

The Constitution and Executive Power(s)

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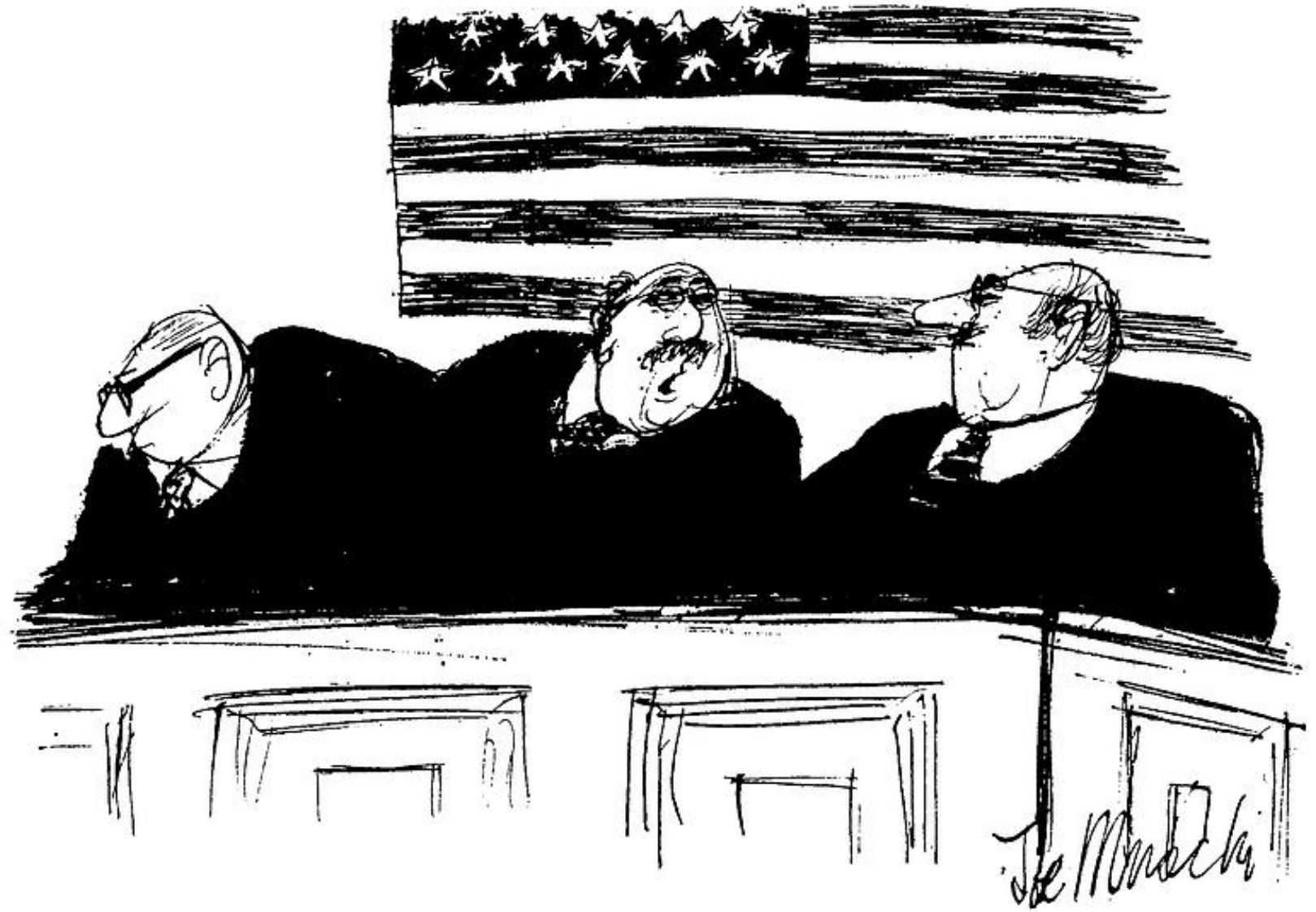
Presentation Outline

- I. Article II: Text and Original Understanding
- II. The Great Debate: “Inherent” vs. “Preclusive” Power
- III. Flashpoints:
 - 1. The President’s Substantive Authorities
 - 2. The President’s Power to Superintend the Executive Branch
 - 3. Presidential Privileges and Immunities
- IV. Some Implications of the Current Trends
- V. Q&A

Spoiler Alert: My Thesis for This Afternoon

- Just to tease where all of this is going, my hope is to persuade you of two points this afternoon:
- ***First***, there is nothing inherently problematic about a powerful, robust President—whether they are a Democrat or a Republican.
- ***Second***, the central constitutional problem with the **presidency** today is that it has become too unaccountable—both because Congress has stopped doing its job and because the courts have weakened existing accountability mechanisms.
- Put another way, it's not the **presidency** that's broken; it's the separation of powers' ability to keep bad presidents in check.

Executive power
in a nutshell (via
The New Yorker):



"Do you ever have one of those days when everything seems unconstitutional?"

in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing, shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money, shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary, for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years, and, together with the Vice President, chosen for the same Term, be elected, as follows.

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of

the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:— "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

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 he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

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He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, 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.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

I. Article II: Text and Original Understanding

- U.S. CONST. art. II, § 1, cl. 1 (“Vesting” Clause): “The executive Power shall be vested in a President of the United States of America.”
- Compare that with the Article I Vesting Clause: “All legislative Powers **herein granted** shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”
- In other words, “executive power” is a concept unto itself—one that is informed by, but not necessarily **limited to**, the specific textual powers conferred by the rest of Article II.

I. Article II: Text and Original Understanding

- Article II also tees up the central debate over executive power by **distinguishing** between:
 - (1) The President's administrative role (he's "Commander in Chief" of the military; he can request "opinions" from heads of departments; etc.);
 - (2) Powers that are the President's **alone** (e.g., pardons; receiving ambassadors; and "taking care" that the laws "be faithfully executed"); and
 - (3) Powers the President **shares** with the Senate (e.g., appointing principal and inferior officers; making treaties; etc.).
- Critically, Article II also doesn't tell us how to resolve conflicts.

II. The Great Debate: Unilateral/Preclusive Power

➤ Consensus: Unilateral (or Inherent) Powers:

- At least **some** power to act **without** congressional authorization (especially important given Congress being out of session);
- At least **some** power to **interpret** acts of Congress; and
- At least **some** discretion over **how** federal laws are to be enforced.

➤ Disagreements: Preclusive Powers / Unitary Executive:

- The President's power to **refuse** to enforce acts of Congress;
- The President's power to **defy** acts of Congress;
- The limits on Congress's powers over the **bureaucracy**; and
- The existence and scope of presidential privileges and immunities.

II. The Great Debate: Unilateral/Preclusive Power

- **Key Takeaway #1:** Although it has become commonplace for politicians to complain about a President of another party using executive orders, the reality is that **all** Presidents do it. Executive orders—reflecting the President’s interpretations of the relevant statutes and the Constitution—are not *per se* problematic. The question is whether the President’s interpretations are **valid**.
- **Key Takeaway #2:** The much more controversial debate is about how much Congress can use its powers to **constrain** the President—whether by mandating enforcement; by imposing **limits** on his authorities; or by **insulating** his subordinates.

II. The Great Debate: Unilateral/Preclusive Power

➤ Justice Robert Jackson in the *Steel Seizure Case* (1952):

“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.

Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”

III. Flashpoint 1: The President's Substantive Powers

1. **Domestic Authority:** The Supreme Court has been skeptical that President can ignore/defy Congress when it comes to domestic affairs—*e.g.*, *Steel Seizure Case* (1952).
2. **Foreign Relations:** The Supreme Court has recognized **some** preclusive powers in the field of foreign relations, such as recognition of foreign borders—*e.g.*, *Zivotofsky* (2015).
3. **Commander-in-Chief:** Congress almost certainly **can't** make someone **else** “Commander-in-Chief of the military.
4. **War Powers:** Much messier; Supreme Court has recognized **broad** presidential war powers—but not limitless ones.

III. Flashpoint 1: The President's Substantive Powers

- The biggest issue we currently face in the war powers debate is the 2001 AUMF—which is **still** on the books:

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

- Too many statutes include these open-ended delegations...

III. Flashpoint 2: The President's Superintendence

- The Rise of the “Unitary” Executive: It is well-settled that “principal” officers (e.g., Cabinet Secretaries) must serve at the pleasure of the President. But can Congress protect “inferior” officers or heads of “independent agencies” (or even line employees in gov’t agencies) from removal except “for cause”?
- For generations, the Supreme Court said yes. But in recent years, it has changed its tune—toward a “unitary” executive.
- From *Seila Law* (2020): “Under our Constitution, the ‘executive Power’—**all of it**—is ‘vested in a President,’ who must “take Care that the Laws be faithfully executed.”

III. Flashpoint 3: Privileges and Immunities

- *United States v. Nixon (1974)*: Article II creates a qualified privilege from the compelled disclosure of confidential comms.
- *Nixon v. Fitzgerald (1982)*: Presidents can not be held civilly liable for acts taken within the “outer perimeter” of their official duties.
- *Trump v. United States (2024)*: Presidents cannot be prosecuted for **anything** relating to their “core” executive powers; and they have a presumption of immunity that protects them from prosecution for **official** acts unless the prosecution would not hamper their ability to do their job.

IV. Some Implications of the Current Trends

- **A More Partisan Executive Branch:** The less independence in the executive branch, the more presidents can direct even junior officials to make decisions for partisan political reasons.
- **More Dependence Upon Executive Orders:** The less Congress is filling gaps with new legislation (e.g., immigration policy), the more presidents of **both** parties are left to address current challenges with executive orders—rather than statutes specifically designed to address them.
- **Less Accountability:** Between fewer statutes **trying** to limit presidential power, and more protections when presidents abuse their powers, this all leads to less accountability overall.

IV. Some Implications of the Current Trends

➤ *The Federalist* No. 51 (James Madison):

“The great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.”

IV. Some Implications of the Current Trends

- In other words, the problem is **not** that presidents are ambitious. One of the central reasons **why** the Constitution created a chief executive was to have a dynamic, single person in a position not just to enforce our laws on a regular basis, but to respond to unpredictable crises. An ambitious executive!
- **Case Study—The Whiskey Rebellion (1794)**: In response to a tax revolt in Western Pennsylvania, President Washington called out state militias to put down the unrest and restore order. **BUT**, he did so only by following the letter of statutes Congress had passed specifying the exact steps to follow.

IV. Some Implications of the Current Trends

- Rather, the problem has two dimensions:
- ***First***, we have a Congress that is as **un-ambitious**, at least institutionally, as we have seen in our lifetimes—if not ever. Increasingly in recent decades, Congress has **stopped** asserting its primacy in federal policymaking **or** the full extent of its ability to constrain the other branches—the courts **and** the presidency.
- ***Second***, and speaking of the courts, we have a Supreme Court that is, as a result, also increasingly unaccountable—and removing comparable checks **from** the executive branch.



IV. Some Implications of the Current Trends

- This leads to my thesis: The biggest problem facing executive power (and, indeed, the separation of powers within our constitutional system today) is the **fecklessness** of Congress—its basic unwillingness to act in its **institutional** (as opposed to partisan) interests.
- We will like some presidents more than others. We will complain that presidents we don't like are abusing their powers (as some have). But we are only **in** this position **because** the presidency has continued to arrogate power (with lots of help from the courts), and Congress has ... acquiesced.

IV. Some Implications of the Current Trends

- And so, whether you see abuses of executive power as coming primarily from Democratic presidents or Republicans, the best way to insulate against comparable abuses going forward is **not** to vote for the other party (of course, you may have **other** reasons for doing that).
- Rather, it's to vote for Representatives and Senators who will work to restore Congress's power **regardless** of whether the President is “on their team”—to get us back to a place where the separation of powers takes precedence over the separation of parties.

IV. Some Implications of the Current Trends

- Until that happens, we'll see more of the divisiveness that currently infects our most significant policy debates.
- We'll continue to fail to distinguish between policies we just don't **like** and those we think are actually **illegal**.
- We'll leave presidents either **powerless** to respond to policy crises or needing to rely upon strained interpretations of the relevant statutes;
- And the institution that ends up empowered the **most** is not the presidency, but the only institution that's left to **check** it—the courts, *i.e.*, the **least** democratic of all of them.

IV. Some Implications of the Current Trends

- It doesn't have to be this way.
- For the better part of 175 years, it **wasn't** this way.
- And, if the Founders' vision is to be realized, it **shouldn't** be this way.
- That's my message for you on this Constitution Day 2024:
- We have spent decades empowering the presidency (and the courts) at the expense of the most representative and democratic branch of our government.
- It's time to reverse that trend.

ONE FIRST

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