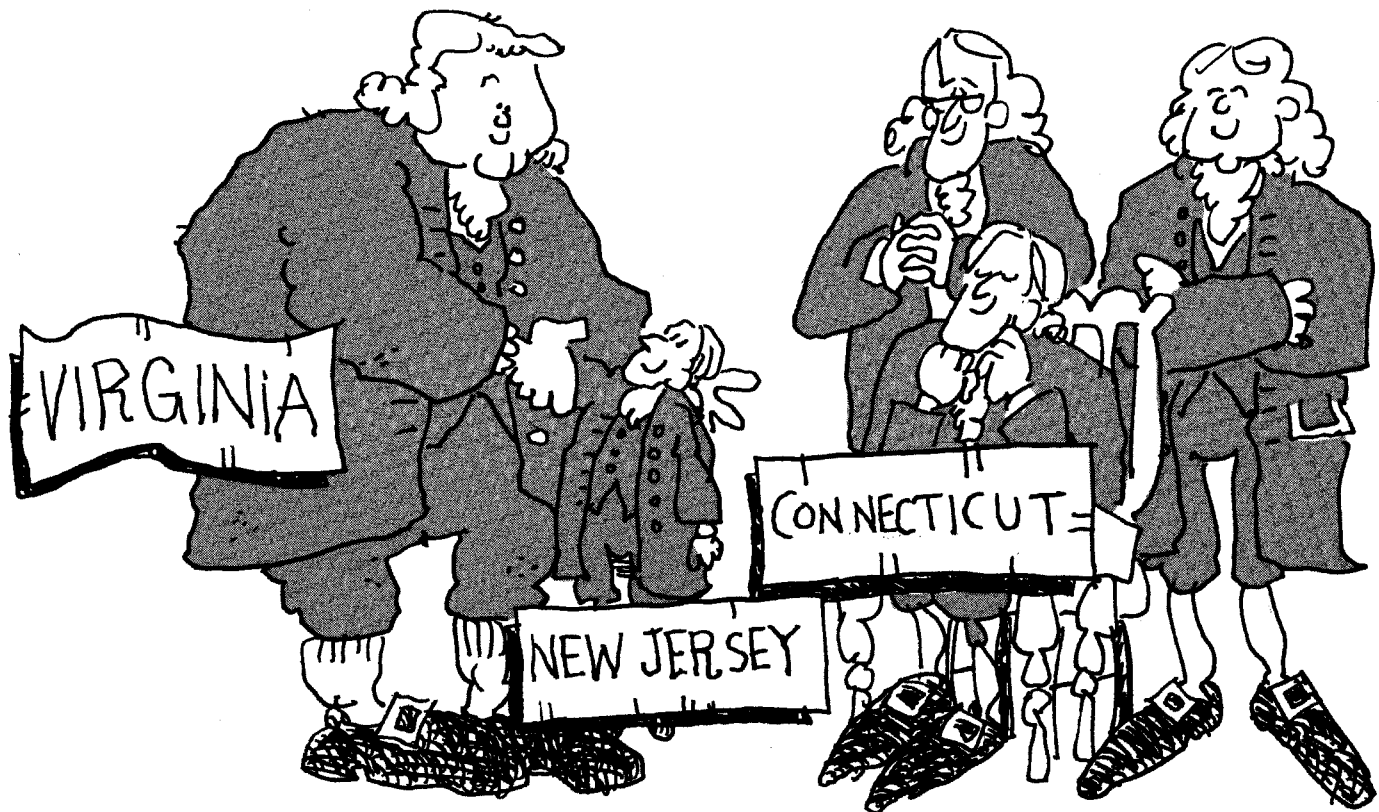
The Great Compromise

The result of the special committee's work is known as the Connecticut Compromise or **The Great Compromise**. The committee adopted a proposal previously suggested by Connecticut delegates Roger Sherman and Oliver Ellsworth. The Great Compromise contained the following ideas:

- **The House of Representatives would be elected by the people on the basis of proportional representation.**
- **There would be equal representation of each state in the Senate. The legislature of each state would select two senators.**

Key Note Term

The Great Compromise—adopted at the Philadelphia convention, this plan provided for equal representation of the states in the senate and house of representatives according to population



How did the Connecticut Compromise resolve differences in the Virginia and New Jersey Plans?

Key Note Term

apportioned—the allocation of legislative seats

- The House of Representatives would be given the power to develop all bills for taxing and government spending. “Direct” taxes would be assigned and divided—*apportioned*—among the states by population. The Senate was limited to either accepting or rejecting these bills, but it could not change them. This provision was later changed to permit the Senate to amend tax bills developed in the House and to develop appropriation bills itself.

As in most compromises, each side gained a little and lost a little. The small states received the equal representation in the Senate that their delegates wanted to protect their interests. Many delegates also believed that a constitution without equal representation of states in at least one house of Congress would not be approved by the smaller states. The large states gave up control of the Senate but kept their control of the House of Representatives. The House was also given important powers regarding taxation and government spending.

The result was that the more populous states would have more influence over laws to tax the people and over how the money would be spent. The larger states also would pay the larger share of any direct taxes imposed by Congress. The decisions of the House of Representatives, however, always would be subject to the check of the Senate, in which the small states had equal representation.

When the committee presented this compromise to the convention, it was bitterly fought by some members from the larger states, including Madison, Wilson, and Gouverneur Morris. They viewed the idea of state equality in the Senate as a step away

from a national government, back toward the system under the Articles of Confederation. Delegates from the small states remained suspicious as well. Two delegates from New York, who had consistently voted with the smaller states, left the convention and did not return. The crisis was over when the compromise passed by one vote.

Points to Ponder

1. Are there good arguments today in support of continuing to divide Congress into two bodies, a Senate and a House of Representatives? If so, what are they?
2. What contemporary issues do you know about that involve conflict over the fairness of representation in Congress?
3. Why should senators be selected for six years and members of the House of Representatives for only two years? Do you think members of the House of Representatives would more effectively represent their constituents if they could serve longer terms?

What Powers Did the Constitution Give to Congress?

The Framers intended the new government to be a government of enumerated—specifically listed powers. They thought it was important to list the powers of each branch of government so that there would not be any confusion about what they could and could not do.

Most of the powers of Congress are listed in Article I, Section 8 of the Constitution. It includes such important matters as the power:

- to lay and collect taxes
- to pay the debts and provide for the common defense and general welfare of the United States
- to regulate commerce with foreign nations, and among the several states
- to declare war
- to raise an army and navy
- to coin money

The Framers also intended the new system to be a government of **separated powers**, or, as political scientist Richard Neustadt has called it, “a government of separated institutions sharing powers.”

Each branch of the government is given powers that enable it to check the use of power by the others. In Article I, Congress was given the power to **impeach** the president, other executive branch officials, or members of the federal judiciary and remove them from office.

The executive and judicial branches also have checks, or controls, on Congress. The Framers specifically gave Congress the power to make all other laws that are “necessary and proper” for carrying out the enumerated powers. This is called the **necessary and proper clause**.

Key Note Term

separated powers—the division of powers among different branches of government

impeach—charging a public official with a crime in office for which they can be removed from power

necessary and proper clause—the clause is limited to those powers enunciated in Article I, Sec 8. It grants the government extremely broad powers as to carrying out the enumerated powers of the Article

Why did the Framers make it difficult to impeach government officials?

Courtesy of the National Archives.



What Power Did the National Government Have over State Governments and the People?

One reason the Framers agreed to meet in Philadelphia was their concern about some things that state governments were doing. They believed that some states were undermining Congress's efforts to conduct foreign relations, and they feared that, in others, individual rights might be threatened by the state governments. They also knew that the national government had no power to enforce its decisions. The Framers all agreed they had to create a national government with more power than the government had under the Articles of Confederation. They did not agree, however, about how much power the new national government should have over citizens and the state governments.

The Framers resolved their disagreements by establishing a national government with authority to act directly on the people in certain specific areas. The national government no longer would be dependent on the states for income or for law enforcement. The state governments, however, would keep many of the more important powers over people's daily lives. The states would keep their powers over education, family law, property regulations, and most aspects of everyday life. The people would not feel they had surrendered too much power to a distant government.

The Framers included a number of phrases in the Constitution that set forth the powers of the national government. They also included phrases that limited the power of both the national government and state governments. Some of the more important of these are listed in the following sections.

Some Powers of the National Government

The **supremacy clause** says that the Constitution and all laws and treaties approved by Congress in exercising its **enumerated powers** are the supreme law of the land. It also says that judges in state courts must follow the Constitution, or federal laws and treaties, if there is a conflict with state law.

Key Note Term

supremacy clause—a clause in Article VI of the U.S. Constitution that declares the constitution, laws, and treaties of the federal government to be the supreme law of the land to which judges in every state are bound regardless of state law to the contrary

enumerated powers—those rights and responsibilities of the U.S. government specifically provided for and listed in the constitution



Why did the Framers believe it was necessary to maintain a national armed force?

Courtesy of the U.S. Army.

- Article I, Section 8 gives Congress power to organize the militia of the states and to set a procedure for calling the militia into national service when needed.
- Article IV, Section 3 gives Congress the power to create new states.
- Article IV, Section 4 gives the national government the authority to guarantee to each state a republican form of government.
- Article IV, Section 4 also requires the national government to protect the states from invasion or domestic violence.

Limits on Power of the National Government

The Constitution includes several limitations on the power of the national government. Article I, Section 9 prohibits the national government from:

- banning the slave trade before 1808
- suspending the privilege of the writ of habeas corpus except in emergencies
- passing any *ex post facto* laws, laws that make an act a crime even though it was legal at the time it was committed
- passing any *bills of attainder*, laws that declare a person guilty of a crime and decrees a punishment without a judicial trial
- taxing anything exported from a state
- taking money from the treasury without an appropriation law
- granting titles of nobility

Article III defines the crime of **treason** and prohibits Congress from punishing the descendants of a person convicted of treason. Article VI prohibits the national government from requiring public officials to hold any particular religious beliefs.

Key Note Term

bills of attainder—a legislative act pronouncing a person guilty of a crime, usually treason, without trial and subjecting that person to capital punishment and attainder; such acts are prohibited by the U.S. Constitution

treason—in the U.S. constitution, treason is “giving aid and comfort” to the enemy during wartime

Why was it important to have only one monetary system for the nation?

Courtesy of the U.S. Bureau of Engraving.



Key Note Term

ex post facto laws—a criminal law that makes an act a crime that was not a crime when committed, that increases the penalty for a crime after it was committed, or that changes the rules of evidence to make conviction easier

Limits on Powers of State Governments

Article I prohibits state governments from:

- creating their own money
- passing laws that enable people to violate contracts, such as those between creditors and debtors
- making *ex post facto laws* or bills of attainder
- entering into treaties with foreign nations or declaring war
- granting titles of nobility

Article IV prohibits states from:

- unfairly discriminating against citizens of other states
- refusing to return fugitives from justice to the states from which they have fled

Issues That Separated the Northern and Southern States

The Great Compromise had settled the disagreement between large and small states over how they would be represented in Congress. Many other issues still had to be resolved. Two of the most critical disagreements were those between the southern and northern states on the issues of slavery and regulation of commerce.

Slavery had been practiced for almost as long as there had been colonies in America. Many Framers were opposed to slavery, and some northern states had begun to take steps toward abolishing it. Still, in the south, slave labor was widely used in producing crops. Slaveholders considered their slaves to be personal property, and wanted to continue using them (see Figure 3.3.1).



Figure 3.3.1: While the north was working towards abolishing slavery, the south still used slave labor.

Courtesy of Bettmann/Corbis Images.

Delegates from the southern states told the convention that their states would not ratify a constitution that denied citizens the right to import and keep slaves. If the Constitution interfered with slavery, North Carolina, South Carolina, and Georgia made it clear that they would not become part of the new nation. Some delegates from the New England states, whose shipping interests profited from the slave trade, were sympathetic to the southern position.

Compromises Persuade the Southern States to Sign the Constitution

After considerable debate, the Framers agreed on a way to satisfy both northern and southern delegates. This agreement gave Congress the power to regulate commerce between the states, which the northern states wanted. The delegates defeated a southern attempt to require a two-thirds vote of both houses to pass laws regulating commerce. To satisfy the southern states, the Constitution provided that the national government would not interfere with the slave trade earlier than 1808.

The Framers also agreed that each slave would be counted as three-fifths of a person when determining how many representatives a state could send to the House of Representatives. Each slave also would be counted as three-fifths of a person when computing direct taxes. The **fugitive slave clause** of Article IV was another concession to the southern states. It provided that slaves who escaped to other states must be returned to their owners.

Key Note Term

fugitive slave clause—provided that slaves who escaped to other states must be returned to their owners

Why did the Framers give constitutional protection to slavery?

Courtesy of the Library of Congress.

\$100 REWARD!

RANAWAY

From the undersigned, living on Current River, about twelve miles above Doniphan, in Ripley County, Mo., on 2nd of March, 1860, ~~A~~ ~~IN~~ ~~THE~~ **GEO. TUCKER**, about 30 years old, weighs about 160 pounds; high forehead, with a scar on it; had on brown pants and coat very much worn, and an old black wool hat; shoes size No. 11.

The above reward will be given to any person who may apprehend this said negro out of the State; and fifty dollars if apprehended in this State outside of Ripley county, or \$25 if taken in Ripley county.

APOS TUCKER.

Examining Northern and Southern Positions on Slavery

The words “slave” and “slavery” are never used in the Constitution. Although the delegates voted to give constitutional protection to slavery, many of them were not proud of having done so. They considered it to be a necessary evil, at best, and many hoped it would go away by itself, if left alone. As we now know, this protection of slavery almost destroyed the United States. Work in small groups to develop positions on the following questions from both a northern and southern perspective. Then develop a position on the final question.

1. What arguments could have been made for or against the Framers’ decision to include the value of property, including enslaved Africans, in calculating the number of representatives a state should have? Should property in the form of enslaved Africans have been treated differently from other forms of property?
2. Should the settling of fundamental issues, such as whether to allow slavery, have been left up to each state?
3. What problems, if any, arise from trying to make judgments about positions that were taken 200 years ago?

Why the Framers Wanted to Limit Executive Power

The Articles of Confederation did not provide for an executive branch, but the Confederation Congress had found it necessary to create executive officials for specific purposes. The Framers wanted to give the executive branch of the new government enough power and independence to fulfill its responsibilities. They did not, however, want to give the executive any power or independence that could be abused. Americans and Englishmen believed that the king, through the use of bribes and special favors, had been able to control elections and exercise too much influence over Parliament. The British constitution permitted members of Parliament to hold other offices at the same time, and even today members of the executive branch, such as the prime minister, are also members of Parliament. In the eighteenth century, the Crown used its exclusive power to appoint people to office to reward friendly members of Parliament.

The Framers thought these actions upset the proper balance of power between the monarch and Parliament. It was the destruction of this balance that Americans referred to when they spoke of the corruption of Parliament by the Crown. They also believed that royal governors had tried to corrupt colonial legislatures in the same way.

This destruction of the proper balance of power among different branches of government, many Americans thought, led to tyranny. Consequently, it is not surprising that, after their experience with the king and his royal governors, the Americans provided for very weak executive branches in most of the state constitutions. This, however, created other difficulties. The weak executives were unable to check the powers of the state legislatures. These legislatures passed laws that, in the opinion of many, violated basic rights, such as the right to property.

The problem that faced the Framers, then, was how to create a system of government with balanced powers. They wanted to strengthen the executive branch without making it so strong that it could destroy the balance of power among the branches and thus endanger the rights of the people.

Organizing the Executive Branch

The Framers had to resolve a number of basic questions in organizing the executive branch. Each question concerned the best way to establish an executive branch strong enough to balance the power of the legislature, but not so powerful it would endanger democratic government.

Single or Plural Executive

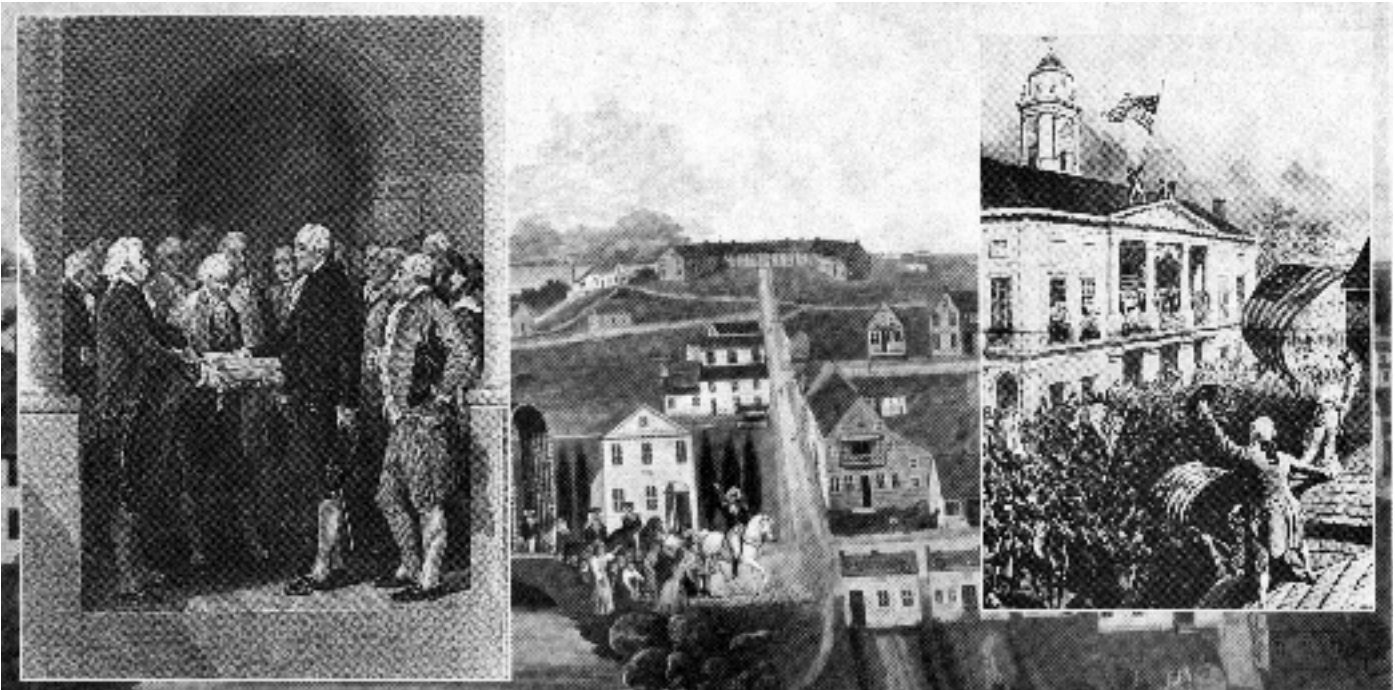
Should there be more than one chief executive? The Framers agreed that there should be a single executive to avoid the possible problem of conflict between two or more leaders of equal power. Some delegates also argued that it would be easier for Congress to keep a watchful eye on a single executive. On the other hand, those who argued for a plural executive claimed that such an executive would be less likely to become tyrannical.

Term of Office

How long should the chief executive remain in his position? The convention considered a seven-year term for the president, but many delegates thought seven years too long. The final decision was to set the term of office at four years.

Re-election

Should the executive be eligible for re-election? Under the original proposal for a seven-year term of office, the president would not have been eligible for re-election. When the term was reduced to four years, the Framers decided to allow the president to run again. The Constitution originally set no limit on the number of times a president could be re-elected. The Twenty-second Amendment, passed in 1951 after President Franklin D. Roosevelt (see Figure 3.3.2) held three terms of office, however, sets the limit at two terms.



The nation celebrates the swearing in of the first president, George Washington.

Courtesy of the National Archives, Library of Congress.



Figure 3.3.2: After Franklin D. Roosevelt was elected to the office of president three times, a two-term limit was set by Congress.

Courtesy of Oscar White/Corbis Images.

Deciding on the President's Powers

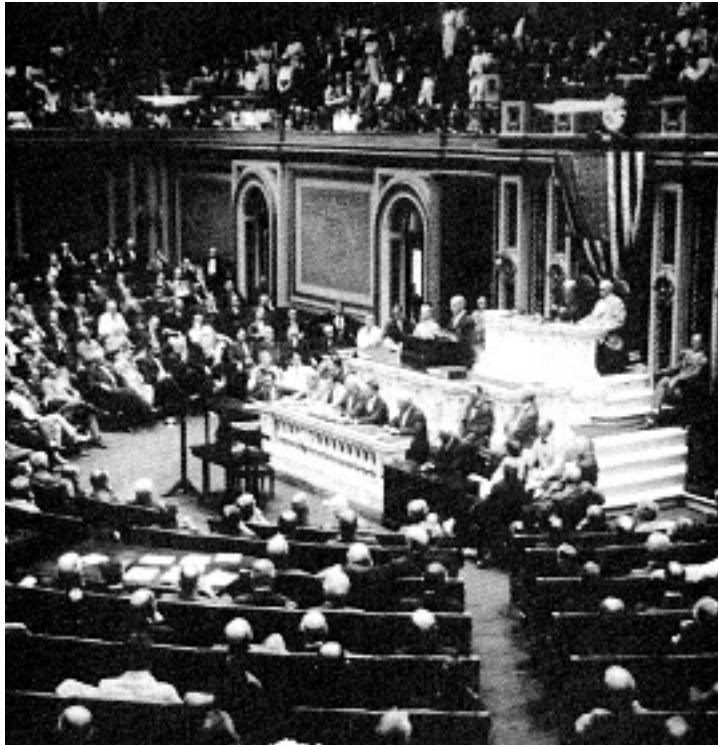
The most important question the Framers faced was what the powers of the executive branch would be. The executive powers include the responsibilities for:

- **carrying out and enforcing laws made by Congress**
- **nominating people for federal offices**
- **negotiating treaties with other nations**
- **conducting wars**

In addition, the president is given the power to:

- **pardon people convicted of crimes**
- **send and receive ambassadors to and from other countries**

Although the Framers thought the executive branch should have enough power to fulfill its responsibilities, they also wanted to be sure it did not have too much power. They limited the powers of both the executive branch and the legislative branch by making them share many of their powers. This was intended to keep the powers balanced and to provide each branch with a way to check the use of power by the other branch. This sharing of powers was accomplished in the following ways.



Why did the Framers limit the power of the president to wage war?

Courtesy of the Library of Congress.

Veto

The president shares in the **legislative power** through the **veto**. Although the president can veto a bill passed by Congress, the bill can still become a law if two-thirds of both houses of Congress vote to override the veto.

Appointments

The power to appoint executive branch officials and federal judges is shared with Congress. The president has the power to nominate persons to fill those positions, but the Senate has the right to approve or disapprove of the persons nominated. To prevent corruption of Congress, members of Congress are not allowed to hold another federal office.

Treaties

The power to make treaties also is shared. The president has the power to negotiate a treaty with another nation, but the treaty must be approved by a two-thirds vote of the Senate.

War

Although the president is commander in chief, only Congress has the power to declare war. Congress also controls the money necessary to wage a war; therefore, the power to declare and wage war also is shared.

Key Note Term

legislative power—the power to write and enact laws

veto—the constitutional power of the president to refuse to sign a bill passed by congress, thereby preventing it from becoming a law

Articles I and II

Key Note Term

executive power—the powers of the executive branch of the federal government

executive departments—cabinet-level agencies in the federal government

Although it includes several important powers, Article II seems short and vague when compared with Article I. It speaks of “**executive power**” but does not define it. **Executive departments** are mentioned, but there are no provisions for creating them, deciding how many there should be, or how they should operate. By comparison, Article I included a specific list of “legislative powers” granted by the Constitution.

The veto power appears in Article I, Section 7, although the term is not used. Article II, Section 3 states that the president has the duty to suggest legislation. These are examples of the executive sharing the legislative power.

The Constitution also gives Congress the power to impeach the president, members of the executive branch, and federal judges. Only the House of Representatives can bring the charges. The Senate holds a trial to determine the official’s guilt or innocence. If found guilty by two-thirds of the Senate, the official will be removed from office.

The Framers had some experience with elected executives in the states, yet they could not be sure exactly what the presidency of the United States should be like. Many decisions were left to Congress. The Framers also trusted George Washington, who was almost universally expected to become the first president. They thought that he could be counted on to fill in the Constitution’s gaps and set wise examples that would be followed by later presidents.

Identifying the Powers of the President to Influence Legislation

The president has the power to veto bills passed by Congress and the power to recommend to Congress legislation that he considers “necessary and expedient.” Answer the following questions. It may be helpful to consider some things that have changed since the Constitution was written.

1. In what other ways can a president have an influence on legislation being considered in Congress?
2. Does the party system give a president more influence in Congress when he is a member of the majority party?
3. Has the presence of television increased the power of the presidency and weakened that of Congress?

How Presidents Would Be Selected

The main alternatives debated by the Framers were to have the president selected indirectly or directly by a majority vote of the people. Among the indirect methods they considered were selection by

- Congress
- state legislatures
- state governors
- a temporary group elected for that purpose

The Framers knew that the group with the power to select the president would have great power over the person who held the office. They were concerned that this power might be used to benefit some people at the expense of others. It might also make it difficult for the president to function properly.

If Congress were given the power to choose the president, then limiting the term of office to a single, long term would be a way to protect the president from being manipulated by Congress to get reelected. This is why the Framers also decided that Congress could neither increase nor decrease the president's salary once in office.

If a president were not chosen by Congress, then providing for a shorter term of office would make the president more accountable to the people. Reelection then would be the will of the people and the president could run for reelection many times.

The problem was given to a committee to develop a plan that a majority of the Framers would support. The committee's plan was a clever compromise. It did not give any existing group the power to select the president. The plan shows that the Framers did not trust any group—the people, the state legislatures, or Congress—to make the selection. In such a large country, the people could not be personally familiar with the candidates and their qualifications, in the Framers' judgment.

The state legislatures and Congress, they thought, might use their power to upset the balance of power between the national and state governments, or between the executive and legislative branches.

Instead, the committee proposed what we now call the electoral college, which would have the responsibility of electing the president. The main parts of this plan are described below.

- **The *electoral college* would be organized once every four years to select a president. After the election, the college would be dissolved.**
- **Each state would select members of the electoral college, called *electors*.**
- **Each state would have the same number of electors as it had senators and representatives in Congress. The method for choosing electors would be decided on by the state legislature.**
- **Each elector would vote for two people, one of whom had to be a resident of another state. This forced the elector to vote for at least one person who might not represent his particular state's interests.**
- **The person who received the highest number of votes, if it was a majority of the electors, would become president. The person who received the next largest number of votes would become vice president.**
- **If two people received a majority vote, or if no one received a majority vote, then the House of Representatives would select the president by a majority vote, with each state having only one vote. In case of a vice-presidential tie, the Senate would select the vice president.**

The compromise was eventually approved by the Framers, but only after much debate and revision. Although quite complicated and unusual, it seemed to be the best solution to their problem. There was little doubt in the Framers' minds that George Washington would easily be elected the first president. There was great doubt among the Framers, however, that anyone after Washington could ever get a majority

Key Note Term

electoral college—the group of presidential electors that casts the official votes for president after a presidential election

electors—a group of persons selected by each state party to vote for that party's candidates for president and vice president if the party's candidates win the popular vote in the general election in that state

How did the Framers' expectation that George Washington would be the first president affect their writing of Article II of the Constitution?

Courtesy of the Library of Congress.



vote in the electoral college. They believed that in almost all future elections the final selection of the president would be made by the House of Representatives.

More Points to Ponder

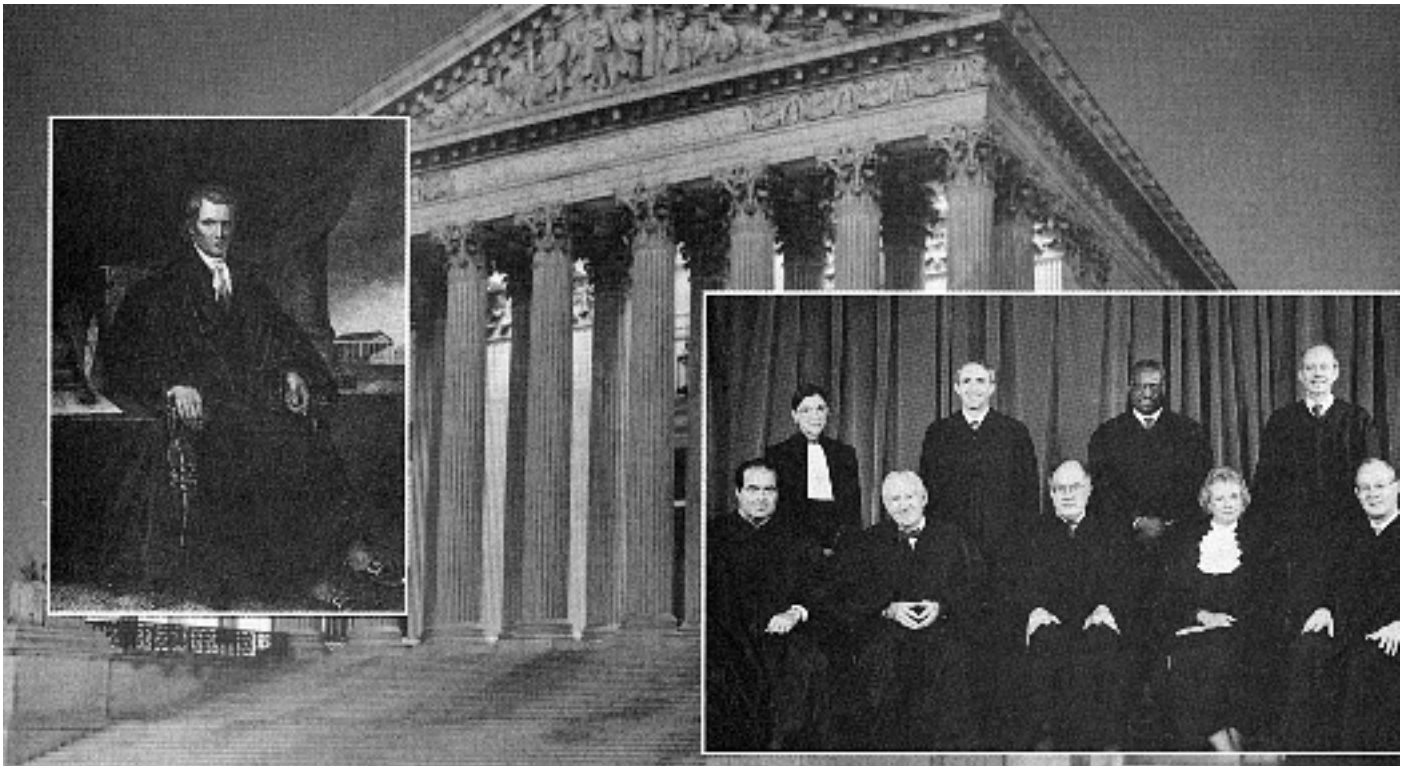
1. What arguments can you give to support the use of the electoral college to select the president? Explain why you agree or disagree with these arguments.
2. What qualifications do you think a person should have, beyond those already in the Constitution, in order to be president? Do you think these qualifications should be required by law? Why or why not?
3. Is it still reasonable to have one person serve as the head of the executive branch? Might it be more reasonable to have two people—one for domestic and one for foreign policy?

What Questions Did Organizing the Judicial Branch Raise?

A national government, with power to act directly on citizens, needed a system for deciding cases involving its laws. This function could be left to state courts, but then the federal laws might be enforced differently from state to state. The Framers realized that some kind of national courts would be needed, at least to resolve disputes involving federal laws.

A judicial branch also would complete the system of separation of powers. They had fewer problems agreeing on how to organize the judiciary than they had with the other two branches.

Many of the Framers were lawyers, and so most of them already agreed about how courts should be organized and what responsibilities and powers they should be given. They also agreed that all criminal trials should be trials by jury. This was a very important check, in their minds, on the power of the government.



Why did the Framers think it was important to protect the independence of the judicial branch?

Courtesy of the National Archives, Supreme Court Historical Society, Ralph C. Jones.

The Framers created the Supreme Court as the head of the federal judiciary, and gave Congress the power to create lower federal courts. They also reached several other important agreements:

- **Judges should be independent of politics so that they can use their best judgment to decide cases and not be influenced by political pressures.**
- **The best way to make sure that judges would not be influenced by politics was to have them nominated by the president. The president's nomination would need to be ratified by the Senate.**

The Framers thought that appointing the judges by this method rather than electing them would remove them from the pressures of political influence. In addition, the judges would keep their positions “during good behavior.” This meant that they could not be removed from their positions unless they were impeached and convicted of “treason, bribery, or other high crimes and misdemeanors.”

There was also a good deal of agreement about the kinds of powers that the judicial branch should have. The judiciary was given the power to

- **decide conflicts between state governments**
- **decide conflicts that involved the national government**

Key Note Term

original jurisdiction—that which is given to courts to take cognizance of cases which may be instituted in those courts in the first instance; the Constitution of the United States gives the Supreme Court of the United States original jurisdiction in cases which affect ambassadors, other public ministers and consuls, and to those in which a state is a party

appellate jurisdiction—the legal authority of a court to hear appeals from a lower court

And finally, they gave the Supreme Court the authority to handle two types of cases. These are

- **Cases in which the Supreme Court has *original jurisdiction*.** These are cases which the Constitution says are not to be tried first in a lower court, but which are to go directly to the Supreme Court. Such cases involve a state government, a dispute between state governments, and cases involving ambassadors.
- **Cases that have first been heard in lower courts and that are appealed to the Supreme Court.** These are cases over which the Supreme Court has *appellate jurisdiction*.

What Do You Think?

1. What are the advantages and disadvantages of having federal judges appointed, not elected, to serve “during good behavior”?
2. Should the composition of the Supreme Court be reflective of the political, economic, racial, ethnic, and gender diversity of our citizenry? Why or why not?
3. What role, if any, should public opinion play in the Supreme Court deciding a controversial case?
4. It has been argued that the Supreme Court is the least democratic branch of our federal government. What arguments can you give for and against this position?

The Question of Judicial Review Left Unanswered

One important matter not decided by the Framers was whether the Supreme Court should be given the power of **judicial review** over the acts of the executive and legislative branches. To do so would give the judiciary the authority to declare acts of these branches of the national government unconstitutional. This would mean giving one branch the power to ensure that the other branches did not exceed the limitations placed on them by the Constitution. The power to declare that legislative acts had violated their state constitution already had been exercised by the courts in several states.

Some Framers simply assumed that the judiciary would have the power to rule on the constitutionality of laws made by Congress. Nothing specific was decided on this subject at the convention. This assumption, however, is one reason why the delegates rejected a proposal to let the Supreme Court and president act as a committee to review bills passed by Congress and decide if they should become law. The only reference in the Constitution to the general powers of the judiciary is at the beginning of Article III: The “judicial power of the United States, shall be vested in one supreme court. . . .”

The power of the Supreme Court to declare acts of Congress unconstitutional was clearly established by the Supreme Court itself in 1803.

Conclusion

This lesson explained why the Framers thought that the executive and judicial branches were needed in the new government and how they organized those

Key Note Term

judicial review—the power of the courts to declare laws and actions of the local, state, or national government invalid if the courts decide they are unconstitutional

branches. It also described the difficulties the delegates had in deciding how best to control the power of the executive, and how and why they created an unusual way of selecting the president. In addition, it described the responsibilities given to the judicial branch and considered some of the powers of both branches that were not directly given in the Constitution, such as the power of judicial review.

This lesson also described the basic organization of Congress. It explained why Congress was organized into two houses, why representation in the House of Representatives is based on population, and why each state selects two senators. The lesson also described some powers of Congress as well as some limitations on its powers. It concluded with a discussion of the issues that caused disagreement between the southern and northern delegates.

In the following lesson, you will learn about debates over the Constitution.

Lesson Review

1. What is meant by “enumerated powers”? Why did the Framers decide to specifically enumerate the powers granted to Congress?
2. How did the Framers deal with the issue of slavery? Why did they choose to take the approach they did?
3. What issues did the Framers have to decide regarding the organization of the executive branch of government and how did they resolve these issues?
4. How did the Framers make sure the executive branch would have enough power to fulfill its responsibilities, but not so much power that it could dominate the other branches of government?