

Lesson 8

LAWMAKING AND THE RULE OF LAW

Unit 2

Lesson Objectives:

When you complete Lesson 8, you will be able to:

- List and explain three ways that a bill may become a law according to the Presentment Clause.
- Define “pocket veto” and explain why it is controversial.
- Understand the differences between bills, resolutions, joint resolutions, and concurrent resolutions.
- Define a bill of attainder and an ex post facto law.
- Explain the purpose of the Bill of Attainder and Ex Post Facto Clauses of the Constitution.

The Process and Limits of Lawmaking

Presentment Clause

Article I, Section 7, Clause 2

Pocket Veto

Article I, Section 7, Clause 3

Presentment of Resolution

Article I, Section 7, Clause 3

Bill of Attainder

Article I, Section 9, Clause 3

Ex Post Facto

Article I, Section 9, Clause 3

Unit 2

Presentment Clause – Article I, Section 7, Clause 2*Essay by Michael B. Rappaport (pp. 86–89)*

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 legislature and the executive branches in the lawmaking process: All federal bills must pass both houses of Congress and be subject to the President's veto. The President has 10 days to veto a bill, or else it becomes law. The President's veto may be overridden by a two-thirds vote in both houses. During ratification, the Federalists justified both bicameralism and the presidential veto as essential to prevent the legislature from encroaching on executive power and to limit the passage of hasty and unwise laws.

There are two ways that the Presentment Clause may be violated. Congress might authorize one or both of its houses or the President to take legislative-type actions without conforming to bicameralism. Additionally, either Congress or the President might take legislative action on their own initiative without proper statutory authority. Today, several practices are held to be contrary to the Presentment Clause: the legislative veto, executive branch rulemaking, and the line-item veto.

A legislative veto occurs when one house of Congress nullifies an administrative action. This can be seen either as an executive action by the legislature or as a legislative action. In the first case, it would be unconstitutional because it fails to follow the principle of separation of powers; in the second case, it would be unconstitutional because it fails to respect the Presentment Clause. The Supreme Court has held the legislative veto to be unconstitutional.

The most common departure from bicameralism and presentment involves the statutory delegation of executive powers. Essentially, this involves the legislative branch statutorily delegating legislative or executive power to executive branch administrators. This type of delegation violates the Presentment Clause because executive agencies create the rules of action (i.e., laws) rather than Congress.

The 1995 Line Item Veto Act authorized the President to cancel certain spending provisions—to veto specific items but not the entire bill. The Supreme Court held that line-item vetoes violated the lawmaking process outlined in the Presentment Clause. Essentially, the Court ruled that the President had been given the unconstitutional power to repeal a law because the line-item veto could allow him to eliminate an appropriation.

**Before You Read**

Ask: Your book uses the term “bicameralism” several times in its discussion of the Presentment Clause. What does “bicameral” mean? (Explain that the prefix “bi” means “two” and “cameral” comes from the Latin word “camera,” which means “chambers.” Bicameral means based on two legislative chambers.)



Active Reading

Have students read the Presentment Clause on pages 86–87 and create a list of three ways by which a bill might become a law. Keep in mind that the complexity of the list is not as important as a correct interpretation of the process. (The student’s list should include these steps: (1) A bill becomes a law if the President signs it. (2) A bill becomes a law if a President vetoes it but two-thirds of the Senate and two-thirds of the House of Representatives override it. (3) A bill becomes a law if the President does not sign it but also does not return it to Congress within 10 days provided Congress is in session.)



Make a Real-Life Connection

To illustrate the process of how a bill becomes law according to the Presentment Clause, explain that former President George W. Bush vetoed many bills while in office. One of these was the Stem Cell Research Enhancement Act of 2005, which would have provided funding for human embryonic stem cell research. When President Bush returned the bill to the House of Representatives, more than two-thirds of its members voted to sustain, or uphold, the veto. President Bush also vetoed the Water Resources Development Act of 2007, which would have provided for water conservation and development by allowing the Secretary of the Army to construct projects to improve rivers and harbors in the United States. However, when the President returned the bill to Congress, both the House of Representatives and the Senate voted to override his veto, and the bill became law.



Work in Pairs

Pair up students and have them research a bill that a President has vetoed. Have them write a summary of the President’s message. They should indicate whether the President’s veto was sustained or overridden. Point out that when voting on sustaining or overriding a bill, Members of Congress record the number of “Yeas” and “Nays” as indicated in the Presentment Clause.



Discussion Questions

1. Why did James Madison add “after it shall have been presented” to the Presentment Clause? (Madison inserted the words “after it shall have been presented” into the Presentment Clause to prevent questions as to the beginning of the 10-day period during which the President must consider a bill. According to Madison, the day on which the bill is presented does not count.)

Unit 2

2. In what two ways might the Presentment Clause be violated? (Congress might take action allowing either Congress or the President to pass statutes without conforming to bicameralism or presentment. Congress or the President might also act on their own and take legislative-type actions without authority.)

Unit 2

Pocket Veto — Article I, Section 7, Clause 3

Essay by David F. Forte (pp. 89–91)

Under the Presentment Clause, the President has partial agency in the legislative process. He can propose legislation and then veto or approve all bills presented to him. Once a bill has passed through Congress, the President has 10 days to review the bill and either approve or veto it. If the President vetoes the bill, he or she must return the bill to the chamber in which it originated—either the House of Representatives or the Senate. Congress may override the veto by a two-thirds majority vote of both houses.

However, what happens if the President refuses either 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 is 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 or she can simply hold on to the bill until Congress adjourns. The bill then “dies.”

The Pocket Veto Clause has led to controversy between the President and Congress because it is silent about types of adjournment. A *sine die* adjournment occurs when a Congress comes to an end and a newly elected Congress convenes. Intersession adjournments occur between two sessions of the same Congress. Intrasession adjournments occur when Congress takes a break within a session. The President and Congress agree that the President may pocket a veto during a *sine die* adjournment, but Members of Congress have argued that intersession and intrasession pocket vetoes are invalid. However, the Founders apparently intended the pocket veto to be available to the President whenever any recess took place. While other clauses of the Constitution refer to adjournments of various lengths, the Pocket Veto Clause does not deal with the length of adjournments, which seems to indicate that the clause permits the President to exercise a pocket veto any time the Congress as a whole adjourns.

Today, when Presidents exercise the pocket veto, they include a “protective return,” which is a message declaring their objections to the bill. This way, if a court declares the pocket veto invalid, the bill is treated as if the President had vetoed it in the traditional manner, and Congress has the power to override the bill.



Before You Read

Have students think about the term “pocket veto.” Ask: *Why do you think this kind of veto is called a pocket veto? What image comes to mind when you picture a President making a pocket veto?* (Students may say that they envision a President receiving a letter and putting it in his pocket.)



Active Reading

Help students understand the meaning of a *sine die* adjournment. Explain that *sine die* is Latin for “without day.” With this type of adjournment, it is anticipated that this particular group of legislators will not meet again.



Make a Real-Life Connection

Tell students that in January 2010, President Barack Obama exercised his pocket-veto authority. In December 2009, Congress passed a war-spending bill that would have funded the Department of Defense before the department ran out of money. To make sure that the President had time to read the bill, Congress even passed a “continuing resolution” (CR), which gave the President an extra week. However, instead of vetoing the bill, President Obama returned it to Congress on December 30 without his signature. Before Congress adjourned, the House appointed a clerk to be available to receive messages from the White House. The House insists that since someone was available, there could not be a pocket veto. Congress further voted to sustain, or uphold, the President’s veto, stating that it was not a pocket veto.



Make an Inference

Point out that Congress dislikes pocket vetoes. Ask: *Why do you think Presidents use pocket vetoes?* (Students may say that Presidents use pocket vetoes to kill a bill and deny Congress the opportunity to override the veto.)

Unit 2

Presentment of Resolution — Article I, Section 7, Clause 3

Essay by David F. Forte (p. 92)

During the Constitutional Convention, James Madison expressed concern that Congress might avoid having a bill vetoed by calling the bill “a resolution.” Madison made a motion to insert the words “or resolve” after the word “bill” in the Presentment of Resolution, but this motion was denied. The next day, Edmund Randolph proposed a clause with more exact wording, which was approved.

Unit 2

Some resolutions, however, are not presented to the President because they will not have the force of law. Concurrent resolutions and simple resolutions (which are used to change the procedures of Congress or determine adjournment, for instance) are not laws and therefore do not require presentment or presidential signature. Concurrent resolutions apply to procedures of both houses, express the sense of Congress on an issue, or set spending goals. Simple resolutions deal with either the procedures or operations of one house of Congress (e.g., censuring a member or setting spending goals for a committee). Some joint resolutions will have the force of law and therefore require presentment. For instance, a declaration of war is a joint resolution that must be presented to the President. An amendment to the Constitution, on the other hand, is a joint resolution that does not require presentment to the President.



Active Reading

Be sure students understand the differences between a bill, a resolution, a concurrent resolution, and a joint resolution. A bill must be presented to the President because it has the potential to become a law. A resolution and concurrent resolutions, on the other hand, do not require presentment to the President. Joint resolutions require presentment if they have the force of law.



Make an Inference

Ask: What do you think a joint resolution is? (A joint resolution is a legislative measure on a single subject that requires approval by both the House of Representatives and the Senate and is sometimes presented to the President for his signature.)



Discussion Questions

1. According to your book, what is the difference between a concurrent resolution and a simple resolution? (Concurrent resolutions are passed by both houses and affect the procedures of both houses. Simple resolutions apply to the operation of only one house of Congress.)
2. What is the difference between a bill and a resolution? (A bill must be presented to the President. A resolution does not have to be presented to the President unless it is intended to become law.)

Bill of Attainder — Article I, Section 9, Clause 3

Essay by Daniel Troy (pp. 154–155)

The Constitution prohibits the federal government (and state governments, as we will study in Lesson 14) from passing bills of attainder and ex post facto laws. In common law, bills of attainder were legislative acts that condemned certain per-

sons or groups of persons to death without a trial. Bills of attainder also denied the condemned persons' heirs the right to inherit their estates. States enacted bills of attainder after the American Revolution. The Framers forbade bills of attainder as part of a strategy to undo the English law of treason and to guard against serious acts of legislative tyranny.

Chief Justice John Marshall argued that bills of attainder violated the separation of powers. In passing a bill of attainder, Congress acts as judge. However, as Marshall explains, only a court can hold a trial, hear the presentation of evidence, and determine the merits of the claims.

Daniel Troy explains that courts have rarely invoked the Bill of Attainder Clause. The Supreme Court did establish a three-part test to determine whether a piece of legislation is a bill of attainder: If the bill specifies the affected persons, includes punishment under a specific definition, and lacks a trial, then it is a bill of attainder. The courts now have a narrow, specific definition of punishment and rarely invalidate legislation on this basis. For example, denying someone government benefits is not considered punishment, but exclusion from employment may be a form of punishment.



Before You Read

Explain that bills of attainder were most often issued by the British Crown for serious crimes such as treason. Individuals suspected of such crimes were quickly executed. Kings sometimes used bills of attainder to get rid of nobles who were gaining too much power.



Active Reading

Ask: What does the Bill of Attainder Clause prohibit? (the sentencing of individuals or groups of individuals to death or a serious non-lethal punishment without a trial and denying their heirs the right to inherit their estates)



Check Understanding

Say: Bills of pains and penalties issued punishments such as banishment or disenfranchisement. **Ask:** What does the word "banishment" mean? (to require a person to leave his or her home or country) **What does the word "disenfranchisement" mean?** (to take away a privilege such as voting)



Discussion Question

How does the Bill of Attainder Clause support separation of powers? (It prevents the legislative branch from acting as a judge.)

Ex Post Facto Clause – Article I, Section 9, Clause 3*Essay by Daniel Troy (pp. 156–159)*

Ex post facto is Latin for “after the fact.” Ex post facto laws criminally punish conduct that was lawful when committed. In other words, people could face punishment for a past action that is now illegal—even though the action was legal at the time it was committed.

There was considerable debate among the Framers of the Constitution with respect to the Ex Post Facto Clause. Ex post facto laws were commonplace in England, and prior to the Constitutional Convention, some states had passed them. Opposition to ex post facto laws was a bedrock principle among the Founders. Hamilton labeled them a tool of tyrants, and Jefferson proclaimed that they violated natural right. James Wilson argued that a constitutional ban would be ineffective since previous state prohibitions against ex post facto laws had been ineffective. Some argued that a ban on such laws was an absolute necessity. Others argued that opposition to such laws was so widespread that a prohibition was unnecessary. Ultimately, the delegates agreed that a ban would support the rule of law and, therefore, included the clause.

The question arose regarding the application of the Ex Post Facto Clause to civil as well as criminal cases. The Founders considered additional language to clarify that ex post facto laws apply to criminal laws but not to civil laws. In *Calder v. Bull* (1798), the Supreme Court defined an ex post facto law as any law that (1) makes an action committed before the passage of the law criminal, (2) makes a crime and the punishment for it more serious than it was when the crime was committed, (3) changes and increases the punishment for a crime after it was committed, or (4) alters the legal rules of evidence or testimony so that less proof is required for conviction.

The Ex Post Facto Clause was not originally intended to regulate ex post facto civil laws, and there has been minimal application of the clause to civil laws, but Clarence Thomas and Joseph Story have voiced doubts. Current Supreme Court jurisprudence applies the clause to cases where criminal penalties are applied in the laws of criminal disabilities. Analysis of these cases has focused on the type of penalty and what constitutes punishment. Under this interpretation, the clause only guards against the most severe use of legislative power, especially laws where personal liberties are at issue. The Ex Post Facto Clause, however, does not apply to judicial decisions that have a retroactive effect.

**Check Understanding**

Before class begins, change the rules of your normal classroom procedure. For example, all students must stand at their desks when addressing you. Do not announce this rule change until midway through the period. At this time, tell students that everyone who did not comply with the rule since the beginning of the class will have to stay after school. Then explain that you have just demonstrated how an ex post facto law operates. Discuss with students the implications of these kinds of laws and why the Framers of the Constitution specifically forbade passage of this type of law.



Check Understanding

Say: Ex post facto laws are retroactive. **What does this mean?** (made effective in the past)



Active Reading

Ask: Why was the Ex Post Facto Clause heavily debated at the Constitutional Convention? (Answers will vary. Some of the Founders thought that ex post facto civil laws were not in and of themselves invalid. Some thought opposition to ex post facto laws was so widespread that a ban was unnecessary. Others argued that a constitutional ban was necessary because past bans were ineffective.)



Discussion Question

In what way is an ex post facto law a form of tyranny? (Such a law can be created to persecute a specific individual or group.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 8. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

- A legislative act condemning a person to death without a trial is called
 - a bill of attainder.**
 - an ex post facto law.
 - a bill of pain.
 - a bill of penalty.
- A law that punishes someone for an action that was legal when the person committed it is called
 - a bill of attainder.
 - an ex post facto law.**
 - a before-the-fact law.
 - a bill of penalty.
- According to the discussion of the Presentment Clause, if the President does not sign a bill within 10 days, and Congress is still in session the bill
 - is automatically vetoed.
 - must be returned to Congress.
 - must be approved by Congress.
 - automatically becomes law.**

Unit 2

4. According to the discussion of the Presentment of Resolutions, a declaration of war is an example of a
 - a. bill.
 - b. joint resolution.**
 - c. concurrent resolution.
 - d. simple resolution.

5. A pocket veto occurs if the President returns a bill to Congress
 - a. that is not signed.
 - b. when Congress is not in session.**
 - c. after 10 days.
 - d. when Congress resubmits it.

6. Which of the following must be presented to the President?
 - a. a bill**
 - b. a concurrent resolution expressing the sense of the Congress
 - c. a constitutional amendment
 - d. a resolution

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

1. It is unanimously agreed that the President may pocket a veto during a _____ adjournment. (*sine die*)

2. The formal process by which the Congress sends legislation to the President for consideration is called _____. (**presentment**)

3. While a bill requires presidential presentment, a _____ may or may not require presidential presentment. (**joint resolution**)

4. According to the Presentment Clause, if the President vetoes a bill, the bill may still become law if two-thirds of the members of each house of Congress _____ the bill. (**override the veto by voting to approve**)

5. Today, when Presidents pocket a veto, they include a message declaring their objections. This message is called a _____. (**protective return**)

6. The Presentment Clause is one of the most _____ provisions in the Constitution. (**formal**)

7. _____ is not counted in the 10-day period of the Presentment Clause. (**Sunday**)

8. The Framers were determined to deny the national legislature and states the power to issue bills of attainder after witnessing abuses by _____. (**Parliament**)

9. After the Convention, most Federalists believed the prohibition on ex post facto laws applied only to _____ statutes. **(criminal)**

Short Answer: Write out your answer to each question.

1. How long does the President have to sign a bill after he receives it? **(10 days)**
2. What is a "pocket veto"? **(If the President doesn't sign a bill within 10 days and Congress is adjourned, a bill is considered vetoed.)**
3. How do joint resolutions differ from bills? How are they similar? **(Joint resolutions differ only in the fact that they usually deal with a single subject. They are similar in the fact that they require presentment to the President and are designed to have the force of law, just as bills do.)**
4. What is a "concurrent resolution"? **(Concurrent resolutions apply only to subjects affecting the procedures of both houses. They are not "law" and are not presented to the President.)**

Unit 2

Unit 2