

**A Brief Overview of**  
**The Constitution of the United States**

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## **Introduction**

The United States Constitution, as the primary law of this nation, affects our lives daily in small and large ways. It has specific impacts on health care and the health professions.

The authority granted by the Constitution to the various agents of the government impacts, for example, the safety and availability of the wide variety of our food; the existence and maintenance of many of our roads; the quality of our water and air; the safety of our automobiles; police and fire protection; our supply of energy; our reading material; the breadth of TV, cable and internet availability; the financial safety net provided our parents and grandparents; the availability of theater, dance, music and museums; the safety of various consumer products (e.g., light fixtures, baby carriages, toys, appliances); preservation and management of forests and national parks; issuance of our money; the existence of our postal system and its reliability; the ordered trading of our investments; protection from intrusive telemarketers; our physical safety in the workplace; the reliable and speedy processing of our checking account transactions; our forebears' entry to the country and acceptance as citizens; our individual rights; our responsibilities as citizens; and more.

The Constitution and the government it has produced specifically impact health professionals. Federal monies subsidize nearly every level of our education. To assist in paying the balance for education, the federal government provides grants and direct loans, subsidizes student loans and provides tax credits and deductions. The federal government pays teaching hospitals based on the number of residents in training, an extra subsidy supporting the clinical aspects of medical education. It supports research in the physical and medical sciences, health care, and various aspects of public health. Legislative actions influence the direction of research by, for example, appropriations to the various government departments, centers and commissions, earmarking monies for particular diseases, and overriding presidential restrictions on stem cell research. Support of research not only provides cures, treatments and tools, but also frequently is a major source of employment. The government also directly employs large numbers of health professionals in its various agencies, including for example, the Centers for Disease Control and Prevention, the military, the Indian Health Service, the National Institutes of Health, the Veterans Administration, the Public Health Service to name a few. Reimbursements for health services through, for example, Medicare and Medicaid not only influence what services may be provided but also directly impacts the survivability of hospitals as well as affects practitioners' incomes. The regulation and licensing of drugs and medical devices can either enhance or restrict health care. Legislative and judicial policies can impact the health professionals' relationships with patients/clients – e.g., informed consent for treatment, HIPAA, begin-and end-of-life issues, drug importation/reimportation; the not-for-profit status of hospitals, indemnifying pharmaceutical companies in order to increase the manufacture of vaccines. Recent legislative support for improvements in medical information technology likely will have some effect.

A myriad of federal actions affect the health of the population, generally. These, in turn, have a long-term impact on the health professions. These include, for example, the actual and proposed restructuring of the nation's financial and social safety net (Aid to Families, Social Security, Medicare, Medicaid); environmental policy (global warming, clean air and water, electric power grid regulation,

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renewable energy sources); drug enforcement; homeland security (first responders, bioterrorism); the "war on terror" (the physical and mental health of the wounded and the survivors).

Every action taken (or not taken) by any branch of the federal government and, often, written and spoken words of federal executives, officers, legislators, judges affect every citizen and resident of the United States and, frequently, people around the world. These actions and words are based on or derived from the authority granted to and withheld from the federal government and the rights and privileges protected by the Constitution of the United States.

Thus, it is important to remember what the Constitution is and does. I hope in reading the following, you will think more personally about how this document itself and its interpretations by all the branches of the federal government affect your life and profession.

The following description of the Constitution provides an overview of the document itself. Neither time nor space permits a complete review of the nearly 250 years of interpretation of the numerous provisions of the Constitution – interpretation made through legislative and executive actions as well as judicial proceedings, rulings and opinions. (Constitution Law textbooks frequently run over 1500 pages, exclusive of appendices and annual supplements.) Following this overview will be a short section on suggested additional reading material.

## **The U.S. Constitution**

### **The Beginnings**

The United States was initially organized and governed under the Articles of Confederation. These Articles proved inadequate principally in their provisions intended to maintain stability among the states and defend the young nation against outsiders.<sup>1</sup> As a result, in May of 1787, seven of the 13 states convened the Constitutional Convention, in Philadelphia, to revise the Articles. Four months later, on 17 September, the delegations from 12 of the states (Rhode Island was not represented) approved the new Constitution. New Hampshire was the ninth state to ratify the Constitution which thereby became effective for all ratifying states on 21 June 1788. The Bill of Rights (the first 10 Amendments) was added to the Constitution on 15 December 1791. A total of 27 Amendments (including the Bill of Rights) have been added, with the 27<sup>th</sup> ratified in 1992.

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<sup>1</sup> The Federalists pointed to the many deficiencies of the Articles, many of which were addressed in the new Constitution: the national government's lack of power to enforce its laws, including those that would protect individuals from state governments and states from one another; the ineffectiveness and inequality of collecting taxes from the states based on quotas; the lack of power to regulate commerce among the states and between the states and foreign governments, which limited national efforts in foreign relations; the difficulty of raising an army for national defense through quotas and the frequently oppressive means employed by states to meet quotas; the chaos of a court system where each state had final jurisdiction, even on relations with foreign countries. See *The Federalist Papers*, particularly numbers 15 – 22. Note: The Papers were written following the approval of the Constitution at the Philadelphia Convention in an effort to persuade the individual state conventions to ratify the Constitution.

## The Basics

The Constitution established our government and defined relationships within the federal government and between the federal government and the several states. A key element of the structure of the federal government is the separation of powers across the three branches of government – legislative, executive and judicial. However, as will be shown, separation is not absolute. Each of the three branches is defined to balance the power of the other two. The Constitution establishes the relationship of the federal government and its laws with the states and critical aspects of interstate relations. The original Constitution did not address many individual rights, but the Bill of Rights, ratified as the first ten Amendments shortly after the basic document was ratified, specified protections of individual rights against federal government actions. Over the years, most of these rights have been judicially extended through the Fourteenth Amendment to protect individuals from state government actions.

## The Legislative Branch

Consistent with the historical antipathy toward royalty and elites, the legislative branch, created in Article I, is presented with the most significance – both in terms of its position as the "first" branch and the specificity with which it is defined. Article I creates the two houses of Congress: the Senate, wherein each state has equal representation<sup>2</sup> (reminiscent of the Articles of Confederation), and the House of Representatives, consisting of members apportioned among the states based on their respective populations.<sup>3</sup> In order to determine the number of Representatives from each state for the House, Section 2 of this Article mandates an enumeration or census every 10 years.<sup>4</sup> Senators were initially chosen by their respective state legislatures,<sup>5</sup> but ratification of the Seventeenth Amendment in April 1913 provided that Senators be elected by the people of their states.

Article I permits each house to choose its own officers, including the Speaker of the House and the President Pro Tempore of the Senate to preside over their respective houses (though the Vice President presides over the Senate, when possible – an executive-legislative overlap); and it permits each to establish its own rules for operation and discipline (though it requires a vote of 2/3 of the members to expel a member).<sup>6</sup> Each house is required to keep and publish a "Journal of its Proceedings"<sup>7</sup> – thus, today, the *Congressional Record*. Each house is empowered to "be the Judge of the Elections, Returns and Qualification of its own Members".<sup>8</sup> Each member of the Senate and the House is protected from arrest while attending or traveling to or from any session and from liability for any speech made in session.<sup>9</sup> Congress' requirement to meet once a year on the first Monday of December<sup>10</sup> was modified to be the third day of January by the Twentieth Amendment.<sup>11</sup> This Amendment also prescribes the start and end dates for congressional terms of office.<sup>12</sup>

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<sup>2</sup> §3

<sup>3</sup> §2

<sup>4</sup> The requirement for a census originally included the provision that 3/5 of "other persons", read slaves, were to be counted. This was changed with the ratification of the Fourteenth Amendment

<sup>5</sup> §3

<sup>6</sup> §5

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> §6

<sup>10</sup> §4

While the majority of powers vested in this bi-cameral system are shared, Section 2 of Article I designates the House as having the "sole Power of Impeachment" and Section 3 grants the Senate sole "Power to try all Impeachments" – another legislative-executive overlap.<sup>13</sup> Further, Section 7 requires that all revenue-raising bills originate in the House, although it permits the Senate to "propose or concur." Section 7 also requires that both houses of Congress pass a bill before it is sent to the President for signature or veto; and it prescribes the presidential veto and legislative veto-override procedures – more overlap. The Senate is given the power to approve international treaties signed by the President (requiring a 2/3 vote) and all major presidential appointments by the "advice and consent" provisions of Article II, Section 2 – major overlaps.

Article I, Section 8 lists the "enumerated powers" of the legislative branch. These include, among others, the powers to

- assess and collect taxes,
- borrow money on U.S. credit and pay its debts,
- regulate international and interstate commerce,
- establish a Post Office and related roads (thus, e.g., the Albany Post Road (Rt. 9), the Boston Post Road (Rt. 1)),
- "promote the Progress of Science and useful Arts" (thus, the Copyright and Patent laws),
- declare war,
- raise an army and maintain a navy,
- create federal courts (lower than the Supreme Court) and determine their jurisdiction (a significant judicial-legislative overlap),
- coin money, and
- establish "the Standard of Weights and Measures".

The final paragraph of this Section 8 empowers Congress "to make all Laws which shall be necessary and proper" to fulfill all the enumerated powers as well as all other powers of the federal government. It is the "necessary and proper" clause which has frequently been the basis, along with the goals stated in the Preamble to the Constitution,<sup>14</sup> for the expansion of the federal government as the nation has grown and become more complex. In passing such laws, it should be noted that Congress may create new positions within the government and grant appointment power of such "inferior Officers" to the President or executive department heads or to the federal courts.<sup>15</sup> Additionally, many of the Amendments subsequent to the Bill of Rights grant Congress powers, through passing appropriate legislation, to enforce the provisions of the Amendments (see below).

Congress is also given the power to define the rules of succession if neither the President nor the Vice President is able, for any reason, to carry out the duties of the President.<sup>16</sup>

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<sup>11</sup> Amendment XX §2

<sup>12</sup> Amendment XX §1

<sup>13</sup> It should be noted that punishment in impeachment cases is limited to removal from office. But whether or not a person tried on impeachment charges is convicted, s/he is still liable under other applicable federal and state laws. (Article I §3)

<sup>14</sup> The goals set forth in the Preamble are "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence [correct spelling at the time], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity..."

<sup>15</sup> Article I §2

<sup>16</sup> Article II §1 and the Twenty-Fifth Amendment.

Offsetting these powers, Article I prohibits the legislature in Section 9 from suspending the Writ of Habeas Corpus,<sup>17</sup> passing laws effective retroactively, issuing bills of attainder,<sup>18</sup> taxing states on exports,<sup>19</sup> showing preference to one state via, for example, commerce regulation or revenue-raising. This section also restricts Congress from spending money without properly passed and signed appropriation bills and requires "regular Statement and Account of Receipts and Expenditures." Congress is also prohibited from giving members raises in compensation "until an election of Representatives shall have intervened."<sup>20</sup>

Recent issues involving congressional powers relate to:

- the extent of Congress' interstate commerce power over action within states,
- the meaning of the Senate's "advice and consent" responsibilities in approving presidential appointments and its implications for cooperation between Congress and the executive branch,
- the definition of "high Crimes and Misdemeanors"<sup>21</sup> as grounds for impeachment
- war powers (see the discussion in the next section of this paper)
- the houses' own procedural and disciplinary rules,
- Congress' oversight of the lower federal courts and how independent from political pressure the federal judiciary should be.

Actions under its taxing, spending and borrowing powers perennially present issues.

## **The Executive Branch**

The Constitution, in Article II, enumerates few specific powers, but vests with the President "the executive power," a pregnant expression. While the Constitution itself sets up tensions between the executive and legislative branches in its separate but overlapping powers, the Presidency has evolved to be extremely large and powerful – most likely more powerful than the Founders envisioned. As Justice Jackson states in the "Steel Seizure Case"<sup>22</sup> in 1952:

While the Constitution diffuses power the better to serve liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependencies, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction and conjunction with those of Congress.<sup>23</sup>

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<sup>17</sup> The primary means used to test the legality of imprisonment. Congress, however, through its powers over the federal judiciary can limit courts from reviewing state cases. This could effectively override centuries of legal precedent and deprive individuals of basic protections when newly available DNA technology has shown that states have convicted many people who did not commit the crimes for which they were convicted.

<sup>18</sup> A legislative act imposing punishment without judicial proceedings.

<sup>19</sup> The prohibition on taxing states based on the census was overturned and replaced by the Sixteenth Amendment, permitting a federal income tax, also ratified in 1913.

<sup>20</sup> Amendment XXVII

<sup>21</sup> Article II, §4.

<sup>22</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>23</sup> *Id.*, concurring opinion at 634 et seq

Justice Jackson proceeds to describe presidential powers in three categories:

- Presidential action pursuant to congressional authority, in which case "his authority is at its maximum, for it includes all that he possesses on his own plus all that Congress can delegate."<sup>24</sup>
- Actions in the absence of congressional authority or denial of authority, where "Congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable if not invite, measures on independent presidential responsibility."<sup>25</sup>
- Actions in defiance of Congress, which represents "his power at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>26</sup> Actions in this category are very dangerous because they threaten the "equilibrium established by our constitutional system."

The first constitutionally specified power is that of the President as Commander-in-Chief of the "Army and Navy...and the Militia of the several States" (when the latter is called up to serve the federal government). But deployment of these forces is subject to the war powers of the legislative branch. (Presidential actions as Commander-in-Chief met with congressional silence, such as President Truman's Korean "police action," would fall under Justice Jackson's second category of presidential power.) The resulting tension between the two branches over armed conflicts has even involved, though rarely, the Supreme Court as early as, for example, in 1863 after President Lincoln ordered a blockade of southern ports following the South's attack on Fort Sumter.<sup>27</sup> The Vietnam conflict resulted in Congress passing and overriding President Nixon's veto of the War Powers Resolution of 1973.<sup>28</sup> This Resolution requires the President to consult with both houses of the legislature before committing troops "where hostilities are imminent"<sup>29</sup> and to report to Congress the reasons for the deployment. If Congress, within 60 days of the report, does not declare war or enact specific authorization for the deployment, the President must remove the forces.<sup>30</sup> Questions of Constitutionality regarding this procedure persist, but it is still law. Most recently, the current President did consult with Congress before deploying troops to Afghanistan and Iraq and the Congress has passed and renewed specific authorizations of funding for these deployments.

Two significant responsibilities imposed on the President by the Constitution are to recommend for congressional consideration "such measures as he shall judge necessary and expedient" and, most importantly, to 'take Care that the Laws be faithfully executed."<sup>31</sup> These powers are used, on the one hand, to develop and propose various policies to Congress and, on the other, through executive actions, to give form to policies established by Congress. Executive interpretation and implementation can result in expansion or diminution of policies. For example, President Clinton's executive order permitting the use of foreign aid funds for contraception contrasts with those of both his predecessor and successor. Generally, if Congress is attentive, and presidential actions do not stray too far from congressional intent, Congress will not take corrective action.

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<sup>24</sup> *Id.* at 635

<sup>25</sup> *Id.* at 637

<sup>26</sup> *Id.*

<sup>27</sup> Known as the Prize cases, 67 U.S. (2 Bl.) 635 (1863), the Court upheld the President's authority.

<sup>28</sup> 87 Stat. 555. 50 USC §§1541-48.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at §5 (b). This section also provides that troops may remain if Congress extends the 60-day period or if Congress is not able to act because of an armed attack on the U.S.

<sup>31</sup> Article II §3

The President is given three additional powers, two of which are subject to the "advice and consent" of the Senate. The power to make treaties requires a 2/3 vote of the Senate. However, the inferred power to withdraw from signed and approved treaties requires no such Constitutional involvement by the Senate.<sup>32</sup> An example of the conflict this executive-legislative overlap can create is the lack of votes in the Senate for approval of the Kyoto Accords on controlling hot house gas emissions (among other matters), signed by President Clinton.

The President may nominate and, subject to a simple majority vote of the Senate,<sup>33</sup> appoint "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for."<sup>34</sup> Congress may grant additional appointment powers to the President or others in the executive branch.<sup>35</sup> Section 2 provides a means by which the President may sidestep the Senate. Specifically, while the Senate is in recess, the President may fill any or all vacancies normally requiring "advice and consent." However, such appointments expire at the "End of the next Session."<sup>36</sup> An appointment made in this manner is referred to as a "recess appointment."

The final power granted the President by the Constitution is the granting of "Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."<sup>37</sup> Typically, Presidents grant pardons during the Christmas holidays or just before leaving office, though the power may be exercised at any time while in office. One of the earliest acts by President Ford on his assumption of the office was the pardon of Richard Nixon.<sup>38</sup> With few exceptions, presidential pardons are not controversial. Most recently, a few of President Clinton's midnight pardons were questioned by political opponents and the press.

The Constitution also imposes few responsibilities on the President. These include the requirement that the President "give to Congress Information of the State of the Union (thus, the annual State of the Union Address) and "receive Ambassadors and other public Ministers."<sup>39</sup>

Finally, Article II prescribes the manner of selecting the President and the succession of the office should the President die or be removed from office or become unable to discharge presidential duties.<sup>40</sup> It is noteworthy that the only mention of the Vice President in Article II<sup>41</sup> is in these two

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<sup>32</sup> Individual treaties may require legislative involvement for such withdrawal.

<sup>33</sup> Recent disputes concerning the constitutionality of the filibuster and other tactics to prevent an up-or-down vote on Presidential nominations of lower federal court judges involve the Senate's own procedural rules permitted under Article I §5. In addition to the filibuster, a Senate "blue slip" rule frequently used in the past to prevent nominations from going to the floor for a vote permits either Senator from the nominee's state to completely block the nomination. Another Senate rule requiring unanimous consent to proceed with business has been used to hold up appointments.

<sup>34</sup> Article II §2

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Remember that President Nixon was never actually impeached by the House. The House Judiciary Committee recommended to the full House three articles of impeachment. After leaving office, Mr. Nixon could have been indicted for other federal offenses. Article I, §3. Nixon was, in fact, tried for these offenses, however, in his disbarment proceeding in New York; he was disbarred and not allowed to resign his admission to the New York Bar.

<sup>39</sup> Article II, §3.

<sup>40</sup> Article II, §1.

<sup>41</sup> Remember, the Vice President is mentioned in Article I as the Senate's presiding officer.

contexts – that is, there is no description of vice-presidential powers or responsibilities in the context of the executive branch.<sup>42</sup>

Section 1 defines the term of office of the President as four years, but it does not specify a limit on the number of terms during which one may serve. Based on the precedent set by George Washington, all Presidents served for only two terms until Franklin D. Roosevelt, who ran and was elected four times. President Roosevelt's break with precedent was based on the perceived unwisdom of changing administrations during World War II. However, with ratification of the Twenty-Second Amendment in 1951, the President is officially limited to two terms of office.

Section 1 also established the electoral college, consisting of electors from each state equal to the number of Senators and Representatives from the state.<sup>43</sup> These electors are selected by popular vote in their respective states. Initially, the person receiving the majority of electoral votes became President and the person receiving the second highest number of votes became the Vice President.<sup>44</sup> This was changed in June 1804 with ratification of the Twelfth Amendment. Today, the state electors vote separately for the President and Vice President. If one candidate has not received a majority of the electoral votes, the House of Representatives selects the President, each state delegation voting as a block within which majority controls. Similarly, if the electoral votes for Vice President do not represent a majority, the Senate selects the Vice President.<sup>45</sup>

The presidential succession provisions apply only in the event of the death or disability of the President while in office or the President's resignation or removal from office. Originally, the office went to the Vice President and then, if both the President and Vice President were not able to perform the duties to another "Officer" declared by Congress.<sup>46</sup> The Vice President or other officer was to "act as" President until the President (or the Vice President) could resume official duties or until a new President was elected.<sup>47</sup> This was augmented with the ratification of the Twentieth Amendment in January 1933<sup>48</sup> and the Twenty-Fifth Amendment in February 1967. This latter Amendment provides:

- that if the President resigns, dies or is removed from office the Vice President "becomes" President;<sup>49</sup>
- that the President may nominate a person to fill a Vice Presidential vacancy and both houses of Congress must confirm the nomination by majority vote;<sup>50</sup>
- procedural details for the President to notify the congressional leaders of an inability to carry out his duties (in which case the Vice President becomes "Acting President") as well as his ability to resume his duties;<sup>51</sup>

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<sup>42</sup> Recent Presidents, on their own, have built up vice presidential powers. For example, President Clinton delegated to Vice President Gore various responsibilities related to science, including inter alia the environment and internet communications; similarly, the current administration has delegated to the Vice President tasks involving energy policy, among others.

<sup>43</sup> Federally elected or appointed people may not serve as electors. It was not until 1961, when the Twenty-Third Amendment was ratified, that citizens of the District of Columbia could elect/appoint electors for President and Vice President.

<sup>44</sup> Article II, §2.

<sup>45</sup> Twelfth Amendment.

<sup>46</sup> Article II, §1

<sup>47</sup> *Id.*

<sup>48</sup> Amendment XX defines the start and end date of the Presidential term of office and provides for succession of a President-elect (§1) or Vice President-elect (§§3, 4).

<sup>49</sup> Amendment XXV, §1

<sup>50</sup> Amendment XXV, §2

<sup>51</sup> Amendment XXV, §3

- a procedure for permitting the Vice President and a majority of "either the principal officers of the executive departments or of such other body as Congress may by law provide"<sup>52</sup> to declare the President unable to perform his duties (and the Vice President "immediately assumes the powers and responsibilities as Acting President") and for Congress to resolve any resulting dispute between the President and those claiming his disability.<sup>53</sup>

Congress has met its responsibility to further define presidential succession with passage in 1886 of the Presidential Succession Act, last amended in 1988.<sup>54</sup> Today, if neither the President nor Vice President is able to carry out presidential duties, the Speaker of the House becomes President.<sup>55</sup> The Speaker would be followed by the President pro tempore of the Senate.<sup>56</sup> If all four are unable to perform as President, the "highest" Secretary in the President's cabinet assumes the Presidency.<sup>57</sup> The defined hierarchy is the Secretary of State, then Secretary of the Treasury, then Secretary of Defense, the Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, and finally Secretary of Veterans Affairs.<sup>58</sup> Thus, it is possible to have a President and Vice President who were not elected. This occurred in the 1970's when Vice President Agnew resigned to face fraud charges in his home state; President Nixon appointed Gerald Ford as Vice President; Ford became President when Nixon resigned and appointed Nelson Rockefeller as Vice President.

The final section of Article II subjects the President, Vice President, and "all civil Officers" in the executive branch to removal from office via the impeachment process for "Treason, Bribery, or other high Crimes and Misdemeanors."<sup>59</sup> Impeachment by the House and trial by the Senate has not been resorted to very often in our history. The trial of President Clinton, resulting in his acquittal, raised unresolved questions about the Constitutional meaning of "high crimes and misdemeanors."

The Constitution does not provide the President or members of his cabinet with the privilege from arrest it grants members of Congress. (See above.) However, the Supreme Court in 1982, based on common law<sup>60</sup> history and the uniqueness of the Presidency, held specifically that the President has "absolute immunity from damages liability predicated on his official acts."<sup>61</sup> The limit of this immunity to official acts of the President was confirmed in *Clinton v. Jones*,<sup>62</sup> which denied the postponement of civil litigation for alleged acts committed by President Clinton prior to his taking office. A related issue is

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<sup>52</sup> Amendment XXV, §4

<sup>53</sup> *Id.*

<sup>54</sup> 3 USC 19.

<sup>55</sup> *Id.* at sub (a)(1)

<sup>56</sup> *Id.* at sub (b). Remember that Article I, §§2 and 3 require that each house of Congress choose their own leaders from the membership.

<sup>57</sup> *Id.* at sub (d)(1)

<sup>58</sup> *Id.* Thus, to assure an ordered succession in the event of a catastrophe, traditionally, at least one member of the President's cabinet is selected to not attend the State of the Union Address, for example. As an historical note, notice that the President's chief of staff is not in the line of succession and there was understandable initial alarm when then chief of staff General Alexander Haig asserted that he was in charge, following the assassination attempt on President Reagan.

<sup>59</sup> Article II, §4.

<sup>60</sup> "'Common law' is all the statutory and case law background of England and the American colonies before the American Revolution...It consists of those principles, usage and rules of action applicable to government and security of persons and property which do not rest for their authority upon any express and positive declaration of the will of the legislature." Black's Law Dictionary, 6<sup>th</sup> Edition. West Publishing Co., St. Paul, Minn. (1990). See also the discussion of federal-state relations, below.

<sup>61</sup> *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) at 750.

<sup>62</sup> 520 U.S. 681 (1997)

executive privilege – i.e., whether records or testimony concerning communication between the President and other members of the executive branch may be subpoenaed by either the judicial branch or Congress. President Nixon was required to turn over to the federal courts tapes of his conversations related to the Watergate burglary.<sup>63</sup> However, the tapes were not required to be given to Congress.<sup>64</sup> More recently, on the other hand, the Supreme Court upheld the Vice President's refusal to reveal to the federal courts information concerning a presidential task force on energy policy.<sup>65</sup>

The executive branch today, in addition to the President, Vice-President and their staffs, is comprised of 15 executive departments (the cabinet).

### **The Judicial Branch**

Article III, establishing the federal judiciary, is the shortest of the three primary Articles in the Constitution. It creates the Supreme Court, but leaves to Congress the power to "ordain and establish" courts lower in stature than the Supreme Court.<sup>66</sup> This would include special courts with limited jurisdiction relating to Congress' power to regulate bankruptcy and maritime matters, for example. These courts are referred to as "inferior courts."<sup>67</sup> The Constitution itself does not specify the number of Supreme Court justices nor the number and organization of the inferior courts. This is left to Congress.

The federal courts' jurisdiction is limited in the Constitution to "cases and controversies."<sup>68</sup> That jurisdiction affirmatively includes cases involving the Constitution and all other federal law, cases in which the United States is a party; disputes between states or between citizens of different states (referred to as "diversity"); cases involving ambassadors and public officials; and cases in which admiralty or maritime issues are raised.<sup>69</sup> Except for matters involving ambassadors and public officials and in which a state is a party, over which it has "original jurisdiction,"<sup>70</sup> the Supreme Court may hear cases and controversies only on appeal from lower courts' decisions (i.e., appellate jurisdiction).<sup>71</sup> But the Constitution grants to Congress the power to create exceptions to and regulate this jurisdiction, including the authority to determine where cases are to be heard.<sup>72</sup> Similarly, the

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<sup>63</sup> United States v. Nixon, 418 U.S. 683 (1974)

<sup>64</sup> Senate Select Committee on Presidential Campaign Activities v. Nixon, 370 F.Supp. 521 (D.D.C., 1974)

<sup>65</sup> Cheney et al v.U.S. District Court for the District of Columbia, 542 U.S. \_\_\_\_ (2004) No. 03-475 (June 24, 2004).

<sup>66</sup> Article III §1

<sup>67</sup> *Id.*

<sup>68</sup> The "cases and controversies" limitation precludes the Courts, for example, from giving advisory opinions. This concept is also related to the requirements that a matter be "ripe" and not "moot." To be "ripe" a controversy must be real, not hypothetical; to have substance, not be too attenuated; to be present and immediate, not speculative – the controversy must be ready for judicial review and subject to judicial resolution. To be "moot", a controversy must have been resolved or otherwise ended – i.e., the dispute is no longer on-going and, therefore, there is nothing left to adjudicate.

<sup>69</sup> Article III §2. Originally, the federal courts would also be involved in disputes "between a State and Citizens of another State" and between a state or its citizens "and foreign States, Citizens or Subjects." Article III §2. However, the Eleventh Amendment, ratified in 1795, rescinded this jurisdiction. Specifically, the federal judicial power does not extend "to any suit...against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* Appellate jurisdiction is the power to review and revise a final judicial action by a lower court. In contrast, original jurisdiction defines the entry point – i.e., the court in which the case is first tried and which first passes judgment on the law and the facts.

<sup>72</sup> *Id.*

Constitution prescribes that criminal trials shall be heard by a jury and in the state in which the crime was committed.<sup>73</sup> But it does not specify the size of juries.<sup>74</sup> While this Article defines treason as either "levying War" against the United States or "giving Aid and Comfort" to its enemies and requires the testimony of two witnesses "to the overt Act" or an open-court confession in order to get a conviction, it leaves to Congress the determination of punishment for treason.<sup>75</sup>

Thus, Congress has considerable control over the organization and processes of the federal judicial system. As indicated above, some of this power is specified; and, to the extent that the Constitution is silent, Congress has passed legislation on various aspects of the system. Such legislation has frequently expanded and clarified various definitional and procedural matters. Congress has taken its responsibilities in this area seriously starting in 1789, with passage of the Judiciary Act. The resulting basic judicial structure remains, but the size, jurisdiction and procedural matters have been amended over the years and are codified in Chapter 28 of the United States Code (USC). Today, the Supreme Court is comprised of one Chief Justice and eight Associate Justices.<sup>76</sup> The inferior courts consist of 13 judicial circuits or Courts of Appeals<sup>77</sup> which, in turn, are comprised of one or more district courts in each state.<sup>78</sup>

The appointment of Supreme Court Justices and inferior court judges is for life, subject only to the requirement that they abide by the standards of "good Behavior."<sup>79</sup> Violations of these standards may subject the justices and judges to impeachment. Salaries and other compensation of the justices/judges is controlled by Congress (as is that of all federal positions), but Congress is constitutionally prohibited from cutting their compensation while they are in office.<sup>80</sup>

Congress' power over the federal judiciary is limited by the concept of separation of powers. This concept has, for the most part (in spite of recent political chatter), been respected by all branches of the government and the federal judiciary has remained relatively independent of the two political branches. The primary self-protection the Supreme Court has is that it is the ultimate interpreter of the United States Constitution.<sup>81</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Article III §3. It did restrict such punishment however. Congress is not permitted to include as punishment for treason confiscation of a convicted traitor's real property, preventing the traitor's heirs from inheriting it.

<sup>76</sup> 28 USC §1.

<sup>77</sup> 28 USC §41

<sup>78</sup> 28 USC §§81-131. New York has four district courts: the Southern District which covers Manhattan, Bronx, Dutchess, Orange, Putnam, Rockland, Sullivan, and Westchester counties; the Eastern District, covering the remaining boroughs of New York City plus Nassau and Suffolk counties; the Northern District, covering the northern tier of the state east of Syracuse (roughly); and the Western District, covering the remaining counties west of Syracuse. §112. Connecticut and New Jersey have one Federal District Court each. §§86 and 110, respectively.

<sup>79</sup> Article III §1.

<sup>80</sup> *Id.*

<sup>81</sup> The power of judicial review of legislative acts is not explicit in the Constitution. However, there is historical evidence that some representatives at the Constitutional Convention assumed and/or favored such review. See *The Federalist Papers*, #78 and 81. But it was Chief Justice Marshall who is credited with firmly establishing this principle in *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803).

### **The "Fourth Branch"?**

Congress has responded to the growth of the United States and the increasing complexity of modern life by expanding the President's cabinet and by creating more than 60 "independent agencies". While the President, in most cases, has appointment power over these independent agencies, the agencies are not responsible to the President. To some extent, Congress retains authority over these agencies through its investigative and funding appropriations powers. These agencies oversee and regulate various national activities. Many of the agencies have "legislative" functions (establishing regulations) and "judicial" functions (e.g., deciding disputed issues of facts and law by means of hearings before administrative law judges and panels of commissioners) as well as governmental management duties.

The growth of the independent regulatory agencies began in 1887 when Congress created the Interstate Commerce Commission. Slow expansion of this sector over the next 40 or so years was followed by roughly two surges: during the New Deal era of the 1930's and then in the 1960's and 1970's. Independent agencies recently in the news include: the Equal Employment Opportunity Commission (EEOC), Federal Communication Commission (FCC), Federal Election Commission, Federal Reserve System, Federal Trade Commission (FTC), National Aeronautical and Space Administration (NASA), National Endowment for the Arts (NEA), National Science Foundation (NSF), National Transportation Safety Board (NTSB), Nuclear Regulatory Commission (NRC), Occupational Safety and Health Administration (OSHA), Office of Special Counsel, Pensions Benefit Guarantee Corporation, and the Securities and Exchange Commission (SEC).

It was the Brownlaw Committee, appointed by Franklin Roosevelt to review the rapidly expanding administrative agencies, that was the first to label this sector of the government the "headless fourth branch." The breadth of power of these agencies (plus the various administrative agencies within the cabinet) may warrant this label even more today.

### **The Federal-State Relationship and Interstate Relations**

The thirteen colonies rebelled against the British crown as independent, sovereign states. They became the "successors of the crown," each separately assuming sovereign powers. In adopting the Articles of Confederation, the states delegated enumerated powers to the federal government and reserved the remainder to themselves – i.e., they retained "every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States."<sup>82</sup> By ratification of the 1787 Constitution, the states granted additional powers to the federal government. Enumerated powers were expanded by adding the taxing power and the power to regulate interstate and foreign commerce. But the "necessary and proper" clause, among others, ceded broader, more general authority.

Article VI of the Constitution, called the "supremacy clause," imposes a specific restriction on the otherwise totally unlimited reserved sovereignty of the states:

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<sup>82</sup> Articles of Confederation, Article II.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.<sup>83</sup>

In addition, Article I prohibits states from engaging in some of the enumerated powers granted to Congress (e.g., to make treaties, coin money, declare war) and imposes some of the same restrictions of power imposed on Congress (e.g., no ex post facto laws, no bills of attainder, etc.).<sup>84</sup>

While this may appear overbearing, a substantial amount of law and governance resides with the states. Though not exclusively, states dominate with respect to such areas as tort law (e.g., civil suits for negligence), family law (marriage, divorce, adoption, child support, etc.), criminal law, insurance regulation, public education administration and finance, contract law, professional licensing, and more – in fact, everything the British crown could do unless barred by express constitutional provisions or congressional action under the federal supremacy clause.<sup>85</sup> Further, in return for ceding powers to the federal government, the federal government commits to defend the states from invasion and, upon request, against intra-state disturbances.<sup>86</sup> It also commits to guarantee a representative form of government to every state.<sup>87</sup>

As to relations among the states, the Constitution provides that the laws and court judgments of each state shall be given "full Faith and Credit" by all states.<sup>88</sup> This is augmented by the provision that every citizen is "entitled to all Privileges and Immunities of Citizens in the several States."<sup>89</sup> Thus, traditionally at least, each state's rules of marriage and divorce have been recognized in each of the other states. The Constitution further provides for the extradition between the states of people charged with criminal offenses.<sup>90</sup>

Finally, the Fourteenth Amendment, ratified in 1868, has been construed by the Supreme Court to extend much of the Bill of Rights to "all persons,"<sup>91</sup> as citizens (see following). Specifically,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

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<sup>83</sup> Article VI, second paragraph.

<sup>84</sup> Article I §10.

<sup>85</sup> A recent illustration of the reserved powers of the states involves a copyright infringement case relating to some 1930's recordings of classical music. *Capital Records, Inc. v. Naxos Am., Inc.* 817 NE 2<sup>nd</sup> 820, 2004 NY. The U.S. Court of Appeals for the Second Circuit inquired of the New York State Court of Appeals (New York's highest court) if New York common law copyright protections covered the controversy being reviewed. Writing the unanimous opinion for the New York court, Judge Graffeo traces New York's adoption of English common law. With respect to copyright, this law dates back to decrees of the Star Chamber in 1586 and 1637. With the ratification of the Constitution and subsequent legislation, federal copyright law supercedes the majority of state copyright law. However, currently, federal law protects recordings made subsequent to 1971 only – not those made in the 1930's. Federal copyright law will preempt the state common law copyright in 2067. *USCOA, Capitol Records, Inc. v. Naxos of America, Inc.*, 4 NY 3<sup>rd</sup> 540 (5 April 2005)

<sup>86</sup> Article IV §4

<sup>87</sup> *Id.*

<sup>88</sup> Article IV §1

<sup>89</sup> Article IV §2

<sup>90</sup> *Id.* Originally, this section also prohibited one state from freeing the slaves from another state, requiring that they be returned on demand to the owner. This provision was rescinded with ratification of the Thirteenth Amendment in 1865.

<sup>91</sup> Amendment XIV §1

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>92</sup>

### **Amending the Constitution**

The delegates to the Philadelphia Convention recognized that the Constitution might, on occasion, require some formal adjustments. However, they prescribed in Article V a process to amend the Constitution that is quite rigorous.

Congress may propose to the states such amendments as it deems "necessary" only when such proposals are approved by 2/3 of both houses. Alternately, if the legislatures of 2/3 of the states apply, Congress "shall call a Convention for proposing Amendments."<sup>93</sup> Amendments, whether proposed by Congress or by such a convention, "shall be valid to all Intents and Purposes, as Part of this Constitution," when ratified by ¾ of the state legislatures or state conventions.<sup>94</sup>

This Article does prohibit two types of amendments. Prior to 1808, no amendment may affect the slave trade. No amendment may deprive a state, without its consent, of "equal Suffrage in the Senate"<sup>95</sup>

Many possible amendments do not make it through this process. Amendments discussed in recent years that have not been formally proposed to the states involve the prohibition of flag-burning,<sup>96</sup> the limitation of marriage to opposite sex couples, and end-of-life issues.

### **Individual Rights**

The core of individual rights protected in the Constitution are addressed in the Bill of Rights. These first ten Amendments became effective on 15 December 1791. The First Amendment is unique among the ten in that it starts with "Congress shall make no law...;" the others speak in terms of rights that are not to be violated or that are granted or acknowledged, for example. The majority of these rights, as with other portions of the Constitution, have been subjected to debate and considerable judicial construction and interpretation since ratification of the Bill of Rights. This section touches on only a small portion of this judicial activity.

The First Amendment prohibits the "establishment" by law of a national religion. This "establishment clause" is cited in protests against public funding of religious-based education or social services. It is often confused with its companion, the right of individuals to freely exercise their religion. For example, is prayer in the public schools an action which tends to establish or sanction a particular

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<sup>92</sup> *Id.* Elements of this Amendment will be discussed further in the following section of this paper.

<sup>93</sup> Article V

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> The House has passed a bill proposing an amendment prohibiting the "desecration" of the flag; as of the August 2005 recess, this had not been voted on in the Senate.

religion or does it impinge on some people's right of religious expression? Could it be both?<sup>97</sup> The free exercise provision has been used, for example, by members of certain religions to defend their refusal of medical care for their children.<sup>98</sup>

The First Amendment also protects the freedoms of speech and of the press, and the rights to assemble and to petition the government. None of these is absolute, however. For example, one cannot slander another without legal liability. Political contributions (viewed as speech) may be restricted.<sup>99</sup> Concerning freedom of the press, reporters may be jailed for contempt for refusing to reveal confidential sources in federal criminal proceedings,<sup>100</sup> but not in many state courts.<sup>101</sup> Local laws requiring permits based on public safety issues are an acceptable balancing of the right to assemble or petition the government.

The Second Amendment, setting forth the "right of the people to keep and bear arms," has been disputed, particularly in recent years. Is it subject to restriction? Is this right limited by the stated purpose to maintain "A well regulated Militia, being necessary to the security of a free State?"

The Third Amendment, though significant following the Revolution, is not particularly relevant today. It prohibits the quartering of troops in people's homes without the owner's consent in peacetime, but would permit quartering in time of war under appropriate law.

The Fourth, Fifth, Sixth and Eighth Amendments protect individual rights related, for the most part, to criminal proceedings. These rights are often perceived to be in conflict with society's efforts to protect itself. The Fourth Amendment prohibits "unreasonable searches and seizures" and requires that "probable cause" be the basis for searches or arrests and for issuing warrants for searches and arrests. The definitions of "unreasonable" in this context and "probable cause" have frequently been disputed. For example, is it reasonable for a policeman, who has stopped you on the street to ask questions about an incident you may have observed, to physically search your pockets? Is it reasonable for a policeman to assume that a person committed a crime based only on a hunch or must he have observed some amount of evidence linking that person to the crime?

The most famous protection afforded by the Fifth Amendment is that against self-incrimination. This protection was among the bases for the Miranda warning (the right to remain silent, the warning

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<sup>97</sup> See the recent Supreme Court cases concerning public display of the Ten Commandments in a state courthouse versus among other historical displays. *McCreary County, Kentucky et al v. American Civil Liberties Union of Kentucky et al*, 545 U.S. \_\_\_\_ (No. 03-1693, 27 June 2005) and *VanOrden v. Perry*, 545 U.S. \_\_\_\_ (No. 03-1500, 27 June 2005).

<sup>98</sup> This argument is not always successful in light of child endangerment or public health laws.

<sup>99</sup> *McConnel v Federal Election Commission*, 540 U.S. 93 (2003)

<sup>100</sup> Judith Miller, a reporter with *The New York Times*, was held in contempt for refusing to reveal confidential sources to the Special Prosecutor investigating the outing of a CIA agent to several reporters by people from the White House, following the agent's husband's Op Ed article in *The New York Times* which refuted the administration's claims of Iraq's attempt to purchase from Niger materials to support its development of nuclear bombs. With the denial of an en banc rehearing by the U.S. Court of Appeals for the D.C. Circuit, 405 F.3d 17, and the denial of certiorari by Supreme Court in June 2005, the original ruling of the Appeals Court, 397 F.3d 964 (D.C.Cir., 2005) affirming the Federal District Court's finding stands.

<sup>101</sup> For example, in New York State "No professional journalist ... shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist ... held in contempt ... for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of such news ..." New York Consolidated Code §79-h(b). The same is true for news obtained not in confidence or not from a confidential source unless "the party seeking such news [or source] has made a clear and specific showing that the news (i) is highly material and relevant ; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source." In this latter situation, a court may order disclosure of only a small portion of the news that meets these three criteria. *Id.* subsection (c).

that anything you say may be used against you, the right to a lawyer, and so on) required of police on detaining a suspect.<sup>102</sup> Though use of this warning was initially thought to reduce police chances of obtaining convictions, it is broadly viewed today as not impeding investigations.

Another protection provided by the Fifth Amendment is that against double jeopardy. That is, one cannot be tried for the same crime more than once. While there is a myriad of subtleties related to this concept (as there is with many Constitutional concepts), a basic notion not generally understood by the public is that an act by a person may actually be an element of more than one crime, or of both a crime and a civil infraction, or of both a federal and a state crime. For example, assault is defined in most jurisdictions as a crime, but also as a tort which could result in actions in civil courts for damages to the victim. Similarly, a crime committed in two jurisdictions may be tried in both jurisdictions. For example, a kidnapping in one state involving crossing state lines where the victim is then murdered, could result in prosecutions in federal court as well as the courts of the two states involved.

A major guarantee of the Fifth Amendment is the right to "due process of law" before being "deprived of life, liberty, or property." Due process is a far-reaching concept that covers both criminal and civil matters. To be "due," the process must include mechanisms assuring all the individual rights afforded by the Constitution and the common law appropriate to the circumstances. Due process, thus, incorporates many rights, including particularly in criminal matters those provided by the Sixth Amendment. These include:

- the "right to a speedy and public trial,"
- to be tried by an impartial jury,
- to be tried "in the State and district" where the crime was committed,
- "to be informed of the nature and cause of the accusation,"
- "to be confronted with the witnesses against him,"
- to be able to subpoena "witnesses in his favor," and
- "to have the assistance of counsel for his defense."<sup>103</sup>

Finally, the Eighth Amendment prohibits "excessive bail," "excessive fines" and "cruel and unusual punishment."

The final clause of the Fifth Amendment provides that "private property [shall not] be taken for public use without just compensation." The debate on what is a "taking" extends back at least as far as the late 19<sup>th</sup> century and, in recent years, has been an issue in challenges to environmental laws that restrict land use.<sup>104</sup> Most recently, the Supreme Court reaffirmed that a city's condemnation of private

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<sup>102</sup> *Miranda v Arizona*, 384 U.S. 436 (1996).

<sup>103</sup> It wasn't until 1963 in *Gideon v. Wainwright*, 372 U.S. 335, that the right to counsel to be appointed by the court, if one was not able to afford a lawyer, was extended to state courts by the Supreme Court via the Fourteenth Amendment. This is the basis for the state- and county- funded legal assistance programs. As early as 1932, such assistance was required to be "effective". *Powell v. Alabama*, 287 U.S. 45. Conduct of an attorney is deemed ineffective only where there is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington*, 466 U.S. 688 (1984) at 694); and that the trial result was unfair or unreliable (*Lockhart v. Fretwell*, 506 U.S. 364 (1993)).

<sup>104</sup> For example, regarding federal or state wetlands protection. See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *United States v. Riverside Bayview Homes, Inc.*, 475 U.S. 121[get year].

property as part of its economic development plan was for a "public use," even though the property was to be turned over to a private developer.<sup>105</sup>

The Seventh Amendment provides for jury trials in common law or civil suits.

The Ninth Amendment in the Bill of Rights reserves to the people rights not enumerated in the Constitution. In 1965, Justice Goldberg, in a concurring opinion,<sup>106</sup> discusses the history of the Ninth Amendment and states "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."<sup>107</sup>

Finally, the Tenth Amendment reserves to the states or to the people powers "not delegated to the United States ... nor prohibited... to the states."<sup>108</sup> It has long been held by the federal courts and accepted by the other branches of government (until recent political buzz) that this Amendment has no affirmative effect. That is, it simply recognizes the reserved sovereignty of the states, discussed above. As Justice Stone said, the Tenth Amendment states

but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it is more than declaratory of the relationship between the national and state governments as it had been established or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.<sup>109</sup>

Debate about the Tenth Amendment has grown out of judicial consideration of the extent of Congress' power under the commerce clause. Within the last decade, the Court in two cases,<sup>110</sup> may be construed to have cast a shadow over the idea expressed by Justice Stone; but a 2005 decision probably erases that shadow.<sup>111</sup>

## **Post Civil War and Voting Rights Amendments**

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<sup>105</sup> Kelo v. City of New London, 545 U.S. \_\_\_\_ (2005) No.04-108 (23 June 2005). As reported in the Sunday New York Times, 31 July 2005, Section 14, p. 1, 6, New York, Connecticut, Kansas, Maryland, North Dakota, and Minnesota laws "broadly interpret the Constitution's phrase 'public use' allowing governments to readily condemn private property for economic development." The New York Times article discusses such development in Portchester, NY. Historically, the taking of the property needed to develop Lincoln Center, in Manhattan, is another example of action under this interpretation.

<sup>106</sup> Griswold v. Connecticut, 381 U.S. 479 at 485 et seq. This case affirmed the right to marital privacy and ruled that Connecticut's law prohibiting the distribution and use of contraceptives violated this fundamental right.

<sup>107</sup> *Id.* at 488.

<sup>108</sup> Amendment X

<sup>109</sup> U.S. v. Darby, 312 U.S. 100, 124 et seq.(1941)

<sup>110</sup> See United States v. Morrison, 529 U.S. 598 (2000), holding that Congress exceeded its authority when it enacted the federal law providing for a civil remedy for victims of gender-motivated violence; United States v. Lopez, 514 U.S. 549 (1995), holding that Congress exceeded its commerce clause authority by its passage of the Gun-Free School Zones Act of 1990, banning possession of a gun within 1,000 feet of schools.

<sup>111</sup> Gonzales v. Raich, 545 U.S. \_\_\_\_ (2005), No. 03-1454, holding that Congress does have the authority to regulate the growth of marijuana even for local medicinal use in compliance with California law.

Many of the Amendments subsequent to the Bill of Rights grant to Congress additional power to enforce provisions of the Amendments by means of passing "appropriate legislation." This leaves to Congress, then, at least the initial interpretation of these provisions. All of the post Civil War and voting rights Amendments include this enforcement language.

The Thirteenth, Fourteenth and Fifteenth Amendments resulted from the Civil War. The Thirteenth actually bans slavery. The Fourteenth Amendment, in addition to being used to judicially extend portions of the Bill of Rights to state actions, establishes all former slaves as citizens and, thereby, subject to all individual rights and protections provided by the Constitution.<sup>112</sup> It also specified that the number of Representatives in the House be based on the "whole number of persons in each State"<sup>113</sup> and that, to the extent male citizens, 21 years of age and older were denied voting rights, the state's representation in the House would be proportionately reduced<sup>114</sup> (a provision never enforced). Excluded from this provision were people who participated "in rebellion, or other crime."<sup>115</sup> Two additional punishments imposed on the South include:

- banning from elected or appointed, military or civilian office in the federal or state government anyone holding a position that required an oath in support of the Constitution<sup>116</sup> who "engaged in insurrection or rebellion against [the United States] or [who gave] aid and comfort to the enemies thereof;"<sup>117</sup> and
- prohibiting the federal government and the states from assuming or paying "any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void."<sup>118</sup>

The Fifteenth Amendment, ratified in 1870, guarantees that the right to vote "shall not be denied or abridged ... on account of race, color or previous condition of servitude." Congress, nearly 100 years after being authorized to do so, passed the Voting Rights Act of 1965.<sup>119</sup> Voting rights were extended to women in 1920 by the Nineteenth Amendment, following the long years of arduous struggle by the suffragettes. The Twenty-Fourth Amendment, ratified in 1964, banished the poll tax and other taxes as mechanism for preventing a person from voting; and the Twenty-Sixth Amendment, ratified in 1971, lowered the voting age from 21 to 18 years.

These Amendments, resulting as they did from war and/or protest, have sparked periods of active governmental and public debate and controversy. This is particularly true concerning the Thirteenth, Fourteenth, Fifteenth and Twenty-Fourth Amendments.

During the Reconstruction era following the Civil War, there was a flurry of civil rights legislation in addition to the ratification of the Thirteenth, Fourteenth and Fifteenth Amendments. Many of these laws, however, were met not only with resistance from the southern states but also with narrow interpretation by the federal courts which limited the impact of the new laws (and the Amendments).

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<sup>112</sup> Amendment XIV §1

<sup>113</sup> Amendment XIV §2

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Almost everyone involved in the Confederate States of America

<sup>117</sup> Amendment XIV §3. Congress is given the power to restore rebels' rights by a 2/3 majority vote in each house of Congress.

<sup>118</sup> Amendment XIV §4

<sup>119</sup> 42 USC 1971 et seq.

For example, the Civil Rights Acts of 1866, 1870, 1871 and 1875 were efforts to enforce the Amendments, providing both criminal and civil liabilities and extending protections beyond voting rights.<sup>120</sup> In 1875, the Supreme Court, dealing with a federal indictment under the 1870 Act of three people for the lynching of two blacks, held that the federal government did not have the authority to protect the rights of one citizen against another.<sup>121</sup> In a subsequent decision in 1883, known as "The Civil Rights Cases," the Supreme Court overturned significant portions of the 1875 Act.<sup>122</sup> That is, to the extent the law proscribed actions of individuals against others "without referring in any manner to any supposed action of the State or its authorities,"<sup>123</sup> the law cannot be upheld.

Probably the most famous civil rights case of the Nineteenth Century was *Plessy v. Ferguson*,<sup>124</sup> which did involve "state action" in the form of imposing racial segregation in public schools and an inferior education to black children. This case established the concept of "separate but equal."

But it wasn't until the mid-Twentieth Century – nearly 100 years after the Civil War – that Americans vehemently protested lack of progress and the three branches of government more or less coalesced in the enforcement of the post-Civil War Amendments. The Supreme Court recognized the failure of the "separate but equal" doctrine in the two *Brown v. Board of Education of Topeka* cases and required that public schools be made racially integrated "with all deliberate speed."<sup>125</sup> In 1955, Rosa Parks was arrested in Montgomery, Alabama for refusing to go to the rear of a bus as required of black people; and black citizens, led by Dr. Martin Luther King, Jr., boycotted public transportation in Montgomery. In 1957, President Eisenhower ordered federal troops to Little Rock, Arkansas to protect the black children entering an all-white school from riotous white parents. In 1961, a Federal District Court Judge in Macon, Georgia ordered the University of Georgia to readmit and protect Charlayne Hunter and Hamilton Holmes following their "protective" suspension resulting from race riots over their admission to the university. Sit-ins at lunch counters, freedom rides, marches, voter registration drives in the south were regularly in the news. NAACP and CORE<sup>126</sup> became well-known acronyms. And, pushed by President Lyndon B. Johnson, Congress passed the Civil Rights Act of 1964. This was followed by the Civil Rights Act of 1968. Both revitalized and amended the civil rights laws of nearly a century before. Congress also passed the Voting Rights Act of 1965. The Supreme Court upheld congressional authority vis a vis these laws, in a long string of cases relating to schools, public accommodations, employment and voting.

But the battle for equal rights for all citizens goes on. Segregation in schools, housing and employment still exists in fact, if not in law. Solutions of the past, such as school busing and affirmative action, are disputed and, some say, undermined by some of the very people who have benefited by them. Subtle and sometimes not so subtle discrimination is still experienced today by blacks and other minorities in America.

The legacy continues.

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<sup>120</sup> Certain provisions of these acts, though modified over the years, do survive in spite of opposition. For example, 42 USC §1983 permits civil action where a person's constitutional or other federal legal rights are violated under the "color of law"; 42 USC §1985(3) provides for civil actions for certain types of private anti-civil rights conspiracies.

<sup>121</sup> *U.S. v. Cruikshank*, 92 U.S. 542.

<sup>122</sup> 109 U.S. 3. This decision involved four criminal cases and one civil action growing out of the exclusion of blacks from hotels, theaters and railroads from California, Kansas, Missouri, New York and Tennessee.

<sup>123</sup> *Id.*

<sup>124</sup> 163 U.S. 537 (1896)

<sup>125</sup> 347 U.S. 483 (1954) and 349 U.S. 294 (1955)

<sup>126</sup> Congress of Racial Equality

## Other Amendments

The only two Amendments not previously discussed in this paper are the Eighteenth and the Twenty-First, which repealed the Eighteenth.

The Eighteenth Amendment, ratified in 1919, prohibited the "manufacture, sale or transportation of intoxicating liquors." This prohibition led to a notorious period in U.S. history of boot-legging and related organized crime activity, which were significant characteristics of the Roaring Twenties. Apparently by 1933, the nation realized its mistake and repealed Prohibition by ratification of the Twenty-First Amendment.<sup>127</sup> It is noteworthy that this Amendment also delegated to the individual states the power to restrict transportation and importation of intoxicating liquor "for delivery or use therein."<sup>128</sup> However, the Supreme Court has just this year held that the state laws limiting the purchase and importation of wine from out-of-state via the internet "discriminated against interstate commerce in violation of the Commerce Clause, Art.I, §8, cl. 3, and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment."<sup>129</sup>

## In Conclusion

The Constitution may be characterized as a document comprising the primary law of the United States as it has been and will continue to be adapted to the changing needs and aspirations of the people. More specifically, as Justice Brandeis wrote in 1922:

It is a living organism. As such, it is capable of growth – of expansion and of adaptation to new conditions ... Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever-developing people.<sup>130</sup>

Thurgood Marshall supported this view in his remarks at a seminar in San Francisco in 1987:

I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for individual freedoms, and human rights, we hold as fundamental today. When contemporary Americans cite "The Constitution", they invoke a concept that is vastly

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<sup>127</sup> §1

<sup>128</sup> §2

<sup>129</sup> Granholm v Heald, 544 U.S. \_\_\_\_, No 03-1116, 16 May 2005.

<sup>130</sup> As quoted by William J. Brennan, Jr. in "Why Have a Bill of Rights?" Valparaiso University Law Review, Vol. 26, No 1 (1991), p. 2.

different from what the Framers barely began to construct two centuries ago.<sup>131</sup>

And finally, in the words of Warren E. Burger, Chief Justice of the United States, 1969 – 1986, "This Constitution was not perfect; it is not perfect today even with amendments, but it has continued longer than any other written form of government.."132

### Suggested Additional Reading

This section barely touches the surface of the hundreds of thousands, probably millions, of books and articles available on the Constitution, the branches of government, and the thousands of major players in the evolution of our government. There are biographies of most of the nations' founders and the Constitution's framers; all the Presidents (even Warren G. Harding) and some presidential candidates; many Supreme Court Justices, Chief Justices and other distinguished federal jurists; several members of Congress, both the famous and infamous; cabinet secretaries; leaders of various social and political movements.

There are numerous government websites. Virtually every executive department and independent agency has its own site. To get to these sites, you can go through <http://www.loc.gov/rr/news/fedgov.html>. The congressional site is <http://thomas.loc.gov>. The Supreme Court's site is <http://www.supremecourtus.gov>. Another good source is the Government Printing Office at <http://gpoaccess.gov>. An excellent legal source is the Cornell Legal Information Institute at <http://www.law.cornell.edu>. Another general law source is <http://findlaw.com>.

In general, *The Washington Post*, *The New York Times*, *The Christian Science Monitor*, and *The Wall Street Journal* provide good coverage and analysis of the events within the federal government. Linda Greenhouse's reports in the *Times* on the Supreme Court provide good summaries of the Court's calendar, arguments in various cases, and the Court's conclusions. Her term-end wrap-up reports are strongly recommended.

Some interesting historical and biographical books include:

- *The Federalist Papers*
- Joanne B. Freeman, ed., *Hamilton Writings*
- Ron Chernow, *Alexander Hamilton*
- David Halberstram, *The Best and the Brightest*
- Joseph P. Lash, *Eleanor and Franklin* and *Eleanor: the Years Alone*
- William Manchester, *The Death of a President*
- David McCulloch, *John Adams* and *Truman*
- Edmund Morris, *The Rise of Theodore Roosevelt* and *Theodore Rex*

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<sup>131</sup> "Reflections on the Bicentennial of the United States Constitution," reprinted in *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences*, Mark V. Tushnet, ed., The Library of Black America (2001), p. 282.

<sup>132</sup> Forward to *The Constitution of the United States*, Commission on the Bicentennial of the United States Constitution, Washington, DC, 1991 (13<sup>th</sup> Edition).

- Almost any book authored or co-authored by Arthur M. Schlesinger or Arthur M. Schlesinger, Jr.
- Theodore H. White, *Breach of Faith: The Fall of Richard Nixon* and any of the *Making of the President* series (1960,, 1964, 1968, 1972)
- Bob Woodward and Carl Bernstein, *The Final Days* and *All the President's Men*

A few books relating to the Supreme Court would include:

- Martin Garbus, *Courting Disaster: The Supreme Court and the Unmaking of American Law*
- John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States*
- Mark V. Tushnet, ed., *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions and Reminiscences*
- Bob Woodward and Scott Armstrong, *Brethren: Inside the Supreme Court*

And related to the Bill of Rights:

- Floyd Abrams, *Speaking Freely: Trials of the First Amendment*
- Noah Feldman, *Divided by God.*
- Anthony Lewis, *Gideon's Trumpet* and *Make No Law: The Sullivan Case and the First Amendment*
- Gary Wills, *A Necessary Evil: A History of American Distrust of Government*

Finally, on impeachment:

- Raoul Berger, *Impeachment*
- William H. Rehnquist, *Inquest: This Historic Impeachments of Justice Samuel Chase and President Andrew Johnson*

And many, many more.

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