A MEDIATOR'S VIEW

OF THE CONSTITUTIONAL CONVENTION OF 1787

THE FUNCTIONS OF MEDIATION

Among the myriad tasks a mediator fulfills, those which will occupy us in this essay are as follows:

1) Facilitation of Discussion: Parties enter the dispute resolution process with a variety of interests and concerns. In many cases, the participants may be wary of expressing their needs or ideas for fear of judgment and dismissal by others. The effective mediator creates an environment which encourages discussion and seeks to clear a space for disputants' ideas to be expressed.

2) Serving as an Anchor: As Christopher Moore has noted, "[s]ocial network mediators are usually respected members of the community who have existing relationships with the parties. While not neutral, they are perceived as being fair. Social network mediators are generally concerned with maintaining stable long-term social relations. Generally they remain involved with the parties after the negotiations, and will participate in implementing agreements."

3) Constructing a Clear and Useful Process: Effective mediators generally adhere to a particular process. Whether it involves the disputants meeting together or caucusing; single session or multiple session; commencement with a prepared speech about mediation (or not); establishment of specific rules of communication and conduct or any other procedural tool, the mediation process is thoughtfully constructed (often with prescribed steps) to facilitate the voicing of interests and options.

4) Creating a Safe Container: In order to encourage free and open discussion, mediation sessions are cloaked with an evidentiary privilege. The collaborative law process explicitly renders all statements made and work product generated to be withheld from production, if the parties resort to litigation.

5) Effective Brainstorming: Perhaps the key to effective facilitative mediation, and its embrace by those who support parties in conflict, is its capacity to generate creative solutions.

The heart of this creativity is active brainstorming by the participants, in an effort to arrive at an outcome that will come as close as possible to mutual satisfaction.

6) Narrowing of Issues: With many disputes, the parties may become so mired in the minutia of their disagreements, that they can be yanked off-course. The mediation process seeks to keep everyone's "eye on the ball" and keep the most significant issue and concerns that need resolution in focus.

7) Driving to Resolution: There are two parts to this function. The first is the reminder to participants (as often as necessary) that failure to resolve their differences by consent is often an unacceptably costly outcome (despite references to BATNA). This emphasis on reaching an outcome is the pre-eminent factor embraced by the caucus/settlement conference, sweat-it-out, full day "mediations" so prevalent in the family law and personal injury litigation settings. While this writer is inclined to put this factor a bit lower in the hierarchy of mediation values, it is undeniable that, whether we are working in one long day or in multiple meetings over a period of time, mediation is generally considered a "success" when an agreement has been reached. The second element to be addressed, here, describes the processes which make it easier to move to agreement. Among these tools is a model agreement which is drafted and presented to the participants for discussion. During these (hopefully final) steps, unaddressed issues can be uncovered, language can be tweaked and deals which either side simply *can't* make are abandoned.

The purpose of this essay is to demonstrate how the framers of the U.S. Constitution utilized all of these tools in order to reach a truly iconic agreement.

THE CONSTITUTIONAL CONVENTION

Over the course of four months during the summer of 1787, 54 men met in Philadelphia and managed one of the greatest feats of Dispute Resolution we might ever wish to study. Imagine today, bringing staunch pro-life advocates together with committed voices for choice—add to this mix, people who hate taxes, together with those who are willing to pay higher taxes if the social safety net is strengthened. Now, just with these two different factions (forget guns, or immigration, or campaign finance reform (*Citizens United)*, or same sex marriage), put 54 men and women in a room and have them create two constitutional amendments which will

incorporate language that is acceptable to all participants. That was the challenge of 1787. The difference from today isn't in the intensity of the emotions engaged in the cause. The difference is in the mobilizing causes between 18th and 21st century America.

There was certainly no shortage of positions represented at the Constitutional Convention. Some delegates – led by James Madison of Virginia and James Wilson and Gouverneur Morris of Pennsylvania – were intent on creating a national government which would be, in Madison's words, "supreme" over the states. Alexander Hamilton went so far, in an ill-fated, and endless, speech, as to extoll the virtues of a national government with a strong, almost monarchical executive and the elimination of the state governments. Arrayed against this faction, were the representatives of smaller states, like New Jersey, Delaware and Maryland, whose allegiance and identity were firmly held by their states. A fear that dogged the debates in Philadelphia was the intention of nationalists to extinguish the states as independent entities. No state was more jealous of its independent integrity than Virginia. While Madison, the Virginian, was a passionate nationalist, he was standing against a strong opposing passion in his home state.

As Richard Beeman notes in his excellent *Plain, Honest Men*,

> "When Washington's contemporaries called him the "Father of his Country," there was no doubt in their minds that the country being referred to was America. Patrick Henry—far more than Jefferson, Madison, Mason or Randolph—was the acknowledged political leader of *his* country. And his country was the independent, sovereign state of Virginia."

Another commentator aptly noted that Virginia delegates were being asked to align themselves with a (distant) national entity which was only four years old (dating from the 1783 end of the war) and eschew their sense of being citizens of an entity which dated from the early 17th century, with the founding of Jamestown. Zealous commitment to one's state of residence may seem quaint to 21st century Americans, but imagine how we'd feel if a decision was being made to combine all the nations of North and Central America into a single country. It is observed by noted constitutional historian, Richard Beeman, that citizens of the various colonies were far more familiar with the culture of the mother country, England, than they were with neighboring colonies.

The Articles of Confederation, under which Americans had labored for the first years of the republic, was a congress-only government (no executive and no judiciary), in which each state had a single vote. Smaller states were loath to sacrifice their recognition as equal entities to the larger states. The fear that the larger states would overwhelm them was revealed continually in overheated statements by "small state" delegates. South Carolina's Charles Pinkney commented that "had the Convention separated without determining upon a plan, it would have been at this point." Forty years after ratification, the elderly James Madison recalled that "reconciling the larger states with equality of the Senate is known to have been the most threatening [difficulty] that was encountered in framing the Constitution." Things got so heated that Delaware's Gunning Bedford challenged the delegates from Pennsylvania, Virginia and South Carolina, "I do not, gentlemen, trust you. If you possess power, the abuse of it could not be checked; and what then would prevent you from exercising it to our destruction?" He went on to threaten, "The large states dare not dissolve the Confederation. If they do, the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice."

Some delegates believed that only property owners were sophisticated, knowledgeable or prudent enough to be able to vote. Democracy was viewed with unalloyed skepticism by most of the delegates. Only one – James Wilson – believed the chief executive should be elected by the public at large. Many in the rural South, which relied on foreign markets and the importation of slaves, were horrified at the notion that a national government could pass laws regulating export and import, while those in the middle and northern states pressed hard for such power for Congress. Some believed the Constitution must include a Bill of Rights, while the majority dismissed this addition as unnecessary (as each state already had its own Bill of Rights). While slavery roused some passions in a handful of delegates on both sides of the issue, its impact on the overall temperature of debate was negligible, as we will see below.

At its most fundamental, the charge to the delegates was to create a government. While there were some scant precedents from which they could draw (Parliament and their own state governments, primarily) there were enough weaknesses in each to cause them to be more examples to be avoided than systems to be emulated. Thus, as these 54 delegates came to Philadelphia in May, 1787, their task was enormous—and made all the more challenging by the

presence of loud, articulate (and often long-winded) voices espousing a wide variety of both thoughtful positions and turbulent passions. How were they able to create an enduring framework of government, given these conditions? Quite simply, they turned to the tools and processes employed by today's mediators, in a demonstration of the timeliness of rules governing the work we do. The processes the delegates employed, coupled with their cultural rules of deportment (a vestige of the Enlightenment), permitted an impressive example of dispute resolution in a group setting.

PRESENCE OF A STRONG FACILITATOR AND ANCHORING PRESENCE

What value does a mediator add to the process of dispute resolution? As practitioners of "Facilitative Mediation," it is axiomatic that facilitation is paramount among the services we provide. This consists of skill in being able to draw out participants—helping them articulate their interests and concerns. The facilitative mediator projects a neutrality and scrupulously protects the safety of the participants. This person's persona is generally open, welcoming and intelligent enough to understand the ebb and flow of discussions and to know when to push and when to hold off.

Christopher Moore has noted, as well, that an essential attribute of any effective mediator is the trust and respect afforded by the participants. By his or her presence, the mediator legitimizes the proceedings and thereby allows the participants to trust the process as well as the mediator him/herself. Despite the gathering of so many well-regarded men at the Convention, there were a handful among them who were able to provide the facilitation and the *gravitas* and legitimacy which would allow the process to succeed.

THE FACILITATOR

While there was no mediator or dispute resolution coach or consultant at the proceedings, there *was* an extremely skillful and respected facilitator among them. Nathan Gorham may well be one of the least recalled names among the Framers, but his profile should be incorporated into *some* mediation org's logo.

Nathaniel Gorham was 48 at the time of the Constitutional Convention. He had been the presiding officer of the Continental Congress earlier that year. He was a merchant, but had devoted the last 20 years of his life to public service. He served in the Massachusetts state

government and the Continental Congress in 1982, '83, '86, '87 and '89. He was one of the four delegates from Massachusetts (of the others Rufus King became a Senator from *New York* in the first Congress chosen after ratification, the cantankerous Eldridge Gerry was one of only three delegates who refused to sign the final product and Caleb Strong bailed on the convention before the task was completed). Gorham had managed debate in the Continental Congress, as its President, with such tact and skill that he was quickly chosen to fulfill that role at the Philadelphia convention. While the austere and revered Washington was unanimously chosen as the Presiding Officer of the Convention, he frequently would surrender the front seat to Gorham and join his fellow Virginia delegates as the convention engaged in free-wheeling debate as a Committee of the Whole (a facilitative process which will be discussed below). Gorham's value was to be found more in his skill in facilitation, not so much in his advocacy. He tended to run lukewarm on most of the overheated issues that entangled the delegates. Indeed, his commitment to a republic was less than resolute. When Daniel Shays led a rebellion of farmers in Massachusetts in 1786, Gorham wrote a panicked letter to the King of Prussia asking if he would deign to become the sovereign of his colony and put down Shays' uprising. Nonetheless, he was noted for his temperament and was eulogized as "mild and conciliating, accompanied with patience and prudence."

Another crucial skill of the facilitative mediator is to get the temperature of the room. Are the participants leaning in a particular direction? Can a proposal be suggested that may be more consistent with what the people have been saying? Gorham demonstrated his sense of the convention on the last day. The document had been completed and simply awaited the signature of the delegates. The final document included language which would limit representation in the House to no greater than 1 representative for every 40,000 people. This issue had troubled a number of delegates, who had sought a smaller population for representation, so as not to overly dilute the relationship of representative to constituent. Yet, there it was on that last day – the previously agreed-to figure of 40,000. Just before the delegates were to step up and sign the document, Gorham spoke up, asking, "if it was not too late, he would wish, for the purpose of lessening objections to the Constitution, that the clause…might be yet reconsidered, in order to strike out 40,000 & insert thirty thousand." Immediately, George Washington, who had uttered nary a word on any substantive matter, rose to endorse this change. The delegates then proceeded to *unanimously* vote to make the change. The scrivener proceeded to take his bottle

of "Parchment-out" (White-out being some 200 years in the future) and replaced the 40,000 number with 30,000. Gorham understood the mood of the room and ventured to interject a proposal for change at a time that might have been considered improvidently late. Yet, his suggestion carried without objection.

THE ANCHORING PRESENCE(S)

Concomitant with successful mediation, a strong, well respected figure at the head lends solidity to the proceedings. While Gorham acted as an agile facilitator of discussion, the gravitas and legitimacy were provided by George Washington and Benjamin Franklin. A good deal of persuasion was needed to goad Washington into attending the gathering. Sitting in a stifling room day after day in a steamy summer was the last place he wanted to be. He loved his property and the pace of rural life as a planter. He was fifty-five years old and was inclined to embrace his sunset years in Mount Vernon. Yet two forces impelled him to travel to Philadelphia. The first was a deep sense of civic responsibility. Coupled with that was the (now unheard-of) fact that he was universally viewed with high regard and even reverence by the other delegates. You can wrack your brains futilely to conjure a public figure who, today, would evoke such broad acceptance. Washington was known for his reserve, even austerity, in public, which only served to reinforce his influential position at the convention.

While Washington attended every meeting of the convention (although he addressed the assemblage sparingly during his four month tenure), another critical figure, lending solidity and gravitas to the meetings had a spottier attendance record, due to the declining health which accompanied his age. Benjamin Franklin was the oldest delegate, at 81 and suffered from gout and kidney stones. His first journey to the convention from his home was provided by a sedan chair carried by prisoners from the local jail. It is hard to imagine the veneration accorded Franklin at that moment in time. He was the only American who had a reputation throughout the world as a man of true eminence. Maybe Bill Gates comes closest to Franklin as a representative of innovation and entrepreneurial talent coupled with universally recognized brilliance. Add to this a reputation of cosmopolitanism unmatched by all but a small handful of colonists coupled with a great wit and a universally beloved and delightful personality and you have some sense of the charisma (despite his advanced age) of America's First Citizen. His contributions to the convention were found not so much in his infrequent insights and comments on the proceedings,

but by his presence, which projected the message (if Washington's attendance wasn't enough) that this was a *big deal*.

PROCEDURAL RULES WHICH CREATED A "SAFE CONTAINER"

CREATING A *COMMITTEE OF THE WHOLE*

A Rules Committee had met before the full body convened and drafted up some rules for the convention. It was chaired by the formidable and respected Virginia lawyer, George Wythe, who had mentored Thomas Jefferson and was the first to call out the brilliance of the future drafter of the Declaration of Independence. The Rules Committee faced a number of fundamental procedural questions. How was this assemblage to operate? Would each delegate have an individual vote or would each state vote as a single body (would the tallies be recorded as "thirty six delegates 'aye' and sixteen 'nay'" or "eight states 'aye,' two states 'nay' and two states split? (Rhode Island never sent a delegation to the convention. Also as certain delegates drifted away over the course of the four months, some states (like New York) lacked a quorum of delegates to even cast a vote.) When would they begin their deliberations and end them? How would they mark their progress?

One rule, proposed by Wythe's committee, held that any delegate could ask for a vote on a topic and the votes would be recorded. Two delegates strongly objected, stating that recording every vote would create pressure to stay with a position and tended to stifle real, open debate. The assembly agreed and thus was created the Committee of the Whole. As a committee, a member can call the vote on a question at any time, even if it has already been voted upon. This "safe container" was vital for the members' ability to throw up trial balloons. As we will see, the number of ideas for how this national government would work were enormously varied. If you think the way we choose a president now is crazy, wait until you hear about the ideas some of the delegates came up with, that *could have been in the U.S. Constitution*. This instrument was effective, with votes on certain provisions bringing votes of 7-5 and then later 9 – 2 with another delegation deadlocked.

As observed by David O. Stewart in his *The Men Who Invented the Constitution—The Summer of 1787*, "This practice gave the Convention a looping, repetitive quality, but—combined with the rule of secrecy—allowed the delegates to revise their views upon wider

consultation and deeper reflection, a luxury both precious and not often afforded to public officials, even in the slower pace of the eighteenth century."

CREATING A SAFE CONTAINER WITH THE OATH OF SECRECY

Together with the procedural gambit of operating as a Committee of the Whole for much of the convention's length, another early rule was crucial in reinforcing the safe container we so assiduously cultivate in our mediation work. At the outset of the proceedings, South Carolina delegate Pierce Butler proposed that an absolute Rule of Secrecy be enacted, with "nothing spoken in the house (to) be printed, or otherwise published or communicated without leave." Perhaps nothing contributed more to the productivity of the deliberations and debates than this secrecy rule. What is truly remarkable (even stunning) in our current world of leaks and bloviating talking heads, is that during the four months of the convention the delegates strictly honored this pledge. There was the very occasional lapse in correspondence between a delegate and a close confidante back home, but the disclosures were never particularly detailed and *never* made for the purposes of stirring up supporters for a particular position.

The convention strove mightily, with unpleasant consequences to the delegates, to enforce this ban on public knowledge of the proceedings. The meetings were generally held in the Pennsylvania assembly hall on the second floor of the building. Windows and doors were closed, with guards posted outside, and the drapes drawn over the windows so as to prevent bystanders from overhearing deliberations. This made for a muggy, very uncomfortable environment, as the congenial climate of Spring rolled into the high humidity and 80º+ summer days of Philadelphia. While the delegates often retired after the 3:00 adjournment of sessions to the local taverns and rooming houses to further discuss the proceedings, care was taken that these conclaves were protected from public disclosure. Indeed, when the final product of the convention was presented to the country in September many people, who you would expect to be "in the know" were jolted by the content of the document. Jefferson, a close confidant of Madison's, first reviewed the product of the convention from his diplomatic assignment in Paris and was appalled by certain passages. The oath of secrecy was such clearly intended to survive the adjournment of the Convention. In the ratification convention in New York, when Robert Yates (a delegate along with Alexander Hamilton) argued that Hamilton's current position was counter to what he had said at the convention, Hamilton exploded with outrage.

It is important to understand the intensity of the adherence to different positions within the population and imagine what would have happened if the proceedings of the convention had been made public. These arguments exploded as the citizenry was able to debate the charter during the ratification process. New York was a major seaport city, with roiling hostility to the interposition of a national taxing authority which would drain the main source of (essentially benign) tax revenue for the state – import/export duties. Citizens who had bled to extricate themselves from a relationship with a distant national government were aghast at the enormous power given a homegrown national government. Delegates to the Massachusetts ratifying convention contended in overheated tones familiar to contemporary ears, that the constitution set up a government ruled by and for the wealthy at the expense of the common man. One delegate complained of "these lawyers, and men of learning, and moneyed men, that talk so finely, and gloss over matters so smoothly, to make us poor little people swallow down the pill." The Oath of Secrecy shielded the delegates and their debates from this tumult and pressure.

This secrecy is particularly admirable, given the journalistic culture of the age. Unlike today's daily papers, which seek to practice journalism, the multitude of papers in the late 18th century were forums for specific political beliefs. Hamilton, Yates and many others of the age published long political arguments in newspapers (as well as pamphlets) under pseudonyms. The work of the convention would have been overwhelmed by the tidal wave of public opinion (and hyperventilation…and invective) which would accompany general publication of the proceedings.

One incident at the Convention demonstrates what happens when the oath of secrecy joins with the anchoring presence. One day, during a break, one delegate saw a copy of a discussion draft of the new government plan lying on the floor. He picked it up and brought it to George Washington. He waited until just before adjournment that day and then stood and, with controlled anger, said that one of their body had been "so neglectful" as to leave this paper lying on the floor and they must be careful not to allow "our transactions get into the newspapers and disturb public repose by premature speculations." He continued, "I know not whose paper it is, but there it is." With that, Washington threw the paper on the table before him, bowed and left the room. After a stunned silence the delegates filed out of the room…nobody ever picked up that paper.

Secrecy, coupled with the Committee of the Whole process, allowed the delegates to speak freely, send up trial balloons and change their minds. They were given a space to brainstorm—and they took full advantage of the opportunity.

BRAINSTORMING AND THE CONSTITUTINAL CONVENTION

It is fairly axiomatic that the heart of creative problem solving lies in the freedom to brainstorm. Fisher, Ury and Patton (in their classic *Getting to Yes*) identify this factor as shifting negotiations away from the zero-sum game of positional bargaining. It is remarkable how fully the delegates embraced this tool. When they convened, they had no idea what kind of government would emerge from their deliberations. After all, their paradigm at the moment was a brutally inefficient government under the Articles which, among other things, required unanimous consent to enact any legislation. This had allowed single outlier states to veto customs fees, thereby starving the national government of operating funds. As mentioned above, there was no executive and no judiciary. When farmers rose up against taxing authorities in Massachusetts in Shays' Rebellion, the absence of a national enforcement arm (neither police nor military existed) left many Bostonians panicked about the impending collapse of public order. Yet, despite manifest deficiencies of government under the Articles, Congress called the delegates to Philadelphia in May, 1787, "for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the federal Constitution adequate to the exigencies of Government and the preservation of the Union." A few delegates objected to the entire proceeding, believing that it was not legally sanctioned by Congress. Yet, it was so clear to the overwhelming number of delegates that the country needed an entirely new structure, that reasonable arguments that such efforts were outside the mandate were simply ignored because the Articles were so terrible in practice.

They could turn to their own state governments, but the main reason the delegates were considering a stronger national government was that the state governments were considered wild and out of control. The offensive conduct of King George III had traumatized Americans, so in setting up their own local governments, the executives were stripped of any real authority. State legislatures printed money, which inflated into worthlessness; they refused to collect sufficient taxes to pay the veterans of the war who had not been paid in months and were holding worthless

state IOUs—worthless so long as the states failed to generate enough revenue to pay them; they violated commitments which had been made in the Treaty of Paris which ended the war.

Delegates who arrived in Philadelphia shared, with few exceptions, a fear and distaste for *democracy*. The people aroused fear in many of the delegates. Elbridge Gerry of Massachusetts, who had been frightened out of his wits by Shays' Rebellion said, "the people do not want virtue, but are the dupes of pretended patriots…it has been fully confirmed by experience that they are daily misled into the most baneful measures and opinions by the false reports circulated by designing men." Roger Sherman of Connecticut, an "everyman" of the convention, if one were to be chosen, added, "the people…should have as little to do as may be about government. They want information and are constantly liable to be misled." John Dickinson lobbied for a property qualification to vote, as property would provide a "defense against the dangerous influence of those multitudes without property and without principle." Suffice it to say, the governments of the states was less a model than a lesson to the delegates.

For all intents and purposes, the delegates came to Philadelphia ready to draw on a blank slate. James Madison saved them the effort. His arrival in Philadelphia having preceded the convening of the convention by almost two weeks, he was able to meet with Washington, Virginia's Governor, Edmund Randolph (a strong nationalist like his Virginia colleagues) and members of the very pro-nationalist Pennsylvania delegation, which included the firebrand Gouverneur Morris and the brilliant, if imposingly arrogant, attorney James Wilson. Madison prepared his outline of a new government in consultation with these men and in the early days of the convention he presented this blueprint, known today as the Virginia Plan. Madison's efforts were the first of a summer of brainstorming.

CONSTITUTIONAL BRAINSTORMS

Madison's first plan had lots of ideas popping out of it:

- Three branches of a "supreme" national government.
- A national Congress which could veto state laws.
- A national government with exclusive right to collect import/export duties.
- Two houses in the national legislature, both of which represented the people. proportionately. The states no longer had equality.

- For the Judiciary, there would be a "council of revision" consisting of the chief executive and "a convenient number of the national judiciary."
- The chief executive would be chosen by the national legislature and would serve a 7 year term.
- The chief executive might be a single person or a committee – that had not been fleshed out.

Such were Madison's original ideas about the new and unprecedented national government. What follows is a partial compendium of the ideas on one single issue which were put on the convention's whiteboard as the four month process unfolded (note that many of these *could* have ended up in the final document and been the basis of our government's operation over the past 230 years).

REGARDING THE PRESIDENCY

To get some flavor of the extent to which the delegates would reach for workable ideas, consider the various ideas contributed on the presidency.

- The legislature would choose the executive and decide what business he/she/they would undertake (Roger Sherman, CT)
- The president would be chosen directly by the people (only James Wilson, PA)
- The president would be chosen by the upper house in the legislature (John Rutledge, S.C.)
- The president would be appointed by state legislatures (Elbridge Gerry, MA, Gunning Bedford, DE & various SC and GA delegates)
- Divide the country into districts and electors within those districts would meet to select a president (again, Wilson, PA)
- Power of the president to absolutely veto any act of congress (without override) (James Madison, VA & Alexander Hamilton, NY)
- President be given the power to "suspend" a law (Pierce Butler, SC)
- Presidential veto may be overridden by 2/3 of both houses of congress (Elbridge Gerry, MA)

- Election of multiple executives rather than a single president (Edmund Randolph and George Mason, VA)
- An executive council of three men to be chosen from three districts of the country (Hugh Williamson, NC)
- President may be removed "at the pleasure" of the legislature (Roger Sherman, CT)

The original idea put forward by Madison—that the president be chosen by the legislature—led many delegates to raise concerns that if the chief executive were to run for re-election, and this election were to be held in the legislature, then the president would be overly influenced and under the sway of that legislature. Therefore, it was agreed that any plan which provided for legislative choice of president would have to limit the president to one term. The length of that term swung from Madison's original seven years, to Maryland's Luther Martin's 11 years; Massachusetts' Elbridge Gerry's 15 years and Bay State colleague Rufus King's 25 years, noting (probably in gest) that "this is the medium life of princes." Alexander Hamilton had suggested that the president should serve for life—a suggestion which horrified the rest of the delegates who were ever-vigilant for any monarchical ideas that might spill out during the proceedings.

To get some flavor of the extent of the brainstorming, Richard Beeman describes a "preposterously complicated procedure (by Elbridge Gerry) by which, in the first instance, the state legislatures would vote by ballot for the president, with each state receiving between one and three votes depending upon some rough approximation of its population. Since it was unlikely that this balloting would produce a majority for any candidate, the election would next be referred to the Congress, where the House of Representatives would choose two out of the four candidates having the most votes, and then, out of those two, the Senate would make the final selections." This idea went nowhere. Pennsylvania's James Wilson proposed a plan in which fifteen members of Congress, chosen by lot, would elect the president.

NARROWING THE ISSUES

Any dispute resolution professional will tell you that an often indispensable service they provide is narrowing of issues. Frequently, parties in real or expectant conflict will bring myriad

concerns and solutions to the table, overwhelming any attempt to arrive at clarity and consensus. Such was the case at the 1787 Constitutional Convention.

The Convention formally opened for business on May 25, 1787. After two months of daily discussion (save for weekends) which started in the Pennsylvania State House at 10:00 a.m. and concluded there at 3:00—only to continue in the taverns, guesthouses and homes of the Pennsylvania delegates into the night—the convention had aired just about every opinion and idea, without anything concrete to show for the efforts. Votes *had* been taken and consensus had been built around certain issues, but they were hanging in the air and on scraps of notepaper. Thus, on July 23rd, Massachusetts' Elbridge Gerry proposed that a small "Committee of Detail" be formed to reduce all the words over the past two months into a coherent framework for a government. This proposal was immediately and unanimously adopted. After some further discussion, it was decided that this committee would consist of five people. The ultimate delegates chosen intentionally reflected the geographic distribution of the assembly. Nathaniel Gorham (MA), Oliver Ellsworth (CT), James Wilson (PA), Edmund Randolph (VA) and John Rutledge (SC) were chosen for this Committee of Detail, with Rutledge as the chair. (As noted by many commentators, including Beeman and Stewart, this committee was notable for the presence of the most powerful advocate for slavery's protection (Rutledge) joined by four other delegates who were either supportive (Randolph) or lukewarm in any expression of dissent. This resulted in language in the report from this committee which added language preventing the national government from ending slavery—language which had not been part of the agreements of the Committee of the Whole

While the rest of the delegates took a much-longed-for break at the height of a brutally hot summer, the Committee of Detail got down to business and for a week, worked feverishly on a draft for review by the Committee of the Whole. Initially, Randolph was chosen to construct a draft of the instrument, after which the remaining committee members would review and amend, as appropriate. Historians' review of the various drafts which included, and followed, Randolph's initial effort revealed copious notes and revisions in the handwriting of either Rutledge or Wilson. It was in the draft produced by the Committee of Detail that certain….*details* were first included in the Constitution we know today. For example, while the basic structure of the legislature had been discussed to a considerable degree in the preceding

two months, the Committee's draft added details like the minimum age for senators, staggering their terms so that 1/3 would be elected every two years and even the title of the body, "Senate."

Most significantly for the *denizens* of Constitutional theory, the powers of Congress, which had been agreed-to as a broad grant, were reduced by the Committee to a specific number of delegated powers. James Wilson, who had been an advocate for the broader grant, added to Congress' enumerated powers the ability "to make all Laws that 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." In fairly short order, upon the formation of the government under this Constitution, Alexander Hamilton utilized this language to blow a gaping hole in any efforts to limit the expanse of federal authority when, relying on the "necessary and proper" clause, he pushed through the Congressional authorization of the First Bank of the United States—over the howling protests of Thomas Jefferson and the advocates of limited national government. (It is interesting to note that when the delegates finally came to this enumerated broad Congressional power, they were entering their fourth month of deliberation and many of them were tired, irritable and homesick. The "necessary and proper" clause was approved unanimously with virtually no debate or question.)

The Report of the Committee of Detail produced 23 Articles, each of which were debated through the last three weeks of August. The Report served as a focusing agent.

SIDEBAR

How Slavery Figured

Another issue which dogged the convention was slavery. It is notable that proponents of the institution – delegates from the large slaveholding states of the South (Georgia, South Carolina and North Carolina) pressed hard for protections. While Virginia was a slaveholding state, its delegates were far more ambivalent in approaching the issue. Washington was to free his slaves in his will. Madison had long and deeply held misgivings about an institution which put the lie to the Bill of Rights which he later drafted and submitted to the First Congress. George Mason, one of the biggest slaveholders in the state was also among the most vocal critics of Southern slave culture. Yet, the Virginians were not prepared to abandon the institution, as it still represented the economic engine of their primarily rural state. Men like John Rutledge from South Carolina held firm and would have blown up the convention with a mass exodus of southern delegates if any move was made to abolish slavery. Indeed, although the Convention would not accept perpetual slavery, the South was able to negotiate a passage which extended the date before which Congress could not make any law negatively affecting slavery from 1800 to 1808. With the exception of a small handful of outspoken anti-slavery delegates, led by

Gouverneur Morris, there wasn't much stomach for a fight on that score. Indeed, Morris of Pennsylvania was almost an isolate, as he railed against "a nefarious institution—It was the curse of heaven on the states where it prevailed." Again, as cogently explained by Richard Beeman, even anti-slavery advocates in the Northeast states in the late 18th century could not comprehend the notion of African Americans being co-equal citizens.

The infamous 3/5 rule had been a compromise between those in the South who wanted each slave counted as a citizen for purposes of representation and those in the North who contended that if property, in the form of humans, were to be counted for purposes of representation, then why not horses and livestock in northern farms? The economics of taxation on imported slaves was far more turbulent a topic than the morality of the institution. Indeed, slavery was so firmly embedded into the psyche of 18th century white American men, that little objection was raised to a fugitive slave clause which was included in the final document. While even large slave-holders like Virginia's George Mason voiced discomfort with the institution and a wish to see it eventually swept from our shores, nobody was ready to push for abolition.

While this is understandably hard for us to fathom in this age of vast recognition of the depravity represented in subjugation of fellow human beings in bondage, this was far from the understanding of the enlightened men of this earlier age. One way to understand these different perspectives is for every person reading this who is not a confirmed vegan to contemplate the message of a vast collection of current literature concerning the treatment of animals in our industrial food economy. As Jonathan Safan Foer notes in *Eating Animals* and Yuval Harari repeats in *Homo Deus* the cruelty inflicted on animals in the course of the food production process is horrific. At this time in history, humans have a natural assumption that animals do not possess the attributes that make humans unique living creatures—be it soul or intelligence or reasoning capacity or the ability to construct a city like New York or a dynasty like the New England Patriots. Therefore, they are lesser beings and are accorded lesser standing and consideration. While it may trouble many meat eaters to know what is perpetrated upon pigs in the course of industrial food production, those slices of bacon with breakfast still taste wonderful and few are giving up that part of an enjoyable life now. Think of how we consider animals in the industrial food manufacturing process. If human culture evolves to a belief that all living things on the planet are equal in value, then imagine how depraved and cruel we will be thought in that later age.

While there *was* some debate around certain clauses related to slavery, the Southern delegates (particularly Rutledge) were far stronger advocates for their interests than their opponents.

DRIVING TO CONCLUSION

As with a prolonged mediation process, the Constitutional Convention had provided ample (perhaps *more* than ample) opportunity for these statesmen to be heard and have their arguments considered. The product emerging from the Committee of Detail was the template for the eventual Constitution. Yet, despite the delegates' movement toward completion, voices of

dissent still intruded into a seeming consensus. Virginia's George Mason and Edmund Randolph were deeply uneasy about elements of the final draft and lobbied for a second convention to be convened after the state legislatures had absorbed the document and provided ideas for amendment. As Richard Beeman notes, "However much many of the delegates may have wished for changes in some particular features of the proposed Constitution, they were solidly and emphatically opposed to the prospect of yet another convention that would reopen all the questions they had spent the long summer debating."

As we know, the Constitution was sent out to the various state ratifying conventions with the direction that there be a simple up or down vote. There would be no amendments entertained or other changes to the document. The deck was stacked in favor of the pro-Constitution Federalists, as they had the momentum and had spent four months debating the tiniest detail of the compact. The Anti-Federalists who tried to mount a campaign against the ratification were disorganized and less numerous. Still ratification in a number of states (particularly New York) was touch-and-go. Clearly, had the state conventions been permitted to change any of the language of the document, there would have been no Constitution and no federal government anywhere resembling what we have today. It is quite possible that the country would have resorted back to the Articles of Confederation and, because of its patent lack of efficacy, the several states would have drifted into conflict and ultimate dissolution of the nascent United States of America. (It is worth noting that, despite the aversion to any amendments as part of the ratification process, the demand for a Bill of Rights was so insistent and universal, that ten amendments were proposed by Madison in the first Congress, passed and ratified.)

CONCLUSION

Viewing the Constitutional Convention through the mediator's lens, it is actually quite remarkable how many of the skills and processes of modern dispute resolution can be detected. This investigation provides, not only a valuable effort in civic education, but also has served to uncover the often forgotten or ignored efforts that permitted these people to create a republican form of government, essentially from scratch, with a strong enough foundation that it persists almost 250 years later.

Final Note – The idea for this paper arose in the Fall of 2017, when, with all this "Constitution this" and "Constitution that" being thrown around, I decided to re-familiarize myself with the history of the document. I had studied Constitutional Law both as an undergraduate and in law school. So, I went to the library and checked out a few books and when I started Plain, Honest Men by Richard Beeman I was hooked. Beeman was a wonderful storyteller and scholar. About 100 pages in, I decided to seek him out and let him know how much I appreciated what he had done. Sadly, I learned that he had died from complications of ALS. After reading Beeman's constitution book, I got his book about the two years preceding the Declaration of Independence and that is a great story too. I heartily recommend either book as the finest history. Other books I could suggest are David O. Stewart's The Men Who Invented the Constitution – The Summer of 1787; Jack Rakove's Original Meanings (the guy won the Pulitzer for this and it contains a lot of interesting ideas, but, also reminded me of the stuff I read in college which was self consciously opaque for lord knows what reason) and Akhil Reed Amar's The Bill of Rights (Amar reflects the difference in style between the historian and the legal historian). A book I did not read, but which Beeman says was his aspirational model is Miracle in Philadelphia by Catherine Drinker Bowen. If anyone has any other fun books on this stuff, please email me at joe@josephshaub.com. Thanks.