

Lesson 10

THE POWERS OF THE EXECUTIVE

Lesson Objectives:

When you complete Lesson 10, you will be able to:

- Describe the main executive powers of the President.
- Understand the President's oath of office.
- Explain the President's role in the lawmaking process.
- Understand the President's pardon power.
- Explain the President's role in the military and in foreign relations.
- List the President's appointment powers.
- Describe the ways the executive interacts and communicates with Congress.

Unit 3

Part 1:

Upholding the Constitution and Executing the Law

Oath of Office

Article II, Section 1, Clause 8

Take Care Clause

Article II, Section 3

The President's Role in the Law-Making:

Presentment Clause and Pocket Veto Powers

Article I, Section 7, Clause 2–3

Pardon Power

Article II, Section 2, Clause 1

Commissions

Article II, Section 3

Unit 3

While the previous lesson discussed the office of the executive and the qualifications for, selection of, limitations on, and removal of the executive, Lesson 10 will discuss the powers of the President. The Executive Vesting Clause in Article II of the Constitution grants the President the executive power.

The executive exercises vital powers in foreign and domestic areas. He is principally responsible for the nation's foreign policy: He negotiates treaties, receives ambassadors, and serves as commander in chief of the military. The President may appoint officers. He is responsible for executing, or carrying out, the laws of the land, but also has the discretion to pardon.

Though the Founders created a unitary executive, the legislature exercises several important checks on the executive, holding the power to declare war, advise and consent to appointments, and ratify treaties. As the only wholly national figure, the President reports to Congress on the State of the Union. The President may convene sessions of Congress and has a duty to provide recommendations for legislation.

Oath of Office — Article II, Section 1, Clause 8

Essay by Vasan Kesavan (pp. 194-195)

After a President is elected to office, he must take the oath of office in order to exercise any executive power. Article II of the Constitution contains the Presidential Oath Clause. Under this clause, a new President must swear to be faithful to the office and do his best to preserve and protect the Constitution. The oath is typically administered by the Chief Justice.

Although Article VI of the Constitution requires federal officers to take oaths in support of the Constitution, the oath for Presidents was specifically included as an internal check to ensure a well-behaved, virtuous executive. According to Vasan Kesavan, some scholars debate whether this oath limits or extends presidential powers. The location and phrasing of the clause suggest that it is limiting insofar as it limits how the President's executive power is to be exercised. Some scholars, however, think it gives the President extra power to interpret the Constitution and to act in protection of the country.



Before You Read

To ensure understanding, ask: What does the word "oath" mean? (An oath is a very solemn promise.) What power does an oath have? (An oath can hold a person to an agreement into which he or she has entered.)



Make an Inference

Remind students that Article VI of the Constitution requires all officers of the United States to take an oath to support the Constitution. **Why do you think the Founders included the oath for President but did not write an oath for the rest of the officers? Why are the two oaths different?** (Answers will vary.)

What is the significance of the placement of the Oath of Office Clause? (It is positioned after the clauses that set forth the organization of the executive office and before the clauses that specifically shape the executive’s power. In other words, the President is supposed to take the oath after he assumes the office but before he executes it.)

Unit 3

Take Care Clause — Article II, Section 3

Essay by Sai Prakash (pp. 222-224)

The Take Care Clause, also known as the Faithful Execution Clause, sets out the main responsibility of the President: He must “take Care that the Laws be faithfully executed.” Based on the Pennsylvania and New York constitutions, the Take Care Clause makes the executive responsible for the enforcement of laws. In fact, George Washington understood this clause to mean he had a duty to execute federal law. This clause does not mean that the President is without discretion or that he is a mere overseer of the execution of laws. The President has broad discretion over how and when to enforce the law. The President may not take actions that are not authorized either by the Constitution or by a valid law.

The President’s discretion has led to controversy. For instance, Sai Prakash describes one controversy regarding congressional appropriations. Presidents since Thomas Jefferson have been impounding funds or even refusing to use any money for particular programs. Opponents of the practice argue that the Take Care Clause reveals impounding to be unconstitutional. This practice is now rare, since the Supreme Court held that President Richard Nixon did not have broad authority to impound funds.

In the modern era, there are two significant challenges to the President’s responsibility to take care that the laws are executed: administrative agencies and the judiciary. Administrative agencies, which we discussed in Lesson 7, execute certain federal laws but are not accountable to the President. Judges have taken it upon themselves to determine whether laws have been executed properly, even when the person or group bringing the case before the court lacks standing (meaning that they have not suffered a wrong or harm). Prakash explains that this behavior is problematic because the executive is responsible for executing the laws, while judges may address the application of the law only when there is a case of before them.



Before You Read

Ask students to think about the words “take care.” **Ask:** How might a President “take care”? (Answers will vary. Students may say that if the President takes care, he acts carefully or takes responsibility.)



Active Reading

Read aloud this sentence from page 222: “Plainly, the President need not enforce every law to its fullest extent.” **Ask:** What does this mean? (Students may say that it isn’t necessary to enforce every law to its fullest extent and that the President may use discretion when deciding how aggressively to execute the law.)



Work in Pairs

Pair up students. **Say:** The wording in the Constitution often leads to debates about how it applies today. It is not always clear what the Framers meant. Ask students to read the Take Care Clause and find other ways of wording it to express its meaning more clearly. Then have them share their findings with the class.



Discussion Question

Should the President have the power to refuse to enforce a law that he thinks is unconstitutional? Why or why not? (Answers will vary. Students may say that the President receives his power from the Constitution and takes an oath to preserve the Constitution; therefore, if he determines a law to be unconstitutional, he does not have a duty to enforce it. Some students may argue that the President should not be able to substitute his interpretation of the Constitution for that of the other branches.)

Unit 3

The President’s Role in Law-Making: Presentment Clause and Pocket Veto Powers –

Veto Powers of Article I, Section 7, Clause 2–3

Essay by Michael B. Rappaport (pp. 86-89), essay by David F. Forte (pp. 89-91)

The Presentment Clause, or Lawmaking Clause, outlines the exclusive method for the passage of federal statutes. One of the most formal and detailed clauses in the Constitution, the Presentment Clause involves both the legislative and executive branches in the law-making process: All federal bills must pass both houses of Congress and be subject to the President’s veto. The President has 10 days to review a bill and to approve or veto it. If the President vetoes the bill, he must return it to the chamber in which it originated, either the House of Representatives or the Senate. Congress may override the veto if a two-thirds majority passes the bill in both houses.

But what happens if the President refuses to approve the bill or to return it to Congress? What if the President vetoes the bill but Congress is not in session to receive it and therefore not able to override the veto? The Pocket Veto Clause addresses these issues. According to the Pocket Veto Clause, if Congress is adjourned, the bill will not become law. That is, if the President does not want to veto the bill in the traditional manner, he can simply hold on to it until Congress adjourns. The bill then “dies.”



Check Understanding

What are some reasons a President might veto a bill? (Sample answers: The President may think the bill is unconstitutional. The President may disagree with the policy.)

Unit 3

Pardon Power – Article II, Section 2, Clause 1

Essay by James Pfiffner (pp. 203-205)

James Pfiffner writes that the pardon power, as outlined in Article II, is one of the President’s most unregulated powers. The presidential power to pardon was derived from the Royal Prerogative of Kings. During the period under the Articles of Confederation, many state constitutions granted their governors power to pardon. In the Constitution, the President’s pardon power has two limitations: The offenses must be against the country (i.e., pardons could not excuse violations of state law alone), and they cannot be used in cases of impeachments (i.e., the President cannot pardon himself).

The pardon power is subject to the President’s discretion. It is meant to reflect mercy as well as to carry out justice in the event of wrongful conviction. The pardon power also serves broader public-policy purposes. For instance, the President ensures peace and tranquility when using the power to defuse rebellions or other internal struggles.



Before You Read

Ask: Have you ever heard someone say, “Pardon me.” What do you think the word “pardon” means? (To forgive or excuse.)



Group Work

Break students into small groups. Have them use the Internet to find a list of persons pardoned by former President George W. Bush and former President William Jefferson Clinton. Have the group research one person’s crime and the reason for the pardon and present their findings to the class.



Active Reading

Point out Pfiffner’s mention of various groups whose members were pardoned by Presidents. *Ask what crimes did these groups commit and the reasons for or effects of their pardons.* (The Confederates attempted to leave the United States; the Whiskey Rebels started a rebellion over taxes; Vietnam draft evaders refused to serve in the armed forces when instructed to do so. Other answers may vary.)



Discussion Question

Do you think the President should have the power to pardon individuals? Why or why not? (Some students may argue that the President should not have not the pardon power because such a power is too easily abused. Some students will say that the President should have the power to pardon because sometimes justice requires mercy, which the law cannot accommodate.)

Unit 3

Commissions — Article II, Section 3

Essay by Trent England (pp. 224-225)

Trent England writes that in British tradition, the king created offices and granted commissions as he thought appropriate. Early Americans rejected this practice because they believed it consolidated too much power in the executive. Following Independence, the new state and national governments experimented with decentralized methods of appointing and commissioning officials. In crafting the Constitution, the Framers decided that the power to grant commissions was indeed an executive function and therefore vested in the President the power to “Commission all the Officers of the United States.”

The Appointment power begins with the creation of an office, generally done by Congress. The President nominates principal officers, and the Senate confirms them. Congress may by law vest the appointment of inferior officers in other persons or departments (but not in Congress itself). Finally, the President commissions the chosen officers. The placement of the Commissions Clause is instructive. It is attached to the Take Care Clause rather than included in the discussion of appointments in Article II, Section 2. Though the executive power is vested in the President alone, these clauses suggest that the President exercises this power through government officials, and the President is ultimately accountable for these officers and the decisions they make.



Before You Read

Say: "If I commission [insert a student's name] to be my assistant, what I have I done?" (Made or appointed the student as your assistant.) The Commission Clause gives the President permission to appoint all officers of the United States.



Before You Read

Help students understand the meaning of "officer" as it is used in this clause. Say: The President's officers are members of his Cabinet. Examples include the Secretary of State, Secretary of the Treasury, Secretary of Defense, and Attorney General.



Check Understanding

Have students write a summary about the way in which the Framers structured the appointment power. (Congress creates the office, and the President appoints principal officers. The Senate approves the nominees, and the President commissions the officers.)



Discussion Questions

1. What is significant about the placement of the Commissions Clause? (Rather than being nestled in the discussion on appointments in Article II, Section 2, the clause is attached with a comma to the Take Care Clause, contemplating that the President will supervise others in their enforcement of the law.)
2. What safeguard exists to ensure that the President does not commission an officer who is unqualified for the job? (The Senate must approve the President's nominees.)



Check Understanding

Multiple Choice: Circle the correct response.

1. If the President pardons an individual, the individual is
 - a. on parole.
 - b. forgiven and set free.**
 - c. given a reduced sentence.
 - d. given a new trial.

Unit 3

Unit 3

Fill in the blank: Write the correct word or words in each blank.

1. The President may issue a pardon for an offense against the country unless it involves _____. (**impeachment**)
2. According to the Constitution, Presidents are required to “take _____ that the Laws be faithfully executed.” (**care**)
3. The executive power is vested in the _____ alone. (**President**)
4. In the Presidential Oath Clause, the President pledges to “_____, _____, and _____ the Constitution of the United States.” (**preserve, protect, and defend**)

Short Answer: Write out your answer to each question.

1. When can a pardon be issued? (**from the time an offense is committed or even after full sentence has been served**)
2. Why can't a pardon be issued before an offense has been committed? (**This would give the President the right to waive the laws, which he cannot do.**)
3. What are the purposes of the pardon power? (**to temper justice with mercy in appropriate cases and to do justice if new or mitigating evidence comes to bear on a person who may have been wrongfully convicted**)

True / False: Indicate whether each statement is true or false.

1. The Framers wanted to maximize presidential responsibility for executive decisions. (**True**)
2. The Oath of Office Clause is one of several that employ the oath concept, but it's the only clause that actually specifies language of an oath for a constitutional player. (**True**)
3. The pardon tool has not been a very powerful constitutional tool of the President. (**False. The pardon tool has been and will remain a powerful constitutional tool of the President.**)
4. By leaving the advice structure entirely to the President's discretion, the Framers actually increased the likelihood that the President will obtain useful advice from his principal officers. (**True**)
5. The Oath of Office Clause empowers the President. (**False. The Oath of Office Clause limits how the President's "executive power" is to be exercised.**)

Part 2: The President and Foreign Policy

Commander in Chief

Article II, Section 2, Clause 1

Commander of Militia

Article II, Section 2, Clause 1

Treaty Clause

Article II, Section 2, Clause 2

Ambassadors

Article II, Section 3

Unit 3

Commander in Chief – Article II, Section 2, Clause 1

Essay by John Yoo and James C. Ho (pp. 195-198)

Under Article II of the Constitution, the President is commander in chief of the armed forces. In early America, people gave their political leaders few powers in times of war. After seeing the failures of weak executive power under the Articles of Confederation and in state governments, the Framers opted for a single, energetic, decisive leader in times of war. The Framers, however, did not want an unchecked executive and therefore granted Congress certain powers, such as the power to declare war and control military resources, to check the executive. To put it another way, the executive held the “sword,” but the legislature held the “purse” (meaning responsibility for budget matters).

As was discussed in Lesson 6, there is much debate on the extent of Congress’s authority to check the President’s commander in chief power. John Yoo and James C. Ho divide the sides into the Congressionalists and Presidentialists. Both sides cite the text of the Constitution and the words of the Framers to support their positions. Congressionalists argue that the Declare War Clause and the Marque and Reprisal clause grant Congress broad power over wartime activities: specifically, that the President has no authority to initiate hostilities without prior approval from Congress. Presidentialists argue that Congress retains only power over funding and removing executive officers. They argue that the Executive Vesting clause together with the Commander in Chief Clause confer substantial power on the President to engage military forces in hostilities and draw a distinction between Congress’s power to “declare war” and the President’s ability to repel invasions of military force. The modern debate over the allocation of war powers between Congress and the President was triggered by the establishment of a large peace time military force after World War II.

Modern Congressionalists have tried to cement their position by passing the War Powers Resolution, which limits presidential ability to engage hostility and requires congressional consultation for military deployments. This act has proved ineffective, since Presidents enter various conflicts or use military force without congressional approval.



Research It

Point out Yoo and Ho's mention of the War Powers Resolution on page 198. Ask students to use the material in the text, in other books, and in online resources to find more information about this resolution and its origins, effects, and status today.

Unit 3

Commander of Militia – Article II, Section 2, Clause 1

Essay by David F. Forte (pp. 199-201)

Article II grants the President the power to be the commander in chief of the militia. Although the Framers agreed that there should be a national army, they still placed great importance on the militia. When the state militias were called into national service, the President would command them.

In 1792, Congress passed the Uniform Militia Act, which allowed the President to call out the militia to put down rebellions or insurrections. The militia assisted federal forces in several campaigns against American Indians in the Ohio Territory. In 1794, President George Washington issued the first formal call for the militia to put down a rebellion, the Whiskey Rebellion. In subsequent years, Presidents exercised control over the state militias. In 1795, Congress broadened the President's ability to call forth and command the militia in times of insurrection and invasion, leading state governors to challenge the President's power. The Supreme Court affirmed that the President's power over the militia is coextensive with his power over the rest of the armed forces when the militia is engaged in national duties.

The militia system faded after the Civil War but returned with the 1916 National Defense Act as the National Guard. Although state governors have occasionally challenged the use of their states' Guard units by the federal government, the President has maintained control. Since that time, National Guard members have served as draftees or reserves for the regular Army and have helped to suppress domestic uprisings.



Before You Read

Ask: What is a militia? (A militia is an organization of part-time civilian soldiers.) How does it compare to a regular army? (A regular army contains professional soldiers and is always on duty.) Why might a country have both at the same time? (Militias are easier and less expensive to raise and maintain, and they can be controlled by states instead of a central government.)



Research It

David F. Forte mentions Washington's use of the militia to put down the Whiskey Rebellion and Eisenhower calling on the National Guard in the Little Rock High School standoff of 1957. Ask students to research the events and write a short paper comparing and contrasting how the Presidents used their power over the militia in each situation.

Unit 3

Treaty Clause – Article II, Section 2, Clause 2

Essay by Michael D. Ramsey (pp. 205-209)

As discussed in Lesson 4, the Treaty Clause is one of the few clauses that divides an executive power between the President and Congress. According to this Article II clause, the President may make international treaties, but the supermajority of the Senate must ratify treaties in order for them to have the force of law.

The Framers saw treaties as involving a combination of foreign policy (the responsibility of the President) and law-making (the responsibility of Congress). Because treaties become the law of the land, they are not to be entered into or ratified without great care.

According to Michael D. Ramsey, some questions remain regarding the Treaty Clause. First, is the Treaty Clause the only way to enter international obligations? Second, how should the President and the Senate interact as they exercise their joint power? Third, who terminates a treaty: the President alone, Congress alone, or the President with consent of two-thirds of the Senate? Finally, what are the limits of the treaty power?

The modern practice of treaty-making largely conforms with the Framers' vision. The President negotiates treaties, but there is often much consultation between the executive and the members of the Senate. The Senate sometimes approves the treaties with conditions.

The modern practice of executive agreements departs from the Framers' vision in certain respects. Executive agreements covering matters within the President's executive power and made pursuant to a treaty or to an Act of Congress seem to align with the Framers' vision. But executive-congressional agreements that have the consent of the majority of both Houses of Congress and executive agreements made without the approval of Congress or the Senate are more problematic.



Before You Read

Ask: What is a treaty, and what effects may it have? (A treaty is an agreement, often between different countries. Treaties may be economic or military or may have many other functions.) **What sorts of treaties might countries make?** (Countries make treaties with one another to end conflicts, to start partnerships, and for many other purposes.)

Ambassadors — Article II, Section 3

Essay by Matthew Franck (pp. 220-221)

Article II of the Constitution gives the President the duty to receive ambassadors and other important ministers of foreign nations. Under the Articles of Confederation, Congress received ambassadors, but the Convention vested this power in the executive. Receiving ambassadors amounts to recognizing a nation's government. Refusing to receive an ambassador amounts to a decision not to "recognize" a foreign government, or at least not to carry on diplomatic relations with it, which has particular implications in international law.

Whether the clause grants the President the unfettered ability to recognize another nation for diplomatic purposes has been the subject of much debate. In the Pacificus-Helvidius debates, James Madison (as "Helvidius") argued that receiving ambassadors is a merely ministerial duty, but Alexander Hamilton (as "Pacificus") argued that the clause gave the President the power to decide the obligations of the nation with regard to foreign nations. As a practical matter, Hamilton's position won. Though Congress possesses other formal powers over foreign affairs, the President's ability to receive ambassadors gives him considerable advantages in the conduct of foreign policy.



Before You Read

Ask: What is an ambassador? (An ambassador is a representative of one country that deals with another country.)



Active Reading

Ask: Does a President have to receive an ambassador? (Ministerially, the President receives the ambassador, unless the ambassador's credentials are in serious doubt.)



Work in Pairs

Explain to students that the United States also has ambassadors. Pair up students and have them research the name of a U.S. ambassador to another country. Have them list this person's responsibilities.



Write About It

Research the debate between Alexander Hamilton (as "Pacificus") and James Madison (as "Helvidius") over President Washington's Neutrality Proclamation of 1793. Have students summarize the purpose of the exchange and explain the main arguments on both sides.



Check Understanding

Multiple Choice: Circle the correct response.

- Who is commander in chief of the armed forces?
 - Secretary of State
 - Secretary of War
 - President**
 - Vice President
- The Treaty Clause divides an executive power between the President and the
 - Senate.**
 - Secretary of State.
 - Speaker of the House.
 - Vice President.
- The President commands the "sword" and Congress controls the
 - "Officers."
 - "Shield."
 - "Purse."**
 - "Treaties."
- Treaty-making is a mixture of
 - executive and legislative power.**
 - executive and judicial power.
 - judicial and legislative power.
 - administrative and judicial power.

Unit 3

Unit 3

Fill in the blank: Write the correct word or words in each blank.

1. Congress and the President work together on treaties because treaties combine law and _____. (**foreign policy**)
2. Article II, Section 2, Clause 1 expressly designates the President as "_____ of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." (**Commander in Chief**)
3. Out of only five declarations of war in the history of our nation, the first did not take place until the _____. (**War of 1812**)
4. The Framers agreed that when the states' militias were needed to defend the country, the _____, not the governors, would be in charge. (**President**)

Short Answer: Write out your answer to each question.

1. As commander in chief, does the President have the power to declare war? (**No, Congress has the formal power to declare war.**)
2. Under the Articles of Confederation, who had the powers "of sending and receiving ambassadors"? (**Congress**)
3. What is significant about the placement of the Commissions Clause? (**Rather than being included in the discussion on appointments in Article II, Section 2, the clause is attached with a comma to the Take Care Clause, implying that the President will supervise others in their enforcement of the law.**)
4. In what ways did states limit executive power through their state constitutions? (**South Carolina expressly provided that the executive could neither "commence war" nor "conclude peace." Other states limited executive war power through frequent election, term limits, and selection of the executive by the legislature.**)

True / False: Indicate whether each statement is true or false.

1. Few constitutional issues have been so consistently and heatedly debated by legal scholars and politicians in recent years as the distribution of war powers between Congress and the President. (**True**)
2. Because Congress controls the federal "purse," it is impossible for the President to engage in lengthy hostilities without the support of Congress. (**True**)

Part 3:

Appointing Officers

Appointments Clause

Article II, Section 2, Clause 2

Inferior Officers

Article II, Section 2, Clause 2

Recess Appointments Clause

Article I, Section 2, Clause 3

Unit 3

Appointments Clause — Article II, Section 2, Clause 2

Essay by John McGinnis (pp. 209-212)

The Appointments Clause of Article II sets out the rules for the appointment of constitutional officers. Officers are either principal or inferior officers, and each type has a different manner of appointment. The Appointments Clause applies to principal officers. An appointment consists of three distinct, sequential acts: The President nominates a candidate, the Senate confirms the nominee, and the President appoints the official.

The Framers designed the appointment process to ensure that the President would be accountable for the selection of officers and that his appointments would not be the result of secret deals.

The President has a plenary power to nominate. The power to nominate is an exclusive executive prerogative. Though the choice of officer is the President's responsibility, the Senate's advice and consent forestalls the possibility of abuse of the appointment power.

Congress has established qualifications for those who can serve as officers, but it is unclear how far these qualifications may go before they contravene the Framers' intent in assuming the President's accountability for the initial choice. The Senate has plenary authority to reject nominees, and nothing in the text limits what the Senate may consider when consenting to or rejecting a nominee. Thus, the Senate may use its advice and consent power to reject a nominee for unsound principles or blemished character. The President's power of repeated nomination checks the Senate's ability to reject a nominee without a compelling reason. The Senate's consent, however, does not bind the President; the President has the power to choose not to appoint an official whom the Senate has confirmed.



Active Reading

Ask: What is an officer under the Constitution? (Officers are generally persons holding high-ranking positions in the executive or judicial branches.)



Research It

The confirmation debates involving Supreme Court nominees are especially heated. Have students research two nominees for the Supreme Court (preferably from two different centuries) and compare the process. Did the Senate confirm both? Why or why not?

Unit 3

Inferior Officers – Article II, Section 2, Clause 2

Essay by Douglas Cox (pp. 213-215)

The Appointments Clause of Article II sets out the rules for the appointment of constitutional officers. Congress creates two types of officers under the Constitution: principal and inferior officers, each of which has a different manner of appointment. According to Douglas Cox, principal officers must be appointed by the President with the advice and consent of the Senate, but inferior officers (which is what most officers are) may be appointed by the President, courts, or heads of departments without the consent of the Senate. These two methods are the only means of appointing officers under the Constitution. Significantly, Congress may not vest the power to appoint in Congress itself. Congress’s role is limited to the Senate’s ability to offer advice and consent to nominees and to decide in which departments to vest the appointment power for a particular office.

The Framers designed this clause to prevent Congress from using the appointment power to fill offices with individuals who would be subservient to Congress, thereby limiting the power of the President to creating or filling offices arbitrarily. Scholars have noted ambiguities in the clause. For instance, what is the difference between principal and inferior officers besides the different mechanisms for appointments? Who are heads of departments? The courts have attempted to provide guidance on these questions by listing factors and duties that would fall on inferior rather than principal officers and by looking to the Opinion Clause to determine the meaning of “heads of departments.” In general, however, such designations are made on a case-by-case basis.



Work in Pairs

Ask students to compare principal and inferior officers and write a summary of the similarities and differences.

Recess Appointments Clause — Article II, Section 2, Clause 3

Essay by Michael A. Carrier (pp. 215-216)

The Recess Appointments Clause is an extension of the President’s appointment power. It allows the President to use Recess Appointments to fill vacancies that occur while the Senate is in recess. Recess Appointments last until the end of the following Senate session, meaning that most recess appointments today may last one to two years.

Presidents have used this power to appoint officials during intersession recesses (the time period between two congresses) and intrasession recess (a recess of a current session of Congress). In early America, Senate recesses lasted six to nine months. The Recess Appointments Clause safeguarded the system by allowing appointments without requiring the Senate to stay in session perpetually. However, as Michael Carrier writes, Presidents in modern times may use this power to select officers without having to face the senatorial confirmation process.

Unit 3



Make a Real-Life Connection

Carrier notes that the Senate remains in session throughout most of the year. Have students research the recess appointments of the Clinton, Bush, or Obama Administrations. Why would these Presidents exercise their recess appointments power in a time when Congress is perpetually in session?



Discussion Question

In what way might a President abuse the Recess Appointments Clause? (by using the power to select officers without having to face the senatorial confirmation process)



Check Understanding

Multiple Choice: Circle the correct response.

1. Most officers are considered:
 - a. Principal officers
 - b. Inferior officers**
2. A recess appointment lasts until:
 - a. The end of the year
 - b. The end of the “next Session” of the Senate**
 - c. The appointee dies
 - d. 12 months has passed

Unit 3

Fill in the blank: Write the correct word or words in each blank.

1. Debates among the Framers and subsequent practice confirm that the President has _____ power to nominate. **(plenary)**
2. The appointment power is one of the powers of the _____. **(President)**
3. A recess appointment lasts until the _____ of the “next Session” of the Senate. **(end)**

Short Answer: Write out your answer to each question.

1. What was the Founders’ purpose in having presidential power of nomination and then congressional approval of the nominees? **(The President is accountable for the person(s) he might nominate, but approval by the Senate ensures that the President will not appoint someone for personal gain.)**
2. The Appointments Clause divides constitutional officers into which two classes? **(principal officers, who must be appointed through the advice and consent mechanism, and inferior officers, who may be appointed through advice and consent of the Senate but whose appointment Congress may place instead in any of the “three repositories of the appointment power”)**
3. What are the three repositories of appointment power? **(the President alone, the courts of law, and the heads of departments)**
4. Why did the Framers adopt the Recess Appointments Clause? **(to prevent government paralysis)**

True / False: Indicate whether each statement is true or false.

1. There are very few specific reasons why a Senate may constitutionally refuse to confirm a nominee. **(False. The Senate may constitutionally refuse to confirm a nominee for any reason.)**
2. Congress itself may not exercise the appointment power. **(True)**
3. Most government employees are subject to the Appointments Clause. **(False. Most government employees are not officers and thus are not subject to the Appointments Clause.)**
4. The phrases “inferior officers” and “Heads of Departments” were not precisely defined in the Constitution. **(True)**

Part 4:

Communicating with Congress

State of the Union

Article II, Section 3

Recommendations Clause

Article II, Section 3

Convening of Congress

Article II, Section 3

Unit 3

State of the Union — Article II, Section 3

Essay by Matthew Spalding (pp. 216-217)

The Framers thought that the President would be uniquely qualified to summarize, explain, and assess information about the country. He would have unique knowledge of military operations, foreign affairs, and the execution of the laws and would be the only national representative of the entire people. Therefore, Article II of the Constitution gives the President the duty of periodically providing information to Congress about the “State of the Union”—a duty, writes Matthew Spalding, that encourages transparency and accountability in the executive branch. Other constitutionally defined communications with Congress include veto messages, advice and consent of the Senate, and recommendations. These communications are examples of the partial agency of one department in the working of another department.

Beginning with George Washington, early Presidents gave “Annual Messages” to the Senate, focusing on foreign affairs or reporting recommendations from department heads. In the 20th century, the State of the Union became less about reporting and assessing and more about advocating policies. With improvements in communication technology, the State of the Union now reaches a much wider audience via television, radio, the Internet, and other media.



Make a Real-Life Connection

Point out to the students that Presidents traditionally did not give an oral address to Congress for the State of the Union. Have students read an example of a State of the Union address that was sent to Congress and compare it to a more recent one spoken before Congress. **What are the differences in content and focus? Does the mode of delivery make any difference?**

Recommendations Clause — Article II, Section 3

Essay by Vasan Kesavan, James Pfiffner, and J. Gregory Sidak (pp. 217-219)

The Recommendations Clause is another example of how the Framers divided powers among the branches of government. When presented with a bill from Congress, the President may sign it into law or veto it. Under the Recommendations Clause, though, the President may make recommendations to Congress for legislation.

The language of the clause underscores the republican nature of the process. These recommendations are not royal edicts, but suggestions to the people's and the states' representatives. The President's recommendations provide a more national perspective, since his constituency differs from that of the House and Senate. Under this clause, the President alone may judge when it is "necessary and expedient" to make a recommendation. Congress may not compel the President to make particular recommendations. The legislature, though, will not hesitate to criticize a President who fails to propose legislation regularly. Furthermore, Congress does not have a duty to implement the President's suggestions. It may be wise for Congress to pass legislation in accordance to the President's suggestions because the President still holds the veto power, but there is no constitutional requirement to do so.

In practice, early Presidents spent little time trying to influence Congress, except in times of war. Twentieth century Presidents, though, have departed from this tradition. Most notably, Franklin D. Roosevelt took an active role in shaping Congress's legislative agenda by recommending new laws.



Work in Pairs

The authors note that Franklin D. Roosevelt made notable use of the Recommendations Clause. Pair up students and ask them to read about some of Roosevelt's proposed laws during his time in office. Then have each pair research one law and give a brief report on its content and effects. (Answers will vary. Roosevelt's proposed legislation dealt with the economy, banks, employment, and many other areas of concern.)

Convening of Congress — Article II, Section 3

Essay by David F. Forte (pp. 219-220)

In the Declaration of Independence, the Americans objected to the traditional British policy that allowed the king to convene and adjourn Parliament at will. In Article I, the Framers gave Congress the power to convene. Recognizing that emergencies may arise when Congress is adjourned, the Convening of Congress Clause of Article II gives the President a limited power to convene Congress on "extraordinary Occasions." Presidents rarely call special sessions, except to address emergencies such as military conflicts and economic crises. Presidents may also adjourn Congress, but only when Congress disagrees on its own time of adjournment.

In practice, the President has exercised this power only a few times in American history, to address crises such as war or economic emergencies. In the later 20th century and the 21st century, because Congress is functionally in session year-round, the President's power to convene is little used.



Make an Inference

British kings had the power to convene or adjourn Parliament at will. To ensure understanding, ask: How may kings have used or misused this power? (Answers may vary. Members of Parliament would be utterly subject to the king's will. There would be little independence from the will of the crown, because the King could control the meetings of Parliament.)



Discussion Questions

1. What are some executive powers held by Congress? Why were they not given to the President? (Congress has the executive abilities to declare war, regulate commerce, and grant letters of marque or reprisal. The Framers gave these powers to Congress to maintain the balance of powers and avoid making a single executive who is too powerful.)
2. Why did the Constitutional Convention design the presidency as a singular position? What concerns might they have had? (The Convention thought that the most effective design for an executive branch would be based on a singular President who could remain independent, be energetic, act quickly and decisively, and be a highly visible leader who assumed many responsibilities and could be held liable for them. The Framers may have had some concern, however, based on their recent dealings with the powerful single monarch of Britain. But, the Framers also understood the problems of a weak executive power, based on their experience under the Articles of Confederation.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 10. Review any material for questions they have missed.

Fill in the blank: Write the correct word or words in each blank.

1. Historically, annual messages focused primarily on _____ and introduced the reports and recommendations of department heads. **(foreign relations)**
2. Active presidential involvement in pressing for legislation began with _____. **(Theodore Roosevelt)**

Unit 3

Short Answer: Write out your answer to each question.

1. How does the State of the Union address in the 20th century differ from those given historically? **(Addresses have become less reporting and assessment and more policy advocacy and political persuasion.)**
2. Although there was an expectation that the State of the Union message would be delivered in person, who thought that practice too royal and had his clerks read the message to Congress instead? **(Thomas Jefferson)**

True / False: Indicate whether each statement is true or false.

1. The President is not required to present information about the State of the Union to Congress. **(False. The President is required to do this as a means of transparency and accountability.)**
2. George Washington gave the first "Annual Message" in the Senate chamber in January 1790. **(True)**
3. Since the power to make laws is vested solely in the legislative branch, the President is not allowed to make recommendations that would affect the legislative process. **(False. Article II, Section 3, the Recommendations Clause, specifically states that the President can make recommendations "from time to time.")**
4. The President has the power to convene Congress in emergency situations. **(True)**
5. The President has no power to adjourn Congress. **(False. The President may adjourn Congress if the Houses cannot agree on a time.)**