

Notes on
The Odd Clauses:
Understanding the Constitution
Through Ten of its Most Curious Provisions
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1 Introduction

Some of the constitution has been looked at very carefully by lawyers and *went to court* to establish what they mean. Some clauses have even changed their meaning. BUT there are many parts that are just lying there and used occasionally. This book is about those types of clauses.

Each chapter is about one clause; however, the chapters often wander into related issues.

2 The Incompatibility Clause

No person holding an office under the United States, shall be a Member of either House during his continuance in office.

So, for example, a member of Congress cannot *also* be in the cabinet. Note that the cabinet often has *former* members of Congress. We are so used to this that it does not seem unusual. England and Israel allow joint-office holding. Some Americans have suggested we should allow it also.

Origin: In England promising another office to someone was a way to bribe them. Note that if someone is a senator AND a cabinet member they get a BIG salary.

Some people writing the constitution wanted to make it that a member of the house could NEVER be in the executive branch. That was too strict and is awkward. But such a strict law would prevent the following: a Senator is bribed by a president to do something with the promise that the senator resigns and THEN the president can put him in the cabinet. No double salary, but still pretty good. This may have happened when Henry Clay threw his votes to John Quincy Adams, and then resigned from the house and became Sec. of State, what Andrew Jackson called *The Corrupt Bargain*. A more recent problem is people who were president doing favors for other countries

and AFTER they stop being president, getting a benefit. Trump's children's business dealings with Saudi Arabia might be in the category. Hunter Biden's mistake was (if the Republicans are to be believed) being bribed WHILE Joe Biden was VP and not afterwards.

Here is a tricky case: If a member of Congress is in the Military Reserves (this was common during the Vietnam war) is that a double-office-holder? One judge said they need to NOT be in the reserves because its a conflict of interest to be voting on (say) going to war. The case never made it to court because the people who brought it (people against the Vietnam war) didn't have standing.

Here is an odd one: a member of Congress cannot take an office that was created when they were in Congress or had the salary increased.

1. When Hillary Clinton was a Senator the salary of the Sec of State was raised by the Congress. So when Obama wanted to appoint her, that was illegal. The compromise reached was that she would take the old salary. So after much legal wrangling her salary was \$4700 less.
2. DURING George Washington's term the SC justice created a new position. GW wanted to nominate a senator but DID NOT because the position was created while that guy was senator.
3. Nixon wanted to appoint Saxbe for his Attorney General. While Saxbe was a Senator the salary for AG when from \$35,000 to \$60,000 and then back to \$35,000. So he could take the job.
4. Orin Hatch was a Senator. During his time as a Senator the SC Justices salary went up. He was considered for being a SCJ. However this time the Justice Dept said NO The issue of *take the lower salary* was not discussed in the book. I think it would have been considered.

The book DOES say that is is arbitrary that the *accept the lower salary* was okay for Hillary but not for Orin. In general there are pragmatists and strict constitutionality's on the course. The pragmatists say its okay to take the lower salary, the Strict Consts say no.

The chapter also gets into how murky *Separation of Powers* can be. Its not actually in the constitution, and its hard to tell what function belongs to which branch. Woodrow Wilson's ugrad thesis was on Sep of Powers being ineffective and unresponsive to the people. In the 1980's a group of 200

scholars wrote a book about how to do better by doing away with Sep. The Incompatibility Clause would be removed, though I don't think that is the main part of Sep.

3 The Weights and Measures Clause

The Congress should have the power to fix the standards of weights and measures.

The book says that Congress can do a lot more than that. Here is a quote from the book (page 25):

Congress may impose taxes, borrow money, regulate commerce, make immigration and bankruptcy rules, coin money, fix the standard of weights and measures, punish counterfeiting, establish post offices, grant copyrights and patents, create lower courts, punish piracy, declare war, create and manage the army and navy, legislate for the District of Columbia, make any law that is necessary and proper for carrying out these other powers, and do a few other complicated things that I can't figure out how to summarize.

A Mars probe went off course because Lockheed Martin was using feet-and-pounds while NASA was using meters-and-kilos.

It is Congress that decide if we use English or Metric. There have been some attempts to switch to metric but they have failed. (Mike and Gail think we can solve Global Warming when we can't even switch to Metric. Then again, Gail thinks *solved* means only 35% of the population dies.)

History

1. In 1790 Thomas Jefferson recommended we go Metric. A Congressional Committee agreed. Nothing happened.
2. (Not in the book but true.) In 1793 Jefferson asked France to sent a scientist named Joseph Dombey to American and bring with him an object weighting 1 kilogram. Joseph got on the ship and was sailing to America when (I am not kidding) *Pirates of the Caribbean* attacked the ship and held him for ransom (they did not know or care what this funny 3-inches tall, 3-inches wide metal object was). Joseph died in captivity. For more information [CLICK HERE](#).
3. In 1816 John Quincy Adams wrote a long and boring report on the issue but recommended we stick with the English system since most of our trade was with England.

4. In 1866 law made it LEGAL to use the metric system, though in that year they also reinforced we should use the English system. Some points were reasonable: We trade with England, Americans would not like it, hard to change. Others are nuts: English system is better: the measurements come from the human body, and then some bogus examples where English is better than Metric. For example 1 mile is easy, but 1.61 Kilometers is hard.
5. The Meter was defined as the $1/10,000,000$ of the equator, which is cumbersome, but now its the distance light travels $1/299,792,458$ of a second, which is GOOD since scientists can agree on that, and its stable.
6. When the book was written the Kilogram was actually the weight of a hunk of medal in France kept under glass. That changed in 2018. A Kilogram is now defined in terms of Plank's constant, though I don't know how. One reason for the change: that hunk of medal got a bit lighter.

I was shocked at how recent the Kilogram was changed. Here is my blog post on it: [CLICK HERE](#).

7. In the mid 1960's Congress delegated to a federal agency this issue. Is that constitutional? The constitution says that CONGRESS should deal with this issue. Didn't matter much- after much hemming and hawing and committee meetings NOTHING happened. Ford and Carter formed the committees and Reagan disbanded it. For a short time many products were given in terms of metric and English, but even that has faded. The boards looking at the issues intentionally had people PRO and CON so nothing got done. Footnote: Dan Ackroyd had a great sketch on SNL about the metric alphabet. SNL made sure it is NOT available on You Tube. Not sure why- its not as though I can buy it.
8. More generally- many of our laws come from unelected gov agencies and not from Congress. For example, the clean air act is passed by Congress but the details are worked out by the EPA. Is that constitutional? Recently (not in the book) the EPA has come under fire for that. The courts have held that this is okay so long as Congress gives

these agencies *intelligent principles* to guide them. This term is undefined. However, gov would collapse if the courts really said NO, no agencies, CONGRESS must pass laws.

9. (I found this on the web [CLICK HERE](#).)

As of 2023:

- (a) America uses Metric for time (Seconds), volume for wine and spirits (Liters), and lighting (Lumends and Candles), sometimes for Soda (in 2-Liter bottles), and nutritional labels. But uses English for gasoline (Gallons), personal measures (Height and Weight).
- (b) Liberia is similar to America BUT is in the process of going full Metric.
- (c) Myanmar announced in 2013 that it is going Metric but has been slow to switch.
- (d) England and Canada still do a few things in the English system.
- (e) Some other countries have a few non-metric things.

So whose fault is the Mars Rover Fiasco? The book says NOT NASA, but actually Congress who refused to do their duty. He also admits that this is a terrible way to run a country—to many parts and nobody is really accountable.

4 The Recess Appointments Clause

The President shall have the power to fill up all vacancies that may happen during the recess of the Senate by granting Commissions that shall expire at the end of their next Session.

1. *Recess* is ambiguous. What if they are on a *break*? This has come up.
2. The chapter talks about prez powers- some are vague. Can he give guidelines to federal agencies? Such as to take into consideration costs as well as benefits to EPA regulations. Prez Pardons bring up some constitutional issues. Can a prez commute a death sentence? What if the prisoner turns it down?

3. The Prez makes appointments- important ones with the consent of the Congress. When the constitution was written the Congress met and had long breaks because of travel. There were no short breaks. Now there are many short breaks. Hence the confusion about *in session*.
4. The founders thought it would be used rarely and only for really important appointments. Not judges or other positions where there is NOT an emergency. They did not foresee it being a loophole.
5. The courts have gone back and fourth about how long the recess has to be to count.
6. If the Senate does not like who the Prez appointed in a recess appointment they could try to reconvene and vote him out, or they could withhold his salary. Or they could challenge it in court. All have been tried with mixed results.
7. Harry Reid kept the Senate in session formally to prevent George W. Bush from doing a recess appointment.
8. This is a good clause to think about since it is REALLY non-partisan. Its good for a Prez, who could be in either party.

5 The Original Jurisdiction Clause

In all cases affecting Ambassadors, other public Ministers and Councils, and those in which a state may be party, the SC shall have original jurisdiction.

1. The book begins by saying that when NY and NJ had disputes (e.g., which state is Ellis Island in?) the final arbiter was the SC.
2. Info on the courts: There are 94 district courts, 13 circuit courts (they are geographically spread out), and 1 SC. The circuit courts are called that because they used to be staffed by SC justices who would ride circuit around those regions.
3. They are lifetime appointments and cannot have their salary reduced. OH- who are *they*? It has been decided that this only applies to the SC. Is that what the Founding fathers wanted? Very hard to say since they didn't really think much at all about the more local judges.

4. What kind of cases does the SC look at? State vs State, citizen vs state, Fed Gov vs State. Two kinds of court cases for th SC: (1) *original jurisdiction* is when the case is brought to the SC first, and (2) *appellate jurisdiction* is when it is first in a lower court but is appealed to the SC. The court can decide to not take it, in which case the lower courts decision stands.
5. Most cases are *appellate jurisdiction* and this makes sense since the SC is not set up to call witnesses and such. It is set up to read over a case being appealed. BUT cases of State vs State it has to take as *original jurisdiction* since they can't be done in a state court.
6. States sue states over Land, Water, Pollution, Taxes. The court has turned down cases they don't think are serious enough. Its not clear that they can do this. It is not clear what the criteria of seriousness is.
7. For Orig-Jur cases the court does not really hold a trial to find facts. It has a *special master* who is an experienced lawyer do it for them. This can be hard work. The Ellis island case involved 4000 pages of documents and the fact-finding lasted 23 days. One issue- the Special Master might have too much power. Also, is it constitutional for the court to hire one? Also, they cost a lot of money- which the two states pay. The author thinks having a Special Master is fine, but that the job itself is boring.
8. *Avulsion* If a state or country ADDS dirt and stuff to an island then the new territory belongs to whoever owns the WATER- which might not be who owned the original Island. This is why some of Ellis Island and Liberty Island is in NJ. NY tried to give the counterargument that *Everyone THOUGHT it was part of NY so it is*. This didn't work.
9. The constitution really wanted to NOT have states fighting each other, Tariffing each other, and for the most part they haven't. That is BECAUSE if two states disagree they can go to the SC.

6 The Natural Born Citizen Clause

No person except a natural born citizen, or a Citizen of the United States, at the time of the adoption of this constitution, shall be eligible for the office of

the President.

1. In a contest of what are the stupidest parts of the constitution the following were suggested:
 - (a) Life Tenure for the SC.
 - (b) The Electoral College.
 - (c) Large and Small States both get 2 Senators.
 - (d) Only a natural born citizen can be president.
2. The requirements for Congress, Senate, and President *seem* straightforward. (a) at least 35 years old, (b) lived in America for 14 years, (c) Natural born Citizen. These would seem easy to apply but some scholars (wiseguys?) have argued that *35* just meant a certain level of maturity.
3. OKAY- now to the Natural born Citizen clause. Objections:
 - (a) There was a big exception made for those born before the US was a country. (Martin van Buren was the first prez to be born in the US).
 - (b) Nat born Cits can be VP, Sec of State, etc. JUST NOT president.
 - (c) America's principle is *anyone can be president!* but this says NO to a large group of people.
 - (d) The following qualified people are excluded: Jennifer Granholm (Canadian-American, Sec of Energy, Gov of Michigan), Arnold Schwarzenegger (Austrian, Gov of California), Madeline Albright (Czech, Sec of State, Ambassador to the UN), Henry Kissinger (Germany, Sec of State).
 - (e) Nat Born Cit is not well defined. Guam? Puerto Rico? Other territories? The Panama Canal Zone (McCain)? Native Americans born on reservations? Children born in the US but whose parents are ambassadors from another country? Children of Enemy Combatants? Child born in a different country but of American Parents (George Romney-Mexico, Ted Cruz-Canada). People born in America but living in a state of delusion (Trump).

4. The fear that a foreigner would want to be President and would not be loyal to America is absurd now. Was it absurd then?
5. John McCain was born in the Panama Canal Zone which is not quite in America (but to American Citizens). The courts have never ruled on this.
6. Barry Goldwater was born in Arizona before it became a state.
7. George Romney was born in Mexico but to American Citizens (Mormon Missionaries).
8. These people all lost so it never came up.
9. For McCain legal scholars said he was fine, but earlier SC decisions say that the constitution does not apply to unincorporated territories (non-states). This is the *insular clause*.
10. The author thinks McCain (and the others) SHOULD be allowed to be president as he takes a pragmatic view. Others have said NO for reasons that I think are way to technical.
11. Oddity: If the president is incapacitated then the VP is NOT president, but merely is *acting as prez*. So if Henry Kissinger had been VP under Nixon, and Nixon was incapacitated, then Henry K could be *acting president*. It gets weirder- the succession rules say that if the Prez is dead the VP BECOMES prez, so they must be a Nat born Citizen; however, further down, the Sec of state merely is *acting president* so maybe okay to not be a Nat Born Cit.
12. In the movie *Demolition Man* which takes place in the future, we find out that Arnold S DID become president after the country got rid of the Nat born Cit clause. The author wishes this fantasy was a reality.

7 The 21st Amendment (Ending Prohibition but...)

This is the SECOND part of the 21st amendment:

The transportation or importation into any State, Territory, or Possession of the United States for Delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

This means that a STATE can regulate alcohol including banning it from coming in from other states. The intent was to still have some curb on drinking. Rather than repealing prohibition they just gave the issue to the states.

This chapter is more about State vs Fed issues than about alcohol.

1. Prohibition may seem odd to us now, but when it was passed it was common for men to spend their salary on booze and then beat their wife's and children. SO, Prohibition could be called a Women's issue. Yeah! Also, immigrants often drank (e.g., Catholics for communion, Jews for Kiddish) so those who hated immigrants wanted to make booze illegal (They may also have thought that the law would never apply to them. See [CLICK HERE](#) for a meme about this.)
2. The Dormant Commerce Clause (see [CLICK HERE](#)).
of the constitution made it clear that no state could regulate goods coming in from another state. Hence (say) Kansas could not say that whiskey from Kentucky is forbidden there. The Webb-Kenyon act closed this loophole so states were now *allowed* to have anti-alcohol laws.
3. The 21st amendment is the only one that says INDIVIDUALS can't do something (e.g., bring a beer into a state that outlaws beer). All of the other amendments either say that GOV can't do something (e.g., GOV can't prohibit speech) or clarify how GOV works (e.g., term limit for the Prez). (Exception- Slavery- people cannot own slaves.)
4. States have used this amendment to defend regulations on alcohol such as (a) restrictions on sex-activities in a place that sells alcohol, (b) no alcohol in a pool hall (though fine in a bowling alley).
5. Some states tried to have a tax on out-of-state liquor but not on in-state liquor. This is NOT what the intent was of letting the states handle the DRINKING issue. The SC ruled 5-4 that NO the states cannot pass that kind of tax.

8 The Letters of Marque and Reprisal Clause

The Congress shall have the Power to . . . grant Letters of Marque and Reprisal.

1. The constitution says Congress and only Congress can declare war. However, many other aspects of war are divided between the Prez and Congress. The war power act allegedly limits how much the Prez can do in terms of sending troops places, but it has not worked. I've read elsewhere that Congress is happy to NOT enforce any restrictions.
2. A letter of Marque and Reprisal is given to a PRIVATE ship (with guns) to allow it to act on our government behalf. So like mercenaries. Rand Paul prefers this to the Army or Navy fighting a war.
3. A boat with a Letter of M, if captured, should be treated like POW's, not pirates. In the Civil War the Union DID NOT obey this— or at least they threatened not to. It didn't come up much. I am more surprised that other countries DID seem to respect the Letters of M.
4. WHO decides HOW to fight a war (actually a police action)? George W Bush believed in torture and that the Prez decides these things. For the amendment at hand - who decides - prez or Congress- who gets a letter of Marque? There hasn't been one in 200 years so it may not be important now, but it is a stand-in for who decides. Note that the Constitution says clearly that its CONGRESS.
5. In the Rev war and the war of 1812 there were FAR MORE private boats with Letters of M then boats in the actual navy—so they were an important part of Americas navy.
6. One advantage of the Letters of M is that America did not need to have a standing army, and indeed, America did not. This appealed to the countries general isolationist mood in the 1800's.
7. In 1856 seven European nations signed a treaty that banned Letters of M from being issued. The United states did not sign; however, there have not been any Letters of M issued since the war of 1812.
8. Some issues: can Congress issue Letters of M only for declared wars? what about undeclared wars? fighting pirates? Is it only ships—how

about mercenaries? And who decides- Congress or the executive (really the prez)?

9. The author thinks that Ron Paul's idea of granting letters of M to privateers to fight pirates is *constitutional* but there are a lot of details to work out, and wonders if it would be a good idea.

9 The Title of Nobility's Clause

No title of nobility shall be granted by the United States: And no person holding any office... shall without the consent of Congress, accept of any title, of any kind whatever, from any King, Prince, or Foreign state.

No State shall grant ... any title of nobility.

1. Many Americans have gotten knighthoods from England. Is that constitutional? YES for ordinary citizens. MAYBE for retired politicians (e.g., Reagan). HMMM for people still in office (Schwarzkopf).
2. Book goes into how the Constitution did not originally say that we are all equal, but NOW it does.
3. Organizations based on *heredity* were frowned upon in the early 1800's. Today we seem to have no problem with legacy admissions to college or with USAA saying you can buy insurance if you are a CHILD Of someone in the military. There have been challenges to legacy admissions based on this part of the const- for state schools (which I don't think have them anyway). I think this is not the intent of the Nobility clause.
4. Immigrants must RENOUNCE any title they have, even though they are not a person holding office.
5. Questions raised: What is *a person holding office*? A scientist who worked for the government on an ad-hoc basis was considered NOT a person holding office, so he could get a title from a foreign country. BUT very few cases have come up. Also what is a *title of nobility*? The following HAVE come up: Is a drivers license a title of nobility (NO)? Is adding *von* to your name a title of nobility (judge said YES but thats silly)

6. Congress CAN agree to having a person get a title. More often, nobody cares as is the case with Schwarzkopf.

A good article on some of this stuff is here: [CLICK HERE](#)

10 The Bill of Attainder Clause

No Bill of Attainder . . . Shall be Passed by Congress

No state shall . . . pass a Bill of Attainder

1. The book does not define *Bill of Attainder* so I will. From Wikipedia:
A bill of attainder is an act of legislature declaring a person, or a group of people, guilty of some crime, and punishing them, often without a trial.
2. The book says that this bans passing a law to punish someone for something they did before the law was passed. After the bailout of AIG, AIG wanted to give its people big bonuses and Congress tried (bipartisan!) to pass a big tax on those bonus. Was this constitutional?
3. Other issues- what is *punishment*? Sex Offenders have this on their record for life, but the law to do that was passed AFTER some of them were convicted. Is that punishment. SC says no.
4. When its come up:
 - (a) The people in Gitmo who were given military trials claim this violated the Bill of Attainment clause, since their trials were different and harder to win. The author (surprisingly since he is a liberal) disagrees- the military has always had different court system. Even so, they ended up being tried in normal courts.
 - (b) AIG bonuses—no such bill was ever enacted so we don't know what the courts would have said. The author says that prob would have been a constitutional since the INTENT was to give money back to the taxpayers NOT to punish AIG and others. There might be a problem with the Congressman declaring things like *is an abomination that they are getting bonuses.*

- (c) Post civil war- do we require people to swear they never served in the confederacy, or perhaps repent if they did, before they can be (say) a lawyer? Laws requiring that were struck down.
- (d) In 1965 laws saying that member of the communist party could not have certain jobs were struck down. The Gov argument FOR these laws is that they are to keep dangerous people out of certain jobs, NOT for retribution. The Warren court rejected this.
- (e) In 1984: students who did not register for the draft were not eligible for financial aid for college. This one was upheld! Why?
 - (a) A student could register for the draft and then be eligible,
 - (b) the law was intended to ENCOURAGE registering, not as punishment,
 - (c) being denied Financial Aid is not really a punishment.
 (I agree with (a) and (b) but not (c).)
- (f) Singling out Gays and Lesbians for not getting married- does that violate this clause? The author thinks that Gays and Lesbians should be able to marry and have rights, that the bill of Attainment clause is NOT the way to do it since it just says *its unconstitutional to ban Gay Marriage* which is not quite the same force as what was finally done *they should have equal protection*.

11 The Third Amendment

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be proscribed by law.

Dave Barry had a humorous book on the constitution. He added to this that if Soldiers want to sleep on your Patio, that IS constitutional. This has never been tested in a court.

1. History: 1905 Lochner vs NY. NY had laws on how long bakers could work (no more than 60 hours). Lochner was a bakery who sued saying the law was unconstitutional. The SC agreed saying that the law interfered with a private contract. For the next 30 years any law that was pro-worker was struck down. This was called *The Lochner Era* and is now thought to be nuts. It came to an end with the New Deal and FDR's threat to pack the courts.

2. History: 1965 Griswold vs Conn. Conn had a law banning contraception. The SC wanted to strike it down but there wasn't really a constitutional reason to do so. They *did not* want to use the reasoning in *Lochner vs NY* so they *found* a right to privacy in the Constitution, that was not there. One of the places they claim to have found it was *The Third Amendment*, though that really is a stretch. See next point.
3. The word they used was *penumbra*. That is, there is a Penumbra of privacy. The First Amendment guarantees right of assembly. Clearly they meant assembly in private- the Gov is not listening in. The Third amendment really means that you are safe in your own house. The Fifth amendment about self-incrimination is also about privacy. My Opinion: Somehow there should be a way to strike down Griswold without inventing rights.
4. Quartering troops was a big issue before the American Revolution. Since then its happened a few times- in the war of 1812 and in the Civil War. The only serious case was in 1982. It involved prison guards who lived in employee housing close to the prison. They went on strike and were kicked out, and the National Guard lived there instead. They claimed this violated the third amendment but lost. (I think they should have won.)
5. While not much discussed, perhaps the Third Amendment has been GOOD- there are very few cases of its being needed, so its been preventative.
6. One loophole *in time of peace*. In the future that may be abused and if there are riots or an internal civil war (like Donald Trump talks about) could that be called *a war* even if undeclared?