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Executive Authority: Presidential Power From America's Founding to Today

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[00:00:02.3] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the Center in person and online. I'm Tanaya Tauber, the Senior Director of Town Hall Programs. In this episode, legal scholars Gillian Metzger of Columbia Law School and Saikrishna Prakash of the University of Virginia School of Law examine the founder's vision for executive authority, how presidential power has changed over time, and the key constitutional debates that have shaped the modern presidency. The discussion also explores how the Trump presidency fits within this historical context and what it means for the future of presidential power. Jeffrey Rosen, President and CEO of the National Constitution Center, moderates. Here's Jeff to get the conversation started.

[00:00:56.0] Jeffrey Rosen: Thank you so much for joining, Gillian and Sai. If I may, Sai, let's start with you. You've written these two great books on the history of the presidency, and I'd like you to introduce our audience and all of us to the unitary executive theory. What is it? What is its history, and how does it evolve? I'll just start us off with Hamilton, who wrote in his *Pacificus* essays, the general doctrine then of our Constitution is that the executive power of the nation is vested in the president, subject only to the exceptions and qualifications which are expressed in that instrument. With these exceptions, the executive power of the union is completely lodged in the president. Hamilton's essay has been invoked by proponents of the unitary executive theory. What is it, and where did it come from?

[00:01:44.9] Saikrishna Prakash: Well, it's great to be here with you, Jeff, and your wonderful audience, and of course with Gillian as well. The unitary executive theory has many incarnations, but basically it involves a claim that the president is able to control the actions of executive branch departments because the executive power in the Constitution is vested entirely in the president, and that department heads and department personnel are to be understood as the eyes, ears, arms, and legs of the president. So it involves some measure of control over the Department of Defense, the Department of the Treasury, and in its more controversial aspects involves measures of control over so-called independent agencies like the FEC, the Federal Election Commission, or the Securities and Exchange Commission. So it's a claim about the president's ability to direct officers within the executive branch, and as you noted, it rests on a claim about the meaning of executive power granted by the Constitution to the president.

[00:02:46.7] Jeffrey Rosen: Thank you so much for that. Just trying together to figure out the intellectual history, it was invoked in the Progressive Era by Chief Justice Taft in his *Myers*

decision, who said the president has the power to fire postmasters, and then those opposed to independent agencies invoked it during the New Deal to claim that independent agencies were unconstitutional, but the Supreme Court unanimously rejected that in the *Humphrey's Executor* case, which is now up for grabs. And then it seemed to have resurrected again big time in the '80s when the Reagan Justice Department began to invoke it not only to question the constitutionality of the independent counsel and other post-Watergate reforms, but also to assert the president's plenary authority in foreign affairs. And then in the Bush era, that claim was extended to say that the president can't be constrained in foreign affairs by Congress. Gillian, how did I do? I'm not at all attached to this intellectual history, and if you took us back, how would you describe it?

[00:03:50.8] Gillian Metzger: Yeah, I mean, I think what I would probably emphasize is that if you go back Myers as much more of an exception at the time, and the 1980s is when you had it being asserted, as you say, in the Reagan Department of Justice and Attorney General Meese beginning to develop and assert the idea more. The court doesn't go for it then, right? The court in 1988 decides *Morrison v. Olson*, where it rejects those claims out of hand, except for a famous dissent by Justice Scalia. And that continues, but it continues to also be a theory that is very much pushed by the conservative legal movement, and then with the turn to the more conservative Robert courts begins to get some additional traction starting with a case in 2010.

[00:04:45.6] Jeffrey Rosen: That's such an important point that the court doesn't go for it during the New Deal era as it remains contested today. Sai, take us back to the beginning, as your books do, *Imperial from the Beginning: The Constitution of the Original Executive*, is the name of your first book, and then *The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers*. What were the debates at the Constitutional Convention over the nature of the presidency, and what were the competing positions of the delegates about presidential powers?

[00:05:20.1] Saikrishna Prakash: So, I think the founders had some conception of executive power as including things like control over law execution, foreign affairs, pardon authority, commander-in-chief authority. And one of the big questions of the convention is, are we going to have a plural executive? Are we going to have a singular executive? And that's a debate that occurs early on, and they quickly decided there's going to be one president. And they're going to vest executive power in that president. And then, of course, in certain areas, there are exceptions to that grant in the sense that the Senate participates in appointments, which is thought to be an executive power. And the Senate participates in treaty making, which is also thought to be an executive power. And then there are other executive powers that are actually given to Congress, like the power to declare war, which was long thought to be associated with executive authority. So, I think early on, there's a question, are we going to have an executive council? Are we going to have a singular executive? And they adopt something of a hybrid approach, where sometimes they give authority to the president alone, and other times they share it with the Senate, and other times they actually vest it with Congress.

[00:06:30.4] Saikrishna Prakash: And those decisions obviously play out in disputes in the first several presidencies, including in the Pacificus-Helvidius debates that you mentioned earlier.

[00:06:41.6] Jeffrey Rosen: Thank you so much for that. Gillian...

[00:06:45.4] **Gillian Metzger:** Jeff could I just jump in on that for a few seconds?

[00:06:47.1] **Jeffrey Rosen:** Yes please do, please.

[00:06:48.3] **Gillian Metzger:** One of the things I think, and it's implicit very much in what Sai just said, is it is really interesting when you go back and you see how long it took to resolve the questions of the presidency at the Constitutional Convention, things that they focused on, and the particular sort of understanding of certain executive prerogatives as prerogatives that had been prerogatives of the Crown, and then figuring out where they were going to go, where these established prerogatives were going to be assigned. And that leaves open the question of whether they thought of these as the executive power or whether they were identifying very specific authorities and figuring out where they thought they should be assigned and how they wanted to differentiate from the kind of conglomeration of them in the British Crown.

[00:07:40.0] **Jeffrey Rosen:** Well, that's really a crucial question. Did they believe that there were certain powers of the Crown that couldn't be shared or assigned to other branches? Sai, I have this new book coming out on the Hamilton-Jefferson conflict throughout history, *The Pursuit of Liberty*, and it begins with the dinner party where Hamilton blurts out the greatest man in history was Julius Caesar, and Jefferson founds the Democratic-Republican Party in opposition to the perceived Caesarism of Hamilton and the Federalists, who they claim want to resurrect elective monarchy. I suggest Hamilton was joking that he also was opposed to demagogic Caesars on horseback who would consolidate power and subvert the Constitution, and that both Hamilton and Jefferson, both the Federalists and the Democratic-Republicans, believed the president should not be a king and wanted the separation of powers to ensure that. Is that right, first of all? And then the second part of the question is, until the end of the convention, both sides were proposing sharing executive power, including at the very end Madison, joined by Wilson and the other nationalists, wanted to have a privy council that would advise the president before he could make decisions. So is it right that both sides wanted the president not to be a king?

[00:08:58.5] **Jeffrey Rosen:** And then to what degree did they think that the presidential powers could be shared with Congress?

[00:09:05.0] **Saikrishna Prakash:** I think it's very clear that there aren't many people who say openly that we ought to have a monarchy. There are a few. I think the difficulty lies in thinking about the presidency and comparing it to a monarchy. When we think about a monarchy, we think about an absolute monarchy. But when you think about the British monarchy of the 18th century, it was a limited monarchy. And when you compare the limited monarchy of Britain to the presidency, they look very similar. We fail to see that because we just don't understand the features of a limited monarchy in the 18th century anymore. It's just sort of no longer relevant to our current state. And we also fail to see that some monarchies in the 18th century were actually elective. There's a reason why half a dozen or more Anti-Federalists say that the presidency is a monarchy in all but name. And so I think the charge has always had credence to it. But I think it's also the case that no one openly said they wanted a monarchy. And I think it's also the case

that the presidency that emerges at the end of the convention is far stronger than many supposed that it would be at the beginning.

[00:10:15.5] Saikrishna Prakash: Several people say that the presidency that was created by the convention reflected the confidence that delegates had in the person they presumed would be the first president, George Washington. And so they lament the fact that everyone knows that Washington is going to be the first president because they confidently give power to an office thinking of the person who will first occupy it and not thinking of the miscreants that might occupy it later.

[00:10:43.8] Jeffrey Rosen: That's a crucial point about George Washington, and that is indeed why they created such a strong presidency. Gillian, what was the limit that people accepted on monarchy? Hamilton famously does stand up and says there should be a president elected for life, and the solution to executive overreach, that solution, is a monarch feeding Jefferson's suspicions. He countered that he didn't mean a hereditary monarch, but he only wanted a life term to create independence in the executive. And a bunch of other delegates, including Wilson and Morris, were open to the idea of life terms for the president. At the same time, Hamilton thought that impeachment was necessary for corruption. He worried about a president being corrupted by foreign powers and try to call off elections. So my question is, for the strongest proponents of executive power, what limits did they put on that power in addition to impeachment and other ways of stopping corruption?

[00:11:47.6] Gillian Metzger: Yeah, so one thing I would say is that those are the ones who were most strongly in favor. Obviously, we didn't end up with life terms, so there was a fair bit of pushback to that. I think one of the things to emphasize is the... Well, two things. One is part of the concern was about how do you select the president? And that was a concern that really took a long time to resolve. Part of the reason why the presidency's powers don't get fully resolved until the end is if the president is essentially just selected by Congress and there's concern about then Congress having... How much scope of power will Congress have versus when they figure out the Electoral College? And once they figure out the Electoral College, then Congress isn't dependent on... Sorry, the president isn't dependent on Congress. Well, then one of the main checks is they give a lot of what had been hereditarily powers of the crown to Congress, right? The Senate gets a role in appointments. The Senate gets a role in treaties. Congress gets the power to regulate offices and create the federal government. Congress gets the power to declare war.

[00:13:00.5] Gillian Metzger: I mean, so part of what once you figure out how you're going to be selected and it's not just going to be consolidating power in Congress over the president, then you can use Congress also as an important check on the presidency. And Congress ends up with quite a lot of power.

[00:13:14.7] Jeffrey Rosen: That's a crucial question about Congress's checks and the powers that it ends up with. Sai, to what degree did the founders agree and disagree on whether or not you could mix powers between Congress and the president? As Gillian suggested, originally Madison and the Virginia Plan wanted the president elected by Congress. And then there's this amazing... At that famous dinner party where Hamilton blurts out the greatest man in history was

Julius Caesar. He also... John Adams says at some point, purge the British constitution of corruption and it would be perfect. And Hamilton says, purge it of corruption and you lose what makes it perfect as it is. The corruption is necessary to make it work. And Jefferson writes, well, this proves that he's for a monarchy based on corruption. But in fact, he was just quoting David Hume, who viewed corruption as a form of influence, where the monarch could give legislators offices and defend himself against legislative overreach. That suggests to me anyway that for Hume and the Tory constitutionalists, it was fine to mix executive and congressional power. And there wasn't a rigid distinction between them. Is that right? And what were the range of views on whether or not you could mix and delegate executive and congressional power?

[00:14:35.4] Saikrishna Prakash: Well, before I forget, Jeff, I think you're recounting what Jefferson said about what Hamilton said at a dinner party. So it's possible that Jefferson's views of what Hamilton said is colored by his many, many disagreements with Hamilton. I mean, of course, you can take something that people think of as an executive power invested in the legislature or you can take something that's a legislative power and give the executive a check on it. The veto is arguably a check on legislative power exercised by the executive and the Senate's role in treaties and appointments are arguably legislative checks on the executive. As Gillian said, there are certain powers that were thought executive at one point that were given to Congress. And so the Constitution doesn't have the view that executive powers can only go to the executive and legislative powers can only go to the legislative branch. It has checks and balances that are thought to be better suited to America or better suited to liberty than giving all executive power to the presidency and all legislative power without any executive or judicial checks to the legislature. So they understand early on that there are abstract categories.

[00:15:51.9] Saikrishna Prakash: How best to allocate those powers is not at all obvious and that it's done different ways in different places, right? It's done one way in Britain. It's done a different way at the federal level and it's done in many, many different ways at the state level.

[00:16:10.2] Jeffrey Rosen: Absolutely. And that crucial debate over the veto, as you say, suggests that there are different arrangements. Madison thinks that a congressional veto over state laws is the most important feature of all, and when he loses that, he wants to vest the presidency with the judges. And there's a big debate along those lines. Gillian, do we have any sense on what the founders would have thought about independent agencies? This is obviously the question that the Supreme Court is likely to decide next year. Cass Sunstein has argued that there is an originalist case for independent agencies. What do you think?

[00:16:53.1] Gillian Metzger: I'm not actually persuaded. I think Sai and I probably disagree on this one. Sorry, I'm not persuaded there are originalist limits on independent agencies. You know, one of the things that makes the originalist case hard for independent agencies is maybe to first begin by clarifying what we mean by independent agencies. So traditionally independent agencies refers to agencies that have the heads of which are not just removable at will by the president. In fact, there are other forms of independence. There is limits on the ways that the president can review, the assignment of certain powers to mutually checking parts of the administrative apparatus that makes it hard for the president to control the decision making and so forth. So there's actually a range of things that we can see, think of as contributing to independence, independent budgets and so forth. But the sort of traditional idea is the president

can't remove the heads of the agencies. And on looking at that in terms of the originalist perspective the textual support for the idea that the president can absolutely do that, I think is very hard. The historical evidence, particularly from this period, there's recently been an outpouring of recent scholarship that has really emphasized things like the variety of measures and arrangements that the first Congress put in place and early Congress's arrangements. The sort of understanding of the executive power clause as really being a power to execute and that clause not necessarily offering any additional authority.

[00:18:36.2] Gillian Metzger: Some say it does offer additional authority. It was defeasible so Congress could change it, which means if Congress creates an independent agency, that would be fine. So I think there's just quite a lot of scholarship recently that really calls into question. It's very difficult to argue that there was a clear original understanding in favor of the unitary executive. And I think even throw some real doubt on whether or not it has originalist foundations.

[00:19:03.3] Jeffrey Rosen: Thank you so much for that. Sai, what is your thought on that debate? Can you sum up the best originalist argument against the unitary executive theory to the degree that it questions independent agencies? And then what's your response? Which side persuades you more?

[00:19:18.5] Saikrishna Prakash: Yeah, well, Gillian does a great job of presenting the opposite point of view. The case for the unitary executive goes back to the convention. It goes back to the first Congress. There's a debate in the first Congress about whether the president has a constitutional power to remove. They enact three statutes that are grounded on the idea that the president has a constitutional power to remove and that they're not granting the authority. The president already has it. The president subsequently puts in commissions that he can remove all officers that he appoints, save for Article III judges. There's no statutory warrant for any of that because most statutes don't mention removal. The president is directing executive officers with no statutory warrant. He's telling prosecutors whom to prosecute. He's telling them to stop prosecutions. He's giving instructions to revenue collectors throughout the nation, even though he has no statutory authority for that. And so there's a lot of evidence of unitariness at the founding. And, of course, James Madison himself says in Congress, if any power is whatsoever executive in nature, it's the power to control, direct, and remove executive officers. So I think there's a very strong claim that the Constitution, as originally understood by at least some, was meant to be unitary.

[00:20:34.5] Saikrishna Prakash: And there's no early statute establishing any independent agency. There's certainly no statute that says these people to exercise their power over law execution independent of the president. No one's found any such statute to my knowledge. And then when we think about Congress, the question is, well, does Congress have authority to change that? I guess, as Gillian said, is it a default allocation or is it something that's absolute? And the way I think about Congress is that Congress generally doesn't have power to change the Constitution. That is to say, there's no clause that says the president has power over the executive branch subject to congressional defeasance any more than there's a power that Congress has to limit the pardon power or limit the power to appoint principal officers. And so the theory of the Constitution is that it grants powers to certain branches with certain conditions, and it doesn't

grant Congress the power to withdraw or alter those allocations. And if it does, then all the presidential powers are defeasible. There's no reason to think that this would be particularly any more defeasible than the pardon power or any other power. So the claim for a unitary executive theory is both that the Constitution grants a certain set of powers through the vesting clause, I.e. The executive power, and that the Constitution doesn't create a Congress with authority to, by statute, reallocate or reassess those powers.

[00:22:06.9] Jeffrey Rosen: Many thanks for that. Gill I'm eager for your... Gill, go ahead.

[00:22:15.4] Gillian Metzger: I was just going to say, I mean, there are counters on all of those. This is like the longest debate in constitutional law, and it continues, but there has also been new scholarship that really called into question whether or not, it was always debatable, people always thought it was indeterminate what exactly happened in the first Congress in terms of did you count the votes, how much of it is for Congress having a defeasible ability of removal and ability to give the president removal, but also ability then to retain it and deny it. And there's recent scholarship saying that actually there wasn't support for the strong presidential view. And I don't think the idea that Congress doesn't have power to limit other branches' power, for example, really works here. The whole question is, what's the scope of the president's power? And Congress is granted powers of its own, and using those powers of its own, it can impose restrictions. The only reason that would be unconstitutional is if the president had an independent, indefeasible authority, for example, to remove. And that's exactly what's disputed. So I don't think that argument works more. But as I said, this is the ongoing debate.

[00:23:26.0] Jeffrey Rosen: Well, this is very important for our audiences to hear and for all of us to learn from. And, Sai, just to disentangle the various parts of the debate, is it right that everyone agrees that the executive now is much stronger than the founders anticipated? It has a populist underpinning. It claims to be the direct steward of the people and is exercising powers that Congress has delegated to it in a way that makes the modern plebiscitary president far different from the constrained chief magistrate that presidents until William Howard Taft exercised. And then, first of all, is that right? And then is there a debate basically about whether the presidency is weak or strong? And might that affect your views about unitariness, about now that the president has accumulated so much power, whether or not Congress can constrain it? Help us understand how to even think about originalism at a time when the presidency, by all accounts, has grown in ways that the founders couldn't have anticipated.

[00:24:34.3] Saikrishna Prakash: That's a great question, Jeff. I think the unitary executive properly understood is about control of law execution by the president and control of the apparatus of law execution. You're quite right that the presidency has grown by leaps and bounds since 1789 in ways that people couldn't foresee, including the rise of the plebiscitary presidency, where the president runs for office and then claims a mandate for change based on the fact that they won. This was not foreseen at the founding. When it was first raised, I think, by Andrew Jackson, people mocked it. They said the president might have a carbuncle. Do the people therefore endorse the carbuncle? Of course not. They vote for a president, warts and all, but they don't necessarily endorse all the warts, meaning they don't endorse all the policy proposals of a president. But nonetheless, it's part of our culture now to say that the president has a mandate, even when the president doesn't get a popular vote majority. That's happened twice in recent

past, and they both claimed a popular mandate or an electoral mandate. So that's one aspect where the presidency has changed, this sort of claim that I represent the people, I uniquely represent the people.

[00:25:53.4] Saikrishna Prakash: Another change, of course, is the accretion of war powers on the part of the presidency. The president essentially has the same war power that Congress has because Congress has given him a huge military, and the president claims constitutional authority, wrongly in my view, to start conflicts and to respond to conflicts. People forget that in World War II, Congress declared war five times against nations that had already declared war against the United States. Today, if a nation attacks the United States, the president believes he can wage war, and even if a nation doesn't attack the United States, the president believes he can wage war. So there is a sense in which the presidency has changed in radical ways since the founding in ways that might be more important than the unitary executive. But the people that make the claim about the unitary executive are making a claim about the original understanding, and many of them would make claims perhaps in opposition to the war declaring pretensions of presidents and the plebiscitary pretensions of our modern presidents.

[00:27:00.2] Jeffrey Rosen: Thank you for identifying those changes in the presidency that clearly diverge from original understanding. You identify them in your book, and they include the war powers. And Gillian, what are originalists making of the fact that you have a non-originalist presidency far stronger than the framers anticipated? The claim is that Congress should be able to constrain this presidency in order to assert its constitutional powers. You mentioned that there's a historic debate about whether or not the removal power was defeasible. Hamilton himself changed his mind about that question. So give us a sense about what those who are challenging unitary executive theory say about Congress's ability to check a vastly expanded presidency.

[00:27:55.2] Gillian Metzger: Yeah, I mean, so the... And this is not limited to originalism, this is sort of just as he's pointing out, those who challenge the unitary executive view would argue that Congress has very broad power to structure the executive branch. And it is, I think, significant that the powers that have been delegated, particularly on the administrative side, to the executive branch have been delegated in the form of powers to particular agencies and secretaries and with procedures attached and with specific instructions attached and so forth. And a whole apparatus, which includes a number, a vast number of employees with some form of removal protection, think the civil service, and as well as some independent agencies protected at the top, you also have, of course, the vast array of the workers in the government participating in the civil service. And indeed, in the New Deal period, when you have much of the expansion to what we now consider the modern administrative state, you have those who are arguing for a little bit clearer presidential control at the top, like the Brownlow Commission, also really emphasizing the importance of the civil service. So I think these things go together, that when you're delegating broader power, it's even more important that you have those checks and constraints on the executive branch as a way of trying to constrain it.

[00:29:24.6] Gillian Metzger: And all of that are things that are enacted by Congress. The other thing that's interesting to focus on historically is how little the Supreme Court was involved in all of this over time until particularly recent. You had *Myers*, you had *Humphrey's Executor*, then

you had *Morrison*. That's a big gap between *Humphrey's Executor* and *Morrison*, that's 50 years. And then in between *Morrison* and the 2010 decision, that's another, what, 40-something years. And a lot of this was really worked out politically through Congress and the executive branch negotiating and agreeing on measures. And part of what has happened is, among other things, with Congress's inability to act and depolarization divisions, more pressure on the executive to assert more unilateral power, more expansion of power in the executive branch, and also a turn towards challenging those basic administrative structures that had always been there to sort of cabin the kinds of power that the executive had.

[00:30:23.0] Jeffrey Rosen: That's such an important point. By insisting on judicial oversight of the unitary executive, it's a Jeffersonian position that would have made the Jeffersonians cringe in terms of empowering courts, which they never thought would be involved in these questions at all. Sai, given the things the president does today that you argue are not traceable to any plausible reading of the original Constitution, and reviewing some of them from your book, dodging the treaty clause, declaring war, spending money not appropriated by Congress, making federal law courtesy of congressional delegations, ignoring federal laws that restrict the president's uses of the military, altering congressional laws by repeatedly violating them, and amending the Constitution via repeated transgressions of it, in light of those things that the founders didn't anticipate, why shouldn't Congress be able to assert itself by constraining executives exercising of authority that it delegates?

[00:31:26.7] Saikrishna Prakash: Well, Jeff, I'm really flattered. I think I found my one reader, and you're the reader.

[00:31:34.4] Jeffrey Rosen: Not at all.

[00:31:35.4] Saikrishna Prakash: So the second book is an originalist book, and the challenge for progressives is you believe in a living Constitution, so tell me why it is that the presidency can't evolve in the way that it has if you believe in a living Constitution. And maybe the answer is, well, I just don't like the evolution, but evolution is fine. I think the problem with that theory is there's nothing that the president can't acquire over time. If you read Woodrow Wilson's book that discusses the presidency, he says we shouldn't have a static presidency, but the one thing the president shouldn't be able to do is ignore statutes. And that's exactly what's happening today. For the past several decades, the presidency is basically rewriting statutes under the guys that have been interpreting them using things like the Sovereign Doctrine using things like delegation and hope for a deference and just hoping to not get caught or at least get credit for trying to skirt the law and it's... I mentioned war declarations and another thing but this is far more important. Essentially the executive branches rewriting statutes on an ongoing basis.

[00:32:44.1] Saikrishna Prakash: And as Gillian said, Congress is kind of feckless, and the only check is the courts. And so from an originalist perspective, the solution is to go back to the founding and have a fixed presidency, not one that floats over time. If you believe in a living Constitution, the institution that you're most empowering is not Congress. It is the presidency, because the presidency can act in ways that Congress can never hope to act. It can act with so much speed and decision and repetitiveness that in the modern era, Congress will always lose to the presidency. And the only thing that's stopping utter domination is our courts.

[00:33:26.7] Jeffrey Rosen: Fascinating. Gillian, is it plausible to ask the courts to enforce an original vision of the presidency and saying that the president can't make treaties without two-thirds, that he can't declare war, he can't spend money that's not appropriated by Congress? And that doesn't seem to be on the table. How is the Roberts Court responding to the fact that the presidency has grown so far beyond its originalist roots?

[00:33:57.5] Gillian Metzger: Well, so just to be clear, I think there's a great deal of debate about whether or not Congress or the president is doing those things. So for example, whether or not Congress is delegating power in ways that are unconstitutional or the president is spending money. I would argue today, yes, not spending money in ways that go against statutes and asserting a power of appropriations that the president doesn't have. But I'm not sure I would agree with the suggestion that that's been rampant. What we do have is a court that is very, very worried about administrative power, very sympathetic, I think, to presidential power, to presidential immunity, as in the most recent decision, and much more willing to see the president and the plebiscitary president and the fact that the president is democratically elected as sort of the be-all and end-all of legitimacy and accountability in the constitutional structure of the executive branch, and very skeptical and concerned about administrative power. I think that's inverted. I think that what has actually made the expansion in the executive branch's rules and responsibilities much more accountable and to the extent it's been constrained has in fact been all of the administrative state that cabins and checks it.

[00:35:16.0] Gillian Metzger: I think actually that much of that is, under our current system of broad delegated power, actually constitutionally required. But the court has been undermining that and undermining administrative authority and also very skeptical of administrative authority. And the court is obviously an important, significant check. But one of the things that has actually also been important are all the other checks in the system. So for example, congressional oversight or internal executive branch lawyering and other kinds of constraints that have actually built up over time as ways of constraining executive power and executive authority. Some of those methods the Supreme Court has invalidated. One of the most important was its invalidation of the legislative veto. So if you are a living constitution, which I am much more one of, part of the problem is that the court may have been not willing to allow sufficient flexibility in understanding how these things fit together, how a delegation goes along with a legislative veto as a way of preserving a role for Congress, and instead invalidated the legislative veto and were left with the delegation and not as much constraint on the executive branch.

[00:36:31.1] Jeffrey Rosen: So many crucial points in there. The invalidation of the legislative veto is indeed a significant hobbling of Congress's ability to check the president. Our nonpartisan constitutional drafting teams all recommended a constitutional amendment that would resurrect the legislative veto as a way of enforcing the separation of powers. And you mentioned that under some circumstances enforcement of congressional checks may vindicate the framers' emphasis on liberty rather than efficiency, and that's exactly what Louis Brandeis, my hero, who's always behind me, and I'll shift the camera so we can be inspired by him. That's what he said in *Humphrey's executive*, that the point of the framers was not efficiency but liberty and that they wanted to create checks on the presidency in order to protect it. Sai, what would a really originalist court do to check those examples of presidential evolution that you identified? Would

it say that the president can't declare war, that he can't spend unappropriated money, can't dodge the treaty clause? What would it look like?

[00:37:42.6] Saikrishna Prakash: Well, I mean, there are examples in early American history of the courts enforcing congressional statutes with respect to congressional war powers, right? There's a case called *Little v. Barreme* where the executive branch orders the seizure of a ship and the court says there's no authority for it, right? And they allow a private damage action to go against the captain because the president acted beyond the scope of statutory authority. That's basically enforcing Congress's monopoly over war declarations. I don't know off the top of my head whether there have been cases protecting the treaty power, but essentially there's this very difficult check on the making of treaties and presidents are now bypassing that by calling things executive agreements or doing other sorts of things where they pledge the fealty of the United States without going through, I think, a formal process of Senate ratification due to the fact that the Senate seems unwilling to ratify treaties in the modern era. I think respectfully disagree with Gillian. I think there's a lot of examples of executive branch officials choosing for political or partisan reasons to ignore congressional statutes, to spend money that's not appropriated, to not spend money that was appropriated.

[00:39:00.2] Saikrishna Prakash: And it goes back the last 12 or 15 years, probably maybe even earlier than that. So I think there's a crisis of executive legality that goes across administrations that didn't begin with Donald Trump and it won't end with his departure because presidents feel like they should be able to do things. They're responsible for the economy. They're responsible for the country. They're frustrated by a Congress that can't do much and they just want to act unilaterally. And they all cite each other after they've done it. That is to say Trump will cite Biden, who will cite Trump, who will cite Obama, who will cite Bush. And that's how we have a new conception of the presidency that wasn't there 20, 30, 40 or 50 years ago.

[00:39:43.7] Gillian Metzger: I actually, I don't disagree. I mean, there certainly are some notable examples. You mentioned the use of force is one where we see each administration building on each other. I just meant to emphasize, I think they are somewhat contested. And there are people who argue that it was within the legal constraints. There are obviously fights about appropriations under the Obamacare and the sort of risk corridors and other examples where there were claims made against the Obama administration. And there are certainly claims, certainly that could be made now about appropriations. So I don't mean to say that there aren't examples. I just am not sure that's either uncontested or the only strain. The other thing just to note, only to be consistent since I was making this point earlier, there's also a lot of debate about whether or not there actually were any of the kind of broad and tight limits on delegation originally. There's, again, quite a big scholarly debate. A number of scholars have pushed back on the idea that restrictions on delegation have some kind of originalist backing. So all of this remains somewhat contested, I guess.

[00:41:00.9] Jeffrey Rosen: Let's put on the table the Trump immunity decision. Critics say it's not an originalist decision. It's basically a pragmatic or consequentialist fear of presidents prosecuting their predecessors. Justice Sotomayor said in her dissent that the framers didn't want the president to be a king, and now he's a king. Do you think the originalist critique of *Trump v. U.S.* is fair or not? And how does it transform the power of the presidency?

[00:41:32.7] Saikrishna Prakash: I think the presidency doesn't come with any privileges or immunities other than salary protections. I think when you look at the Constitution and you look at across all three branches, you see that Congress has quite a few privileges or immunities. The presidency has the salary protection and judges have salary protections and tenure protections. I think all other privileges or immunities are to come from statutes passed by Congress. So I think the Nixon tapes case was wrong, and for sure, I think this case is wrong. I don't believe that the Constitution gives the president any immunity for his official acts. I will say there's one caveat to that, which is I don't think Congress can make it a crime just to pardon someone, but I think it could make it a crime to issue a pardon that ends up obstructing justice or take an official act that ends up helping an enemy of the United States. And so I think implicit in the Constitution when you say that the president can pardon or do this or that is that you can't make it a crime to do just this or that.

[00:42:36.5] Saikrishna Prakash: But a lot of a lot of statutes about corruption involve the corrupt use of power. Treason can be understood as sometimes involving the corrupt use of power. I certainly think the president can be prosecuted for treason, even if it involved the use of the pardon or the commander in chief power. But as a general matter, I don't think the Constitution immunizes presidential, the use of presidential powers from damage actions or criminal prosecutions.

[00:43:06.7] Jeffrey Rosen: Thanks so much for that. Gillian, your thoughts on the *Trump v. U.S.* decision, which you've criticized both from an originalist perspective and from a pragmatic perspective?

[00:43:19.9] Gillian Metzger: I mean, I would agree with Sai on the lack of originalist foundation. I also don't think the court makes any effort to provide any kind of originalist foundation. They make two arguments for immunity. One sounds in the idea that you can't impose a criminal penalty for the president exercising core and exclusive powers. But in identifying those core and exclusive powers, there's nothing particularly originalist about the court's analysis. And in fact, quite remarkable, some of the things they put in there, including the idea that suggesting for the reasoning that Congress couldn't regulate prosecution investigations, which would be, I think, a pretty extraordinary position. You know, I think that it reflects, again, my sense that this court is pretty sympathetic to presidential power. And the other interesting feature of the *Trump* versus *United States*, you do get a sense that they are worried about how partisanship may lead to different factions going after each other. There's a line in there about how not letting the executive branch cannibalize itself. And that really strikes me as sort of motivating the analysis far more than an originalist understanding. But unfortunately, the sloppiness of the reasoning and its potentially broad expanse actually dramatically increases, I think, some of the dangers about abusive executive power.

[00:44:46.6] Jeffrey Rosen: Thanks so much for that. Sai, you have identified the different dimensions to the discussion of presidential power, which we've been talking about. Unitary executive theory, delegation, the *Chevron* and the major questions doctrine. You've said most conservatives are pro-unitary executive, anti-delegation, anti-*Chevron*, and pro-major questions doctrine. Progressives are anti-unitary executive theory, pro-delegation, pro-*Chevron*, and anti-

major questions doctrine. Even to state it, it's so technical, it's hard for me and our audience to get our heads around. But unpack this. Are both sides being opportunistic to reach preferred results? Or does this have to do with competing and principal differences in their conception of executive power?

[00:45:32.5] Saikrishna Prakash: Oh, I think it's quite principled on both sides. I think the originalists don't believe in just "strong presidency" and the folks who are more living constitutionalists don't believe in a weak presidency. They have different commitments across different issues, and that's why an originalist is able to say, I believe in the unitary executive, but perhaps don't believe in executive branch war-making, and I don't believe in the *Chevron* doctrine, and I believe in the non-delegation doctrine or a five version of it. And a progressive can perhaps believe the opposite. They're intellectual commitments that people have based on honest disagreements about how best to read our Constitution. I will say that the court itself reflects this, right? You have some conservatives that want to advance the unitary executive, but also are behind the move to get rid of *Chevron* and are behind the move to revive the non-delegation doctrine. And so the arrows are pointing in different directions. Some cases seem to aggrandize the presidency, and other cases make the presidency weaker. And I think that's all in the service of a constitutional vision that's not tied exclusively or excessively to the presidency on both sides, which is healthy.

[00:46:56.9] Jeffrey Rosen: Thank you for that. Gillian, do you agree or not that the conservative vision is principled rather than partisan in its embrace of unitary executive theory, its suspicion of delegation, and its insistence that Congress speak clearly when it delegates? And then after you've told us whether or not you think it's principled, how will it play out when it comes to constraining the presidency of Donald Trump?

[00:47:24.5] Gillian Metzger: So principled is a little tricky. I certainly think that these are positions that are held in good faith. I would identify the underlying things somewhat differently. I think a lot of it has to do with your view of Congress's power and your stance on regulation versus whether you're pro or against. I think a lot of the lineup is often broad presidential power alongside a real reluctance to have as active a government and to be more anti-regulatory versus those who might actually, what they really fundamentally favor is Congress's ability to delegate, the ability of the government to regulate the administrative state. And they're not necessarily particularly pro-presidential power. They're pro-executive power in the sense of the administrative state. The current court does not fall into that second cap. There is a very clear supermajority, conservative supermajority on the Roberts Court, and that has, as I mentioned before, very suspicious of administrative power. I think we will see how they respond to President Trump. There are certainly some aspects of what Trump has been doing in terms of, I think, just ignoring statutes on the funding side or just dismantling agencies. Things really seem to go against what Congress has clearly enacted into law that I think the court will probably reject.

[00:48:55.0] Gillian Metzger: But I think that what we're going to see, at least on the independent agency front, I think the court has signaled this in its recent state decision, is that they're pretty willing to go along with some of the more dramatic moves, at least at the head of agency level, that the president is taking in terms of removing a number of heads of agencies

who have removal protection. So that's an instance where I think they're not going to be enforcing the statutes that limit presidential authority.

[00:49:20.0] Jeffrey Rosen: Many thanks for that. Sai, how would you think through the broad trends on the Roberts Court over the coming year? Gillian suggests the court's more likely to recognize the power to fire the heads of independent agencies than to allow the president not to spend allocated funds. Does that sound right to you? And how do you think it'll play out broadly?

[00:49:45.8] Saikrishna Prakash: I think Gillian's right that the court's likely to strike down statutes that limit the president's power to remove these officers and these independent agencies. The court has signaled that over and over again, including in the most recent opinion that it issued. So I expect that to continue. I think there's six votes for that. I think Gillian's also right that the president will lose some cases where he's claimed either constitutional or statutory authority to take some action and the court will disagree with that. As much as I think they believe that the presidency is supposed to be powerful, it's not meant to be all powerful. And as Gillian said, they have a view that there are some things that Congress should be doing rather than the presidency. So I think that's the source of President Trump's frustration. He thinks he should win every case or at a minimum get the votes of all the judges or justices he appointed. But that's not the way the system works. And they aren't beholden to him.

[00:50:45.2] Jeffrey Rosen: Gillian, if it's right that the court may tell the president he doesn't have authority to do stuff he wants, including possibly not spending allocated funds or if the recent decisions are upheld to issue tariffs, what does history tell us about the president's likelihood to comply? The classic executive power case is the steel seizure case. The court tells President Truman that he can't seize the steel mills and he complies within a half hour. He immediately complies. Do presidents generally comply when they're told they can't do stuff? And what are we likely to see in the future?

[00:51:27.4] Gillian Metzger: I think that's been a critical linchpin of our constitutional system is that we have had law compliance and quite a lot of the time the law compliance comes without going to a court. You have, as I've mentioned before, executive branch lawyers saying you can't do that or you can't do it that way. I think what I find particularly alarming about the current administration is the extent to which they seem to be sidelining a lot of that internal legal advice to constraining. I think that exactly what will happen in terms of when or if they will disobey court orders remains to be seen. But there seems to be a real commitment to pushing the legal, pushing executive power as far as you can go and not, I think, enough attention and willingness to adhere to what good sound lawyers in an executive branch should be saying about what's legal and what's not.

[00:52:24.8] Jeffrey Rosen: That's such an important point about internal executive branch constraints like the Office of Legal Counsel and their crucial role in constraining the president. Sai, thoughts about compliance? In the past, presidents have been more likely to refuse or threaten to refuse when they're ordered to do things than when they're ordered not to do things. Jefferson signaled that he wouldn't turn over the commission to Marbury if he were ordered, and

yet Truman did obey the decision not to steal the steel mills. So what are we likely to see on the compliance front?

[00:53:04.3] Saikrishna Prakash: I mean, I think that President Trump will comply with what the Supreme Court says in part because he thinks that they are more likely than not over the range of cases to agree with him. And so there's a sense in which he's taking he's trying to get their imprimatur for some of his more controversial policies. And to get that imprimatur to have any meaning, you have to then comply with the other decisions. I think with respect to lower court decisions, there's going to be far more resistance. And part of that is grounded on the sense that there shouldn't be nationwide injunctions, but part of it also is grounded on the fact that the executive branch hasn't always acquiesced to a district court decision or even a circuit court decision throughout the country. So I expect continued resistance of a sort to lower court opinions with grumbling with the Supreme Court decisions where he loses, but I expect compliance nonetheless.

[00:54:05.4] Jeffrey Rosen: Oh, important distinction between the U.S. Supreme Court and the lower courts. Gillian, time to sum up in this great discussion. We've talked about ways the presidency has evolved in ways the framers couldn't have anticipated. We've talked about ways that sometimes the courts are asserting themselves in ways the framers couldn't have anticipated broadly. Do you think that the US Supreme Court will preserve constitutional limits on the presidency or not?

[00:54:43.2] Gillian Metzger: I think they will to some extent. You know, whether or not they will do so in a way that is rigorous, I think they are also probably attuned to their situation right now. And what limits they put out will be ones that they think may be more likely to be accepted. And I think they will go slow because I think they also don't want to create a clash with the president. So I think it's something we'll see over time. But I do think that they will impose some limits, yes.

[00:55:18.1] Jeffrey Rosen: Last word to you, Sai the same question. Will the court impose limits on the president or not?

[00:55:25.9] Saikrishna Prakash: Oh, I think, of course, the president's not going to win all the cases that go to the court. I think the legal strategy isn't designed to do that. Some of the legal arguments they're making, I don't think they're going to win. I don't think they think they're going to win. I think it's partly for political purposes or playing to the base. And I think that's been true for decades now, that presidents are making arguments that they don't necessarily think will prevail, but are doing so for other reasons. So, yes, I agree with Gillian that the court will strike down some of the president's initiatives.

[00:55:56.2] Jeffrey Rosen: Thank you so much, Sai Prakash and Gillian Metzger, for a deep, challenging and illuminating discussion. We covered so much ground and we've had a great response from our audience members in the chat, including an inspiring quotation from Russ Larson from the Federalist Papers. In order to lay a due foundation for that separate and distinct exercise of the different powers of government, it is evident that each department should have a

will of its own. Thank you, friends. Thanks for taking an hour in your day to learn about the Constitution in American history and look forward to seeing everyone again soon.

[00:56:36.9] Tanaya Tauber: This episode was produced by Lana Ulrich, Bill Pollack, and me, Tanaya Tauber. It was engineered by Dave Stotz and Bill Pollack. Research was provided by Samson Mostashari and Gyuha Lee. Check out our full lineup of exciting programs this summer and register to join us virtually at constitutioncenter.org. As always, we'll publish those programs on the podcast, so stay tuned here as well or watch the videos. They're available in our media library at constitutioncenter.org/media-library. Follow Live at the National Constitution Center on Apple Podcasts, Spotify, or your favorite podcast app. On behalf of the National Constitution Center, I'm Tanaya Tauber.