



Scholar Exchange: The Presidency and the Executive Branch Briefing Document

INTERACTIVE CONSTITUTION RESOURCES

- Resources for [Article II](#)

BIG IDEA

With the new President, the Founding generation set out to establish an executive head stronger than the weak Governors in charge of the states at the time, but weaker than a king.

FRAMING QUESTIONS

- What is the job of the President? What powers and responsibilities does the Constitution give to the President?
- How did the Founding generation come up with the idea of the President, and what were their worries?
- Which presidential powers were written down, and what has been defined over time?
- What was the Founding generation’s vision for the President?
- How has the President’s role in our constitutional system changed over time?
- What are some of the modern debates over the Presidency? (Like executive orders)

INTRODUCTION TO THE CONSTITUTION’S TEXT

Let’s begin—as we always do when interpreting the Constitution—with the Constitution’s text.

The Constitution sets up three branches of government. [Article I](#) establishes the national government’s legislative branch—Congress—which writes the laws. [Article III](#) sets up the nation’s court system—with the Supreme Court at the top—which interprets the laws. [Article II](#) establishes the national government’s executive branch.

Within the national government, the executive branch is responsible for **enforcing the laws**. We commonly think of the presidency as the most powerful elected office in all of the world. Yet, the Constitution actually grants far fewer explicit powers to the President in Article II than it does to the Congress in Article I.

Article II

Article II “vest[s]” the “**executive Power . . . of the United States**” in a single President. It sets out the details for how we elect a President (namely, through the Electoral College) and how we might remove one from office (namely, through the impeachment process). It also lists some of the President’s core powers and responsibilities, including:

- Her role as “Commander in Chief of the Army and Navy of the United States.”

- Her power to:
 - Appoint judges and executive branch officials with the advice and consent of the Senate.
 - “[M]ake Treaties, provided two thirds of the Senators present concur.”
 - “[G]rant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”
 - And her duty to “take Care that the Laws be faithfully executed.”

Article I and III

In Article I, the Constitution also gives the President the power to veto legislation passed by Congress. (But Congress can override the President’s veto with a 2/3 vote in both Houses of Congress.) At the same time, the Constitution’s system of checks and balances ensures that the other two branches—Congress and the Supreme Court—can check the President.

For instance, the President may be able to veto a law passed by Congress. But Congress has the power to *override* the President’s veto—to cancel it—with a 2/3 vote in both Houses of Congress. The Constitution also gives the President the power to appoint Supreme Court Justices, but those appointments must be approved by the Senate. The same goes for new treaties with other countries

Finally, the Supreme Court has the power to review the President’s actions—for instance, new executive orders—and decide whether those actions were constitutional or unconstitutional.

22nd Amendment

Here’s the [Twenty-Second Amendment](#)’s language:

“No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once...”

The President Must be 35 Years Old. In part, this age requirement guarded against the danger of politicians being elected to office based on their famous names—giving candidates from famous families enough time to live their lives, gain valuable experience, and provide the public with a record of their own for judging whether they were fit to be President.

Article II, Section 4

Article II, Section 4, sets out the process for impeachment and removal.

It reads as follows: The **“President, Vice President and all civil Officers of the United States” shall be removed from office if convicted in an impeachment trial of “Treason, Bribery, or other high Crimes and Misdemeanors.”** Two clauses in Article I lay out the role of the House of Representatives and the Senate in this process. The House has the power to impeach—by a majority vote and the Senate has the power to hold impeachment trials and remove a President from office with a 2/3 vote. In practice, impeachments by the House have been rare. Only three Presidents have been impeached and no President has been removed by the Senate. (Although President Nixon *did* resign from office, and Andrew Johnson was only a single vote away!)



25th Amendment

Section 1 says that when the President dies, resigns, or is removed from office, the Vice President becomes President. (So, when President Nixon resigned, his Vice President—Gerald Ford—became President under the Twenty-Fifth Amendment.)

Section 2 sets out the process for filling an open seat for Vice President. The President nominates a new Vice President, and *both* the House *and* the Senate must approve of the pick by majority vote in each House. (So, when Vice President Spiro Agnew resigned in 1973, President Nixon selected Gerald Ford as Vice President, and the House and Senate confirmed the pick.)

Section 3 permits the President to temporarily transfer power by a written statement that he is **“unable to discharge the powers and duties of his office.”** The President can then resume his responsibility with a second written statement saying that he’s ready for duty. (So, President Reagan transferred his authority to Vice President Bush for a few hours while he had a planned surgery.)

Section 4 addresses the situation where a President refuses to transfer his duties when others might conclude that he is unable to fulfill them. It’s a pretty complicated process.

- Today, it requires the Vice President and a majority of the President’s cabinet concluding that the President is “unable to discharge the powers and duties of his office.” The Vice President then becomes Acting President. But the President can disagree—giving the Vice President and the Cabinet four days to respond. If they side with the President, he resumes his duties as President. If they still conclude that the President is unable to carry out his duties as President, the Vice President remains Acting President, and Congress must meet quickly and weigh in. The President retakes office unless *both* Houses of Congress vote by a two-thirds majority that the President is unable to carry out his duties.

Big Idea: With the new President, the Founding generation set out to establish an executive head stronger than the weak Governors in charge of the states at the time, but weaker than a king.

So that is a LOT. This was all done in that summer of 1787 in Philadelphia. But there was a lot of debate and, of course, compromise. Now that we did a Constitution check and found out where the powers of the President are given in the Constitution, let’s turn to the founding story.

How did we end up with Article II and this vision of the Presidency? To answer this question, let’s return to the Constitutional Convention and to Article II’s Founding Story.

FOUNDING STORY

It’s fair to say that the Framers struggled with how to structure the Presidency. This was driven, in part, by the lack of examples in practice at the time. When the Framers looked to Europe, they saw powerful kings. When they looked to their own state constitutions, they saw executives too weak to govern effectively. When they looked to their own Congress under the Articles of Confederation, they saw a body with little (to no) executive leadership. Something had to give.

At the same time, the Framers feared executive power. Of course, they remembered the abuses of King George and his ministers in America—abuses that helped lead to the American Revolution. In colonial America, royal governors shut down popular assemblies and vetoed their bills.

Tracking these lessons, early state constitutions created weak Governors.

- In 1787, eleven states declined to give their Governors a veto over laws passed by the state legislature. (New York only permitted its Governor to sit on a council of revision. But the Massachusetts Constitution—written by John Adams in 1780—*did* grant the Governor a veto. Adams was more supportive of executive power (and more suspicious of popular rule) than many in the Founding generation.)
- Most Governors were elected—not by the people of their states—but by the state legislatures. Most Governors had to work with an executive council chosen by others. Ten states set the Governor’s term at only one year, and many of the Southern states either banned reelection bids altogether or limited them to three terms in a row. No state had a term for longer than three years.

At the same time, the Continental Congress had no executive to speak of. True, it had a president. However, the president was simply a delegate “appointed to preside” in Congress for no more than a year. He had to be a sitting member of Congress. His position was largely honorary, with no powers of appointment, no veto, no command of the military, power over executive departments, no power to negotiate treaties with other nations, and no pardon power. (The President was more like the Vice President’s honorary position in the Senate today—basically like an “honorary chair.”).

With this background in mind, let’s turn now to the Convention story. How did we get Article II and the U.S. Presidency as enshrined in the Constitution?

- The Framers as a whole had a range of opinions when it came to the new executive. On one end of the spectrum, Alexander Hamilton and John Dickinson voiced admiration for the limited monarchy of Britain. On the other end of the spectrum, Roger Sherman suggested that no constitutional provision need be made for the executive because it was **“nothing more than an institution for carrying the will of the Legislature into effect.”** So, a weak President and a strong Congress. In the end, Pennsylvania’s James Wilson would be the driving force behind the Presidency at the Convention.

The debate over the Presidency was a long and winding road. In many ways, it often felt like the more that the Framers discussed the executive, the more puzzled they became. Furthermore, unlike the debates over Congress, the Framers’ positions often didn’t match the perceived interests of their states. Over time, they wrestled with four big issues:

- How to elect the President.
- How long the President’s term should be.
- Whether the President should be allowed to run for reelection.
- How a President could be removed from office during his term (so, the question of impeachment and removal).

The delegates repeatedly learned that a decision made on one of these issues changed their views about one (or more) of the others. Under these conditions, no single delegate or faction could control the course of the debate—although, as

I said earlier, I think that James Wilson can most persuasively lay claim to being called the “Father of the American Presidency.”

That’s a bit of the backstory, but how did Article II evolve through the course of the Convention?

The Virginia Plan

Let’s begin with the Virginia Plan—the proposal introduced at the beginning of the Convention by Edmund Randolph and driven by James Madison—that helped frame so many of the Convention’s debates.

The Virginia Plan contained a thorough theory of the Legislative branch of government, but little on the Executive. Basically, it proposed two big things—that (1) there should be an Executive, chosen by Congress, to serve a single term; and (2) that the Executive should have a joint veto power (with the judiciary) over acts of the National Legislature, subject to a supermajority legislative override.

It’s also worth noting what the Virginia Plan didn’t say. It didn’t: specify the length of the President’s term, say whether the President would play any role in matters of war and diplomacy, or grant the President any powers of appointment. So, everything else was left to further debate.

Generally, it’s possible divide the debate over the Presidency into three distinct phases

Phase One

The first phase was from June 1-6—so, it’s early in the Convention—and it produced agreement on two major points: to place the executive power in a single person, who would, in turn, have a limited veto over legislation.

Phase Two

The second phase was from July 17-26, and, during this period, the Framers struggled with how best to balance a (relatively) independent executive with different options for election and length in office. Much of this discussion involved weighing the relative disadvantages of election by the legislature, the American people, or the Electoral College.

Phase Three

Then, the third (and final) phase ran from September 4-8—as the Convention was speeding to a close—when the delegates’ lingering concerns about an (elitist and corrupt) Senate led them to empower the President. So, what were some of the big debates?

First Debate

First, the delegates had a heated debate over whether to have a single President or whether to divide the executive power between multiple people.

It’s easy to take the American Presidency—with a single President—for granted today, but the decision to go with a single President was a big deal. Various states had more than one executive or limited the executive’s power through some sort of council. At first, even Madison himself supported an arrangement like this. (This may have been in

deference to fellow Virginian, Edmund Randolph, and his fear of a unitary executive.) James Wilson—initially standing alone—argued vigorously **“that the Executive consist of a single person.”** Two key delegates then attacked Wilson.

- Connecticut’s Roger Sherman suggested leaving the entire subject—and the structure of the Presidency itself—to Congress.
- Virginia’s Edmund Randolph—sponsor of the Virginia Plan—described **“unity in the Executive magistracy” (so, a single President) as “the foetus of monarchy.”** In short, he criticized Wilson for taking the British Constitution (and its king) **“as our prototype.”**
- Wilson countered that a single President—if structured properly—would balance the advantages of a powerful king (namely, “energy” and “dispatch”) with “responsibility” (in other words, checks by Congress and the American people).

On June 4, Wilson eventually convinced his colleagues (including Madison) of the viability of an energetic, single President. Wilson saw before others that in a republic where even executive power rested directly or indirectly on the people, we had less to fear in a strong executive than under an unaccountable monarchy. Wilson (who was America’s prophet of popular sovereignty) argued that the more the President was held responsible to the American people, the more power he could safely be given. (Wilson also supported a national popular vote for the President.) So, Madison—and the delegates—eventually went along with Wilson’s plan for a single executive.

Second Debate

Second, the delegates debated the length of the President’s time and whether to impose term limits on the President.

The Constitution sets the President’s term at four years and allows the President to run for reelection, but the delegates debated other options. For instance, in July, the delegates agreed to a President who would serve for a single term of six years.

- So, that’s a longer term than today but with term limits attached. This was consistent with the Virginia Plan. Remember, the longest term for a state Governor at the time was *three* years—with most state executives serving for a term of only *one* year. The delegates were open to a relatively longer term because they wanted a President powerful enough to compete with Congress and also one with enough experience to do the job well.

The delegates forcefully debated whether or not to impose term limits on the President.

- On one side was George Mason, strongly in support of term limits. He argued that it was “the very palladium of Civil liberty, that the general officers of State, and particularly the executive, should at fixed periods return to that mass from which they were first taken, in order that they may feel & respect those rights & interests, which are again to be personally valuable to them.” This was hardly a surprise. He had already written this principle into the influential Virginia Declaration of Rights in 1776. On the other side were delegates—like Roger Sherman and Rufus King—who saw eligibility for reelection as valuable. They argued, “He who has proved himself to be most fit for Office, ought not to be excluded by the constitution from holding it.”

The delegates settled on a four-year term, with the President able to run for reelection.



Third Debate

Third, the delegates debated how to elect a President.

Today, many democratic nations elect their executives by direct popular vote. But we don't. Instead, we use a system known as the "Electoral College." How does it work?

- Today, the Electoral College is made up of 538 electors drawn from the states and the District of Columbia. Under Article II of the Constitution, the states are given a number of electors equal to their congressional delegation. (So, if your state has two members in the U.S. House and two U.S. Senators, you get 4 Electoral Votes in the Electoral College.)
- Today, the American people vote for President and Vice President on the Election Day. But, technically speaking, these votes don't directly determine the outcome of the election. Technically, these popular votes determine which electors will be appointed to the Electoral College from each state. The electors eventually meet in December to cast their votes for President and Vice President. If a candidate receives a majority of these votes in the Electoral College, she wins—even if she lost the popular vote. If no candidate secures a majority in the Electoral College, then the election is sent to Congress. (As happened in the Election of 1824.)
 - The U.S. House of Representatives—voting as states, not individuals—selects the President and the Senate selects the Vice President.

At the Constitutional Convention, the delegates staked out a range of positions on how to elect a President, including by a popular vote (Wilson's preference), by the electoral college (Wilson's compromise), by members of Congress selected by lot (Wilson's ridiculous suggestion), by state Governors (Elbridge Gerry's idea), or by Congress (a popular view held by many of the delegates). For much of the Convention, the election of the President seemed like an unsolvable problem. Each idea had its own strengths and weaknesses.

- Election by the legislature had the advantage of placing the decision in the hands of the nation's most knowledgeable leaders. However, the concern was, as Gouverneur Morris warned, that the result would eventually be the "**work of intrigue, of cabal, and of faction,**" producing a pliable President who would become the willing tool of his supporters in Congress.
- Election by popular vote had the advantage of rooting the Presidency in popular sovereignty. Many delegates were concerned that the size of the country would make it difficult for the average voters to know anything about an out-of-staters' record.
- The third—and final—idea on the table was the Electoral College. The key advantage of this proposal was that it would keep the President independent of the legislature. He would have his own independent base of support that would dissolve after the election. Key disadvantages were the logistics of getting the Electors to meet and the related expenses. The Framers also feared whether the Electors would "**be men of the 1st or even the 2^d grade in the States.**"

Late in the Convention, the delegates settled on the Electoral College as a compromise between those who supported congressional election of the President and those who supported a role for the American people in selecting a President. Over time, the Electoral College has remained in place, but within this system (and beginning in our nation's earliest years), the American people have played a key role in presidential elections.

Fourth Debate

Fourth, the delegates debated whether to grant the President a role in the legislative process as a check on Congress.

James Madison proposed a Council of Revision—with the President sitting with members of the federal judiciary to review law passed by Congress and veto any bad ones. When Madison’s proposal came up for debate in early June, Elbridge Gerry immediately pushed to give the President a limited veto over laws passed by Congress. This would allow the President to veto congressional law, but also give Congress to override the President’s veto.

For Gerry and his Massachusetts colleague Rufus King, Madison’s proposed Council of Revision was flawed because it would give judges an improper role in legislating, while making it difficult for them to “expound the law as it should come before them, free from the bias of having participated in its formation.”

Wilson and Hamilton then pushed for an absolute veto for the President—one that couldn’t be overridden by a vote in Congress. But this was too much for the delegates to accept and drew the support of only Wilson, Hamilton, and Rufus King.

Gerry’s proposal for a limited veto passed decisively, 8 to 2. So, rather than having the President serve as part of Madison’s Council of Revision, the delegates gave the President his own veto power—with Congress given the authority to override it with a 2/3 vote in both Houses of Congress.

Final Debate

Finally, the delegates debated the process for removing a President from office before the end of his term—in other words, the process of impeachment and removal.

In July, the delegates agreed to a version of the impeachment and removal power that was broader than the one in the final draft—with removal allowed for “mal Practice or Neglect of Duty.” This broad language could have even included allegations of general incompetence—not simply abuses of power.

The Committee of Detail—tasked with taking the Resolutions passed during the first phase of the Convention and creating the first full draft of the Constitution—then narrowed the impeachment and removal power, limiting it to “Treason or Bribery or Corruption.”

The final text settled on “Treason, Bribery, or other High Crimes and Misdemeanors.”

TESTS OF PRESIDENTIAL POWER

Before turning to some of today’s ongoing debates over presidential power, let’s begin with how the Supreme Court analyzes many of these issues. When it comes to presidential power, the *constitutional* question often comes down to this: *can the President do that?*

Examples

- Can she put government money towards building a border wall?
- Can her Administration issue a sweeping regulation to regulate air pollution?
- Can she issue an executive order blocking immigration from certain countries?

- What about one to require everyone in the nation to wear a mask? Or to stay at home?
- Can she send American troops to another country to defend American diplomats? To protect innocent civilians from a violent dictator?
- What about trying to overthrow that dictator?

It's worth noting that the Supreme Court often tries to steer clear of cases addressing the scope of presidential power—perhaps fearing that it might be stepping into an area where it has less knowledge than the President (and also one in which the Congress has some power to check the President). However, the Court *has* provided *some* guidance over time.

Executive Orders

However, the Court *has* provided *some* guidance over time. These battles often involve *executive orders*. What are *they*?

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 they 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.”)

This case took place during the Korean War. Steel workers were going on strike and President Truman responded by arguing that a steel strike was a threat to national security because the Army needed steel to conduct the war. Truman then decided on his own—in other words, without explicit congressional approval—to seize the steel mills under his Article II Commander-in-Chief Power.

Truman argued that Article II (of the Constitution) made him commander-in-chief. Read broadly, this power gave him broad authority to take actions necessary to fight (and win) a war. If the steel workers went on strike, that would undermine the war effort. Therefore, the President had the power to step in and seize the steel mills.

This dispute ended up at the Supreme Court, and the Court ruled against Truman. The Court concluded that Truman couldn't seize the steel mills on his own. Truman was shocked. He had appointed some of the Justices himself, and FDR—his political ally—had appointed the others.



- To be clear, some Justices agreed with Truman. (For instance, Chief Justice Fred Vinson—appointed by Truman. And he was joined by Justices Minton and Reed.)
- However, the majority ruled against him. The Court concluded that the President’s Commander-in-Chief Power didn’t permit him to use his power to seize a steel mill inside the United States—even if it helped the war effort. (The majority opinion mostly focused on the separation of powers.) The President needed congressional approval for that.

The most influential opinion in the case was a concurring opinion by Justice Robert Jackson. There, Jackson, identified three different categories for analyzing presidential power. When the President acts with congressional approval, he has the maximum authority to act. When he acts in the face of congressional disapproval, he has the least authority to act. (As Jackson wrote, the President’s power is “at its lowest ebb.”) When Congress has neither approved nor disapproved of the President’s actions, the President then acts in a “zone of twilight”—somewhere between those two situations.

Applying his analysis to *The Steel Seizure Case*, Jackson reasoned that Congress hadn’t authorized the seizure of the steel mills and the President had no non-military—in other words, no independent source of— authority to act. (Like an existing law passed by Congress.) Therefore, Jackson concluded that the President had acted unconstitutionally.

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.)

In the end, 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 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 and 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 actions are 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 actions violate any other provisions of the Constitution—whether that’s a key Bill of Rights protection like free speech or religious liberty, the Fourteenth Amendment’s promise of equal protection of the laws, or some other part of the Constitution.

So, that’s the basic framework for analyzing the scope of the President’s powers in many instances. What are some of the other areas of the ongoing constitutional debates over the scope of presidential power?



The President and the Military

One key area is the debate over the President’s authority to use military force without congressional approval.

Under the Constitution, both Congress and the President are given key roles in national security. Under Article I, the Constitution grants Congress the power to declare war. At the same time, Article II entrusts the President with the role of commander-in-chief of the nation’s armed forces.

- Here’s the key language from 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.”

As Justice Jackson put it in *The Steel Seizure Case*: “These cryptic words have given rise to some of the most persistent controversies in our constitutional history,” with Presidents at various points claiming that it “vests power to do anything, anywhere, that can be done with an army or navy.”

Over time, the President has asserted broad authority to use military force without congressional approval. The question remains how far the President’s authority sweeps. At a minimum, scholars generally agree that the Commander-in-Chief Clause has two separate—but related—purposes.

- First, it ensures civilian control over the military. In other words, it ensures that we don’t live in a military state.
- Second, it places this control in the hands of a single person—a President elected by the American people.

Scholars also generally agree that only Congress can formally declare war.

As our Interactive Constitution essay on this topic explains, there are three areas where scholars generally agree that the President may use force:

- First, Presidents may use military force if specifically authorized by Congress. Authorization may come from a formal declaration of war, but it can also come from some other form of congressional approval.
- Second, Presidents are thought to have independent authority to use military force in response to sudden attacks on the United States.

At the 1787 Philadelphia convention, James Madison described the Declare War Clause—which gave Congress the authority to declare war—as still leaving the President with authority to repel sudden attacks on the nation. However, the scope of this power is sharply contested. For instance, some commentators argue that it includes defense against attacks on U.S. citizens or forces abroad, in addition to attacks on U.S. territory. Some would extend it to attacks on U.S. allies or U.S. interests, defined more broadly and some commentators think it includes defense against threats as well as actual attacks.

The Supreme Court addressed this issue during the Civil War in [The Prize Cases \(1863\)](#).

The Prize Cases (1863)

President Lincoln had set up a blockade of Southern ports without a formal declaration of war by Congress and the Court upheld President Lincoln’s blockade in a 5-4 decision. The Court explained, “The President was bound to meet [a war] in

the shape it presented itself, without waiting for Congress to baptize it with a name.” The dissent—authored by Justice Nelson—countered that only Congress had the constitutional power to declare war. Congress would later pass a law approving of President Lincoln’s actions.

- Third, Presidents may use his constitutional authority to deploy U.S. forces in situations that do not amount to war. (For example, President Bush’s deployment of troops to Saudi Arabia after Iraq’s invasion of Kuwait in 1990—which, at that point, didn’t involve U.S. troops in combat. Similarly, deployment of U.S. troops as peacekeepers (as President Clinton did in Bosnia))

But the scope of the President’s power remains a topic of constitutional debate. For instance, modern Presidents from both parties have used military force without a formal declaration of war or clear approval by Congress. For instance, President Reagan ordered the use of military force in Libya, Grenada, and Lebanon and President Obama used air strikes to support the overthrow of Muammar Qaddafi in Libya.

Some claim that involvement in low-level hostilities may not rise to the level of war in some constitutional sense. For instance, President Obama argued on this ground that U.S. participation in the bombing campaign in Libya in 2011 didn’t require congressional approval. However, this position is strongly disputed by other commentators.

A related argument—also contested—is that using force against non-state actors such as terrorist organizations doesn’t amount to war, and therefore doesn’t involve questions related to the Declare War Clause.

To make this debate more concrete, consider the constitutional debate over the War Powers Resolution (1973).

War Powers Resolution (1973)

Congress passed the War Powers Resolution in response to the Vietnam War. In particular, Congress was upset with President Nixon after he sent bombers into Cambodia without congressional approval—an act that Nixon’s critics viewed as expanding the Vietnam War and taking military action against a separate nation, a potential act of war. Congress and the President had sparred over the scope of presidential power throughout the Vietnam War.

In response, Congress tried to write out new rules for when the President can use military force. The War Power Resolution said the following:

- In the case of a sudden attack, the President could act without congressional approval. The President would have to notify Congress within 48 hours of the time that she sent troops without congressional approval. The President could then (generally) keep those troops on the ground for 30 days. Otherwise, the President needed to get congressional approval before using military force.

Even since then, Presidents have argued that the War Powers Resolution violates the President’s Commander-in-Chief Power and is, therefore, unconstitutional.

- Presidents argue that Article II’s Commander-in-Chief Clause gives the President control over the nation’s military operations, and that he can generally act as he thinks best to protect the nation—including decisions to send troops into the field. On this view, the president can take a variety of actions to preserve national security without formal approval by Congress.

At the same time, others side with Congress. They argue that the Founding generation granted Congress a central role in determining when the nation used military force and they wrote it into the Constitution itself—with Article I’s Declare

War Clause. On this view, the President’s powers have grown too much in recent decades—far beyond what the Founding generation imagined. Congress has abandoned its responsibilities in this area. The War Powers Resolution is a way of reinvigorating Congress’s role in military policy.

Importantly, the Supreme Court hasn’t weighed in on the Resolution’s constitutionality. So, this remains a topic of ongoing constitutional debate—and institutional conflict.

CONGRESS AND THE PRESIDENT

Another key area of debate is the balance of power between Congress and the President over certain features of the executive branch itself.

Again, Article II, Section 1, begins with (what lawyers refer to as) the [Vesting Clause](#): “The executive power shall be vested in a President of the United States.” Key constitutional debates turn on the meaning of the phrase “executive power.” What does it mean, and what does it include?

- Throughout American history, some have argued that this language simply means that the Constitution establishes a single President, and that’s about it. In this view, this key language—“the executive power of the United States”—didn’t have a set meaning at the Founding. It simply refers to the presidential powers that the Constitution specifically lists in the document itself—for instance, those spelled out in writing in Article II.
- At the same time, others have argued that the Constitution—and this language—does more than that, granting the President a set of powers not specifically listed in the Constitution that establish areas in which the President can act and, importantly, Congress cannot. (Scholars refer to this as the “Unitary Executive” theory.)
 - On this view, the “executive power” meant something specific at the Founding—the sorts of things that the Founding generation would have expected an executive to do. For instance, the power to execute the laws, appoint officers, serve as the voice of the nation in foreign policy, wage war, etc.
 - The President may still be checked by specific limits written in the Constitution. For instance, the President must get the Senate’s approval for her nominees to the Supreme Court. And Congress—not the President—is given the power to declare war. However, when the Constitution doesn’t limit the President’s authority in these core areas of executive power, she has the authority to act.

Now, this can seem like a pretty abstract debate. But it has serious consequences for the American constitutional system. Broadly speaking, these questions pits Congress’s power to check the President against the President’s authority to lead the executive branch without congressional interference.

Here’s the bottom line:

If advocates for congressional power win this debate, Congress would have the power to limit the President’s discretion to fire executive branch officials—and, as a result, check her authority to lead the executive branch however she deems fit.

At the same time, if advocates of presidential power win, it’s possible that the Supreme Court would have to strike down various laws that limit the President’s authority to control certain parts of the executive branch.

- For instance, laws setting up independent agencies within the national government—like the Federal Communications Commission and the Federal Reserve. So, Congress wouldn't be able to set up agencies that protected its board (or commission) members from removal by the President. In other words, laws that made them (at least somewhat) independent of the President. The argument here is that these restrictions (or protections) keep the President from one of her core functions—leading the members of the executive branch.

SUPREME COURT CASES

What has the Supreme Court said in this area?

Well, it's actually a live debate at the Supreme Court today—including a 5-4 decision in a case called [Seila Law](#). (The opinions split mostly on their reading of the Founders' vision for the executive branch, government practice over time, and the Court's previous decisions.)

Over time, the Court has gone back and forth on these questions. In a case involving presidential dismissal of a postmaster, [Myers v. United States \(1926\)](#), the Court weighed in on the side of broad presidential power to fire executive branch officials—claiming that Article II's Vesting Clause granted the President authority to execute the law and to remove executive officials.

Yet in a series of other cases, the Court has also approved congressional authority to make certain public officials (at least somewhat) independent of presidential control.

- In a case involving the Federal Trade Commission, [Humphrey's Executor v. United States \(1935\)](#), the Court held that Congress could limit the President's ability to remove a commissioner.
- In [Morrison v. Olson \(1988\)](#), the Court sustained a law that said the executive could remove independent prosecutors for just cause only.
- And in [Seila Law](#) and in another recent case called [PCAOB](#), the Roberts Court has moved back in the other direction—striking down certain laws that try to make it more difficult for the President to fire the heads of government agencies.

And so, the constitutional debate continues. The main issue at stake? The President's authority to lead the executive branch versus Congress's ability to check some of that authority.

CHANGE OVER TIME

Finally, it's worth pausing to consider how the President's role in our constitutional system has changed over time.

The Founding generation assumed that the legislative branch—in other words, Congress—would be the most powerful branch. That's part of the reason why they took such care to divide Congress's power between two Houses—creating a House of Representatives and a Senate. At the same time, it left the Presidency to a single person. Their hope was that this arrangement might both check congressional power and create an energetic (and accountable) President.

However, many scholars from across the ideological spectrum argue that over time, presidential power has expanded—with many arguing that the Presidency has proven to be the most powerful branch of government.





Scholar Exchange: The Presidency and the Executive Branch Briefing Document

In the end—and as we’ve discussed throughout today’s lesson—the scope of presidential power remains one of the most hotly debated topics in constitutional law.

**Research provided by Nicholas Mosvick, senior fellow for constitutional content and Thomas Donnelly, senior fellow for constitutional studies, at the National Constitution Center.*