

Module 1 Primary Source Reader

The President Is Not a Lawmaker | Can a President Make Law by Executive Order?

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How to Use This Reader

The purpose of this reader is not simply to collect quotations.

Primary sources are most useful when we ask:

Who wrote this?

When was it written?

What constitutional problem was the author confronting?

What distinction was the author trying to preserve?

How does that principle apply to presidential power today?

As you work through these sources, keep one central question in mind:

May executive will become law?

The documents span more than two and a half centuries—from the struggle against royal prerogative in England, through the American founding, to the constitutional confrontation produced by President Harry Truman's seizure of the steel industry in 1952.

Together they reveal a consistent constitutional concern:

Liberty is endangered when the authority to make law and the authority to execute law accumulate in the same hands.

SOURCE 1

The English Bill of Rights

1689

Historical setting

The constitutional principle behind America's separation of legislative and executive power did not begin in Philadelphia in 1787.

English constitutional history contains centuries of conflict over the powers claimed by kings.

One of the most consequential occurred during the reign of James II.

James asserted royal authority to suspend the operation of laws and dispense individuals from statutory requirements without obtaining Parliament's consent.

This was not merely a dispute over individual policies.

It raised a fundamental constitutional question:

Could the executive determine when duly enacted laws would or would not operate?

James II was removed in the Glorious Revolution of 1688.

The following year Parliament enacted the English Bill of Rights.

Among its charges against James was his exercise of royal authority for:

"suspending of laws ... without consent of Parliament"

Source: English Bill of Rights, 1689.

What did "suspending" and "dispensing" mean?

The concepts were related but distinct.

Suspending power involved preventing a law from operating.

Dispensing power involved exempting particular people or situations from compliance with a law.

In either case, the executive claimed authority to alter the practical operation of legislation.

The constitutional objection was straightforward:

If the executive could decide when legislation applied, Parliament's lawmaking authority could be defeated without repealing the law.

Constitutional principle

The English Bill of Rights therefore represents an important step in the development of the principle that:

The executive is subordinate to law rather than superior to it.

That principle would later become deeply embedded in American constitutional thought.

Study questions

Why would the ability to suspend a law amount to more than merely enforcing it differently?

If a king can decide that a statute will not operate, what practical authority remains with Parliament?

How is suspending a law different from repealing it?

Why might Americans who inherited this constitutional history be suspicious of executive claims to alter law unilaterally?

Connect it to Module 1

Consider this statement:

"Congress will not change the law, so the President will accomplish the same result through executive action."

What similarities, if any, do you see between that argument and the older claim that executive authority may suspend or dispense with legislation?

SOURCE 2

John Adams and the Massachusetts Constitution

1780

Historical setting

Between independence and the federal Constitution, the newly independent states had to answer a difficult question:

How should republican government actually be structured?

The Revolution had overthrown royal government.

But eliminating kings did not eliminate the possibility of concentrated political power.

John Adams became one of the most influential architects of the American answer.

His political writings emphasized separated governmental functions, an independent judiciary, bicameral legislatures and an executive strong enough to execute law but institutionally distinct from the legislature.

Adams played the leading role in drafting the Massachusetts Constitution of 1780. Founders Online describes that constitution as a major development in the American movement toward a tripartite system of checks and balances that later influenced the federal Constitution.

Article XXX

The Massachusetts Declaration of Rights concludes its separation-of-powers provision with the objective that Massachusetts remain:

"a government of laws and not of men."

Source: Massachusetts Constitution of 1780, Declaration of Rights, Article XXX.

The complete article expressly prohibits each department from exercising the powers belonging to the others.

The executive is therefore prohibited from exercising legislative and judicial powers.

Why this source matters

This document predates the federal Constitution by seven years.

It demonstrates that Americans were already articulating separation of powers as a concrete constitutional rule-not merely as political theory.

The objective is especially important:

government of laws, not men.

That phrase identifies the danger of executive legislation.

If law changes because the individual holding executive office decides it should change, then law is increasingly dependent upon the man rather than upon the constitutional lawmaking process.

Study questions

What is the difference between "a government of laws" and "a government of men"?

Why does Article XXX prohibit the executive from exercising legislative power?

Does an elected executive pose no danger of concentrated power simply because he was chosen by voters?

What institutional process makes law something more durable than the will of a single officeholder?

Constitutional connection

Write one paragraph explaining this proposition:

The separation of powers protects the law itself from becoming dependent upon the personality of the officeholder.

SOURCE 3

The United States Constitution

Article I, Section 1

1787

The federal Constitution begins its allocation of governmental power with an unusually precise statement:

"All legislative Powers herein granted shall be vested in a Congress of the United States"

Source: U.S. Constitution, Article I §1.

Read the words carefully

There are three particularly important components.

"All legislative Powers"

The subject is legislative power.

The Constitution is identifying the power to establish federal law.

"herein granted"

Congress does not possess unlimited legislative power.

The federal legislative powers are those granted by the Constitution.

That distinction becomes important throughout LFS constitutional teaching.

"shall be vested in a Congress"

The Constitution identifies the governmental institution that receives the legislative authority it grants.

That institution is Congress.

Not the President.

Not federal agencies.

Not federal courts.

Congress.

Why it matters

Congress.gov's Constitution Annotated explains that one purpose of the Legislative Vesting Clause was specifically to limit the extent to which the executive and judiciary could exercise legislative power. Its historical discussion connects that concern with the English tradition against combining the making and enforcement of law.

Study questions

What does "vested" mean in this context?

Why does the Constitution identify the holder of legislative power before describing individual congressional powers?

Does Article I §1 say that Congress may exercise executive power simply because Congress believes doing so would be more effective?

What corresponding limitation should follow for the executive branch?

Textual exercise

Complete the statement:

If the governmental action is fundamentally _____ in nature, our first constitutional inquiry should be whether that authority belongs to _____.

SOURCE 4

The United States Constitution

Article II - Executive Power and Faithful Execution

1787

Article II begins:

"The executive Power shall be vested in a President"

Source: U.S. Constitution, Article II §1.

Article II later requires that the President:

"take Care that the Laws be faithfully executed"

Source: U.S. Constitution, Article II §3.

Compare Article I and Article II

Put the two clauses next to one another.

This comparison is one of the simplest and most useful exercises in the entire Presidential Power course.

The President may recommend law

Article II also authorizes the President to recommend measures for Congress's consideration.

That is an important textual clue.

The President may:

identify a problem;
recommend legislation;
advocate for legislation;
negotiate with Congress;
sign or veto legislation through the Article I process.

But if Article II contemplated a general presidential lawmaking power, there would be little reason to tell the President to recommend measures to Congress.

The Take Care Clause

Congress.gov identifies the Take Care Clause as encompassing presidential authority to carry out powers supplied directly by the Constitution and duties supplied through statutes enacted by Congress.

That does not mean executive execution is mechanical.

Executive officials often exercise judgment.

Law must be interpreted.

Administrative details must be resolved.

Priorities must sometimes be established.

But executive judgment still operates within an underlying source of lawful authority.

Study questions

What is the object of the phrase "faithfully executed"?

How can the President faithfully execute a law that does not yet exist?

What distinction should we make between executive judgment and legislative policy-making?

Why is the President's power to recommend measures to Congress relevant to the executive-order question?

Compare these actions

Action A

Congress creates a veterans program and directs the Department of Veterans Affairs to establish an application process.

The President tells the department how to organize the process within the statute.

Legislation or execution?

Action B

Congress refuses to create a new veterans benefit.

The President orders the department to create and fund the benefit anyway.

Legislation or execution?

Explain your answer.

SOURCE 5

James Madison

Federalist No. 47

January 30, 1788

Historical setting

The Constitution had been drafted, but it had not yet been ratified.

Opponents argued that the proposed government did not adequately separate its branches.

Madison answered the objection in Federalist No. 47.

His response is frequently misunderstood.

Madison did not argue that separation of powers was unnecessary.

He agreed that separation was indispensable to liberty.

The dispute concerned what proper separation actually required.

Madison's warning

Madison describes accumulation of the three principal governmental powers as:

"the very definition of tyranny."

Source: James Madison, Federalist No. 47.

The full discussion is more sophisticated than the famous quotation alone.

Madison explains that absolute isolation of the branches is neither possible nor desirable.

The branches may exercise certain constitutional checks upon one another.

But one department must not consume the whole power properly belonging to another.

Madison uses the British constitution to illustrate the distinction.

The king participated in the legislative process through a negative-what Americans would recognize conceptually as veto authority.

But possessing a check on legislation did not make the king the legislature.

Partial agency versus possession of the power

This distinction is critical.

The President participates in legislation.

He can recommend legislation.

He can sign legislation.

He can veto legislation.

But participating in the constitutional legislative process is not the same thing as possessing the legislative power itself.

Why this matters for executive orders

An executive order may be a valid exercise of executive authority.

But if an executive order establishes the governing legal policy Congress itself did not enact, we must ask whether the President has moved from:

executive participation

to:

legislative possession.

Study questions

Does Madison demand complete isolation between branches?

What is the difference between checking another branch and exercising that branch's entire constitutional power?

Why is presidential veto authority not evidence of a general presidential lawmaking power?

How does Federalist No. 47 help us analyze executive orders?

Application

Suppose the President vetoes a bill.

Is the President exercising legislative power?

Explain carefully.

Now suppose the President replaces the vetoed legislation with his own executive order creating substantially the same legal regime.

What constitutional difference has occurred?

SOURCE 6

James Madison

Federalist No. 51

February 6, 1788

Historical setting

Federalist No. 51 asks how separated powers can actually be maintained in practice.

Writing constitutional boundaries on parchment is not enough.

Government officials have incentives.

Institutions have ambitions.

Power tends to expand.

The constitutional structure therefore needs internal mechanisms that encourage each department to resist encroachments by the others.

Madison summarizes the idea:

"Ambition must be made to counteract ambition."

Source: James Madison, Federalist No. 51.

Government must control itself

Madison's reasoning begins with human nature.

If rulers could always be trusted to remain within proper boundaries, structural safeguards would be less important.

But government is operated by human beings.

So constitutional architecture must anticipate the possibility of overreach.

Congress receives powers with which to resist executive encroachment.

The President receives powers with which to resist legislative encroachment.

Courts possess their own independent judicial responsibilities.

Federalism provides an additional division between the federal and state governments.

Madison calls this a system of "double security" for the rights of the people.

Why this matters

When a President responds to congressional refusal by acting unilaterally, the constitutional question is not simply whether the President's objective is reasonable.

We should also ask whether an important structural check is being bypassed.

Congressional refusal may itself be part of the constitutional process.

The inability of one officer to obtain everything he wants is sometimes evidence that the constitutional system is functioning exactly as designed.

Study questions

Why does Madison believe elections alone are insufficient to protect liberty?

What are "auxiliary precautions"?

Why should Congress resist executive encroachment even when individual legislators support the President's desired policy?

Can institutional gridlock sometimes serve a constitutional purpose?

Reflection

Respond to this claim:

"If Congress will not act, someone has to."

What would Madison likely ask before accepting that argument?

SOURCE 7

343 U.S. 579

June 2, 1952

The historical problem

In 1952 the United States was engaged in the Korean War.

A major dispute between steel companies and steelworkers threatened a nationwide strike.

President Harry Truman believed interruption of steel production would seriously impair national defense.

On April 8, 1952, Truman issued Executive Order 10340.

The order directed Secretary of Commerce Charles Sawyer to seize and operate major steel mills.

The President relied upon his constitutional authority and his position as Commander in Chief.

But Congress had not enacted a statute giving him the specific seizure authority he claimed.

Indeed, Congress had previously created other mechanisms for resolving labor emergencies and had declined to grant the seizure power Truman used. The Supreme Court's syllabus specifically notes these circumstances.

The steel companies challenged the seizure.

The Supreme Court ruled against the President, 6-3.

Justice Hugo Black - Majority Opinion

The central question was not whether maintaining steel production was important.

It unquestionably was.

The question was whether the President had constitutional authority to seize private steel mills.

Justice Black concluded that the order could not be sustained because neither a statute nor an independent constitutional power supplied that authority.

The Court's holding is commonly summarized as denying the President authority to take private property absent congressional or constitutional authorization.

The constitutional principle

The President's duty is to execute law.

The seizure order effectively established a governmental policy that required legislative authority.

Why the emergency matters

The case occurred during an actual war.

That makes Youngstown more-not less-important.

The Court was not considering presidential power in calm circumstances.

It was considering an asserted executive power during a national-security crisis.

The existence of a serious problem did not answer:

Where is the authority?

JUSTICE ROBERT JACKSON

The Three Categories of Presidential Power

Justice Jackson wrote a concurring opinion that has become one of the most influential frameworks for evaluating presidential authority.

Rather than assuming presidential power exists in isolation, Jackson examined the President's relationship with Congress.

Category One

President + Congress

When the President acts pursuant to congressional authorization, Jackson said presidential authority is:

"at its maximum"

Source: Justice Robert Jackson, concurring, *Youngstown*.

In this circumstance the President possesses:

whatever constitutional authority belongs independently to the executive;

plus lawful authority Congress has supplied.

Example

Congress enacts an emergency-management statute authorizing specified presidential actions when defined conditions exist.

The President acts within those statutory boundaries.

This presents the strongest general case for executive authority.

Category Two

Congress Is Silent

When Congress has neither granted nor denied authority, Jackson described a:

"zone of twilight"

Source: Justice Robert Jackson, concurring, *Youngstown*.

Here the constitutional analysis becomes more difficult.

The President must rely upon independent executive authority, historical practice and the particular distribution of power between the branches.

Congressional silence is not necessarily the same thing as congressional authorization.

Category Three

President Against Congress

When presidential action conflicts with Congress's expressed or implied will, presidential authority is weakest.

The President must then demonstrate that the Constitution gives him an independent authority that Congress itself cannot constitutionally restrict.

In Youngstown, Congress had not merely forgotten labor emergencies.

It had legislated concerning them without granting Truman the seizure authority he used.

That substantially weakened the President's position.

Student exercise

Place each scenario into a Jackson category.

Scenario A

Congress passes a statute expressly authorizing the President to suspend certain federal contracting rules during a defined emergency.

Category: _____

Scenario B

No statute clearly speaks to a narrow diplomatic action, but the President claims the action falls within independent Article II foreign-affairs authority.

Category: _____

Scenario C

Congress expressly prohibits the President from spending federal funds for Purpose X. The President orders the Treasury to fund Purpose X anyway.

Category: _____

THE HISTORICAL THREAD

Now place the sources in chronological order.

1689

English Bill of Rights

The executive may not set aside enacted law merely by asserting royal prerogative.

1780

Massachusetts Constitution

Executive, legislative and judicial powers are separated so government remains a government of laws rather than men.

1787

Article I and Article II

Legislative power is vested in Congress.

Executive power is vested in the President.

The President faithfully executes the laws.

1788

Federalist No. 47

Accumulation of governmental powers threatens liberty.

1788

Federalist No. 51

Constitutional institutions must possess structural means to resist encroachment.

1952

Youngstown

An executive order cannot create presidential authority that neither Congress nor the Constitution supplied.

SYNTHESIS EXERCISE

What Principle Connects These Documents?

Using at least four sources from the reader, explain this proposition:

"The President is not a lawmaker."

Your answer should distinguish between:

executive power;

legislative power;

executive discretion;

constitutional checks;

presidential participation in legislation;

unilateral creation of law.

PRIMARY SOURCE LABORATORY

A New Executive Order

Assume that Congress enacted the National Infrastructure Act.

The statute authorizes the Department of Transportation to administer grants for interstate bridge construction.

Congress specifies eligibility requirements and appropriates \$20 billion.

The President issues an executive order directing the department to establish application procedures and prioritize bridges classified as structurally deficient.

Question 1

What source of authority supports the executive action?

Question 2

Is the President creating the underlying program?

Question 3

Which primary source from this reader best helps explain why this action may be legitimate?

Now change the facts.

Congress repeatedly rejects legislation creating a national residential-building code.

The President issues an executive order directing the Department of Transportation to create a national building code, require states to enforce it and assess federal penalties against noncompliant property owners.

Question 4

What has changed?

Question 5

Where should you look for the claimed authority?

Question 6

Which source in this reader most directly tells you who possesses federal legislative authority?

Question 7

How would Youngstown help analyze the President's claim?

SOURCE COMPARISON MATRIX

KEY TERMS

Legislative Power

The governmental authority to establish binding legal rules within the jurisdiction constitutionally entrusted to the legislature.

Executive Power

The authority to carry out and administer laws and perform the constitutional functions assigned to the executive.

Executive Order

A presidential directive concerning the operation of the executive branch. Its constitutional validity depends upon the underlying authority being exercised.

Separation of Powers

The constitutional allocation of legislative, executive and judicial functions among distinct governmental institutions.

Suspension of Law

An assertion that an existing law will temporarily cease to operate.

Dispensing Power

An asserted executive authority to exempt particular people or situations from operation of a law.

Faithful Execution

The Article II obligation that the President take care that federal laws are faithfully carried out.

Legislative Vesting Clause

Article I §1, assigning federal legislative powers granted by the Constitution to Congress.

Youngstown Framework

Justice Jackson's method of analyzing presidential authority in relation to congressional authorization, silence or opposition.

FINAL REVIEW

A student completing this reader should be able to answer all of the following without referring back to the text.

- 1.

Why is the English Bill of Rights relevant to American executive power?

- 2.

What did John Adams mean by "a government of laws and not of men"?

- 3.

Where does the Constitution vest federal legislative power?

- 4.

What does the Take Care Clause require of the President?

- 5.

Why does Madison believe separation of powers is essential to liberty?

-
- 6.

Why are constitutional checks needed even when officials are elected?

- 7.

What authority did Truman claim in Youngstown?

- 8.

Why did the Supreme Court reject the steel seizure?

- 9.

What are Justice Jackson's three categories?

- 10.

Why is "Congress refused to act" not by itself a constitutional grant of presidential power?

- 11.

What is the difference between executing a statute and creating the governing policy?

- 12.

What question should you ask whenever executive authority is asserted?

Where is the authority?

DOCUMENT REFERENCES

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LIBERTY FIRST SOCIETY

Presidential Power - Constitutional Analysis Tool