

Constitution Class Handout
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Lesson 7: Faithfully Execute

He

The first word of Article II, Section 3 is “He.” The word refers to the President of the United States. I have actually had some people, who oppose the Constitution, tell me that the word “He” being used is evidence that the Constitution disallows women from being President. They then argue that if a woman was to become President, because of the word “He” being used in the Constitution, anything she did in office would be unconstitutional since the Constitution does not allow women to be President of the United States.

Not necessarily.

As with other writings, such as the Holy Bible, often the word “He” may be used as a general term to represent both sexes.

In the case of the Constitution, it is conceivable, considering the mindset of the day, that the Founders did not think a woman would someday become President of the United States. I assure you, people like John Adams and Aaron Burr were exceptions to that line of thinking.

Aaron Burr was Vice President under Thomas Jefferson, and he actually was one that proposed that there be a uniform rule across the nation that enabled women to vote.

If you look through the Constitution, there is no place in the Constitution that says women cannot vote, or run for office. The reason women were not able to vote, or run for office, was because the States were given the authority over the rules of elections, and during that time the States did not allow women to vote or hold office. Much of that changed in some States and territories long before the Suffrage Movement, but it took a Constitutional amendment to make the practice uniform among all States.

Therefore, the first word of Article II, Section 3, being “He,” is simply a general term. Whoever the first female President is in the future, she will be fully entitled, upon being elected, to assume the Office of the President of the United States.

State of the Union

“He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.”

The **State of the Union address** is supposed to be as it is worded in the Constitution, a speech about the state of the union addressed to Congress by the President. It is not supposed to be a campaign speech, it is not supposed to be a popularity speech, nor a chance to take a stab at political opposition. The speech is simply supposed to be an opportunity for the President to give the Congress information regarding the state of the union.

The speech is also not supposed to be designed as an address to the people, either. It was expected that the electorate would be interested in hearing the speech, and that the press would report on the speech, for it is in our interest to know what the state of the union is. But, the specific reason for the State of Union address is to give Congress information of the state of the union.

There is an additional reason for the State of Union address should the President deem it necessary. According to the Constitution, he may during the speech *“recommend to their Consideration such measures as he shall judge necessary and expedient.”* Of course, he can do this during the normal course of his presidency, as well. The word *“recommend to their consideration”* in this part of the clause gives us a clue to the limits on the powers of the President.

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

This means that the authority to make law, modify law, repeal law, and strike down law - “all” legislative powers - are granted to the Congress by the States.

Article II, Section 3 says the President can “recommend” to their “consideration” such measures. He cannot act without Congress, he cannot put measures into place “with or without Congress,” and at best he can “recommend” to Congress his own ideas regarding legislation that he would like to see Congress initiate. The President can only “recommend to their consideration,” because he has no legislative capacity. He cannot make Congress do anything, and he cannot act legislatively without Congress.

Executive Orders

The President has the authority to issue Executive Orders. An **Executive Order** is a proclamation. Executive Orders began back when George Washington was President. His Thanksgiving Proclamation was an Executive Order. Executive Orders serve two functions. They may be used to change the processes within the Executive Branch, because the rules of the internal workings of the Executive Branch are up to the

President. Or, an Executive Order may be used to issue a proclamation that is not legally binding.

No place in the Constitution does the document give the President the allowance through Executive Order to modify, repeal or make law. Executive Orders have been used often in history to modify law, but that is an unconstitutional executive action. The President does not have that kind of authority.

Since all of the **regulatory agencies** in the United States Government are a part of the executive branch, they are also bound by the same limitations. Like the President, regulatory agencies cannot act legislatively. Whenever they make a regulation that is not to directly regulate (put in good order and execute) an existing constitutional law, but to regulate an unconstitutional law, or to create a new law, it is outside the authorities granted to the executive branch by the Constitution.

On March 26, 2012, **Cap and Trade** auto emission legislation failed to pass through Congress. The Environmental Protection Agency began to auction greenhouse gas allowances anyway, effectively taxing emissions and regulating in a manner consistent with Cap and Trade should it have passed as a piece of legislation.

On December 20, 2010, when an Internet regulation bill failed to pass through Congress, the Federal Communications Commission announced it would regulate the Internet anyway. The FCC's new regulations controlled the way service providers may manage their network transmissions.

The regulatory agencies are under the **Executive Branch**, and are not a part of the **Legislative Branch**. A **Separation of Powers** exists, limiting each branch to only the authorities granted to it, and any part of the executive branch, including the regulatory agencies, do not have any **legislative authority**.

Extraordinary Occasions

“He may, on extraordinary occasions, convene both Houses, or either of them.”

What is an extraordinary occasion? That would be an emergency, or during a time that matters are urgent. If the President believes a matter needs to be tended to, he can compel the Congress to be in session. In other words, it is constitutional when the President says something like, “I’m working, so Congress needs to be, too.”

An extraordinary occasion can be wartime, budget discussions, or anything else the President determines to be an extraordinary occasion.

This includes when there is a “disagreement between them (the Houses).” The President may choose when the Houses will meet, as he feels is proper.

The President was expected to be a man of sacred honor, and it was believed he would

use this authority wisely, and not in excess based on the whims of his ideology fancy.

In Article I, Section 5 the Constitution instructs that the Houses may not **adjourn** without the permission of the other House. But what if they refuse to allow the other House to adjourn? This is where the President comes in. If, because of disagreement, the Houses won't allow each other to adjourn, the President, if he feels it is necessary, "may adjourn them to such time as he shall think proper."

The President can compel the Houses to convene, or adjourn, as he feels necessary, as well.

He can't force them to make particular laws, per se, but he can make them be in session to get the work done, or take a break if he sees it as necessary.

As much as Congress has control over when they convene or adjourn, the President does have the authority if things are getting out of hand, or for whatever other reason he deems necessary, to override Congress' decision of when to convene or adjourn.

An appropriate example would be during wartime. The President's war powers enable him to put the military into action. If he feels there should be a declaration of war, would like to discuss his war plans with the Congress, or requires an apportionment of funding for the military effort, he can compel them to be in session. He cannot force Congress to declare war, or approve of his actions, but he can ensure they are in session so that the politics of war may be discussed.

If some of the members of Congress have a problem with the actions of the President so that they refuse to convene, he can then order Congress to convene so that he may discuss with them the issues at hand. If there are enough to qualify as a **quorum**, it is not necessary to compel the absent members to be in attendance. If Congress does not meet the requirement for a quorum, and the President believes the matter to be an extraordinary occasion, he can then compel the absent members to attend.

Receiving Ambassadors and Other Public Ministers

The President may invite important people to Washington, be they ambassadors, or other officials. Having the Chinese leader over for a dinner at the White House, or entertaining a group of diplomats, for example, is completely constitutional.

Regulatory Agencies

"He shall take Care that the Laws be faithfully executed."

This clause establishes the enforcement arm of the Executive Branch, which eventually became the **regulatory agencies**.

The clause is definitive in its instruction to the President regarding the execution of the

laws of the United States by using the word “shall.” The words “take Care” places an additional importance upon ensuring the laws of the United States are executed. The word “Care” in this clause is capitalized, placing emphasis on the word in a manner that we use today with *italics*. The laws must be executed with Care, and the Laws are expected to be “faithfully executed.” Faithfully, without exception, without preferences, and without ideological interference.

Laws, under the federal government, are only valid laws, if they are constitutional. If the laws are not made in line with the authorities granted to the federal government by the Constitution, they are not legal laws. The executive branch shall “execute” the laws - constitutional laws.

Some people say the Executive Branch is supposed to “enforce” the laws - and in a sense that is correct. But really, the Executive Branch is supposed to execute the laws - ensure they are carried out - Laws that were put into place constitutionally.

We are the final arbiters of the Constitution, but there are other steps along the way to ensure that unconstitutional laws don’t go into effect. The President represents one of those checks.

When President Obama determined DOMA was unconstitutional, and decided his agencies would not execute that law, he was acting constitutionally. The law is the law, however, and there is much discussion regarding if, considering that the President has decided the law is unconstitutional, he is compelled to ensure the law is executed. Also, if he refuses to execute constitutional law, calling it unconstitutional, it is our responsibility that he is removed, and replaced with somebody who will execute the laws appropriately.

The constitutional check in the hands of the President is not supposed to be utilized “after” a bill becomes a law, however. Unconstitutional laws are supposed to be caught before they get that far. The early President of the United States vetoed bills based on the constitutionality of the bill, and not necessarily because they disagreed with it ideologically.

In 1817, when President Madison deemed a public works bill unconstitutional, he simply refused to sign the bill into law, indicating in his written reason why he vetoed the bill that the proposed law was unconstitutional.

Congress can override a President’s decision not to execute a law on the books because he deems it unconstitutional, just like they can override a **veto**. The States may also enforce the law if the President refuses. Article I, Section 8 grants to Congress the authority to “provide for calling forth the Militia *to execute the Laws of the Union.*”

The reverse is also true. If the President tries to execute law, calling it constitutional, when it is not constitutional, the States can ignore those federal laws, or **nullify** them.

Officers of the United States

“... and shall commission all the Officers of the United States.”

The “United States,” as mentioned here in this final part of Article II, Section 3, does not mean The United States as a country. The United States is mentioned often in the Constitution, and whenever the “United States” is mentioned, it means one of two things. Either, it means “these States that are united,” or the “federal government.” Remember, to these early Americans, who considered themselves citizens of their States before they considered themselves “Americans,” the United States meant “these States that are united,” rather than a single, nationalistic, entity.

In this particular clause the “United States” means “federal government.”

As a result of that definition, you could also say that this part of the Constitution reads: “and shall commission all the officers of the *federal government*.”

The Senate must give consent, as indicated in Article II, Section 2 and Article I, Section 3, to the appointment of these officers, therefore, giving the U.S. Senate (and therefore “the States” prior to the 17th Amendment) the power of oversight over the President’s choices. This, in turn, means that *any and all* of the President’s czars are unconstitutional. Officers of the United States are any office holders in the government exercising significant authority pursuant to the laws of the United States, and czars are included in that definition.

Impeachment

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Impeachment is a term that means “To charge with misconduct.” Removal from office does not happen unless the official is “convicted.” In the case of the President and Vice President, the hearings are held by the U.S. Senate.

The reasons for impeachment may be for “Treason, Bribery, or other high Crimes and Misdemeanors.”

Treason is defined in Article III, Section 3 as “levying War against them (these States that are United), or adhering to their Enemies, giving them Aid and Comfort.”

Bribery is defined as meaning the exchange of money, promises, or other things, with someone in office, in order to influence that person’s views or conduct.

The real confusion comes when we talk about the final part: “or other **high Crimes and Misdemeanors**.”

When it comes to the phrase, "high crimes and misdemeanors" and the meaning of that phrase to the Founding Fathers, we must recognize the language used.

The word "high" in this context does not necessarily mean "more serious". It refers to those punishable offenses that only apply to high persons, meaning "public officials," or those who, because of their official status, are under special obligations that ordinary persons are not under.

For an official who was placed in office by the people, a crime offends the sense of justice of the people. When a public official commits these crimes, they can be more serious than if the same crime is committed by a citizen, because of the trust put into the office the official holds.

One of those high crimes is **Perjury**, which is more than merely "lying under oath". Under the definitions used by the Founders, perjury also means "violation of one's oath (or affirmation)". Therefore, the President refusing to protect and defend the Constitution, could be considered perjury.

The President is bound by his oath of office in all matters until he leaves office to follow the oath of office. While he holds that office, he is always under oath, therefore his failing to uphold the oath, or lying at any time, constitutes perjury if it is not justified for national security.

An executive official is also ultimately responsible for any failures of his subordinates and for their violations of the oath he and they took, which means violations of the Constitution and the rights of persons. The President's subordinates include everyone in the executive branch, and their agents and contractors. It is not limited to those over whom he has direct supervision. He is not protected by **plausible deniability**. The President is legally responsible for everything that everyone in the executive branch is doing.

Impeachment and removal proceedings may then encompass a full range of offenses against the Constitution and against the rights of persons committed by subordinate officials and their agents which have not been adequately investigated or remedied.

The meaning of the phrase "high crimes and misdemeanors," was common knowledge during the time of the founding of this nation. The phrase imports a concept in English Common Law of the word "misdemeanors" that essentially means bad behavior.

"Misdemeanors" in the language of the Founders, then, did not necessarily refer to a criminal act as many believe, but opened up the opportunity for impeachment of the President should he be guilty of gross incompetence, gross negligence, or outright distasteful actions which clearly show "malevolence toward this country and constitution, which is unabated."

The subject of impeachment was adopted from the English concept of this idea. In England impeachment was a device to remove from office someone who abused his office or misbehaved, but who was protected by the Crown.

James Madison said during the federal convention that impeachment ought to be used to reach a bad officer sheltered by the President and to remove him “even against the will of the President; so that the declaration in the Constitution was intended as a supplementary security for the good behavior of the public officers.”

At first, during the debates in the Constitutional Convention, the grounds for removal of the president were to be upon conviction “of mal-practice or neglect of duty” and subsequently this was changed to “Treason, or bribery.” George Mason objected to this limitation, saying that the term did not encompass all the conduct which should be grounds for removal. So, Mason proposed adding the term **maladministration** following “bribery.”

Madison objected, believing the term to be too vague, or too general. Mason then suggested “other high crimes and misdemeanors,” which was adopted without further recorded debate.

Term:

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

Bribery - The exchange of money, promises, or other things, with someone in office, in order to influence that person’s views or conduct.

Cap and Trade - Emissions trading; a regulatory approach to control pollution by providing economic incentives for achieving reductions in the emissions of pollutants; central control limit of amount of pollutants that can be emitted (cap), and companies are permitted to sell the unused portion of their limits to other companies who are struggling to comply (trade).

Executive Branch - The branch of government responsible for executing, or carrying out, the laws. An executive in government can be a president, or a governor.

Executive Order - An order issued by the President of the United States that may be a proclamation, or an order to change the processes within the Executive Branch.

High Crimes - Punishable offenses that only apply to high persons, meaning “public officials,” or those who, because of their official status, are under special obligations that ordinary persons are not under.

Legislative Authority - See Legislative Powers.

Legislative Branch - Congress; the branch of the federal government that is vested with

all legislative powers and consists of two Houses, the House of Representatives, and the United States Senate.

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

Maladministration - Inefficient or dishonest administration; mismanagement.

Misdemeanors - In the Constitution the definition is bad behavior including, but not limited to, gross incompetence, gross negligence, or outright distasteful actions which clearly show “malevolence toward this country and constitution, which is unabated”; maladministration.

Nullification - State power to ignore unconstitutional federal law.

Perjury - Lying under oath, violation of one’s oath (or affirmation).

Plausible Deniability - Circumstances where denial of responsibility or knowledge of wrongdoing cannot be proved as true or untrue due to a lack of evidence proving the allegation; when high ranking officials deny responsibility for or knowledge of wrongdoing by lower ranking officials; any act that leaves little or no evidence of wrongdoing or abuse.

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

Regulatory Agencies - Agencies within the Executive Branch tasked with executing the laws of the nation; the enforcement arm of the Executive Branch.

Separation of Powers - A division of governmental authority into three branches: legislative, executive, and judicial; division of powers between the States and federal government.

State of the Union address - A speech about the state of the union addressed to Congress by the President.

Treason - Levying war against the States, or adhering to the enemies of the States, giving aid and comfort to the enemy.

Veto - The power of a chief executive to reject a bill passed by the legislature in order to prevent or delay its enactment into law.

Questions for Discussion:

1. During what kind of circumstance can the President of the United States act legislatively? Why?

2. What kind of circumstances do you believe would be considered extraordinary by the Founding Fathers?
3. What is the proper role of the Regulatory Agencies?
4. Should failing to preserve and protect the United States Constitution be an impeachable offense? Why, or why not?

Resources:

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