

Constitution Class Handout
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Lesson 6: Powers of the Executive Branch

Article II, Section 2

Commander in Chief

Section 2 of Article II establishes the President as the *Commander in Chief of the Army and Navy, and of the Militia of the several States, when called into the actual Service of the United States.*

This allows for the President to wage war, if necessary, without Congressional approval. However, if Congress does not agree with the President's actions, they can pull the funding, which would force a discontinuation of the use of the military for whatever operations the President chose them to operate. In the Articles of Confederation, the powers to wage war, and to declare war, were listed as separate authorities, although in the Articles of Confederation both powers were granted to the Congress.

There were extensive debates over **war powers**. In fact, when the founders were debating over **war powers** in regards to Article I during their assembly on August 17, 1787, they considered giving to Congress the power to "make war." A number of reasons brought up during that debate convinced the delegates to give Congress the power to declare war, instead. This decision left the power to make war with the President, as Commander in Chief.

When the Framers of the Constitution were creating the executive branch, the President they had in mind was George Washington. He was, in their eyes, the perfect President. The executive branch was fashioned around Washington's personality, and abilities. The expectations were that the presidents to follow Washington would be similar to Mr. Washington in their level of sacred honor, humility, and ability to properly apply the war powers as necessary, while refraining from becoming involved in **foreign entanglements** that did not directly affect the United States of America.

Among Washington's strengths was that he was a great general. It became apparent that the President would need to be a strong military leader. However, the consideration that an executive may take that power and abuse it was in play. Therefore, a number of checks and balances against the power of the executive branch were put into place.

Part of the reason the power to make war was given to the President, and not Congress, has much to do with the time period. One must consider that when the members of Congress were at home in their districts, it could be as far as the southernmost State of Georgia. Considering the lack of technology, members of Congress could not just get on a plane, or take a drive, to get to Washington, D.C., quickly. Even the time it may take to get the messages out to the members of Congress could take longer than the time needed to begin necessary war maneuvers.

When it came to war powers, the need was for the Commander in Chief to be quick, decisive, and take care of business as needed. However, if we have a President acting in a tyrannical manner, launching military operations when it is not necessary, aside from the ability to electorally vote the President out of office, the Congress has two ways to check his behavior.

First, Congress can pull funding. If there is no money, the troops must be brought home. Second, the Congress has the power to impeach the President if he is becoming tyrannical, or is doing things that he shouldn't (maladministration).

One concern that has arisen in today's political environment, largely as a result of the change in the dynamics of our political system by the 17th Amendment in 1913 that changed the Senate from being the voice of the States, to an assembly directly voted into office by public vote, is if both Houses of Congress are in **collusion** with the President. A White House administration with both Houses of Congress working with the President could be a recipe for disaster in regards to the rule of law, creating an opportunity for those three parts of the federal government to collude against the people, which would inevitably lead to the rise of an unchecked **oligarchy**.

In the cases of the wars in Iraq, Afghanistan, or Libya, the President had every right to launch those operations. That is not to say the decisions were correct, or in the best interest of our country, but that the President had the constitutional authority to wage war in those theaters without his actions being accompanied by a congressional declaration of war.

When it came to foreign entanglements, the Founders preferred America to stay out of such conflicts unless American interests were directly influenced. George Washington in his farewell address is actually quite clear on the subject.

Congress holding the power to declare war does not mean that the President must ask Congress for permission before waging war. In today's world it would seem to be the reasonable thing to do, and I believe it would be the proper thing to do, but as far as the Constitution is concerned, congressional approval for a military action is not necessary.

A reference used to support the concept of "no war without a declaration" is The War Powers Act of 1973. The War Powers Act was simply a piece of legislation, and did not change the authorities of the President when it came to his war powers. The War Powers

Act is unconstitutional. Only amendments can change the authorities granted to the President of the United States.

The two Barbary Wars, the first two international wars the United States found herself engaged in, were waged by Thomas Jefferson and James Madison. Jefferson's engagement against the Muslim States of the Barbary Coast was fought from 1802 to 1805, after Jefferson refused to continue paying a tribute to the Barbary Pirates for safe passage through the Mediterranean Sea. Hostilities were reignited in 1815, during Madison's presidency. Both wars were undeclared, waged by Jefferson and Madison without a declaration of war from the Congress, but Congress did appropriate funding for both campaigns.

Calling forth the Militia

The President of the United States is not supposed to be all powerful, or the final decision maker in the federal government. The American System of government is full of checks and balances. Even as the Commander in Chief, if he is abusing his power as the head of military operations, Congress can defund war efforts, or impeach the President.

In Article II the Constitution states that the President is the "Commander in Chief 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." Some have argued that means he is only Commander in Chief when "he" is called into service to do so, which is accomplished by a declaration of war. That is an erroneous opinion.

As Commander in Chief, the President may engage the Army and Navy in war operations as necessary. This power of Commander in Chief does not extend to the militias at the President's whim. The President is only the Commander in Chief of the Militia of the several States, when the **militia** is called into actual service of the United States.

The distinction was established so that the President could use military forces against foreign enemies if a quick and decisive decision was necessary, but not against the States, or the American people. The standing army is not for domestic use to suppress insurrections, or repel invasions. That is what the militias are for, and the militia can only be put into action by Congress, or State leadership. The President does not control the militias, nor does he determine when they go into action. His only relationship with the militias only emerges when they are called into actual service of the United States by the United States Congress. Then, and only then, the President serves as Commander in Chief over the militias.

Article I, Section 8 states that "*Congress shall have power to provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel invasions.*"

States cannot call their militia into action "*unless actually invaded, or in such imminent Danger as will not admit of delay.*" (Article I, Section 10)

Though the President is tasked with "faithfully executing the laws of the United States" as stated in Article II, Section 3, and he can do so with executive departments such as I.C.E., and the Border Patrol, the actual call for the militia (National Guard, State Militias, unorganized militia) to protect the border is the responsibility of Congress, and State leadership.

Executive Departments and Agencies

Article II, Section 2, Clause 1 indicates the President may "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective offices." This part of this clause is a good indication that the Founding Fathers felt the President should consult others when making decisions, especially those familiar with the departments in question.

The existence of the different executive departments is constitutional, as long as they are established to handle constitutional duties of the federal government, and their powers are limited within constitutional allowances. Originally, there were only four executive departments (and five if you separate the War Department and Department of the Navy); the War Department, the State Department, the Department of the Treasury, and the Department of Justice. The Department of the Navy served as a separate department until 1947, but worked closely with the Department of War.

There are many departments in the executive branch that are unconstitutional, and should not have even been established. The Education Department, for example, is unconstitutional in its current form because there is no place in the Constitution that gives the federal government the authority to regulate, or be involved in, education. Therefore, as per the 10th Amendment, education is a State issue.

The Energy Department and the Environmental Protection Agency are also unconstitutional. The federal government has no authority to regulate those issues. However, if those departments did not regulate, but only kept studies and records of those issues, then the existence of those agencies may be acceptable.

The executive branch can have departments and agencies that study issues not authorized by the Constitution to fall under the federal government, but they cannot have any regulatory power because any federal laws regarding those issues are not constitutionally authorized to the United States Government. Regulations are directly connected to laws, and laws must be constitutional in the first place in order to be considered the supreme law of the land.

Despite these agencies not being legally allowed to regulate unconstitutional law, agencies like the EPA are doing just that. In fact, the EPA is regulating independently, literally legislating through regulations. In other words, the EPA, as well as other agencies, have been enacting their own regulations without the benefit of a law being on the books, revealing the danger of having unconstitutional departments and agencies.

This is not to say we should not have the various departments and agencies of the executive branch. Some of them are constitutional, and absolutely necessary.

Correction of federal unconstitutionality can be sought through concepts known as **Republic Review**, and **nullification**. By using a convention of delegates from the several States to determine the unconstitutionality of particular laws, actions, or departments of the federal government, the States can be encouraged to work together to **nullify** the unconstitutional regulations set forth by the various federal agencies. The States have the authority to take care of their own business, and if a federal agency tries to regulate an issue that falls under the State's powers, the States have the right to ignore that regulation.

A common belief is that if we do not have these various federal agencies regulating things like food, energy, and actions against the environment, people will just act in ways that are unacceptable and dangerous. The opposition to the Constitution will tell you that we need the federal government to make sure that our food is safe, energy is used properly, and corporations are not polluting our fragile environment.

Local issues are supposed to be handled at the local level, and the people, through their States, are more than capable of properly regulating these issues as necessary, but in a manner that is consistent with the local opinion of the electorate.

The Founding Fathers did not trust a large, centralized, **national government**, hence, the reason the Framers only granted to the federal government authorities regarding external issues, and the power to act as a mediator between the States in the case of disagreement.

Reprieves and Pardons

The President is also given the power to grant reprieves and pardons for offenses against the United States, except in cases of **impeachment**. This was one of the first functions President Gerald Ford took advantage of when he took office after President Richard Nixon resigned, pardoning Nixon so that no criminal cases could be brought against him. No impeachment procedure had ensued, so Ford was constitutionally allowed to grant the pardon. It has been suggested that is why Nixon resigned. If he had not resigned, and was impeached, the next President would not have had the authority to pardon him.

The President is granted the ability to make treaties and to nominate members to the executive branch, Supreme Court, and other offices not expressly provided for in the Constitution. Agreement and consent of two thirds of the Senate is necessary for any treaty, or nomination for that matter, to become effective. The **advise and consent powers** granted to the **United States Senate** was a way of disallowing the executive branch from mirroring the centralized British Model of unilateral control under the king. The authority also gave the States the allowance to approve or disapprove any action by the President by requiring that the Senate concur with two-thirds vote.

The purpose of giving advise and consent powers to the U.S. Senate refers us back to the

original dynamics of the United States government. The Senators in the U.S. Senate were appointed by the State Legislatures before the appearance of the 17th Amendment in 1913. The Senate was the States' representation in the federal government. The Senators were the voice of the States. Treaties, appointments, and other executive functions, though executed by the President, requires approval by the Senate. The States, as with the granting of powers to the federal government in the first place through the articles of the Constitution, had the power to approve or disapprove the President's actions through the U.S. Senate in a manner much like parents grant permission to their children before a child can perform a particular action. After all, the Senate was the voice of the States, and it was the States that created the federal government in the first place.

This was an important check upon the executive branch by the States.

The executive branch requiring the consent of the U.S. Senate for some of its actions reminds us of the amendment process. As with treaties and appointments by the executive branch, amendments must be approved, or ratified, by the States. In the case of amendments, however, the vote is three-quarters of the States in order to ratify.

The federal government, be it through amendments, or executive actions, needs the permission of the States.

Remember, the States once held all powers. It was the States that provided the authorities to the federal government so that it may exist, and function. The States had original authority over all powers, and decided to grant a few authorities to the federal government so that it may operate in a necessary manner - specifically for the purpose of protecting, preserving, and promoting the union.

The States gave permission to the federal government to function in a manner prescribed by the Constitution.

An opponent to the originalist viewpoint of the Constitution once said to me, "You have it all wrong. The federal government tells the States what to do."

If that was the case, then why would the President need to get the consent of the U.S. Senate to make treaties, and two-thirds of the Senators present have to concur? Why would the President's nominations need to be interviewed and approved by the Senate? And with that in mind, remember that before the 17th Amendment in 1913, the Senate was the voice of the States.

The executive can do very little without the Senate's approval.

War Powers seems like an exception on the surface, but even the authority to make war has its checks by Congress.

For the most part, it is up to the people and the States through Congress to ensure the

President does not act in a manner unbecoming of the office.

This check is designed to protect us from tyranny.

Imagine how different the appointment hearings of Supreme Court justices have become, now that the Senate is no longer the representation of the States, anymore. The questions are probably very different than they otherwise would be. Now, the House and the Senate are really not a whole lot different. They are both voted in by the popular vote. Before 1913, the Senate was the voice of the States.

I wonder how the questions posed to the Supreme Court nominees would be different if the Senate still belonged to the States. Perhaps the questions would be more in line with protecting State sovereignty. Surely the concerns of the States would be behind much of the questioning.

The 17th Amendment changed the dynamics of our government. One of the reasons our federal government is constantly acting unconstitutionally is because it is now structured unconstitutionally. The people voting for the Senators, rather than the Senators being appointed by the State legislatures, is not in line with what was originally intended. With the voice of the States removed, the government cannot function as intended because the proper checks and balances are not in place. The 17th Amendment introduced **ideology** into the Senate, and removed one of the checks necessary to protect us against a federal government constantly seeking to become more expansive.

Recess Appointments

The final clause of Article II, Section 2 of the U.S. Constitution states: *The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.*

This clause refers to what is called a **recess appointment**. A recess appointment is the appointment of a senior federal official (department head, judge, etc.) by the President while the U.S. Senate is in recess. As the voice of the States in the federal government, the Senate must confirm all appointments of senior federal officers before they assume office. However, while the U.S. Senate is in recess, and during the early years of this nation that meant they could be a few days ride away, the President can make a recess appointment without Senate confirmation. However, the appointment only remains in effect until the next session. A recess appointment must be approved by the Senate by the end of the next session of Congress, or the position becomes vacant again.

Remember, the House of Representatives and the Senate were originally made up very differently from each other. The Representatives go to Washington to serve their district, and to act in accordance with the will of the people in their district, making the House of Representatives literally the voice of the people in the federal government.

The Senate was made up of Senators appointed by the State legislatures. The Senators

represented the States, and they made up the State coalition of the federal government. It was through the Senate that the States had representation in the federal government, and could ensure, along with the House of Representatives, to provide a series of checks against the executive branch.

Part of the way to control power is to divide it. Then, after you divide the power, divide it again. Then, make the powers of the separate branches different from each other, that way they do not collude together against the people, or other branches of government.

One of the fears of the Founders was that the branches would collude together in an effort to take away individual freedoms.

By requiring the Senate to confirm appointments by the Executive, it kept a leash on the Executive. Even in a recess appointment, when the President could appoint without confirmation by the Senate, confirmation would still eventually be needed or else the seat became vacant again. This kept the Executive from surrounding himself with a group of cronies the States did not approve of.

Terms:

Advise and Consent Powers - Treaties, appointments, and other executive functions, though executed by the President, requires the advise by, and the approval of, the Senate.

Collusion - Conspire together.

Foreign Entanglements - Unnecessary involvement with other nations.

Ideology - A set of political or economic ideas that forms the basis of economic or political theory and policy.

Impeachment - To charge with misconduct. Formal process that may lead to removal of an official accused of unlawful activity; impeachment does not mean the removal from office, though removal from office is often the result of impeachment proceedings.

Militia - An army composed of ordinary citizens rather than professional soldiers; a military force that is not part of a regular army and is subject to call for service in an emergency; the whole body of physically fit civilians eligible by law for military service.

National Government - Any political organization that is put in place to maintain control of a nation; a strong central government that does not recognize the individualism or local authorities of the smaller parts, such as states, of the nation.

Nullification - State power to ignore unconstitutional federal law.

Nullify - See Nullification.

Oligarchy - Government by a few powerful persons, over the many. A state governed by a few persons.

Recess Appointment - The appointment of a senior federal official (department head, judge, etc.) by the President while the U.S. Senate is in recess.

Republic Review - A convention of delegates representing the several States in order to audit the laws, actions, and composure of the United States federal government; a review of unconstitutional characteristics of the federal government based on the amendment ratification concept that if it takes three-quarters of the States to ratify an amendment, a quarter (plus one) of the States determining a law, action or department of the federal government to be unconstitutional allows the States to nullify the item.

United States Senate - The House of Congress in which each State enjoys equal suffrage of representation, with two Senators per State. The appointment of Senators was originally by their State legislatures, creating a natural check and balance between the House of Representatives, and the U.S. Senate. The appointment of Senators was changed to the popular vote of the people by the 17th Amendment in 1913.

War Power - Power exercised in the prosecution of war.

Questions for Discussion:

1. What is the difference between the power to Wage War, and the power to Declare War?
2. What is meant by “Commander in Chief?”
3. Why should, or shouldn’t, the United States engage in foreign entanglements?
4. Why is the War Powers Act of 1973 unconstitutional?
5. How can the States protect against a President abusing his war powers?
6. When are State Militias under State authority, and when are they under federal authority?
7. When is the President the Commander in Chief over the State Militias?
8. Regulatory Agencies are constitutional, but their regulations must conform to what authorities granted?
9. What is the difference between impeachment, and being removed from office?
10. When are recess appointments allowed?

11. What is a pro-forma session?

Resources:

Joseph Andrews, A Guide for Learning and Teaching The Declaration of Independence and The U.S. Constitution - Learning from the Original Texts Using Classical Learning Methods of the Founders; San Marcos: The Center for Teaching the Constitution (2010).

Madison's Notes Constitutional Convention, Avalon Project, Yale University:
http://avalon.law.yale.edu/subject_menus/debcont.asp

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