Handout A

Background Essay: The Constitutional Powers of Congress

Directions

Read the following essay on the constitutional powers of Congress and answer the “critical thinking” questions.

Articles of Confederation

The Articles of Confederation was ratified in 1781 and created a national legislature based upon the American experience under the British Parliament and taxation without consent. Because Americans were fearful that centralized power would lead to tyranny, they severely curtailed the powers of the Confederation Congress. This first experiment with setting up a national legislature proved to be a failure.

The Congress was a unicameral, or one house, legislature and therefore did not have the checks and balances that a bicameral, or two-house, legislature would have. Each state had only one vote regardless of the size of its population so Rhode Island had an equal vote to Virginia or Pennsylvania. Since laws or amendments to the Articles required a supermajority or unanimity in Congress, individual states such as Rhode Island often frustrated Congress from assuming adequate powers to govern the new nation.

The Congress also lacked the power to tax, regulate trade, and raise an army. The feebleness of Congress became especially problematic during the crises of the 1780s. States taxed each other’s trade and transportation and nearly fought several times. States routinely ignored the provisions of the 1783 Peace Treaty and requisitions of Congress for taxes. Most notably, Shays’ Rebellion demonstrated that the Congress had difficulty raising an army to respond to national emergencies. The Congress could, however, declare war and make peace treaties.

The problems resulting from the weak powers of Congress led a group of nationalists including George Washington, Alexander Hamilton, and James Madison to revise the framework of government and strengthen the national Congress. When the Constitutional Convention met in Philadelphia in May, 1787, Madison’s Virginia Plan was immediately introduced with a proposed Congress that differed greatly from the Confederation Congress.

The Virginia Plan

The Virginia Plan proposed a bicameral Congress with both houses based upon proportional representation rather than the equality of states. Under the plan, the “first branch” of the legislature would be elected by the people, and the “second branch” elected by the first branch, from among those nominated by the state legislatures. The authors of the plan did not define the powers of Congress but made them more expansive than those of the Confederation Congress. Resolution 6 provided, “The National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent.” The plan also gave the national legislature a power to veto
state laws that conflicted with the Constitution, a provision which James Madison particularly favored.

Several delegates, especially from smaller states, objected to the vague powers of the Virginia Plan for two reasons. One, they feared that the national government would have unlimited powers. Two, they worried that the national government would assume the powers of the states and upset the proper federal relationship between national and state governments.

The New Jersey Plan
The shape of the national legislature was subject to rancorous deliberation that bogged down the Convention in May and June. The deadlock ensued because of the fears about granting the Congress too many powers which would result in tyranny. The debate often split the large and small states and became even more acrimonious when William Paterson of New Jersey presented an alternative framework called the New Jersey Plan. Paterson offered a plan to preserve the unicameral legislature with equal suffrage that characterized the Confederation Congress. He simply wanted to grant Congress additional powers to tax and regulate trade that it lacked under the Articles.

Paterson proposed that, “The articles of Confederation ought to be so revised, corrected & enlarged, as to render the federal Constitution adequate to the exigencies of Government, & the preservation of the Union.”

The Great Compromise
In late June, Roger Sherman of Connecticut accurately told his fellow delegates, “We are now at a full stop.” Unless they devised a solution, the debate over the shape and powers of the Congress would destroy the Convention. Finally, in July, a committee proposed a compromise that narrowly passed over significant opposition especially by larger states.

The Great Compromise resulted in the Convention creating a House of Representatives with proportional representation elected by the people and a Senate with equal representation selected by state legislatures. The House would be more directly representative of the people and with more members, while the Senate would represent the people indirectly, be the safeguard of federalism and have fewer members. The legislative powers of the Congress were still not defined as the Convention moved on to discuss the executive branch.

The Powers of Congress
The powers of Congress were later enumerated in early August by a committee and included in Article I, Section 8. An “elastic clause” was included to allow Congress to make all “necessary and proper” laws related to specific powers that were listed. Article I, section 9 specifically prohibited Congress from exercising certain powers. Both the enumerated and restricted powers supported the principle of limited government. The House and Senate had similar legislative powers, though tax bills could not originate in the Senate because of the fear of an aristocracy. Finally, Article VI made the laws made by Congress, as well as treaties approved by the Senate, part of the supreme law of the land if they were consistent with the Constitution. In September, the Constitution was signed and eventually sent to state ratifying conventions. Supporters of the Constitution called “Federalists” and opponents
called “Anti-Federalists” quickly wrote essays that appeared in newspapers to influence the public debate.

**Federalists and Anti-Federalists**

Anti-Federalist objections to congressional powers were numerous but centered on a few main arguments. First, they feared the enumerated powers granted to Congress. An Anti-Federalist writing anonymously under the pseudonym of Brutus warned in his first essay that “the power to lay taxes [is] unlimited.” He also warned that the power to raise armies would lead to standing armies and the “destruction of liberty.”

The “necessary and proper” clause caused several Anti-Federalists to raise a warning that this “indefinite” clause, as they termed it, would lead to greatly consolidated power in the new national government. This was particularly worrisome because of the federal supremacy clause of Article VI which made the national laws binding on all states. Many Anti-Federalists were keen to ensure that the rights of the states were not overshadowed by the national government’s new powers. Brutus later admitted in a fifth essay that the powers of Congress were constricted in Article I, Section 9, but feared the “restrictions are very limited” and would not restrain Congress from exercising unlimited powers.

The Federalists responded and explicated the powers and limits on Congress in several of their essays. They reminded readers of the feebleness of the Confederation Congress and the need for greater powers especially over taxation and regulation of interstate commerce. A weak government, they argued, would lead to more frequent acts of coercion against the states to compel obedience of federal law. Therefore, weakness actually caused tyranny.

The Federalists averred that the powers of government were limited and defined because the powers of Congress were enumerated in Article I, section 8. Alexander Hamilton argued in *Federalist No. 33* that the “necessary and proper” clause was an essential means for carrying laws into execution. In other words, the laws of Congress must be necessary and proper according to its enumerated powers. It was not a grant to Congress to do whatever it wanted.

Finally, the Federalists disagreed that a legislature should mirror the people, being composed of the same interests, feelings, and opinions that the people have at large. They wanted a legislature where the wisest and most virtuous citizens could resist the will of the majority when it was in error. As James Madison famously proclaimed in *Federalist No. 10*, representation should “refine and enlarge the public views” by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.”

**Continuing Debate**

The Constitution was ratified and went into effect with the First Congress in 1789. Within a few years, Secretary of the Treasury Hamilton’s financial plan including a national bank caused a heated feud over the meaning of the “necessary
and proper” clause when Thomas Jefferson and James Madison thought the national government was acting beyond its constitutional powers. In the mid-nineteenth century, a continuing debate occurred over whether “internal improvements” or infrastructure spending by the national government was constitutional. Throughout the twentieth century, clashes over the scale, scope, and constitutionality of congressional laws animated political discussion. The debates of the American Founding about the powers of Congress endured for centuries after the Constitution was made the law of the land.

CRITICAL THINKING QUESTIONS

1. What were the weaknesses of the powers of the Congress under the Articles of Confederation?
2. Why was there a debate over the powers of Congress at the Constitutional Convention?
3. What parts of the Constitution explained the powers of Congress?
4. Compare and contrast the views of the Anti-Federalists and Federalists related to the powers of Congress during the ratification debate.
**Articles of Confederation: Legislative Powers**

**Directions**
Read the following primary source and answer the critical thinking questions.

**Article VIII.** All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all land within each state . . . . The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the United States in Congress assembled . . . .

**Article IX.** The United States in congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . . .

The United States in congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians—establishing or regulating post-offices from one state to another, throughout all the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations...

**CRITICAL THINKING QUESTIONS**

1. Did Congress have the power to tax or was it dependent upon the states? Explain your answer.
2. What powers did Congress have under the Articles?
Legislative Powers of Congress in the U.S. Constitution

**Directions**
Read the following primary source and answer the critical thinking questions.

**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.

**Article I, 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 Offenses 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.

Article I, 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.

Article VI

... 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...
CRITICAL THINKING QUESTIONS

1. What were some of the important powers of Congress in Article I, Section 8?
2. What powers was Congress restricted from exercising in Article I, Section 9?
3. What was the supremacy clause in Article VI?
**HANDOUT D**

**The Powers of the Articles of Confederation and the U.S. Constitution Venn Diagram**

**Directions**
For the Venn Diagram below, make a list of the different powers of the Articles of Confederation and the U.S. Constitution in their respective circles, and the powers they had in common in the space between.

**Articles of Confederation**

**U. S. Constitution**
Constitutional Convention Role-Play

Teachers will assign students roles to play while simulating debates at the Constitutional Convention of 1787. Students will read the following scripts assigned to their character.

Note: Passages from Madison’s *The Debates in the Federal Convention of 1787* reflecting the debates of individual speakers are modified only to modernize spelling and punctuation and to provide for first-person presentation in this role play.

**Part I: Proposing a New Government:**
**Edmund Randolph introduces the Virginia Plan**

Mr. Edmund Randolph [Virginia]: (May 29, 1787)
“Resolution Six: Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be empowered to enjoy the Legislative Rights vested by Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the Articles thereof.”

**Part II: Federalism: Congressional Powers and the States (May 31, 1787)**

Narrator: (May 31, 1787)
“On the resolution stating the cases in which the national Legislature ought to legislate was next taken into discussion: On the question whether each branch should originate laws, there was an unanimous affirmation without debate. On the question for transferring all the Legislative powers of the existing Congress to this Assembly, there was also a silent affirmation. On the proposition for giving ‘Legislative power in all cases to which the State Legislatures were individually competent.’”

Mr. Charles Pinckney [South Carolina] (supported by Mr. John Rutledge, from South Carolina):
“I object to the vagueness of the term incompetent, and I could not well decide how to vote until I should see an exact enumeration of the powers comprehended by the definition.”

Mr. Pierce Butler [South Carolina]:
“I repeat my fears that we are running into an extreme in taking away the powers of the States, and called on Mr. Randolph for the extent of his meaning.”
Mr. Edmund Randolph [Virginia]:
“I disclaim any intention to give indefinite powers to the national Legislature, and declare that I am entirely opposed to such an inroad on the State jurisdictions, and that I did not think any considerations whatever could ever change my determination. My opinion is fixed on the point.”

Mr. James Madison [Virginia]:
“I had brought with me into the Convention a strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the national Legislature; but had also brought doubts concerning its practicability. My wishes remained unaltered. But I should shrink from nothing which should be found essential to such a form of government as would provide for the safety, liberty, and happiness of the community. This being the end of all our deliberations, all the necessary means for attaining it must, however, be reluctantly submitted to.”

Narrator:
“On the question for giving powers, in cases to which the States are not competent . . . nine states vote aye, and Connecticut is divided.”

Part III: Defending the Articles of Confederation:
William Paterson introduces the New Jersey Plan

Mr. William Paterson [New Jersey] (June 15, 1787)
“I lay before the Convention the plan which several of the delegations wish to be substituted in place of that proposed by Mr. Randolph [the Virginia Plan].

“Resolved that the articles of Confederation ought to be so revised, corrected & enlarged, as to render the federal Constitution adequate to the exigencies of Government, & the preservation of the Union.

“Resolved that in addition to the powers vested in the United States in Congress, by the present existing articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandizes of foreign growth or manufacture, imported into any part of the U[nited] States. Also, to pass Acts for the regulation of trade & commerce as well with foreign nations as with each other.”

Part IV: Gouverneur Morris on the Need for More Congressional Power at the National Level

Mr. Gouverneur Morris [Pennsylvania]: (July 5, 1787)
“It [a system such as that of the Confederation] is no Government at all. It is altogether dependent on the States, and will act over again the part which Congress has acted. A firm Government alone can protect our liberties.”
“Returning to the Report I cannot think it in any respect calculated for the public good. As the 2nd branch is now constituted, there will be constant disputes & appeals to the States which will undermine the General Government & control & annihilate the 1st branch. State attachments, and State importance have been the bane of this Country. We can not annihilate; but we may perhaps take out the teeth of the serpents. I wish our ideas to be enlarged to the true interest of man, instead of being circumscribed within the narrow compass of a particular Spot.”

Part V: Debate on the Need for Checks and Balances over the Legislature by the Judiciary and Executive

Mr. James Wilson [Pennsylvania]: (July 21, 1787)
“The Judiciary ought to have an opportunity of remonstrating against projected encroachments on the people as well as on themselves. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of the character of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.”

Mr. James Madison [Virginia]:
“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 had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; [I think it necessary to give] every defensive authority to the other departments that was consistent with republican principles.”

Mr. Elbridge Gerry [Massachusetts]:
“The Executive [who] will best know and be ready to defend his rights ought alone to have the defense of them. The motion is liable to strong objections. It is establishing an improper coalition between the Executive and Judiciary departments. It is making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people. I rely for my part on the Representatives of the people as the guardians of their Rights & interests.”

Mr. Gouverneur Morris [Pennsylvania]:
“It has been said that the Legislature ought to be relied on as the proper Guardians of liberty. The answer was short and conclusive. Either bad laws will be pushed or not. On the latter supposition no check will be wanted. On the former a strong check will be necessary: And this is the proper supposition.”
Mr. George Mason [Virginia]:
“I wish the further use to be made of the Judges, of giving aid in preventing every improper law. Their aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences.”

Part VI: Congressional Powers and the Separation of Powers

Narrator: (August 17, 1787)
“A debate on a resolution for giving Congress the power ‘to make war.’”

Mr. Charles Pinckney [South Carolina]:
“I oppose vesting this power in the Legislature. Its proceedings are too slow. It would meet but once a year. The House of Representatives would be too numerous for such deliberations.”

Mr. Pierce Butler [South Carolina]:
“I am for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.”

Mr. James Madison [Virginia] (supported by Mr. Elbridge Gerry from Massachusetts):
“I move to insert ‘declare,’ striking out ‘make’ war; leaving to the Executive the power to repel sudden attacks.”

Mr. Roger Sherman [Connecticut]:
“I concur. The Executive should be able to repel and not to commence war.”

Mr. Elbridge Gerry [Massachusetts]:
“I am shocked! I never expected to hear in a republic a motion to empower the Executive alone to declare war.”

Mr. George Mason [Virginia]:
“I am against giving the power of war to the Executive, because [he is] not safely to be trusted with it. I am for clogging rather than facilitating war; but for facilitating peace. I prefer ‘declare’ to ‘make.’”

Narrator:
“On the motion to insert declare – in place of make, it is agreed to. Seven states to two with Massachusetts absent.”
**Federalists and Anti-Federalists Debate Congressional Powers**

**Directions**
Work with an assigned partner and place the quote cards into “Federalist” and “Anti-Federalist” piles. Be prepared to explain why you chose your answer for each card.

<table>
<thead>
<tr>
<th>Document One</th>
<th>Document Two</th>
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<tbody>
<tr>
<td>“With regard to direct taxes; these include poll taxes, land taxes, excises, duties on written instruments, on everything we eat, drink, or wear; they take hold of every species of property, and come home to every man’s house and pocket.”</td>
<td>“Was it not an acknowledged object of the convention, and the universal expectation of the people, that the regulation of trade should be submitted to the general government, in such a form as would render it an immediate source of general revenue?”</td>
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<th>Document Three</th>
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<td>“How far the clause in the eighth section [“necessary and proper” clause] of the first article may operate to do away all idea of confederated states and to effect an entire consolidation of the whole into one general government, it is impossible to say. The powers given by this article are very general and comprehensive, and it may receive a construction to justify the passing almost any law.”</td>
<td>“That standing armies may be established, and appropriation of money made for their support for two years, that the militia of the most remote state may be marched into those states situated at the opposite extreme of this continent.”</td>
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Document Five

“Shall the union be constituted the guardian of the common safety? Are fleets, and armies, and revenues, necessary to this purpose? The government of the union must be empowered to pass all laws, and to make all regulations, which have relation to them. The same must be the case in respect to commerce, and to every other matter to which its jurisdiction is permitted to extend.”

Document Six

“It is expressly to execute these powers, that the sweeping clause, as it has been affectedly called, authorizes the national legislature to pass all necessary and proper laws. If there be any thing exceptionable, it must be sought for in the specific powers, upon which this general declaration is predicated.”

Document Seven

“They propose to lodge in the general government very extensive powers, powers nearly, if not altogether, complete and unlimited, over the purse and the sword. . . . And therefore, unless the people shall make some great exertions to restore to the state governments their powers in matters of internal police; as the powers to lay and collect, exclusively, internal taxes, to govern the militia . . . the balance cannot possibly continue long. But the state governments must be annihilated, or continue to exist for no purpose.”

Document Eight

“The convention thought the concurrent jurisdiction preferable . . . and it is evident that it has at least the merit of reconciling an indefinite constitutional power of taxation in the federal government, with an adequate and independent power in the states to provide for their own necessities.”