

# CONSOURCE



*The Constitutional Sources Project*

## THE CONSTITUTION IN ACTION: THE EARLY REPUBLIC

### Who Shapes Foreign Policy?

#### TIME AND GRADE LEVEL

One 45 or 50 minute class period in a Grade 9-12 US history, civics, or government course.  
NOTE: To address some the constitutional issues presented here in greater depth, teachers might wish to devote two days to this lesson.

#### PURPOSE AND CRITICAL ENGAGEMENT QUESTIONS

History is the chronicle of choices made by actors/agents/protagonists in specific contexts. This simulation places students in the Early Republic and asks them to engage with a fundamental question of Constitutional interpretation faced at that time: Who controls foreign policy, Congress or the President? Students will explore this sweeping question with respect to Washington's Neutrality Proclamation of 1793 and Jay's Treaty. By confronting foreign policy issues in historical contexts, students will see that the Constitution, necessarily sparse, did not spell out what should be done in every circumstance. They will also see that constitutional interpretations depended in some measure on politics, with players on both sides of an issue marshaling constitutional arguments to support their positions.

#### LESSON OBJECTIVES

\*Students will be able to explain the political contexts for Washington's Neutrality Proclamation of 1793 and Jay's Treaty.

\*Students will be able argue both sides of the constitutional controversies that arose over Washington's Neutrality Proclamation and Jay's Treaty: Does the Constitution empower the president to forbid American citizens from engaging in military efforts against a nation that is not at war with the United States? Does the president need to seek advice from the Senate before negotiating a treaty? Is approval by the House of Representatives necessary for commercial treaties? Can the president refuse to release documents relevant to treaty negotiations?

\*When analyzing constitutional arguments, students will seek to elucidate conflicting opinions before arriving at personal conclusions.

\*When analyzing constitutional arguments past or present, students will explore the political contexts for those arguments.

## **OVERVIEW OF THE LESSON**

### **Prefatory homework:**

Handout A: Washington's 1793 Neutrality Proclamation

### **In class:**

1. Homework review: 5 minutes
2. Students debate the constitutionality of Washington's Proclamation of Neutrality: 10 minutes
3. Vote on constitutionality of Neutrality and Presentation of Jay's Treaty: 10-15 minutes
4. Students debate the constitutionality of Jay's Treaty: 10-15 minutes
5. Presentation and discussion of historical outcomes: 10 minutes.

Summary Homework / Extended Activities

## **MATERIALS**

### *Background Handouts:*

- A. Washington's 1783 Neutrality Proclamation

### *Classroom Handouts*

- B. Jay's Treaty
- C. Historical Outcomes
- D. Vocabulary List

### *Teacher Resources*

- T-A. Additional Context for Jay's Treaty

## **PREFATORY HOMEWORK**

Distribute Handout A, "**Washington's 1793 Neutrality Proclamation.**" Go over the instructions on that sheet.

## CLASS ACTIVITIES: 45-50 MINUTES

### 1. Homework review and introduction to the lesson: 5 minutes

Review briefly the arguments on both sides of the debate over Washington's Neutrality Proclamation.

### 2. Students debate the constitutionality of Washington's neutrality proclamation: 10 minutes

In breakout groups, instruct students to engage in the debate as citizens of that time, unaware of events subsequent to 1793.

### 3. Vote on constitutionality of Neutrality Proclamation and presentation of Jay's Treaty: 10 minutes

First, have students vote on the constitutionality of Washington's Neutrality Proclamation. Tell students they will be able to discuss this further as a class or explore the issue more thoroughly in an extended activity.

Then move on. Distribute Handout B, "**Jay's Treaty**." Allow students time to read it, then ask if students have questions—is there anything they do not understand?

### 4. Students debate the constitutionality of Jay's Treaty: 10-15 minutes

Students debate the three constitutional issues that arose during the Jay's Treaty controversy. Again, instruct students to engage in the debate as citizens of that time, unaware of events subsequent to 1793. They will have a chance to examine the issues from today's perspective in the concluding discussion of historical outcomes and in extended activities.

### 5. Presentation and discussion of historical outcomes: 10-15 minutes.

First, have students vote on the three issues arising from Jay's Treaty.

Then present the historical outcomes. Students can read Handout C, "**Foreign Policy: Historical Outcomes**," or teacher can present the material.

Finally, in a class discussion, process the material by comparing student decisions with historical outcomes. This discussion can include the historical consequences of decisions made in the 1790s. Here, anything goes—see ideas below, in "extended activities."

## SUMMARY HOMEWORK/EXTENDED ACTIVITIES

Explore any of these topics:

1. Propose an amendment to the Constitution that clarifies who directs foreign policy.

2. According to Article I, Section 8, Clause 11, only Congress can “declare War.” How is that to be interpreted today, when wars are no longer formally declared and hostilities are not limited to conflicts among nation-states? (The last war the United States declared was World War II.)
3. Evaluate the War Powers Act of 1973. Is it Constitutional? In practice, what obstacles does it face?
4. To advise the president on treaties, should the Senate have the right to review classified information?
5. In 2015, Congress invited, without consultation with the White House, Israeli Prime Minister Benjamin Netanyahu to address a joint session of the House of Representatives and the Senate. Was this within its constitutional authority? In your response, address Article I, Section 8 (powers granted to Congress), and Article II, Section 2, Clause 2 (powers granted to the president, as modified by the Senate).
6. In this lesson we have touched briefly on five constitutional issues. Explore any of these in greater depth. You can cite historical instances in which one of the issues was raised, or you can construct hypothetical cases and evaluate them.
7. Why do you think Hamilton switched his position between 1788, when he argued that foreign policy should be determined by both the executive and legislative branches, and 1793, when he argued that foreign policy, during peacetime, was exclusively an executive matter?
8. Evaluate any current foreign policy debate from a constitutional perspective. Who should be calling the shots, and why?

## Foreign Policy Handout A: Washington's 1793 Neutrality Proclamation

In 1793 Britain was at war with France, hardly an unusual occurrence for the eighteenth century. Although the United States was not directly involved, many Americans hoped the nation would give support to one side or the other. But which side? Many favored Britain, the former “mother country” with whom Americans still shared a language, a culture, and close commercial ties. Others favored France, which had come to the aid on the newly independent nation during the Revolutionary War and which was in the midst of its own revolutionary fight for liberty. American Francophiles accused their opponents of being monarchists who still honored the British king; American Anglophiles did not see how their opponents could support ruthless revolutionaries who were threatening the fabric of civil society.

President Washington tried to steer a middle course. On April 22, 1793, he issued an executive proclamation pledging the United States to “pursue a conduct friendly and impartial toward the belligerent powers.” To this end he wrote, “I ... exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition.” Further, he promised to prosecute anyone who aided or abetted the hostile actions of either power or who in any way “violate[d] the law of nations with respect to the powers of war.”<sup>1</sup>

Did the president have the constitutional authority to issue such a proclamation? This raised a broader question: Who in the new government was empowered to direct foreign policy, the president or Congress?

During the ratification debates, Alexander Hamilton had addressed the question of foreign policy in [The Federalist No. 75](#), which he hoped would calm fears that the president possessed too much power. “Though several writers on the subject of government place that power [making treaties] in the class of executive authorities, yet ... it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them,” he wrote. The power to make treaties formed a “distinct department,” partly executive and partly legislative. The executive was “the most fit agent” to negotiate a treaty, “while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.” This applied not only to making treaties but also to all “foreign negotiations.” A president, who served for a limited time and would then have to return to the private sector, could be influenced by avarice or ambition, he observed. It was therefore “utterly unsafe and improper ... to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.”

In 1793, however, Hamilton took a different tact. Using the pen name “Pacificus” to suggest the President’s proclamation would keep the nation from war, he penned a series of letters to the pro-administration *Gazette of the United States*. “The Legislative Department is not the organ of

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<sup>1</sup> [Morten J. Frisch, \*The Pacificus-Helvidius Debates\* \(Indianapolis, Liberty Fund, 2007\), 1.](#)

intercourse between the U. States and foreign nations,” he declared. “It is charged neither with making nor interpreting treaties.” The executive was the sole “organ of intercourse between the nation and foreign nations.” Article II of the Constitution – “The executive power shall be vested in the President” – was a general grant of power. He admitted that this grant was modified in a few specific instances, such as the Senate’s authority to ratify treaties and Congress’s power to declare war, but otherwise, “with these exceptions, the EXECUTIVE POWER of the Union is completely lodged in the President.” Although only Congress could declare war, it was the president’s job to conduct foreign relations during peacetime—to keep the nation out of war if at all possible.<sup>2</sup>

James Madison disagreed. Adopting the pen name “Helvidius” (Helvidius Priscus was a Roman statesman allied with Brutus and Cassius), Madison penned six letters to the press that countered Pacificus. (The Pacificus-Helvidius letters can be accessed [HERE](#).) Madison detailed each of the powers granted to the executive by the Constitution and argued that none of them enabled the president, by himself, to issue a proclamation that determined matters of war and peace. The closest approximation to such a power was his authority to negotiate treaties, but this was a power he shared with the Senate. “Although the executive may be a convenient organ of preliminary communications with foreign governments, on the subjects of treaty or war, and the proper agent for carrying into execution the final determinations,” the president alone could not be the “essential agency which gives validity to such determinations.” Madison concluded his first essay by quoting Hamilton’s *Federalist No.75* verbatim.<sup>3</sup>

QUESTION: In class you will engage in this argument. Now, briefly, jot down how you might support for each position. As you do so, consider the several powers granted to Congress in Article I, Section 8, of the Constitution and powers granted to the president in Article II, Section 1, Clause 1, and Article II, Section 2, clauses 1 and 2. You can read these clauses of the Constitution [HERE](#).

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<sup>2</sup> [Hamilton, “Pacificus Number 1,” Frisch, \*Pacificus-Helvidius Debates\*, 11-13.](#)

<sup>3</sup> [Madison, “Helvidius Number 1,” Frisch, \*Pacificus-Helvidius Debates\*, 59-64.](#)

## Foreign Policy Handout B: Jay's Treaty

Late in 1793 and early in 1794, acting on official orders, British ships seized almost 250 American ships and reportedly mistreated many of the captured seamen. Americans were outraged. Anti-British sentiment reached a fever pitch when newspapers reported that Lord Dorchester (formerly Guy Carlton), the Governor General of Canada, had told an assembly of Native Americans that Britain would be their ally if they waged war against the United States. Responding to popular pressure, the House of Representatives passed overwhelmingly a non-importation bill designed to punish Britain by inhibiting her commerce. Step-by-step, the nation seemed to be moving toward war.

Just before that bill arrived at the Senate, Alexander Hamilton and a caucus of Federalist Senators proposed to Washington that he dispatch a special mission to London to address American grievances. The president agreed, and using his Constitutional power of appointment, he tapped John Jay, Chief Justice of the Supreme Court, to head the mission. The treaty Jay negotiated, contrary to the will of the House of Representatives, normalized trade relations between the two nations. This was excellent news for pro-British merchants in the United States, but other Americans argued that the treaty violated the spirit of neutrality by favoring Britain over France. It prohibited the United States from honoring its 1778 “perpetual” alliance with France, they noted. Further, while it ensured that merchants would be paid for seized ships, it failed to return the actual seamen, nor did it promise that seamen would not be taken and impressed into British service in the future.

Opponents of the treaty started to mobilize even before the precise terms were known, and as they did, they raised two constitutional issues:

\*The Constitution required not only the “consent” of the Senate but also its “advise,” yet the Senate was never queried. True, that body confirmed Jay’s nomination as an emissary, but it played no role in determining his instructions or negotiating the treaty.

\*Several articles of the treaty regulated commerce, but according to Section I, Article 8, Clause 3 of the Constitution, Congress had the power to “regulate Commerce with foreign Nations.” This meant that the House, of Representatives, as well as the Senate, would have to approve the treaty.

It is difficult to determine whether these complaints contributed significantly to the treaty’s unpopularity or were used as arguing points to justify opposition based on other grounds. In either case, serious Constitutional questions were raised—but were they valid? Consider these rebuttals:

\*The Constitution does not specify how the president is to seek advice from Congress. In 1789, when President Washington visited the Senate to discuss treaties he wished to negotiate with Creek Indians, senators resented his presence and rebuffed him.<sup>1</sup>

\*At the Constitutional Convention, when James Wilson moved that the House of Representatives as well as the Senate must ratify treaties, his motion failed by one state to ten. If

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<sup>1</sup> See Ray Raphael, *Mr. President: How and Why the Founders Created a Chief Executive* (New York: Alfred A. Knopf, 2012), 166-169.

the framers had wanted the House to ratify commercial treaties (as contrasted with peace treaties), they would have stated that explicitly.<sup>2</sup>

Aside from these issues, the arbitration commissions established by the treaty required funding, so the agreement could not take effect until the House of Representatives appropriated some money. Before allocating money, however, the House began to address the merits of Jay's Treaty: What did it intend? How was it negotiated? Seeking answers, it requisitioned the instructions that President Washington gave to John Jay. Claiming what we now call executive privilege, Washington immediately and forcefully refused to deliver any papers. Making such information public would undermine the process of treaty negotiations, he argued.

As an informed citizen in 1795, respond to each of the three constitutional issues raised:

\*Does the president need to seek advice from the Senate before negotiating a treaty? If so, how might that be achieved?

\*Is approval of the House of Representatives necessary for commercial treaties?

\*Can the president refuse to release documents relevant to treaty negotiations?

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<sup>2</sup>[The vote on Wilson's motion was on September 7.](#)

## Foreign Policy Handout C: Historical Outcomes

The Constitution did not explicitly allocate the direction of foreign policy during peacetime to one branch or the other, and because it didn't, future government officials have had to work out the details, case-by-case, argument-by-argument, and crisis-by-crisis. Both the president and Congress, at different times, could and did take the lead in claiming special powers. (Note that in 1795 the Supreme Court had not yet declared, on its own authority, that it possessed the power of judicial review.)

**Washington's Neutrality Proclamation:** In 1793 Washington decided, simply by doing so, that the president could issue a proclamation of neutrality, but the following year Congress decided, also by doing so, that it could issue a proclamation of neutrality. The Neutrality Act of 1794 prohibited Americans from aiding a military expedition against a nation with whom the United States is at peace. The Act has been superseded many times but the core principles remain in force today.

**Jay's Treaty:** Constitutional objections did not derail the treaty. The Senate ratified it 20 to 10, barely clearing the two-thirds threshold required by the Constitution. The House then funded it by the slimmest of margins—the key vote was a dead heat, 49 to 49, and House Chair Frederick Muhlenberg, who had formerly been allied with the treaty's opponents, then broke the tie and voted for funding. A few days later Muhlenberg was stabbed by his brother, a fierce treaty opponent, and his constituents voted him out of office at the next election.<sup>1</sup>

### As for each of the constitutional issues:

***Does the president need advice from the Senate when negotiating a treaty?*** In the case of Jay's treaty, the Senate advised the president to seek a change to one provision, and the president complied. Historically, how the Senate is to advise the president has been problematic; in practice, "advice and consent" has centered more on consent, or ratification. Today, the president seeks advice on foreign affairs from the State Department and the Secretary of State, an office not specifically created by the Constitution. Both the House and the Senate have foreign affairs committees; at times these have challenged a president's policies, but presidents have not felt legally bound to follow their advice. Customarily, for important matters, the president meets with the Congressional leadership of both parties rather than with full committees.

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<sup>1</sup> In the nine-day period leading up to its final decision, it received 104 petitions containing 17,400 signatures urging a vote one way or the other. By this time, Federalists had been able to mobilize support among the educated and politically active mercantile class, and slightly more than half the petitions favored the treaty. (James Roger Sharp, *American Politics in the Early Republic: The New Nation in Crisis* [New Haven: Yale University Press, 1991], 129, 132.)

***Does the House of Representatives have to approve commercial treaties?*** Today, Jay's Treaty would be considered a trade agreement, subject to the approval of both houses of Congress by simple majorities.

***Can the president claim executive privilege in sensitive matters of foreign affairs?*** Possession being nine-tenths of the law, Washington did not release the documents requested by the House of Representatives. He did, however, release them to the Senate, which he agreed had a legitimate claim since it was empowered to accept or reject the treaty. Claiming executive privilege has proved highly controversial. It would seem justified when national security is at stake, but who, other than the president, can make that determination?

## Foreign Policy Handout D: Vocabulary List

1. Elucidate: To explain or make something clear.
2. Exhort: To strongly encourage or urge a person or entity to do something.
3. Contravene: To violate the prohibition or order of a code or law; conflict with a right or principle, especially to its detriment.
4. Avarice: Extreme greed for wealth or material gain.
5. Magistrate: A civil officer or judge who administers the law.
6. Ratification: To confirm by expressing consent, approval, or formal sanction.
7. Supersede: Take the place of (a person or thing previously in authority or use); supplant.
8. Constituency: A body of voters in a specified area who elect a representative to a legislative body.
9. Loyalist: A person who remains loyal to the established ruler or government, especially in the face of a revolt.
10. Privateers: An armed ship owned and officered by private individuals holding a government commission and authorized for use in war.

## Foreign Policy T-A: Additional Context for Jay's Treaty

Britain justified its seizures of ships by claiming, correctly, that the United States was trading with France through the West Indies, but that justification did nothing to quell the popular outrage in America. Inhabitants of eastern seaports seethed at the British seizures, while some westerners, seeking access to and control over the Mississippi River, threatened to violate Washington's neutrality order by joining a French expeditionary force to take the Mississippi region from Spain.

John Jay, who had tried to bargain away American access to the Mississippi River a decade earlier, was a controversial choice. Because of Jay's unpopularity, whatever treaty he negotiated would be suspect from the start – and when Jay did return home with a paper in hand, wanting only ratification by the Senate, that paper raised a nationwide political storm.

On the surface, the treaty appeared to have accomplished some goals. Britain agreed to withdraw its posts south of the Canadian border and submit border disputes to arbitration. Further, Britain promised to repay American merchants for recently seized ships and merchandize. But there was a price. The treaty established a process to arbitrate the claims of British merchants for unpaid debts, which Americans worried would allow loyalists to be compensated for property confiscated during the war. There was an intangible price as well. Citizens of neither the United States nor Britain would be permitted to join the services of a nation at war with the other, nor could one nation harbor, supply, or trade with privateers from an enemy nation. So much for attempts by private American citizens to aid the French cause.

The central thrust of the treaty, though, was to normalize trade relations between the two nations, excellent news for pro-British merchants in the United States. The nuts-and-bolts of the 28 provisions insured that importers and exporters on both sides would not suffer from any disagreements between the two governments. Trade restrictions were eased or lifted. Merchants, even privateers, were guaranteed safe haven in each other's ports, and no goods could be confiscated without due process. Article 10 stipulated that in the event of war between Britain and the United States, no money deposited in any bank could be sequestered, "it being unjust and impolitick that debts and engagements contracted and made by individuals having confidence in each other, and in their respective governments, should ever be destroyed or impaired by national authority, on account of national differences and discontents." Article 26 struck a similar chord: "If at any time a rupture should take place (which God forbid) between His Majesty and the United States, the merchants and others of each of the two nations, residing in the dominions of the other, shall have the privilege of remaining and continuing their trade so long as they behave peaceably and commit no offence against the laws."<sup>1</sup>

The favors and securities offered to merchants pleased one group of Americans but angered others, as discussed in Handout C, "Jay's Treaty." One additional group, not mentioned there, focused on what the treaty did not accomplish: slave owners were upset that Jay, who opposed slavery, failed to obtain payment for the enslaved men and women who had escaped or been carried away during the Revolutionary War.

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<sup>1</sup> The full treaty appears in Samuel Flagg Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* (New Haven: Yale University Press, 1962), 442-484.

Treaty opponents in the nation's largest state acted on the constitutional issues. The Virginia legislature proposed four amendments to the United States Constitution and instructed its representatives and senators to present these in Congress. The first stipulated that any treaty "containing any stipulation upon the subject of the powers vested in Congress by the eighth section of the first article" of the Constitution – including, of course, the regulation of commerce – must gain the approval of both houses of Congress before taking effect. The next two weakened the influence of senators, one by lessening their terms from six to three years, the other by taking away their power to try impeachments, thereby preventing any collusion between the Senate and the president. Finally, the Virginia legislature demanded that federal judges be forbidden from "holding any other office or appointment whatever." These were the sorts of amendments that had been proposed during the ratification debates, and they met the same fate. No state legislature other than Virginia's was willing to challenge the very structure of the fledgling Constitution so directly at this time.<sup>2</sup>

From Ray Raphael, *Mr. President: How and Why the Founders Created a Chief Executive* (New York: Alfred A. Knopf, 2012), 188-193.

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<sup>2</sup> Thomas J. Farnham, "The Virginia Amendments of 1795: An Episode in the Opposition to Jay's Treaty," *Virginia Magazine of History and Biography* 75:1 (January 1967), 84-85.