



Congress Cedes Legislative Power to President

On December 2, the headline on [businessweek.com](#) read: “Boehner Leads Drive to Take Away Obama Power to Issue Rules.” Seems the Speaker of the House wants to preserve to Congress the right to sign off on any rule promulgated by an executive branch agency that would cost more than \$100 million to the businesses to be regulated.



The Speaker’s effort to restrain the runaway executive branch is a far cry from the tone he struck in his victory speech on election night last year as his party won a powerful majority of seats in the lower house. [In that jubilant address](#), Boehner said, “While our new majority will serve as your voice in the people’s House, we must remember it is the president who sets the agenda for our government....”

For a man who prides himself on his devotion to the Constitution, the foregoing assessment of the power of the President is woefully ignorant and absolutely constitutionally unsound.

Were the Speaker of the House to spend a bit of time himself reading the document he insisted be read at the opening of the 112th Congress, perhaps he would understand that the “agenda” for the federal government (all three branches) is established by way of the enumerated powers set out in the Constitution. The authority granted to each branch is specifically set forth in the various articles of the Constitution (particularly Articles I-III), and they are few and well-defined.

As James Madison himself once wrote of the federal government, “The powers delegated by the proposed Constitution to the federal government are few and defined....” ([Federalist 45](#)).

When it comes to the slate of powers afforded the President by the Constitution, they are purposely limited so as to avoid allowing that office to be incrementally expanded into an autocracy. The roster of executive branch powers is laid out in Article II, with a couple of additional powers written into Article I as it pertains to the President’s constitutional check and balance on the lawmaking power of the legislative branch.

The following is an exhaustive list of the powers of the President as authorized by the [Constitution](#) of the United States.

Art. I, Sec. 7: power to approve or veto Bills and Resolutions passed by Congress.

Art. I, Sec. 9: power to write checks pursuant to Appropriations made by law

Art. II, Sec. 1: President has the “executive power.”

Art. II, Sec. 1: the President’s Oath of Office — to “preserve, protect and defend the Constitution of the



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United States.”

Art. II, Sec. 2:

President is the Commander in Chief of the armed forces.

President may require the principal Officers in the executive agencies to provide written opinions upon the duties of their offices.

President may grant reprieves and pardons for offenses against the United States, with the exception of impeachment.

Article II, Sec. 2:

President may make Treaties — with the advice and consent of the Senate.

President may nominate ambassadors, other public ministers and consuls, federal judges, and various other officers - with the advice and consent of the Senate.

President may make recess appointment which expire at the end of the next congressional session.

Art. II, Sec. 3:

President must periodically advise Congress on the State of the Union, and authorizes the President to recommend to Congress such measures as he deems wise.

President may, on extraordinary occasions, convene one or both houses of Congress and if both houses can not agree on when to adjourn, he is authorized to adjourn them to such time as he deems proper.

President must receive Ambassadors and other public ministers.

President must take care that the laws be faithfully executed

President must commission all the officers of the United States.

That is it. No President may unilaterally set any agenda that lies outside of this very narrow range of powers. Likewise, Congress may not permit the President to act outside of this constitutional sphere of authority.

Another crucial aspect of Article II is the presidential [Oath of Office](#). By willingly taking that oath, the President solemnly swears to “preserve, protect, and defend the Constitution.” In the execution of the vital duties covered by that oath, the President must check the Congress and watch that no bill passed by that body that is in violation of the Constitution is signed by him into law.

This solemn responsibility must be read in conjunction with [Article VI](#) wherein the Constitution mandates that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...

If the President were to sign a bill into law that is not made in pursuance of the powers granted to Congress by the Constitution, then he violates his oath.

Further, the President should be a person of extraordinary awareness of the fact that if any measure passed by Congress exceeds the scope of its constitutionally permitted arena of power, then such a “law” is not a law at all, as it is made not in pursuance of the Constitution, but in violation thereof. In such a case, the President’s oath would obligate him to veto that measure, thus protecting the



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Constitution from a domestic enemy.

Alexander Hamilton made this point very plainly in [Federalist 39](#):

But it will not follow from this doctrine [that laws passed by Congress are the Supreme law of the land] that acts of the large society which are NOT PURSUANT to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. [Emphasis in original.]

Today, the President routinely signs unconstitutional usurpation of power into law, thus eroding the sovereignty of the people and cooperating with Congress in the growth of the federal government in open and hostile defiance of the Constitution and his oath.

Perhaps the most common example of the unlawful grab of power committed by Presidents is in the promulgation of regulations by agencies that fall under the executive branch of which the President is the head.

In analyzing the breadth of this usurpation of the lawmaking power, it must be recalled that the *Constitution grants absolute legislative power to the Congress*. [Article I](#) reads, “All legislative Powers herein granted shall be vested in a Congress of the United States.”

The timeless principle of self-government and liberty that informs this article is the accountability of representatives. As the theory goes, if Congress, House or Senate, passes a law contrary to the will of the people or the states, then those voting for the offensive measures may be recalled by the electorate every two or six years, respectively. The right of suffrage makes representatives answerable to the people for their behavior on Capitol Hill.

According to [an article written by Joseph Postell](#), the lawmaking power of Congress was not usurped by the President; rather, the Congress itself ceded that right to the executive branch beginning during the administration of Woodrow Wilson.

Postell rightly explains that since that period, Congress has consistently and unconstitutionally surrendered its legislative power to the President through laws that have created a bloated bureaucracy and endowed the agencies composing it with the power to pass regulations and rules that are afforded the power of law.

Finally, unqualifiedly there is no power given to the President by the Constitution to issue “executive orders” that become the “law of the land.” Executive orders, so called, are permitted only to manage matters related to the exercise of the President’s enumerated powers. That is to say, the President may, theoretically, issue orders to members of the executive branch commanding them to carry out their constitutional duties or fulfilling his obligation to do so. No other use of an executive order is anticipated or authorized by the Constitution.

Sadly, executive orders and regulations may be the least of the constitutional abuses on the part of the President if the [National Defense Authorization Act of 2012](#) is passed and signed into law. Provisions of that bill empower the President to deploy the armed forces of the United States to arrest and indefinitely detain an American citizen on American soil who is determined to be threatening the safety of the “homeland.”

The people yet have the opportunity to hold their representatives accountable for their efforts to either reduce or expand the powers of the President.



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