

Title: The Federalist Papers and The Federal Judiciary

Corresponding Student Center Pages: The Role of the Federal Courts; The Ratification Debate

Age Level: Grades 9-12

Suggested Time Needed: 2 class periods, with time outside of class to write essays

Description: This lesson provides some suggestions for using those essays of *The Federalist Papers* that apply to the creation of the judiciary. Since the reading level of these essays is quite high, and the essay suggestions all involve reading one or more of the *The Federalist Papers*, this activity will be quite challenging for most students.

Educational Objectives:

This series of primary source activities will require students to read and analyze *The Federalist Papers*. After doing this assignment students will:

- Have a greater understanding of *The Federalist Papers* and their impact on the ratification debate for the Constitution.
- Comprehend the value of primary sources in understanding an historic argument.
- Comprehend the Federalists' arguments pertaining to judicial appointment, life tenure of judges, the creation of inferior courts, judicial independence, and the opposing argument presented by Hamilton in *The Federalist Papers*.
- Be able to use the primary source documents noted to create a scholarly essay based on their interpretation of fact.

Guiding Questions:

- What can *The Federalist Papers*, and specifically the essays about the federal courts, teach us about the intent of the founders when it came to the courts?
- What were the founders' beliefs about why the members of the federal courts should be appointed and not elected? What did they believe the appointment of judges would ensure, or protect, the U.S. from? What was the "danger" inherent in electing judges?
- What is judicial independence, and why is it important?

Missouri Course Level Expectations:

- Principles of constitutional democracy in the United States – Analyze/apply important principles in the Constitution.
- Role of citizens and governments in carrying out constitutional principles – Explain the relevance and connection to constitutional principles in *The Federalist Papers*.
- Identify, select, use, analyze, and create primary and secondary sources for social science inquiry.

Materials List:

- Paper copies of *The Federalist Papers*, #78-83, or
- Access to laptops or computer lab and the internet
- Handout (for Activity 1 only)
- Teacher Fact Sheet

Procedures:

Most of these activities are in reality essay or discussion prompts. They could be edited to provide the foundation for a class debate, be used for assigning essays, or for general classroom discussion to tie a unit on the courts back to the Constitution. You'll notice some of the arguments to which Hamilton was responding are still relevant today, such as those on the topic of judicial independence, judicial activism, and judicial review.

See the attached Teacher Fact Sheet for additional guidance on using the following activities with students.

Activity 1: Small Group Read and Summarize Activity on Essay #78

- **Student Handout 1**

For this activity, students will read and summarize Essay #78. They will be asked to use the 3 introductory points made by Hamilton to structure the summary. This will call on students to read and analyze the information, looking for relevant details under each point.

Students might work alone or in groups, or begin alone then be asked to compare their responses with a partner or small group.

Activity 2: Essay and Discussion Ideas for *The Federalist Papers* #78- 83

The following essay prompts can be used to assign students an essay that asks them to read, analyze, and formulate an argument on an element from *The Federalist Papers*.

- Students will need copies of *The Federalist Papers*, or should be provided with the links to find them online:
- The *Federalist Papers* at The Library of Congress THOMAS page:
 - <http://thomas.loc.gov/home/histdox/fedpapers.html>
- The *Federalist Papers* at FoundingFather.info web page, full text, free
 - <http://www.foundingfathers.info/federalistpapers/fedi.htm>

Feel free to cut and paste the prompts into your own document, or onto your own web page so that you can add or remove elements. You may want to add essay guidelines that reflect your own writing and typing guidelines, or perhaps a grading rubric.

As an alternate assignment, the prompts could be used as a classroom discussion starters or debate questions.

Provide students with the appropriate document and prompt, and allow them time to read and reflect on the answers, then discuss or debate student responses in class.

A. Essay/Discussion Topic: Judicial Independence and *The Federalist Papers* #78

#1: One of the main themes in Hamilton’s Essay #78 is “judicial independence” or the necessity that the judicial branch be truly separate from the executive and legislative branches. How does Hamilton make this argument? Do you agree or disagree with him?

#2: The Constitution helped to ensure judicial independence, in part, by having judges be appointed instead of elected, and by giving them a life term. Using *Federalist* #78, explain Hamilton’s arguments for appointment of judges and life terms. Why did he think that these things made the judiciary more independent? Why was this independence so important according to Hamilton?

B. Essay/Discussion Topic: Judicial Review, *The Federalist Papers* #78

The Constitution does not directly give the federal courts the power of judicial review. This power was first used by the court in 1803 in the case of *Marbury v. Madison*.

However, in *Federalist* #78 Hamilton refers to the process when he states: “Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power.”

Read *Federalist* #78. Then, in a formal essay, describe Hamilton’s argument in SUPPORT of the power of judicial review. Be sure to:

- Define the term judicial review.
- Use specific examples (properly documented) from *Federalist* #78 to support your arguments.

C. Essay/Discussion Topic: Judicial power vs. the power of the other branches, *The Federalist Papers* #78

In the course of making his arguments in *Federalist* #78, Hamilton notes that “. . . the judiciary is beyond comparison the weakest of the three departments of power. . .” and that as such it can “never attack with success either of the other two.”

After reading *Federalist* #78, write a formal essay in which you explain the reasons that Hamilton gave in support of his claims above.

- You should also consider whether this statement rings true today, given changes in society (access to information, the media, etc.).

D. Essay/Discussion Topic: The tenure of federal judges and *The Federalist Papers* #78

In *Federalist* #78, Hamilton notes that one of the “weighty reasons” for the life term of federal judges is the “nature of the qualifications they require.” He goes on to explain that they must know a “voluminous code of laws.” He asserts that to “avoid an arbitrary discretion in the courts it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case . . .”

In a formal essay, reflect on Hamilton’s words above and the subsequent argument he makes in *Federalist* #78. Then formulate an argument that considers the following questions:

- What does the amount of legal knowledge that judges possess have to do with the courts making consistent decisions?
- Why is this consistency in decision making so important in the federal judiciary? Or any courts for that matter?
- How does the life term of federal judges contribute to this consistency?

E. Essay/Discussion Topic: Compensation of federal judges and The *Federalist Papers* #79

In writing *Federalist* #79, Alexander Hamilton discusses the compensation of federal judges. After reading *Federalist* #79, write a formal essay in which you describe Hamilton’s argument for:

- How the payment of judges is different from that of the president or congress? Why it is acceptable to differentiate for judges?
 - Be sure to explain clearly the differences in how these officials are paid.
- How are salary and the life term of judges linked? What argument does Hamilton make to show that, because judges serve a life term instead of a fixed one, their compensation should differ from the other branches?

F. Essay/Discussion Topic: The *Federalist Papers* #81

#1: In *Federalist* #81, Hamilton addresses Anti-Federalist arguments that the Supreme Court should be a part of the legislative branch. Read the document, and when you are finished write a formal essay in which you present Hamilton’s arguments AGAINST such inclusion. Why did he think it was a bad idea?

#2: In *Federalist* #81, Hamilton warns that putting the judicial function of government in the legislative branch, or putting the Supreme Court in the Congress, was a bad idea. In a brief essay, specifically describe the major problem that Hamilton saw with placing judges with “life time tenure” under the leadership of a Congress that served fixed terms.

- How did he see the amount of knowledge necessary for judges as a contributing factor in this argument?

#3: In *Federalist* #81, Hamilton speaks at length about the “original jurisdiction” of the Supreme Court. Why do you think he felt the need to give so much time to this issue? What “problems” might the Anti-Federalists have had with this particular power of the Court?

#4: Anti-Federalists argued that having “district courts” (federal courts that were placed within a state), would conflict with the jurisdiction of the state courts. What arguments does Hamilton make in *Federalist* #81 to counter these concerns?

Conclusion:

After completing one or more of these assignments, student should be able to answer the following:

- What are *The Federalist Papers*?
- Who was the primary author of those essays specifically devoted to the federal courts?
- What are any TWO of the main ideas that Hamilton makes in *The Federalist Papers* #78-83, about the federal courts?

Review the Guiding Questions:

- What can *The Federalist Papers*, and specifically the essays about the federal courts, teach us about the intent of the founders when it came to the courts?
- What were the founders' beliefs about why the members of the federal courts should be appointed and not elected? What did they believe the appointment of judges would ensure, or protect, the U.S. from? What was the "danger" inherent in electing judges?
- What is judicial independence, and why is it important?

TEACHER FACT SHEET:

Directions for the Activity/Lesson:

For Government and Politics teachers in general, and Advanced Placement or Dual Credit teachers in particular, delving into *The Federalist Papers* is almost a necessity. These are valuable primary source documents for anyone seeking to understand the perspective of the framers of the Constitution. They are also very difficult reading for high school students, even challenging honors level students.

Prior to the activity, you may find this background on *The Federalist Papers* helpful as you prepare to introduce the documents.

This lesson plan contains a series of essay prompts that ask your students to read, evaluate, and then write about the content of *The Federalist Papers*. These essay ideas are designed for upper level students, but may be adapted for all students. Each prompt deals with *The Federalist Papers* dedicated to the federal courts. You will also find web pages and links that might help you to expand on the ideas presented here, or which might help you in constructing your own additional discussion prompts.

Access to the Documents:

The Federalist Papers are often printed in part in U.S. Government textbooks, but you are unlikely to find the essays devoted to the courts there. You may want to look to the following sources:

- *The Federalist Papers* at The Library of Congress THOMAS page:
 - <http://thomas.loc.gov/home/histdox/fedpapers.html>
- *The Federalist Papers* at FoundingFather.info web page, full text, free:
 - <http://www.foundingfathers.info/federalistpapers/fedi.htm>

Background for the Educator:

As the debate over the new Constitution began in September of 1787, two camps swiftly formed. Those opposed to the Constitution became the Anti-Federalists. They called the Constitution a flawed document and warned of dire consequences should it be ratified. They warned that the executive, in placing power in the hands of one man, would be a step towards monarchy. They charged that the document was written to support the views of the aristocratic elite and that the creation of a more powerful national government would threaten individual liberties, especially in the absence of a Bill of Rights. As early as September 27, 1787, Anti-Federalists began to publish their arguments against the Constitution in the hopes of swaying state legislatures and the population against the document.

The Federalists countered the arguments of the Anti-Federalists and supported ratification of the new Constitution. *The Federalist Papers* were the most organized argument against the Anti-Federalists' arguments. This series of 85 essays was published in New York newspapers (and then in some other city newspapers as well) starting on October 27, 1787. Penned initially by Alexander Hamilton, writing under the pseudonym of Publius (for Publius Valerius Publicola, a statesman who had helped to found the Roman Republic, and who was written about by Plutarch, in *Parallel Lives*), the demands of writing 3-4 essays a week (at the height of publication) led to the addition of John Jay, and then James Madison as authors as well (though they all published anonymously under the name of Publius).

Hamilton’s primary goal in writing the essays can be found in Federalist #1, where he promised to “give a satisfactory answer to all the objections which shall have made their appearance . . .” to the Constitution. He tells his “countrymen” that he (Publius) is of the opinion that adopting the Constitution is the “. . . safest course for your liberty, your dignity, and your happiness” and promises to “lay before them” the reasons for his beliefs.

The 85 essays in the series tackle the Anti-Federalist arguments against ratification of the Constitution, one by one. There are six essays dedicated to the federal judiciary, all penned by Hamilton himself.

Essays dedicated to the federal judiciary:

- Essay #78: *The Judiciary Department*. This essay outlines the general arguments made against the Constitution by the Anti-Federalists, and begins to make an argument for the importance of judicial independence.
- Essay #79: *The Judiciary Continued*. This essay speaks to the compensation of judges.
- Essay #80: *The Powers of the Judiciary*. This essay describes the jurisdiction of the federal courts.
- Essay #81: *The Judiciary Continued, and the Distribution of the Judiciary Authority*. This essay primarily discusses the importance of maintaining separation of the legislative and judicial branches.
- Essay #82: *The Judiciary Continued*. This essay discusses the jurisdiction of the state and federal courts, and tackles the questions of concurrent jurisdiction.
- Essay #83: *The Judiciary Continued in Relation to Trial by Jury*. This essay counters the Anti-Federalist argument that the Constitution did not specifically allow for trial by jury in the federal courts.

Timing:

In a U.S. Government class, work with *The Federalist Papers* could be used in connection with:

- Units on Constitutional underpinnings and the ratification debate
 - Essays 78-83 on the courts could be used as part of a discussion on separation of powers (in connection with the essays on the executive and legislative branches)
- Units on the role and function of the courts
- Units on the courts, specifically those dealing with judicial independence
- Units on the courts, specifically those dealing with the jurisdiction of the federal courts

Handout: Small Group, Read and Summarize Activity on *The Federalist Papers*

In *The Federalist Paper #78*, Alexander Hamilton points out that the lack of a federal court was a “deficit” in the Confederation. He goes on to point out that the creation and need for a federal court was not disputed; rather it was “the manner of constituting it” and “its extent” that caused concern.

The “manner of constituting it” refers to **how** the courts will be created. Hamilton notes that there are three basic concerns in this area:

1. The mode or method used to appoint judges.
2. The tenure or term by which judges will hold office.
3. The means by which judicial power or authority will be divided between different courts, and how these different courts will relate to one another.

Directions: Read Essay #78 from *the Federalist Papers*. As you read, use the space provided below to pull out the information and arguments presented by Hamilton to make his point on EACH issue. **You should SUMMARIZE his arguments on each point in your own words.**

1. The mode or method used to appoint judges: (What did people fear about how federal judges would be chosen? How did Hamilton counter their concerns?)

2. The tenure or term by which judges will hold office: (What was/is the tenure or term of federal judges? Why was this a concern for some? How does Hamilton counter that argument?)

3. The means by which judicial power or authority will be divided between different courts, and how these different courts will relate to one another: (Hamilton does talk about the role of the courts in this essay, and thus talks about their power and authority. What does Hamilton imply the role or job of the courts will be? What does he argue about the limited nature of the courts' power?)

4. After reading this essay and seeing Hamilton's arguments, would you vote to ratify the Constitution that created the federal judiciary in this way? Why or why not?
