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Interpreting the Tenth Amendment

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FYI, I have no legal training but I am highly educated and have read the Constitution numerous times searching for the answer to my question.

The tenth amendment limits the powers of the federal government to those specifically enumerated in the Constitution. I can find no authority enumerated in the Constitution for a majority of what the federal government does. Can some of you enlighten me as to how they gained that authority? Understand that in order to convince me that the federal government has the authority, you're going to have to show me where it is in the Constituion. I'm not arguing wheter or not they're "good and necessary", just whether or not they're Consttutional.

A partial list of the programs/departments (some I like and some I don't) for which I cannot find the authority in the Constitution:

1. **Department of the Interior**
2. **Department of Agriculture**
3. **Department of Labor**
4. **Department of Health and Human Services**
5. **Department of Housing and Urban Development**
6. **Department of Transportation**
7. **Department of Energy**
8. **Department of Education**
9. **Environmental Protection Agency**
10. **OSHA**
11. **Social Security**
12. **Medicare/Medicaid**
13. **"Obamacare"**
14. **National Parks**
15. **NASA**
16. **FDA**
17. **NIH**

18. **WIC**
19. **Farm Subsidies**
20. **Oil Subsidies**
21. **Federal Minimum Wage**
22. many more too numerous to list

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Chaan Tutlam · 6 days ago

At the time of the framing of the constitution, the framers could not envisage what circumstances would arise in the future and what that would mean for the powers of Congress. The list under article 1 section 8 of the constitution is not an "exhaustive" list where the federal government cant do anything other the listed powers. The list is rather "illustrative". I THINK.

So, many of the things the federal government does is not listed specifically, but rather its an interpretation from the power to provide "for the general welfare of the United States" under sec.8 of art. 1. I THINK

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Albert Strong · 4 days ago

David:

To possibly address the first nine items on this list:

Article I, section 8: To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in *any Department or Officer thereof*.

Article II, SECTION. 2. The President shall be 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; he 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,

and all other *Officers of the United States*, whose Appointments are not herein otherwise provided for, and *which shall be established by Law*: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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I am not sure that this is the text the Cabinet departments are based on, but the word Cabinet does not appear in the text. Just that there are Heads of Departments and Officers Appointedwhich shall be established by law. There is no specifications of what those departments

should be. So apparently congress established them with the approval of the Senate. Since there are no specifications, apparently the congress can establish departments as they see fit.

What you left off are Secretary of State, Attorney General, Secretary of Defense (which was WAR in the First Administration) and Treasury. None of those posts were mentioned in the Constitution either. Since the first Administration contained Washington, Randolph and Hamilton from the Framing Convention, the Congress contained several (Madison for instance) as well as the Supreme Court they understood they had the authority to establish these departments. Nobody objected then and I don't know of any (legal/constitutional) objection to Cabinet departments that were established since then.....which is a precedent by practice that would re-inforce the practice.

(Unless you want to add the first 4 cabinet posts to your list and argue no cabinet posts were allowed at all.)

+++++

The other items on the list are a mixed bag. Some are programs which are different issues and should be addressed separately: like Farm subsidies -- so they were probably challenged and they may or may not be Case law explaining the power to create them.

Others are sub-cabinet departments, some semi-independent agencies and some with Mixed legislative/administrative authority which might be questionable. One would have to look at each department separately.

But if the President, the Congress and the Supreme Court agree, then the Govt. has the authority to create them. It is a political issue at that point whether from time to time, under different Congresses and different Presidents they should be abolished for whatever reason.

I go back to the National Bank that many thought was unconstitutional: It was created under Washington, Jefferson let it lapse thinking it was beyond scope to the Constitution, Madison re-instated it, The Supreme Court ruled it constitutional in a very famous opinion and then President Jackson intentionally killed it again believing it was unconstitutional. It was reinstated later in our history.

(as a historical side-note, when first Jefferson and later Jackson killed the banks, a sharp recession soon ensued affecting the Madison and the Van Buren Administrations. But that is a political and economic question, not a constitutional one.)

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David Fey · 3 days ago 🔒

Albert,

My question is not with the Cabinet, but with what they do. I know I painted the Cabinet

Departments with a broad stroke and didn't break them apart program by program; my point was that it appears to me that much of what the federal government does is unconstitutional based on the limits imposed by the 10th amendment. I purposely did not include the Department of Defense and others, because I can find the authority in the Constitution for what they do, at least in broad terms. There might be individual programs within those departments that I still find constitutionally troubling.

I also did not include the Department of Commerce because the Constitution does give the government the power to regulate interstate commerce. There is debate as to the breadth of those powers, but that is the subject for another forum.

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Albert Strong · 6 days ago 🔒

David:

Your list is too much of a shotgun blast. There are many answers to your list of question programs, departments and agencies.

. Having Read Amer's books, you probably will not find the answers to most of these in the lectures. Many of these have been taken to court and the justification can be found in the Caselaw. While your list is current programs and departments, your question is as old as the republic and can be dated back easily to the Federal Bank question first debated between Madison and Hamilton and the answer changed over the years and several Generations (see Jackson administration in particular) until it is finally settled in modern times (Wilson until now) in favor of the federal power.

As for the Cabinet departments, I believe Amer discussed this point as something specified as an enumerated Congressional power to decide. I can review but you should too. I wasn't concerned and let that go. we should watch it again maybe?

Finally your title suggest this a thread to discuss the 10th Amendment. We have not reached that part of the course yet. It might be better to follow up after that lecture helps us along a little.

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Albert Strong · 5 days ago 🔒

David.

An additional thought as to your question and relates back to the example of the National Bank. The Supreme Court ruled it constitutional although it is not specifically mentioned in the text of the Constitution. The ruling is one of the most famous and the logic or how the (Marshall) court arrived at the decision would be one example how one of the many questions

your post raised was resolved. But please note, the decision resolved the legal question, but not the political one as President Jackson who hated the Bank killed it via veto later on. It was erected again later by other administrations.

I copied this summary from a legal website but if you google *McCulloch v. Maryland* you will find a landslide of information:

McCulloch v. Maryland (1819)

In the early years of our country, there was disagreement about whether the national government had the power to create a national bank. The first president, who believed in a strong national government created a national bank. The third president, who believed states should have more power closed the bank. The fourth president opened a new national bank in 1816.

Many state banks did not like the competition and the conservative practices of the national bank. As a way to restrict the national bank's operations or force the banks to close, the state of Maryland imposed a huge tax on the national bank. After the Bank refused to pay the tax, the case went to court. Maryland argued that the federal government did not have the authority to establish a bank, because that power was not specifically delegated to them in the Constitution.

The Supreme Court reached a unanimous decision that upheld the authority of Congress to establish a national bank. In the opinion, Chief Justice John Marshall conceded that the Constitution does not explicitly grant Congress the right to establish a national bank, but noted that the "necessary and proper" clause of the Constitution gives Congress the authority to do that which is required to exercise its enumerated powers. Thus, the Court affirmed the existence of implied powers.

On the issue of the authority of Maryland to tax the national bank, the Court also ruled in the Bank's favor. The Court found that "the power to tax involves the power to destroy ...If the states may tax one instrument [of the Federal Government] they may tax any and every other instrument ...the mail ...the mint...patent rights ... judicial process? This was not intended by the American people..." Furthermore, he said, "The Constitution and the laws made in pursuance thereof are supreme; they control the Constitution and laws of the respective states and cannot be controlled by them."

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Albert Strong · 5 days ago

Also, this might be of interest to readers of this Thread:

On January 5, 2011, the House adopted a new rule requiring that each bill or joint resolution introduced be accompanied by a Constitutional Authority Statement. The rule can be viewed on Rep. Eric Cantor's (R-VA) website <http://majorityleader.gov/CAS/>

Constitutional authority statements are printed in the Congressional Record when a bill is introduced and may be found on the LoC THOMAS site as well as the Gov. Printing Office

(GPO) site. Although they are hard to search for online, if you have a question about any current house bill you could search or write your Member of Congress (via email of course) to find one for you or give you a link to it.

An Example:

<http://thomas.loc.gov/cgi-bin/query/z?r113:H07OC3-0035/>

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David Fey · 6 days ago 🔒

I understand that the Founders could not foresee all the future needs that would need to be addressed so they allowed for changing the Constitution by amendment, not by executive, legislative, or judicial action. That is the genius of the Founders. It seems pretty clear to me that the Bill of Rights was to limit the power of the federal government; the powers of the federal government were specifically limited to those enumerated by the Constitution while the rights of the people were not limited to those enumerated.

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Anonymous · 6 days ago 🔒

This goes to the core of the competing doctrines when it comes to the interpretation of the constitution.

For an eloquent defense of the "living constitution view" that apparently the professor endorses to a certain degree, see this <http://www.law.uchicago.edu/alumni/magazine/fall10/strauss> .

For an equally eloquent defense of its opposite, "originalist view", see this http://www.amazon.com/Reading-Law-Interpretation-Legal-Texts/dp/031427555X/ref=la_B001I9N9XW_1_3/188... .

Legal interpretation not being "science", ie, being mostly about different opinions and ideology, what remains is the ideology of the sitting US Supreme Court justices. As they stand today, there are 4 mostly originalists (though Roberts took a living constitution approach to save Obamacare) and 4 living constitution people. Anthony Kennedy is originalist for economic matters (he was in the majority of Citizens United) but living constitution for social matters (abortion, gay marriage, etc).

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Anthony Gary Brown

Signature Track

· 6 days ago



A good starting point is Article I, Section 8. This gives Congress a list of specific areas of legitimacy, one of the very first of which is to "provide for the common Defence and general Welfare of the United States". And the final Art I:8 power is "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Give 'em an inch.....

Gary B.

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Anonymous · 6 days ago

You forgot to mention NASA. Perhaps we should have stepped aside and conceded the space race to the USSR. Looking for civilization ending asteroids - not in the Constitution. We should shut down SETI. Is this a forum for serious discussion or just a cutesy way of whining about taxes?

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