

Executive Order Constitutional Analysis Worksheet

Presidential Power - Constitutional Analysis Tool

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Purpose: Use this worksheet to evaluate any presidential executive order, proclamation, memorandum, agency directive, or similar executive action.

The question is not whether you agree with the policy.

The question is:

Where is the authority?

1. IDENTIFY THE EXECUTIVE ACTION

President / Administration:

Executive Order / Directive / Action:

Date:

What does the action actually require or prohibit?

Who is affected?

Executive branch employees

Federal agencies

Federal contractors

States

Private businesses

Individual citizens

Other: _____

2. CLASSIFY THE POWER

What governmental function is actually being exercised?

Executing an existing law

Administering a federal program
Establishing a new legal requirement
Regulating private conduct
Spending or redirecting money
Seizing or controlling property
Exercising military authority
Conducting foreign affairs
Suspending or declining enforcement of law

Other: _____

Is the action primarily:

Legislative

Executive

Judicial

Mixed

Unclear

Why?

3. FIND THE CONSTITUTIONAL AUTHORITY

What specific provision of the Constitution is claimed to support the action?

Article / Section / Clause:

Relevant language:

Does the Constitution give this power directly to the President?

Yes

No

Unclear

If yes, explain:

4. FIND THE STATUTORY AUTHORITY

What Act of Congress is claimed to authorize the executive action?

Statute:

Citation, if available:

What does the statute actually authorize?

Does the executive action remain within that statutory authority?

Clearly yes

Probably yes

Unclear

Probably no

Clearly no

Explain:

5. WHAT HAS CONGRESS DONE?

Congress has:

Expressly authorized the action

Authorized related executive discretion

Remained silent

Rejected substantially similar legislation

Restricted the claimed authority

Expressly prohibited the action

Taken conflicting actions

Unknown

Relevant congressional action:

6. APPLY THE YOUNGSTOWN FRAMEWORK

Category One - Strongest Executive Position

The President acts with authorization from Congress.

Applies

Does not apply

Category Two - Constitutional "Zone of Twilight"

Congress has neither clearly authorized nor prohibited the action.

Applies

Does not apply

Category Three - Weakest Executive Position

The President acts contrary to the expressed or implied will of Congress.

Applies

Does not apply

Which category best describes this action?

Category: _____

Why?

7. EXECUTION OR LEGISLATION?

Ask the decisive question:

Is the President carrying out a legal policy already established by the Constitution or Congress?

Yes

Or is the President establishing the governing policy himself?

Yes

What would be different if Congress had enacted this policy directly?

Could the executive action exist in substantially the same form if Congress had never passed the underlying statute?

Yes

No

Unclear

If yes, explain where the independent presidential authority comes from:

8. CHECK THE SEPARATION OF POWERS

Does the executive action appear to exercise a power principally assigned to another branch?

Legislative power

Judicial power

Congressional spending authority

Congressional war authority

Senate advice-and-consent authority

No apparent encroachment

Other: _____

Which constitutional check is relevant?

Congressional legislation

Appropriations / defunding

Veto process

Senate consent

Judicial case or controversy

Impeachment

Federalism / state authority

Elections

Other: _____

9. TEST THE JUSTIFICATIONS

Mark every argument being used to defend the action.

Congress will not act

Congress is too slow

The policy is necessary

It is an emergency

National security requires it

Previous Presidents have done it

Congress delegated broad authority

The President won a national election

The policy is popular

The agency possesses technical expertise

Other: _____

Which of these arguments actually identifies constitutional or statutory authority?

10. THE POLITICAL CONSISTENCY TEST

Imagine the identical power being exercised by a President whose policies you strongly oppose.

Would you still consider the power constitutional?

Yes

No

Unsure

If your answer changed, explain why:

Remember: Political agreement cannot create constitutional authority.

11. CONSTITUTIONAL CONCLUSION

Based upon the analysis above, the executive action appears:

Clearly within constitutional executive authority

Within executive authority delegated by Congress

Constitutionally defensible but uncertain

Constitutionally questionable

Primarily legislative rather than executive

Contrary to congressional authority

Unsupported by an identified constitutional or statutory power

More research is required

State your conclusion in two or three sentences.

THE LIBERTY FIRST RULE

Before asking:

Is this good policy?

ask:

Who is acting?

What power is being exercised?

Where was that power delegated?

What constitutional check applies?

And above all:

Where is the authority?

Primary Sources for This Analysis

U.S. Constitution, Article I §1 "All legislative Powers herein granted" are vested in Congress.

U.S. Constitution, Article II §§1 and 3 The President receives executive power and must faithfully execute the laws.

James Madison, Federalist No. 47 Concentration of legislative, executive and judicial powers threatens liberty.

James Madison, Federalist No. 51 The constitutional structure must enable the branches to resist encroachment.

English Bill of Rights, 1689 Condemned executive suspension of law without legislative consent.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) Provides the foundational modern framework for evaluating presidential action in relation to congressional authority.