

CONSTITUTION 101

Module 8: The Executive Branch and Electoral College
8.6 Info Brief

ANALYZING EXECUTIVE ORDERS

When it comes to presidential power, the *constitutional* question often comes down to this: *Can the president do that?*

Over time, the Supreme Court has provided some guidance for analyzing this question. These battles often involve *executive orders*.

The American Bar Association describes an executive order as “a signed, written, and published directive of the President.” Executive orders go back to the very beginning of America—with President George Washington.

They aren’t specifically mentioned in the Constitution. For instance, there’s no “Executive Order Clause.” However, they *are* rooted in the president’s role in leading the executive branch and the president’s Article II duty to “take care” that the laws are “faithfully executed.”

In other words, the president is the boss of other people working in the executive branch of the government, and the president often uses executive orders to tell other executive-branch officials what to do.

Simply put, executive orders tell people working in the executive branch to do something.

For instance, President Washington used them to ask his executive-branch officials to prepare reports for him.

And President Truman used an executive order to desegregate the armed forces.

The main criticism is often that presidents use executive orders to stretch their powers—and sometimes command executive-branch officials to do things that presidents can’t get Congress to pass laws to do.

The leading case is [*Youngstown Sheet & Tube Co. v. Sawyer \(1952\)*](#) (also known as “The Steel Seizure Case”).

BIG IDEA: So, what’s the big idea that arises from the *Youngstown* decision?

When the president acts side by side with Congress, his power is at its highest level. (The Supreme Court tends to uphold his actions.) However, when the president acts on his own—especially in the face of congressional disapproval—his powers are at their lowest level. (And the Supreme Court may rule against him.)

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In the end, Justice Jackson's *Youngstown* concurrence remains a useful framework for analyzing constitutional debates over presidential power. In particular, it's a reminder to always ask the following question: Where is the president getting her authority to act? For instance, this is precisely the question that we ask when analyzing a president's executive order. (In those cases, the president is acting. But then, we must ask under what source—or sources—of legal authority?)

- Sometimes the president argues that the Constitution itself grants her the power to act.
- Sometimes she draws on laws passed by Congress.
- Sometimes she looks to previous court decisions to guide her actions.

Regardless, she must root her authority in some source of law. Otherwise, her executive action is invalid.

Of course, once we establish that the president can look to some source of authority to act in a particular situation, we must still ask whether the president's action violates any other provisions of the Constitution—whether that's a key Bill of Rights protection or some other part of the Constitution.