

**A USER’S GUIDE TO THE CONSTITUTION – PART II**

**THE ORGANIZATIONAL CHART:  
THE RELATIONSHIP AMONG THE THREE BRANCHES OF THE  
FEDERAL GOVERNMENT**

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## THE ORGANIZATIONAL CHART: THE RELATIONSHIP AMONG THE THREE BRANCHES OF THE FEDERAL GOVERNMENT

A. SUMMARY: Having stated that the government's legitimacy is derived from the consent of the politically-equal governed, what did the Founder's do make the government representative of the people? The importance of the establishment of districts within states based upon population for both the Legislative and Executive Branches; the use of a bicameral Congress with one branch representing each state equally and how the Electoral College is a combination of the representative techniques of the House and Senate.

Having decided to design a government to make Liberty a practical reality and to safeguard it, what techniques did the Founders employ to manage against Government's the abuse of power? The apportionment of power by function; the disbursement of process among the branches and requiring them to interlock in order to be activated.

Having decided to establish a limited central government, what techniques did the Founders employ to create a government that would be powerful within its sphere of operation, yet constrained from going beyond it?

### B. GENERAL CONCEPTS:

1. Limited Power to achieve its object: Enumerated Powers in a written Constitution

- Ratified by 9 of 13 States on Sept 17, 1789 (*Const. Article VII*)
- Designed to be permanent: Amending the Constitution cumbersome: (*Const. Article V*). See also, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-178 (1803).
- Designed to be contained to the powers expressed in the Constitution itself. See, Amendments IX and X of the Bill of Rights:
  - Enumeration of individual rights does not mean the unalienable rights of the People are limited to those enumerated in the Constitution and the Bill of Rights (*Const., Amend. IX*)
  - Powers not delegated to the US Government nor prohibited to the States, are reserved to the States and the people. (*Const., Amend X*).

2. All the power necessary to carry out the objectives of the Preamble are apportioned among the three branches of the federal Government. Undue concentration of power/abuse of power is managed against by means of checks and balances:

*Const. Article I, sec. 1* (all legislative power vested in Congress)

*Article II, sec. 1* (executive power vested in the President)

*Article III, sec. 1* (judicial power vested in the Supreme Court “and in such inferior Courts as the Congress may from time to time ordain and establish”)

Shorthand formula: Congress makes a law, the President implements the law and the Judiciary interprets the law.

Usually, two branches are required to enact a law, but when issues of constitutional dimension are at stake, all three, via judicial review.

3. All branches are co-equal, although in practice one branch may exert more or less influence relative to the other branches. This is especially so when power is “out of balance” or during a time of extraordinary events (*i.e.*, war)
4. The apportionment of power is a deliberate design to induce policymakers to find the *consensus* of competing interests/viewpoints. In other words, policymaking in the federal system is *designed* to find *the common ground*. This is to ensure the broadest public support for the law.

Food for thought: can inflexible partisanship (*i.e.*, my party is always right) or strict ideological adherence work in a system designed to find the common ground among citizens with equal political rights? Is it compatible with the responsibilities of good citizenship?

5. The Constitution; federal laws and Treaties are the Supreme law of the land. All judges, State and federal, are bound to enforce them. (*Const., Article VI*: Supremacy Clause)

## C. THE LEGISLATIVE BRANCH – ARTICLE I

### 1. Two Houses:

- House of Representatives: 2 yr. term; represents a district drawn by population within a state; branch closest to the “will of the people” (*Const., Article I, Sec. 2*)
- Senate: 6 year term, 2 from each State (initially selected by state Legislature/ changed to direct election by the Seventeenth Amendment); 6 year term; designed as the more deliberative body to check on undue” public passion” (*Const. Article I, sec. 3*)

### 2. Public policymaking originates in a bill passed by Congress (*Const., Article I, sec. 7*)

(modern day exception: rulemaking by administrative agencies, usually in policymaking areas requiring technical expertise;( e.g, EPA), BUT, rulemaking power and delegation of policymaking power is made initially by Congress via a law, e.g., Administrative Procedures Act, 5 U.S. Code 551 & 553. See also, *Const., Article I, Sect. 1* (“**All** legislative powers...” (emphasis added)). Compare with Executive Orders)

### 3. What may Congress legislate about?

To be constitutional, all laws must be derived from one of the powers listed in Article I, Sec. 8.

- However, Article I, Sec., 8 has flexibility, which has resulted in an expansive reading of Congressional policymaking power:

Necessary and proper clause (*Const., Article I, Sec. 8(18)*).

Commerce clause defined expansively: “[t]o regulate commerce ...among the several States...” (*Const., Article I, Sec. 8(3)*).

- Article I, Sec. 9 identifies specific limits on Congress’s policymaking power.

### 4. House of Representatives

- Closest to the popular will (‘finger on the pulse’); districts drawn based on population **within** State boundaries. Districts roughly equal numerically (we are too mobile a people to be more precise than that); one Representative per district. Each state has a minimum of 1 representative who serves a two-year term.
- Qualifications: 25 years old; 7 years a US Citizen; inhabitant of State in which elected. See, *Const., Article I, Sec. 2.(1), (2), & (3)*.

## 5. Senate

- Two Senators from each state, regardless of population within State.
- Senators initially selected by State legislatures, now by direct popular vote within State. (*Const., Art I, sec. 3(1) repealed by Const., Amend. 17 (1913)*).
- Qualifications: 30 years old; 9 years a US citizen; inhabitant of State, (*Const., Article I, sec. 3(3)*).
- Vice President (*i.e.*, the Executive Branch) is president of the Senate, but votes only in the event of a tie. (*Const., Article I, sec. 3(4)*).
- The Senate is designed to be less responsive to the will of the people; the six year term is intended to serve as a check on the popular passions of the time. This promotes ordered liberty by having a stabilizing effect on policymaking.

## D. THE EXECUTIVE BRANCH – ARTICLE II

### 1. - Four-year term (*Const., Article II, Sec. 1*).

- Nationwide vote; voters vote to select Electors to the Electoral College, who are selected within States. (*Const., Article II, Sec. 1, amended by Twelfth Amendment (1804)*).

- Qualifications today: natural Citizen; 35 years old; 14 years resident in the US; (*Const., Article II, Sec. 1*).

- Oath of Office specified in the Constitution:

“faithfully execute the Office of President...”

“preserve, protect and defend the Constitution of the United States” (*Const., Article II, Sec. 1*).

- Powers include:

Commander in Chief

Power to Pardon, except for cases of Impeachment

Treatymaking, with advice and consent of Senate

Nominating power, including of Supreme Court Justices, with advice and consent of the Senate

. (*Const., Article II, Sec. 2*).

- Serves out term of office unless there is cause to remove via impeachment, which is defined. (*Const., Article II, Sec. 4*).

### 2. *The Creation of the Electoral College to Choose the Nation’s Sole Nationwide Officeholder:*

- (a) The President is the only nationwide elected office-holder in the federal Government. (*Const. Art. II, Sec. 1, as amended by Amend. XII (1804), as amended by Amend. XX, Sec. 3 (1933)*). While we commonly, but mistakenly, believe that the country engages in one general election on election day, what actually occurs is **50 elections** – one per state – **on the same day**. The purpose of the statewide election is to select the slate of electors to send to the Electoral College, which in turn elects the President. What the voter sees on the ballot is the name of the presidential candidate, however, in the stead of the electoral slate that supports that candidate. The import of this design is that to be successful, a presidential candidate must win the majority of the popular vote **in a majority of the States**.

The Electoral College is an example of design to produce consensus. It forces the equal political involvement of ‘we the people’ across the country, as it forces candidates to seek popular majority support **in each State**, and not just the states with the largest population. It also forces the successful candidate to win majority support in states throughout the country, and not just a few regions.

(b) The Electoral College is a State/Federal venture. The State controls the process of selecting an elector; federal law governs the voting process in the College itself. A state law requiring an elector to vote for the candidate the voters selected is enforceable. *Chiafalo v. Washington*, 591 U.S. \_\_\_\_ (2020). See also *Baca v. Colo. Dept. of State*, 591 U.S. \_\_\_\_ (2020) (about so-called issue of ‘faithless voter’). The case is an example of the State/Federal relationship in action, also known as ‘federalism’.

(c) *Should the Electoral College be Abolished?*

A constitutional amendment is needed to abolish the Electoral College outright. (*See, Const., V*). To get around the amendment process, there is currently circulating among the State legislatures an interstate compact, the National Popular Vote (NPV) plan, which would functionally end the Electoral College without formally abolishing it. The States that adopt the Compact agree that their electors to the Electoral College will vote for the presidential candidate who wins the most votes **nationally, even if that candidate did not win the most votes in that State**.

The purpose of the Compact is to substitute the current formula, (*i.e.*, a candidate must win the most votes in the most states), with the formula that the candidate who wins the most votes nationwide wins. In 2016, President Trump won the most votes in the most states (*i.e.*, 30 States), but did not win the most votes cast nationwide. Had the Compact been in force, Hillary Clinton would have been elected President, because she won the most votes cast, even though she did not win the most votes in the most states. (*i.e.*, 20 States)

The NPV Compact becomes effective when the number of States joining the compact reaches 270 electoral votes, the current number required to reach a majority in the Electoral College. Currently, 15 States and the District of Columbia have joined the NPV Compact, for a total of 196 electoral votes. The Compact is currently 74 votes short of becoming effective. New Jersey is a member of the Compact, *N.J.S.A. 19:36-4*. Interstate Compacts, once enacted by the membership States, are **federal** laws. *Cuyler v. Adams*, 449 U.S. 433 (1981).

Food for thought: Do you think the NPV Compact, if activated, would be constitutional?

## E. THE JUDICIAL BRANCH – ARTICLE III

1. Judicial power is vested in the Supreme Court and such lower courts as Congress may choose to establish. (*Const., Article III, Sec. 1 and Article I, Sec. 8(9)*).
  - Congress established the US District Courts (trial-level court) and the U.S. Circuit Court of Appeals (appellate level court).
2. All federal Judges and Justices serve for life (“shall hold their offices during good behavior”) and their compensation may not be reduced while in office. This establishes the principle of Judicial independence, so that a Judge will rule on the merits of a case without fear of loss of job. (*Const., Article III, Sec. 1*).
3. As a general matter, the Supreme Court’s jurisdiction is limited to appellate matters. This means the Court’s primary function is to review errors of the decisions of the lower courts. (*Const., Article III, Sec. 2*). *See also*, regarding jurisdiction, *28 U.S.C. 2101* and, for the factors warranting certiorari review, *Sup. Ct. Rule 10*.
4. The crime of Treason against the United States is defined; Congress has the power to define the punishment for a conviction. (*Const., Article III, Sec. 3*).
5. The Judiciary’s power of judicial review includes the power to determine whether a law violates the Constitution *and* the power to *invalidate* the law if it does.  
  
*Marbury v. Madison, 5 U.S., (1 Cranch) 137, 176-178 (1803)*.
6. As a practical matter, the power of the Judiciary derives from its ‘moral suasion’, that is, the public’s respect for it, earned from its open courts; reasoned decisionmaking, and written rulings. (The Executive Branch enforces judicial orders.)



## F. THE BRANCHES MUST WORK TOGETHER TO GOVERN

The following are examples of the involvement of more than one branch of Government:

Policymaking by means of the enactment of a law: a Bill becomes law when it is passed by both the House and Senate and is signed by the President. (*Const., Art. I*).

President makes treaties, nominates cabinet and ambassadors, and SCOTUS; Senate advises & consents. (*Const., Art. II*).

Congress and Executive pass law, SCOTUS says if constitutional: *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Marshall, CJ)

## G. THE EXCLUSIVE POWERS OF EACH BRANCH

What is an example of an exclusive power (*i.e.*, within the sphere of one branch alone)

*See, e.g., Const. Article I, Sec. 7*: Bills for raising revenue originate in House.

*See, e.g., Const. Article I, Sec. 3*: Senate has the “sole power” to try impeachment and  
*See, e.g., Const. Article I, Sec. 2*: House has the “sole power” to impeach.

*See, e.g., Article II, Sec. 2*, The President is the Commander in Chief.

*See, e.g., Article III, Sec. 3*: Judicial power is vested exclusively in the Judiciary.