Constitution Class Handout
Instructor: Douglas V. Gibbs
douglasvgibbs@reagan.com

www.politicalpistachio.com
www.douglasvgibbs.com
www.constitutionassociation.com

Lesson 02

Legislative Powers

Establishing the Legislative Branch

Legislative Powers

Article I, Section 1: *All Legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*

Article I establishes the Legislative Branch of the federal government. Article I, Section 1 of the U.S. Constitution establishes the two parts of Congress, and grants all legislative powers to the two Houses of the **Congress of the United States**. When studying the language used in Article I, Section 1, the original intent by the Founding Fathers becomes clear.

The first word in the first section of Article I is the word "all." The definition of *all* is "the whole of a particular thing."

The next words in Article I, Section 1 are **legislative powers**. Legislative powers are the ability to make law, modify law, repeal law, and anything else that has to do with affecting law.

The next word in the clause is "herein." The primary definition of *herein* is "here in this document."

After *herein* is the word **granted**. *Granted* is defined as "to give," "to allow," or more specifically "to legally transfer." If powers are granted, then there must be a "grantor," as well as a grantee. As we learned in our discussion regarding The Preamble, the "grantor" of the authorities enumerated in the Constitution is the States.

"Shall be" is definitive. The Constitution in its first clause reads, "All legislative powers herein granted shall be. . .," *shall be* meaning "it is," or "it will be."

"Vested" is much like "granted." Vested is a legal transfer of something, or in this case, an allowance to have legislative powers at the federal level granted to **Congress**.

The Congress of the United States is the legislative branch of the federal government, and this clause indicates that not only will the Congress be granted all legislative powers given to the federal

government, but that the branch of government consists of two houses; a Senate and **House of Representatives**.

All legislative powers, according to this clause, are granted to the Congress by the States for the purpose of making law, modifying law, or repealing law. The powers are herein granted, which means that the laws must fall within the authorities granted by the text of the U.S. Constitution. In other words, laws made must remain consistent with the "powers herein granted."

Based on language used in the first clause of the United States Constitution, when members of the judiciary legislates from the bench, or the President issues an executive order to modify a law, such action is unconstitutional. After all, "all legislative powers" were granted to the Congress, not to the judicial branch, or the executive branch.

Since all legislative powers belong to the Congress, that means any regulations by federal departments that are not in line with laws made by the Congress that are in line with the authorities granted by the Constitution are unconstitutional as well. All legislative powers belong to the Congress, therefore any "legislative actions" by regulatory agencies, which are a part of the executive branch, are not in line with the original intent of the Constitution.

Powers the federal government has were "granted" by the States. "We The People of the United States" granted those powers to the federal government through the Constitution. Therefore, if the federal government acts in a manner that is not consistent with the contract between the States and the U.S. Government, the States have the option to ignore those unconstitutional actions by the federal government. This action of ignoring unconstitutional law is the States' way of being the final arbiters of the Constitution. The term for this kind of action by a State is **nullification**. Thomas Jefferson, in his draft of the Kentucky Resolutions, explained that any unconstitutional law is null and void, and as an illegal law, the States have the right to nullify it.

The concept that only Congress has legislative powers, only the executive branch has executive powers, and the judicial branch only has judicial powers, as described in the first sentence of each of the first three articles of the Constitution, is called **Separation of Powers**. The purpose of this philosophy is to disallow different branches from abusing the powers not granted to that branch, as well as to protect against **collusion**.

The Separation of Powers also exists between the States, and the federal government. Most authorities granted to the federal government are powers the States did not reserve to themselves. Most authorities retained by the States are not authorized to be administered to by the federal government. There are a few authorities that are **concurrent**, meaning that both the federal government, and the States, have some authority over the issue. One issue that is concurrent is immigration, which will be addressed later in this book. Sole authority over a particular power is called **Exclusive Powers**.

House of Representatives

Article I, Section 2 establishes, and defines, the **House of Representatives**. The members of the House of Representatives are divided among the States proportionally. As it is today, the House of Representatives was the voice of the people in the federal government. Each Representative is chosen to serve for two years, which means every two years every Representative is up for re-election, if they choose to run.

The eligibility of a Representative as explained by Article I, Section 2 requires that the candidate must be at least twenty-five years of age, and been a citizen of the United States for at least seven years. The age is lower than for Senators. Representatives were not expected to be as politically savvy as the Senators,

and tended to have less experience. The age requirement simply reflected that. Political knowledge and experience tends to come with age.

Divided allegiance was a serious concern to the Founding Fathers. The requirement that Representatives have been citizens of the United States for at least seven years reflects that concern. Seven years, for a Representative of the people, was assumed to have been long enough for the Representative to have thrown off any allegiances to other nations.

The third clause of Article I, Section 2, includes the **3/5s clause**, which was changed by the 14th Amendment following the American Civil War.

The Southern States used slaves for their agricultural economies. The southern states were needed to ratify the new constitution. As a condition for ratifying the Constitution, the southern states demanded that the slaves be counted as one whole person each. The idea was that if the slaves were counted as whole persons, the apportionment would tip the scales in their favor through increased representation in the new United States House of Representatives. White populations in the southern states were lower in number when compared to the northern states, due to the rural nature of the Slave States to the south.

The Northern States, under the heavy influence of merchants, political elitists, and a group of abolitionists, wanted the slaves counted as "zero" in order to reduce the number of representatives the southern states would receive, which would give the majority to the northern states, thus giving the north more legislative power. With this additional voting power in the House of Representatives, the northern states sought to have greater influence on the federal government through legislation. The plan was to use their legislative power to tyrannically force the southern states into submission, and to eventually abandon slavery.

In the interest of compromise, to convince the southern states to ratify the constitution, while giving the northern states the satisfaction that the southern states did not get exactly what they wanted, the decision was made that slaves would be counted as 3/5 of a whole person for the sake of apportionment. In other words, it was not a declaration that they believed blacks to be less than a person, but simply to affect the census in such a way that too much power through apportionment would not be given to either The North or The South, while also ensuring that the Constitution got ratified.

G.R. Mobley, author of *We the People, Whose Constitution Is It Anyway?*, believes the Founding Fathers missed a great opportunity to abolish slavery. He supports the idea that the 3/5s Clause was an error in judgment by the Founders, and that the authors of the Constitution should have only allowed those States that rejected slavery to be members of the union under the Constitution. By failing to ratify the Constitution the southern slave states would then have been on their own as a separate union. Pressure from the Spanish in Florida, and the threat of invasion by Spanish forces, would have then encouraged the slave states to abolish slavery, so that they may rejoin the union, and enjoy the strength of the union of all thirteen States.

Historically, it is impossible to know if that is exactly how it would have played out. Regardless of the opportunity, the Founders largely believed they had to compromise to ensure every State remained a member of the union, and ensure that they would receive the required nine ratifications of States in order to put the new federal government into motion.

Article I, Section 2, Clause 3, in addition to containing the 3/5s Clause, also establishes the **census**. The census is a required a head count to be taken once every ten years in order to determine the enumeration for establishing the number of Representatives each State shall receive. The clause also indicates that the number of Representatives shall not exceed one for every thirty thousand. This means there cannot be more than one Representative for a district of thirty thousand. However, it does not indicate there must be one Representative per thirty thousand. If that was the case, we would have thousands of Representatives.

Article I, Section 2, Clause 4 states that whenever vacancies happen in the House of Representatives, it is the duty of the Executive Authority to issue Writs of Election to fill such vacancies. What this means is that the Governors of the States have the duty to ensure there is a special election to fill any vacancies that may happen in the House of Representatives.

The House of Representatives chooses for itself its own Speaker of the House, and other officers.

According to Article I, Section 2, Clause 5, the House of Representatives has the sole power of **impeachment**. To impeach is to charge with misconduct. The formal process of impeachment may lead to removal of an official accused of unlawful activity or other offenses deemed to be impeachable offenses. Impeachment is not defined as removal from office, though removal from office is often the result of impeachment proceedings. In history, two presidents have been impeached, but neither were removed from office. The presidents who faced impeachment were Andrew Johnson (serving as President of the United States from 1865 to 1869), and William Jefferson Clinton (1993-2001). President Richard Nixon resigned in 1974 before impeachment proceedings began.

The United States Senate

Article I, Section 3 established, and defines, the **United States Senate**. The representation of the States in the U.S. Senate is equal, two per State. The Senators serve for six years, which means every two years an election is held for one-third of the Senate seats. The required minimum age of a Senator is thirty years, five years older than that of a Representative. The increased age requirement for Senators reveals the importance of longer life and political experience, as considered by the Founding Fathers. Allegiance to the United States also remained important to the framers in the U.S. Senate, requiring that Senators need to be nine years a citizen of the United States, rather than the seven years as required of Representatives.

Article I, Section 3 originally required that Senators were chosen by the legislatures of the States, rather than voted into office directly by the voters. The appointment of Senators by their State legislatures changed to the vote of the people in 1913 with the ratification of the 17th Amendment. By the State legislatures appointing the Senators, it made the Senate the voice of the States, while the House of Representatives was the voice of the people. By the Houses of Congress being different, it created a natural check and balance, which did not allow the representation of the people to accomplish anything without approval of the voice of the States, and vice versa.

Article I, Section 3, Clause 4 establishes the Vice President as the President of the Senate. The Vice President, though a member of the executive branch, is also connected to the legislative branch. The Vice President may preside over the sessions of the U.S. Senate, and even participate in the debates, but in the end, the Vice President has no vote in the U.S. Senate, except as the tie-breaking vote.

During the early days of our nation the Vice President attended a large number of sessions of the Senate. He served as the voice of the executive branch in the Senate, ensuring the States' representation in Congress had the opportunity to be exposed to the executive branch's opinions regarding the issues that concerned the States, and the union as a whole.

As with the House of Representatives, the Senate chooses its own officers. One of those officers is the **President pro tempore**, which is the President of the Senate when the Vice President is not present.

The House of Representatives has the sole power of impeachment. Article I, Section 3, Clause 6 gives the U.S. Senate the authority to try all impeachments. No conviction can be reached unless two-thirds of the U.S. Senate membership is present. Impeachment cannot extend further than the removal of the impeached from office, and the disqualification to hold any office in the future. However, a legal case can

still be brought against the convicted from other sources, according to the law. Since the U.S. Senators were originally appointed by the legislatures of the individual States, this means that impeachment charges could be brought by the people (House of Representatives), but it took the States (Senate) to hear the case, and make the final determination after all evidence was provided. During impeachment hearings, the Chief Justice presides over the hearing, as provided by Article I, Section 3.

The 17th Amendment changed the dynamics of our governmental system. Note that many functions by the executive branch are subject to the **advise and consent** of the Senate. The Senate ratifies treaties, holds hearings for any appointments the executive branch nominates, and the Senate holds the sole power for holding hearings on impeachments. This is because actions by the federal government are subject to approval by the States. The States granted the federal government its powers in the first place.

The House of Representatives, as the voice of the people, and the Senate, as the voice of the States, and the natural check and balance that is the result of that relationship between those two Houses of Congress, also enables both Houses together to be a valuable check against the executive branch. One of the emanations of that correlation is the ability of Congress to override a veto with a 2/3 vote. The authority to override vetoes was established to enable the People, and the States, when they are in full agreement regarding a proposed bill, to be able to ensure a law is put into place, and to constrain the executive together through the power of combined vote.

Elections and Assembly of Congress

Article I, Section 4 begins, *"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."* This clause establishes that each State may have its own methods for electing members of the Congress. The same applies, as determined in Article II, to presidential elections. If there is a discrepancy, or a question regarding the acceptance of ballots, it is not the job of the courts to make final determination. Article I, Section 4 gives that authority to the State legislatures.

The same clause adds, after giving the State legislatures authority over federal elections, that *"Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."*

Congress, as discussed earlier, is **bicameral**. The two Houses of Congress are the House of Representatives, and the United States Senate. The House of Representatives, at the time of the writing of the Constitution, was designed to be as it is now, the voice of the people. Representatives have always been elected by a **direct vote**. The United States Senate was the voice of the States, appointed by the State legislatures. The appointment of the Senators by representatives of the people is an example of an **indirect vote**.

As the representation of the people, and the States, Congress was not seen as the greatest potential danger in the federal government. Congress was the voice of the people and the States in the federal government; the eyes of the parents to ensure the **central government** did not grow beyond the authorities granted to it. With Congress representing the oversight by the people, and the States, the oversight powers given to the federal legislature often led to other authorities that allowed Congress to act as a **check and balance** against potentially dangerous government activity. Giving Congress oversight authorities was a way to ensure that Congress participated in the concept of a government "by the consent of the governed."

Though elections were established with the State legislatures prescribing the times, places and manner of holding elections, as a check and balance against that authority, Congress may pass laws to "*make or alter such regulations*."

At the end of the clause giving Congress the authority to act as an oversight regarding the manner in which elections are held, a qualifier is present, expressing, "*except as to the Places of chusing Senators*."

A majority of delegates at the Federal Convention in 1787, by the conclusion of the assembly, were strong supporters of the sovereignty of the States, and the parental nature of the States in relation to the newly formed federal government, and the duty of the States as the final arbiters of the United States Constitution to ensure the new government functioned within the limitations granted to it. A part of that function by the States included the very important fact that the States had a voice in Congress with appointed U.S. Senators. The framers did not want that authority to be tinkered with, so they remind future generations at the end of this clause that though Congress has lawmaking authorities, and oversight authorities, manipulating the dynamics of government where the people, *and* the States, have a voice in the United States Congress is something not to be fiddled with. A similar advisement also appears at the end of Article V., "and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Oversight powers by the States were seen by the framers as being a right of the States, and as with natural rights of the people, a right is not something that should be able to be taken, but if the holder of the right wishes to give it away, no law can prevent such a foolish action.

The second paragraph of Article I, Section 4 reads, "*The Congress shall assemble at least once in every Year*." The first thought regarding this clause by the typical reader may be, "Of course. How can they get anything done if Congress isn't assembling?"

Another question may be, "Why did the framers feel it to be necessary to insert this clause into the Constitution?"

During the convention in 1787, there were some who felt this clause was "overburdensome." Government was not supposed to dominate their everyday lives. The members of Congress were not professional politicians, nor did they care to be. They had businesses to run, and lives to live. Surely, the attitude of many of the Founding Fathers was, there is not enough business to compel Congress to meet every single year!

Those who supported the concept of an annual meeting reminded the others that Congress was the check the people and the States had available to them in the federal government. It was the duty of Congress to serve as a check against the President, and the federal judiciary. To be an effective check, Congress must meet at least once per year. The clause, it was argued, was for the benefit of the people.

In present day politics, the opposite seems to be the norm. Government is viewed as being broken if they do not act on an endless and constant flow of issues, committees, and crises. Politicians view their position as their job, rather than a service they are providing.

Originally, the required meeting day was the first Monday in December. That was later changed to noon on the third day of January by the 20th Amendment.

Congressional Procedure

Article I, Section 5 requires Congress to have a minimum number of members present in order to do business. That majority constitutes a **quorum**, and if the Congress deems it necessary, the present members may set fines for members who do not show up. The Houses of Congress may remain in session, during which no formal business is conducted because the House does not have a quorum, so as to prevent executive actions that may be carried out during recess. This kind of session is called a **pro forma session**.

In Article II, Section 2, the President is given the authority to make **recess appointments**, when Congress is not in session. Normally, the United States Senate has **advise and consent** authority over appointments, which means that appointments of personnel to fill vacancies are possible for the President to grant, but such appointments requires the approval of the United States Senate (voice of the States). If the Senate is not in session, and an appointment is necessary, the President may make appointments, but the terms of those appointments only last to the end of the Senate's next session. If the Senate is in a pro-forma session, the President may not make any appointments. With Congress only in session when there is work to be done, and the Founders believing that would likely only be once a year, the ability of the President to make appointments when Congress is not in session was a valuable, and necessary, tool. In today's political environment, it seems like Congress is always in session, so recess appointments are not as common.

In early January of 2012, President Barack Obama used a recess appointment to name Richard Cordray the new Director of the Consumer Financial Protection Bureau (CFPB). The CFPB is a powerful bureaucracy created by the 2010 Dodd-Frank financial overhaul legislation. However, even though most of the members of Congress were on vacation, the United States Senate was still in session. President Obama's definition of recess, it turned out, was broader than the Constitution's definition. In reality, the U.S. Senate was in pro-forma session. John Berlau, Director of CEI's Center for Investors and Entrepreneurs, called the nomination of former Ohio Attorney General Richard Cordray "very troubling," criticizing both Obama's controversial use of a recess appointment, and the selection of Cordray itself. Berlau later asked, "What's next, appointing nominees when the Senate takes a bathroom break?"

Article I, Section 5 also allows each House of Congress to determine its own rules, keep a journal to record proceedings and votes, and that neither house may **adjourn** without the permission of the other. Section 5 also establishes that if a member of a house does not follow the established rules, the house may punish its members for disorderly behavior, and by a two thirds vote may actually expel a member from Congress.

The establishment of rules, holding a hearing in regards to the breaking of those rules, and punishing a member for his behavior, as set forth by Article I, Section 5, was used when Charles Rangel broke the rules of the House of Representatives. He faced a panel for his actions, and was punished by **censure** in December of 2010. He later sued, spending about a third of his 2014 campaign cash on legal bills in a failed bid to overturn his fall from congressional grace. On December 11, 2013, a federal judge in Washington dismissed the lawsuit, filed by Rangel in the previous April, to get the censure overturned.

The mandate to keep a journal to record proceedings and votes was included in this section because the Founders wanted government to be transparent, accessible, and accountable to the people. Deals behind closed doors were not supposed to be a part of our political system.

Congressional Compensation, Privileges, Restrictions

When President George Washington took office, he refused to accept the constitutionally allowed compensation for holding the office. He viewed his office as being a privilege, and an opportunity to once again serve the country he loved. During the Constitutional Convention, Benjamin Franklin considered proposing that elected government officials not be paid for their service. By the end of the debate, it was decided that government representatives should receive fixed stipends by which they may be compensated for the devotion of their time to public service. It was also determined, however, that the compensation should not be so high that it would become the motive for seeking office.

Article I, Section 6 of the Constitution addresses compensation, and the rules regarding such. Section 6 also establishes that members of Congress may not be detained while traveling to and from Congress, and that they cannot hold any other office in government while in Congress.

Protection from arrest while traveling to and from Congress was not only a privilege based on those enjoyed by their counterparts in the British Parliament, but also a protection from political enemies who may wish to keep certain members of Congress from voting.

This section also indicates that no member of Congress shall be appointed to a later office if while in Congress the office was created, or a raise in pay was enacted for that office.

To explain this clause, let's visit a recent violation of it during the Obama administration.

After Barack Obama won the 2008 Presidential Election, he announced that Hillary Clinton would be his new Secretary of State. The position of Secretary of State received a pay raise while Hillary Clinton was a member of the United States Senate. Article I, Section 6 states that "*No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall be been created, or the Emoluments whereof shall have been encreased during such time.*" Since Clinton was a Senator at the time the position of Secretary of State was given a raise, technically she was not eligible for the position to which she was appointed. To resolve this problem, and still allow Mrs. Clinton to accept the position, the Democrats applied the **Saxbe Fix**, meaning they undid the raise, and Hillary Clinton received the compensation that was in place before the vote she participated in while in the Senate. The Saxbe Fix, or a Salary rollback, is an unconstitutional action. The clause in the Constitution is clear: "*No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time.*"

The Saxbe Fix, or the rollback of the salary, does not change the fact that the emoluments increased during the time Hillary Clinton was in the U.S. Senate.

As a tool, the Saxbe fix was nothing new. The salary rollback in the case of a violation of Article I, Section 6, a mechanism by which the President of the United States can avoid restrictions by the United States Constitution which prohibits the President from appointing a current or former member of Congress to a position that was created, or to an office position for which the pay and/or benefits were increased, during the term for which that member was elected until the term has expired, was first used in 1909. The "Saxbe" name was applied to the political maneuver later in history. The Saxbe Fix is named for William Saxbe, a Senator appointed Attorney General by President Richard Nixon in 1973.

Terms:

Adjourn: Suspend proceedings to a later time and/or place.

Censure: Procedure for publicly reprimanding a public official for inappropriate behavior. There are normally no legal consequences. Censure is not mentioned in the Constitution, but is a procedure devised by the legislature as a tool for formal condemnation of a member of the congressional body.

Congress of the United States: The legislative branch of the federal government which consists of two houses; a Senate and House of Representatives. The Congress is the only part of the federal government granted the authority of legislative powers.

Granted: To confer, give, or bestow. A gift of legal rights or privileges, or a recognition of asserted rights, as in treaty. To legally transfer.

Impeachment: To charge with misconduct. Formal process that may lead to removal of an official accused of unlawful activity; impeachment does not mean the removal from office, though removal from office is often the result of impeachment proceedings.

Legislative Powers: The ability to make law, modify law, repeal law, and anything else that has to do with affecting law.

Nullification: State power to ignore unconstitutional federal law.

President pro tempore: Second highest ranking official of the United States Senate. Vice President is President of the Senate and the highest-ranking official of the Senate despite not being a member of the body. During the Vice President's absence, the president pro tempore presides over its sessions or appoints another senator to do so. The president pro tempore is elected by the Senate and is customarily the most senior senator in the majority party.

Pro Forma Session: A session in either house of the United States Congress at which no formal business is expected to be conducted, so as to fulfill the obligation "that neither chamber can adjourn for more than three days without the consent of the other." Pro forma sessions are also used to prevent the President from pocket-vetoing bills, calling the Congress into a special session, and to prevent the President from making recess appointments.

Quorum: Minimum number of members of an assembly necessary to conduct the business of that group.

Saxby Fix: Salary rollback. A mechanism by which the President of the United States can avoid restrictions by the United States Constitution which prohibits the President from appointing a current or former member of Congress to a position that was created, or to an office position for which the pay and/or benefits were increased, during the term for which that member was elected until the term has expired. First used in 1909, the Saxbe Fix is named for William Saxbe, a Senator appointed to Attorney General by Nixon in 1973.

Questions for Discussion:

1. If only Congress can make law, then why do some politicians believe that Executive Orders can modify law, or that regulatory agencies can create new regulations to enforce laws that were never passed by Congress?

2. The word "granted" reminds us that all powers once belonged to the States, and some of those authorities were "granted" to the federal government for the purpose of carrying out the tasks necessary for the protection, preservation, and promotion of the union. If the federal government was created by the States, then how can statists justify their belief that all federal laws trump all State laws?

3. Why do you think the Congress has two legislative houses?

4. Why do you think representatives are only elected for two years?

5. Why is it significant that only the House can originate bills for raising revenue?

6. Why is the power of impeachment belonging to the House so important?

7. As President of the Senate, what kind of role should the Vice President play in the day to day activities of the United States Senate?

8. Why do you think the House of Representatives has the sole power of impeachment, but the Senate has the task of hearing the case?

9. How are the dynamics of our governmental system different in relation to how the Senators are appointed, or voted for?

10. How was the Senate expected to check the House of Representatives, and work together with the House to check the Executive and Judiciary?

11. Why do you think the authority for prescribing the times, places, and manner of holding elections was given to the State Legislatures?

12. Why was Congress given the allowance to pass laws that may make or alter such regulations?

13. Why was the federal government prohibited from influencing the places for choosing Senators?

14. To conduct business, the houses of Congress need a quorum. If they do not have a majority, they may remain in session through a rule established by Congress called pro forma. What advantages does pro forma give the houses of Congress when it comes as serving as a check against the executive branch?

15. Why do you think neither house can adjourn without the permission of the other?

16. The houses of Congress establish their own rules of procedure. If a member breaks any of these rules, Congress also has the authority to punish the rule breaker. One type of punishment is called censure. How is censure an adequate punishment?

17. How has the concept of transparency changed over the last two hundred years?

Resources:

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