

Executive Power in the Trump Era

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[00:00:03.2] Jeffrey Rosen: Hello friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. This week, the NCC convened at George Washington's Mount Vernon for a conversation about executive power with Stephen Vladeck of Georgetown University Law Center, Ilya Shapiro of the Manhattan Institute, and Adam White of the American Enterprise Institute. We had a wide-ranging discussion about the Trump administration and the Roberts Court. Enjoy the show.

[00:00:48.4] Jeffrey Rosen: Let's begin with the big historical question that is transfixing the country right now. Is President Trump, Julius Caesar or Andrew Jackson? In other words, does he represent the fulfillment of the founders' greatest fears about the consolidation of powers and the subversion of the rule of law, or does he represent the continuation of a vast expansion of executive authority that's been taken advantage of by presidents from both parties, and in that sense is very much part of a continuation of a historical trend? Steve Vladeck, let's begin with you.

[00:01:27.4] Stephen Vladeck: Great, well, thanks for having all of us. It's really an honor to be here. I'm gonna give the profoundly unsatisfying answer, both. Which is to say that I think that there are features of President Trump's actions over the first four months of his second term that you could place on a historical line of sort of broad, slow accretion and accumulation of executive power. For example, control over the administrative state. For example, control over hiring and firing decisions within the executive branch. And then there's a universe of actions that I think are above and beyond any reasonable extension of any prior presidency, including, I think it should be said, President Trump's first term. And so just a couple of examples the, to my view, unprecedented efforts to claim control over Congress' appropriations power, the unprecedented resistance of courts, including I think now we are up to multiple, at least district court orders that the government has just flat out defied in the context of the removal of non-citizens. And so I think the problem is that it has been so busy a time that you really can place plenty of President Trump's actions into both of those buckets. And indeed, we might not even agree about which actions go into which bucket, but I think there are plenty for both.

[00:02:51.8] Jeffrey Rosen: That's so helpful in setting up the buckets that way, and we'll return to each of them. Adam.

[00:02:57.4] Adam White: Well, thanks, Jeff, and thanks to Mount Vernon and the Presidential Library for hosting us here tonight. I would say first, separate President Trump from the presidency. As Steve pointed out, the presidency has grown, and certainly the presidential power have grown and continued going back decades. Even more than that, I'd say, this country has spent 150 years teaching presidents to think of themselves as our legislator in chief, right? Not all at once, but little by little, starting after the Civil War, Congress has continued to delegate more and more decision-making power to presidents, and in so doing, taught presidents to think of themselves as the decider in chief at a legislative level. That is an old story, and every year, it just gets worse. But then when you take a look at President Trump, I would focus on two things. First of all, and I'm not gonna parse words here, in so many ways, President Trump acts as a demagogue, and that is exactly what the founders feared. They feared the power of somebody, they would say, on horseback who would come in and stir up the people against other people and seize power. And whether President Trump means it or not, sometimes it feels like he's half-kidding when he throws these things out.

[00:04:14.5] Adam White: He governs in the style of a demagogue, obviously, and that's something the founders feared. But there's one other aspect to President Trump's presidency that strikes some themes with the founders. When you read Hamilton on executive power in the Federalist, everybody reads Federalist 70, energy in the executive. When you read the rest of that part of the Federalist, the part people skip, the flyover country of the Federalist. Toby and I can make that joke because we're both from Iowa. Rachel can too. The founders, Hamilton and Washington and others, they were deeply worried about what they called unsteady administration. Set aside the politics, set aside the rhetoric. Hamilton said in Federalist 71, 72 and onward, he said that the greatest fear he had for our government was the ruinous, sort of the disgraceful and ruinous mutability of government.

[00:05:09.8] Adam White: That each administration would come in and wipe away the previous one like an Etch-A-Sketch, if they had Etch-A-Sketches back then. And we live in that world, and we have lived in that world now for decades, where every president comes in and wipes away his predecessor's work. That accelerates from presidency to presidency, and it's uniquely well-tailored to President Trump's style of wanting to change things, wanting to stir things up, wanting to make deals on the fly. It's the antithesis of steady administration, and in many ways, that might be the most mundane part of what we're talking about here. But from the founding perspective, it was the greatest thing to fear. Hamilton said twice in the Federalist that the true test of a government was its tendency to produce good administration. That that was what was gonna instill people's faith in government. And that's what I think is most at risk in this style of presidency, just the unsteadiness of it, the chaos of it.

[00:06:08.6] Jeffrey Rosen: Ilya.

[00:06:08.7] Ilya Shapiro: Well, if we're talking about good administration and what have you, that seems to be every president going back, I don't know how long, everyone gets worse concomitant with the growth of the imperial presidency and the problems therein and the warping of power and Congress is, you know, the great original sin of Madisonian political philosophy and thinking that Congress would be a jealous guardian of its own legislative powers rather than the rise of the party system and just deferring both to its party leader, the president,

and seeing the incentive of passing the political buck so it wouldn't be held accountable ever more so in the era of the modern administrative state where you can just say, I'm passing the, at best the Truth, Beauty, and Goodness Act of 2025, and then when some deputy undersecretary of whatever does something that harms a constituent, the constituent goes to their representative and says, no, no, I voted for Truth, Beauty, and Goodness, it's that guy, go sue him, and so all of that ends up in the Supreme Court. And it's just a huge warping of power, and that's kind of a, seems to be a one-way ratchet administration upon administration.

[00:07:16.3] Ilya Shapiro: But let me back up. Thanks for having me. I've very much enjoyed my involvement with NCC over the years, such a valuable institution, and I have to apologize because I guess on this panel, I'm sort of playing the role of the administration apologist, what have you. There was supposed to be a fourth member who's actually in the administration. I guess she has, in the White House Counsel's Office, she has many more things to do, but I have to play this role, even though I've been prevented from joining the administration because the Presidential Personnel Office has adjudged, I think that I don't have sufficient MAGA-tude or who knows what, it's kind of a black box. But regardless, the point is that this is, Trump is neither Andrew Jackson, who famously, if apocryphally, said that John Marshall has made his ruling, let him now enforce it. Nor is he Julius Caesar, just kind of some sort of autocrat. We have constant court rulings every which way. The administration wins some on the merits, it wins some procedurally, it loses some on the merits, loses some procedurally. This is kind of the messy give and take of what's going on.

[00:08:24.9] Ilya Shapiro: The things that people point to, I get constantly asked, I was having a discussion at my table about... The thing I get most asked about by reporters these days is, are we in a constitutional crisis? How will we know if we're in one? Is it kind of a gradual boiling the frog? Is it an up and down switch? The things that people most point to are these one-off individuals being removed from the country for the wrong reasons, either without due process or administrative error or what have you, which is fair enough. It's bad, but it doesn't seem like the downfall of the republic. And then these other things that I would personally point to as just brash ignorance or avoidance of the law and prolonging the bipartisan past TikTok divestiture rule, as well as the blatant abuse of the Emergency Economic Authorization Act, the tariffs and all that.

[00:09:23.0] Ilya Shapiro: But that doesn't match the political narrative because there's cross-cutting ideological positions over this. I guess everybody's kids has TikTok, so they don't wanna take a strong stance, even though Congress voted on it, what have you. But at the end of the day, I think what we have is a president who has a definite vision and the legal manifestation of a political cultural vibe shift that is rubbing people the wrong way, particularly at a time when we have the culmination of several trends where divergent interpretive theories or constitutional visions map onto partisan preference at a time when the parties are more ideologically sorted and polarized than since at least the Civil War.

[00:10:05.8] Jeffrey Rosen: Excellent. A fine diversity of views in the first round. Now let us take up the question of the president and the courts. Just this morning, Judge Ho, a great friend of the National Constitution Center, issued an opinion I just learned about moments before we started in which he accuses the Supreme Court of tying the president's hands in unprecedented

ways. Steve, you're blogging about it tomorrow. First, tell us what Judge Ho said and then describe more broadly the relation between the president and the courts. Is he threatening to defy the courts in unusual ways? Is he, in fact, defying them in unprecedented ways? Or is this part of the usual give and take?

[00:10:48.1] Stephen Vladeck: Sure, so I guess we have 31 minutes, so I will do my best. So this is all sort of continuing fallout from the Alien Enemies Act cases that are now proliferating across the country. There's only one district court in the country that did not immediately block President Trump's effort to use the statute of the ones that have had cases, it's the Northern District of Texas. That led the Supreme Court back in April to intervene, you guys might remember, the sort of one in the mornings, Friday night, Saturday morning ruling, where the justices themselves temporarily blocked the government from removing anyone else under the Alien Enemies Act, in the face of news reports that there actually was a bus literally on its way from the Bluebonnet Detention Facility in the Northern District of Texas to the Abilene Airport. And this has provoked, and then last Friday, the Supreme Court finally published a majority opinion explaining its order from back in April, and that came over a dissent from Justice Alito joined by Justice Thomas. And what the Supreme Court basically said last Friday was that there was reason enough to believe that at least some of the folks who were being held in the Northern District of Texas faced the prospect of imminent removal to El Salvador.

[00:12:07.1] Stephen Vladeck: That there have been difficulties, I think that's an understatement, in securing the return of individuals who have been wrongfully removed to El Salvador, and that those two things together justified preliminary intervention to prevent further removals until the question of legality and due process can be answered. And this, I think, was a relatively reasonable position for the court to take, by all accounts it received seven votes, but it has provoked quite a backlash. And Judge Ho, in his... So on remand to the Fifth Circuit, the Fifth Circuit issued this perfunctory order saying, okay, we'll hustle, we'll decide this case on the merits, and Judge Ho wrote an eight-page concurrence where he accused the majority of showing unprecedented, in his words, disrespect for both the district judge in that case and for President Trump. And what I'm struck by is that Judge Ho's concurrence really does seem to take the view that it was just... That there was nothing remotely wrong with the possibility that these folks might be removed while the judicial review was playing out in the district court, that it was completely disrespectful of the Supreme Court to suggest otherwise, and that sort of not taking the president's lawyers at their word when they said, well, we won't remove the two named plaintiffs, but we reserve the right to remove others. That not taking them at their word showed just unprecedented disrespect for President Trump.

[00:13:36.5] Stephen Vladeck: And I will say that what I find striking about Judge Ho's concurrence, besides the point where he says we're not at Denny's, that was a fun line, was the sort of the vibe in it, which is that we should just trust the Executive branch. I have, I think, my whole career been pretty critical of deference to presidents of both parties in the national security space. Our history is rife with examples of assertions of national security interests that turned out not to be true. But in this case, we don't actually have to speculate. In this case, we have now at least four specific examples of individuals who were removed in violation of court orders and in violation of court orders issued by district judges, just like the judge in the Northern District of Texas.

[00:14:28.0] Stephen Vladeck: So it seems to me that there ought to come a point in the relationship between any president and the courts where the courts can look at the behavior of the president's administration as at least probative evidence for how the administration is likely to behave going forward. I think we can have a longer conversation about whether deference to the Executive in general is appropriate in this space. But I think they're... A world in which the Executive branch can remove folks in defiance of court orders and then turn around and insist that it's entitled to deference when it promises to not remove people in violation of court orders is a world in which I think courts are being told and are indeed choosing to willfully turn a blind eye to what the law requires. And so that's my view of the issue. It's why I think the Supreme Court was right, even if Judge Hendriks had done nothing wrong.

[00:15:20.4] Jeffrey Rosen: Many thanks for that. Adam, do you agree that four individuals have been removed in defiance of court orders? Does that represent an unprecedented executive defiance of the federal judiciary? Or is it an appropriate effort to argue around orders short of a direct order from the Supreme Court? And do you think that this administration is coming up to the brink of defying the U.S. Supreme Court?

[00:15:44.5] Adam White: Oh, just the little things. So I haven't followed the cases day-to-day as closely as Steve and others have. So I'm not actually sure about the count. I'm not saying you're wrong. I'm saying I don't know about the count about whether they've defied it or not. One of the challenges in thinking about this maybe a few weeks ago, when everybody was wondering if we were on the verge of a constitutional crisis, a showdown between the president and the courts, is that I didn't expect there to be some big showdown, some big moment like that movie with Jack Nicholson and Tom Cruise and Jack Nicholson shouting, you can't handle the truth, and President Trump saying, I'm not gonna comply with that order. That's not really the way it works.

[00:16:20.9] Ilya Shapiro: I've invoked that analogy to students and they stare at me blank face. But this is the right audience.

[00:16:26.3] Adam White: I mentioned the Etch-A-Sketch earlier. That's another one that's lost on students now.

[00:16:30.4] Stephen Vladeck: The siege is better when Denzel Washington shows up with a writ of habeas corpus and Bruce Willis is the general who refuses to...

[00:16:38.2] Adam White: What actually happens though is you don't have that showdown. You have either good faith or bad faith sort of disagreements between the judge and the government, and the bad faith might run in either direction. I'm not just accusing the government. And sometimes it feels like they're talking past each other, right? The government says, "We're complying with your order." The judge says, "Well, what about this?" The Justice Department, this happened in one of the earlier cases, says, "We don't actually know what your order means. It's written so broadly." And there's this funneling over time normally from ambiguity to certainty as the cases get narrower and narrower, and they provide a lot of off-ramps that can stop short of an outright constitutional showdown. I don't know that we've seen

outright defiance so far other than the litigation around Garcia in El Salvador, where the Justice Department has filed a number of pro forma papers day after day saying, "We've done the best we can, we're working on this." It's pretty clear they're not working on this.

[00:17:39.5] Ilya Shapiro: Well, it depends on what the meaning of facilitate is.

[00:17:42.0] Adam White: Yeah, I thought the Justice Department was totally wrong about that. But to actually answer Jeff's question after 10 minutes of my filibustering, I don't think we've seen maybe more than one example of pretty bad-faith defiance that I've seen. Jeff or Steve could educate me. I don't think we're going to see it either. I think we're gonna see a lot of arguing about the facts on the ground. We're gonna see the administration try to run out the clock on some things. And let's be really clear here. The courts are not built to move this quickly. They're just not. And in fact, not to keep hearkening back to the founding, they were built to be slow and deliberative and to be able to actually adjudicate real-world facts. One of the challenges of the modern governing environment, everything comes out of executive edicts, out of governor's offices, and out of administrations, is that it all moves too quickly for a sensible, normal judicial process. And the courts are doing their best to keep up. And they make lots of mistakes. Don't get me wrong. But this whole process is deforming the courts as much as anything by forcing them to act in a way that they just were not built to act.

[00:18:47.2] Jeffrey Rosen: Many thanks for that. Ilya, the argument is that the vast number of lawsuits combined with, to put it bluntly, the case against the administration is bad faith in complying with the orders, is subverting the rule of law even without outright defiance. Why isn't that right?

[00:19:09.9] Ilya Shapiro: Yeah. I mean, Adam sort of danced around this point. Trump himself has said we're not gonna defy a court order. But his lawyers are being good lawyers and narrowing and making arguments of various kinds. There's a lot of creakiness in the laws. I agree with what Adam is saying. I wish the Supreme Court would jump in, not just on rulings on stays and what have you, but just assume broader things. Fine. We need to decide this. Let's have a full-blown quasi-original jurisdiction trial in the court or something like that because these things are not going away. And I think there's a popular demand and a distrust for institutions because the rhetorical point that, okay, President Biden is allowed to let in 5 million people illegally, but we have to go one by one to deport them. It's a very salient, powerful rhetorical point to make. There has to be a solution. It's not that our Constitution is not a suicide pact, so we have to suspend habeas corpus for everybody. There has to be a better solution than that. And so we're facing these multifarious kinds of tensions, and the courts are not the best organs to solve them. And I think that Chief Justice Roberts' inclination to always go minimalist and be institutionalist and try to extricate the court from political battles, every single time has the exact opposite effect. So the court might as well just grasp the nettle and start deciding more of these things more broadly.

[00:21:06.4] Stephen Vladeck: This is not in any way meant to disagree with anything Adam really has said. But I do think that a little more concreteness about the facts would help illuminate the conversation. So in the JGG case, somewhere between 150 and 200 Venezuelan nationals were flown to El Salvador in direct violation, at least according to a probable cause

finding by Chief Judge Boasberg, of a temporary restraining order issued by Chief Judge Boasberg. In the JOG...

[00:21:34.9] Ilya Shapiro: Is this the one where he has proper jurisdiction or he was a judge not to have jurisdiction? 'Cause there was the one where he was... We were supposed to file the habeas cases in Texas.

[00:21:43.3] Stephen Vladeck: At the time he issued the order, he had jurisdiction. He actually still has the case because he still has jurisdiction over the folks who have been now sent to El Salvador. So that's one. In the JOG case, this is the guy who's known in the media as Christian. He was removed in violation of an agreement he entered with the United States Government. That's two. In DVD, this is the case that has been in the news today about a district judge in Massachusetts who specifically barred the government from removing particular individuals to third-party countries. And yet the government put them on a plane last night and sent them to South Sudan. That's three, right? And then there's Abrego Garcia, where the government itself conceded on the record that it had wrongfully removed Mr. Abrego Garcia. And so I don't... This is, again, this is not me trying to play gotcha with anyone, it's just me trying to suggest that I know it's hard to keep track of the hundreds, literally, of cases that are out there, but there are concrete examples of what I would call much more than just clever lawyering by the Justice Department, but defiance the likes of which we haven't seen before. Now, it's district courts, and so maybe the theory is that district court rulings aren't as binding as Supreme Court decisions, but that hasn't been our tradition historically.

[00:22:56.5] Adam White: I'll just say, not to keep cutting off the moderator, take the JGG case, the famous turn back the planes case, Judge Boasberg's case, right? Justice Sotomayor had a really great sort of play-by-play, moment-by-moment account of this in one of the orders the court put out. But even if you take at face value her timeline of what's happening, think about this in real time. The administration is in action, loading people onto planes and moving them out of the country at the same time that a hearing is happening at a court a time zone away, right? Even if the Justice Department lawyers receive the TRO, while some of the deportations, you know two... Maybe two of the planes were in the air, one was about to take off, it's not as though the pilots of these planes have, you know, for the lawyers in the room, a PACER account, and they're getting real-time readouts of TROs that are happening. You have to account for some sort of discrepancies in timelines because the government is in motion. And you have judges coming in quickly and trying to issue orders. There's going to be mistakes that are made even in good faith, even on a policy I totally disagree with. But it's the constant difficulty of the courts trying to keep up with something that isn't built for judicial micromanagement. It's not their fault. It's the administration's fault. The courts are not built to keep up with this.

[00:24:13.3] Stephen Vladeck: I would say, 'cause I don't wanna belabor this, I would encourage folks to read Chief Judge Boasberg's probable cause ruling, which walks through the timeline in even more detail, and suggests that some of that was manipulated and generated by the government to allow them to have the exact argument Adam has now presented.

[00:24:29.8] Jeffrey Rosen: Ilya just to finish this thread, we may have a situation where the government is held in contempt by Judge Boasberg or others, Judge Xinis and others are doing

these contempt investigations. And we have attempts to delegitimize the courts, including calling for their impeachment that led Chief Justice Roberts to intervene and say there's a tradition in this country ever since Justice Chase of not impeaching judges 'cause you disagree with their rulings. Might the combination of the attacks on judges by the administration and the possibility of contempt findings represent something unusual in American history?

[00:25:04.7] Ilya Shapiro: I mean, we could end up with nobody respecting courts whatsoever, which is not a good scenario. We've just run through a long while of the left wanting to fiddle with the courts and delegitimize them for various ways and pack them because as, if you believe Erwin Chemerinsky, none of the Republican appointees were legitimately appointed and all these sorts of things. It's a dangerous game we play, and nobody has clean hands, and we can argue about who started it and when. I would argue that it was started under the Washington administration. Here we are at Mount Vernon when one of his Supreme Court nominees was rejected for political reasons, as I detail in my previous book, *Supreme Disorder*. We're just gonna have to muddle through this because disrespecting courts is the worst of all bad options.

[overlapping conversation]

[00:26:01.8] Adam White: I just wanna say, for the last four years, we've seen a constant stream of invective directed at Judge Aileen Cannon in Florida. For people who thought she was being too soft on President Trump in some of the criminal cases the... Was it the documents case? Judge Kacsmaryk, the district judge in Texas, who ruled against the Biden administration in a number of regulatory cases, constantly denounced. The American Bar Association last summer put out a resolution. They didn't name him by names, but they passed a resolution trying to get cases no longer sent to courts like his. They wanted cases routed away from districts like his, and they said that the kind of decisions coming out of his court posed a threat to the legitimacy of the courts.

[00:26:44.6] Adam White: In this era where it's constant showdowns between presidents and courts, the politics become so personalized, and that's a fight judges can't win. I spent a year serving on President Biden's Supreme Court Commission, the court packing commission, who doesn't love a group project. We spent a year studying this, and I was shocked by the sheer amount of invective for that year that was directed at the Roberts Court and at judges, Trump appointed or otherwise, who folks on the left thought were insufficiently, either insufficiently hostile to the Trump administration or insufficiently deferential to the Biden administration. Steve's gonna have actual facts to set me straight on this, but this is, as Ilya said, a very worrisomely bipartisan and permanent part of our political arena right now.

[00:27:32.3] Stephen Vladeck: I certainly agree that people from across the ideological spectrum have, in many cases, lost the ability to differentiate between personal attacks on judges and substantive critiques of their rulings, and I think that's unfortunate. I do think that sort of the suggestion that everyone's doing it and so it's a wash rather undersells a couple of features of what's been happening in the last four months that we did not see during the Biden administration. So, for example, for all of the invective directed toward Judge Cannon and Judge Kacsmaryk, no Democratic member of the House of Representatives introduced impeachment resolutions against any single district judge in the United States during the Biden administration.

There have been six introduced against six different judges in the first four months of the Trump administration.

[00:28:18.1] Stephen Vladeck: Judges who have done nothing other than have the temerity to rule against the Trump administration, it should be said. We never saw the executive branch show the kind of disrespect toward district judges in any of those cases that we've seen in these cases. And I'll just say, I mean, I think some of the behaviors that were being called out by groups like the American Bar Association were not actually about partisan manipulation. I mean, the sort of... I mean, the judge shopping critique, at least from some of us, was about how there shouldn't be judge shopping anywhere. I think that when... I mean, just one super nerdy... I'm the, I think the nerdiest of the nerds up here on legal procedure, right? Right. The District of Massachusetts very quietly changed its case assignment rules in February to eliminate judge shopping. So again, my point is not that everyone's hands are clean. My point is that I still think that there are meaningful differences in both degree and kind in the attacks we've seen from the government on the Judiciary in the last four months and what we've seen in recent years.

[00:29:19.3] Jeffrey Rosen: Well, you've all agreed, importantly, that the legitimacy of the courts is urgently important to maintain the rule of law. And the question that we're discussing is, are the attacks on judges undermining the rule of law? Adam, do you think that the... Although it's true that both sides don't have clean hands and these partisan attacks have been escalating, that we're approaching a point where the rule of law itself is imperiled?

[00:29:48.3] Adam White: No, I don't think so. I was struck by Chief Justice Roberts' statement to that effect last week. He's not usually one for overstatements. So I...

[00:29:55.5] Stephen Vladeck: At Georgetown Law School, that's one.

[00:29:57.5] Adam White: He's playing to the audience. No, I don't think we're there yet. No, I don't think we're there yet. I'd say that the greater problem right now is a cultural impatience with the rule of law. And again, that's bipartisan. We're in an era where we expect everything instantly. Our food deliveries and our Netflix and our Judicial decisions and our policy outcomes. We want everything very quick. We're impatient for any kind of prolonged deliberation about any kind of dispute. And I think it's those factors as much as anything, just the rapidity of our political culture that's the strain on the rule of law.

[00:30:36.5] Adam White: I don't think it's what the courts are doing, and frankly, I don't think that what President Trump and his administration or what the people who were criticizing judges during the Biden administration, nothing they could do, I think, could delegitimize the courts. I think, and I've written about this, I think what I do worry about is the way judges go about their work and the way that the friends and critics of the judges go about their work. Academics and journalists I hold more responsible for it than anybody, no offense to the academics and journalists on this table. Most Americans don't read judicial opinions. They leave normal flourishing lives and they're not gonna sit there reading Supreme Court opinions. They only know what they know about the courts through journalists and through educators. And I think that it's the ideological warfare among the journalists and the educators that distorts the public's view of what happens in the court oftentimes and is one of the greater challenges to our culture

of a rule of law in America. Present company excluded.

[00:31:32.8] Jeffrey Rosen: It's a crucial point and it's why discussions like this are so important, why geeky podcasts like all of us participate in and host are necessary to inspire citizens to take the time to listen to the arguments on both sides and to read the opinions themselves. It is very important given the magnitude of these decisions to have citizens make up their own minds. Ilya, do you agree with Judge Ho that the Chief Justice is contributing to this clash? Chief Justice Marshall was so careful not to pick direct fights with President Jefferson. He said, I'm not fond of beating my head against a wall in sport. And he refused to strike down the Negro Siemens Acts, which were kind of sailing while black law, even though he thought they were unconstitutional because he thought that the administration would ignore him. Is Chief Justice Roberts picking a fight?

[00:32:23.0] Ilya Shapiro: Roberts holds up Marshall as his idol, of course, but he fails again and again to be like him. Every time he tries to play politician, it backfires. Whether you look at the Obamacare ruling, what I think accelerated us towards our populist moment as people saw that you can't win on the law, and so you need a strong man to beat their strong man. Whether you think about, so many places where by inserting himself and trying to calm the waters, he does, he roils the waters instead. So I think, yeah, there is some failure of Supreme Court leadership, but beyond that, I mean, we're at a time of historically low institutional trust more broadly. And even as the Supreme Court and the judiciary has more respect than almost any other institution, certainly in the federal government, it's lower than it was before. Although the Supreme Court apparently has more public confidence now than even before the *Dobbs* ruling overturning *Roe v. Wade*. But what is historically different is the partisan or ideological disparity in public confidence for the court. And I don't know how we get away from that because, as I said, there's just strikingly different visions of what different parts of the Constitution mean, what authorities they give.

[00:33:54.9] Ilya Shapiro: And this doesn't relate so much to the immigration cases now or executive authority over things like this, but just the role of the federal government and the different branches and federalism and these very basic things, it's, you know, we live in two countries this way and that are all mixed together. I'm not talking about geographical splits necessarily. And especially among elites, there's just irreconcilable differences. And the way that media and commentary has been bifurcated where every source is left-wing or right-wing except Twitter, X, I think is the most balanced medium I think that we have anymore. So thanks to Elon Musk for that, if not anything else. But yeah, we're definitely in a period of transition. Future historians will see this as an inflection point, I think, in American history.

[00:34:58.1] Jeffrey Rosen: That point about institutional trust is so important. Justice Breyer stopped by the NCC last week and joined the podcast to pay tribute to Justice Souter, who just passed. And Justice Breyer noted that the most striking thing about *Bush v. Gore*, where he and Justice Souter were together in dissent, was that the country obeyed it, that Gore and the Democrats accepted it and that there was no violence. And he expressed concern that a lack of institutional trust might lead the courts to be defied, and that all has to do with norms. Steve, I do wanna take a beat on the substance, you started off really helpfully by distinguishing between three categories of cases.

[00:35:39.3] Jeffrey Rosen: The unitary executive cases involving control over the executive branch, where you said President Trump might win many of those cases, those involving impoundment, where he's assaulting congressional authority, where he's less likely to succeed. And I think tariffs and immigration may have been a separate category. I was struck on the podcast that both Steve Calabresi, the head of the Federalist Society, and Sam Estreicher, the leading liberal administrative scholar, thought that President Trump will lose the tariff cases before the Supreme Court. Without going through all of them, let me ask you this. If the Supreme Court overturns the *Humphreys'* executor case and holds that the president can fire the heads of independent agencies, will that embrace of the unitary executive theory transform executive power in ways that the framers would have been alarmed about or not?

[00:36:34.1] Stephen Vladeck: Yes. I mean, I think, the framers had, I think, a much more complicated, nuanced view of executive power than the current Supreme Court does. I think it says a lot about where we are that the only reason why the court hasn't overruled *Humphrey's Executor* yet is because it hasn't figured out how to carve out the Federal Reserve, which I think suggests that this is not just about pure legal theory. This might be impolite of me, and I apologize, but I feel the need to say a little more about the last question and the prompt of are we in a crisis and the suggestion from both Adam and Ilya that things are bad but not sort of... I will say... I teach constitutional law and I teach civil procedure.

[00:37:20.3] Stephen Vladeck: And we have a government that takes the position that individuals can be removed from this country without any hearing as to who they are and whether they are properly being removed. If that is true and if that is sustained, they can do that to anybody. We have a government that takes the position that law firms can be punished for having the temerity to hire people who worked in the Justice Department on investigations into the January 6 prosecutions. We have an executive branch that is revoking funding from universities because private universities didn't do what the Executive branch think they needed to do to combat the executive branch's particularly one-sided view of what anti-semitism is, right? And it just seems to me that, like, a world in which all of these arguments were sustained in the courts is a world in which we don't have the legal system we think we have. And so we can sit up here and say, well, you know...

[00:38:11.4] Ilya Shapiro: But courts are blocking a fair bit of that.

[00:38:13.3] Stephen Vladeck: Well, I mean, they're blocking some of it, but the sort of... There are plenty of folks who have been very critical of the courts for blocking it. And I think, you know, so this is why... I mean, I suspect that Adam and Ilya and I are all in violent agreement that the long-term cause of the moment we're in is the abdication by Congress of its various responsibilities. We might prefer to see Congress flex its muscles in different ways, but that the sort of the inevitable head-on conflicts between the executive and the courts is a function largely of congressional abdication. I just... I can't get off this stage without making the point that there is something to me fundamental about due process in the American system and that the notion... And that part of why I think the immigration cases have resonated more than *Humphrey's Executor*, more than the tariff cases, even though those might actually have more of a direct impact on everyday Americans' lives, is because I think at an intuitive, instinctual level,

Americans actually do understand what due process is. And I just think that we have not seen this kind of assault on both the principle of due process and the idea that courts should play a role in promoting it in a long time.

[00:39:25.6] Jeffrey Rosen: Thank you for putting that on the table so powerfully. And indeed, when the president was asked, are non-citizens entitled to due process, he said, I don't know, even though the Constitution says that all persons are entitled to due process, citizen and non-citizen alike. Adam, your response to Steve's charge that we really could see the courts blessing violations of the law in ways that we haven't seen before?

[00:39:51.3] Adam White: I don't think we've seen that yet. I'm not trying to downplay what's happening with the deportations. I find them horrific. That's an understatement. What worries me about the situation, and again, it's because it's all centered around presidential politics, Congress has left the stage. I'm holding this, and I just wanna point this out. This state, this farewell address, and the other part of the bookend of the Washington administration is his first inaugural address. They are both in words and in the way he presented themselves, they are an argument for self-restraint, right? There is so much in here about duty, starting with the inaugural oath in his inaugural address, and over and over again, returning to the theme that there were higher powers and higher principles that he was bound by. And so much of the farewell address is trying to account for how he carried that out in his government, and urging the country going forward to have self-restraint in a spirit of union.

[00:40:50.1] Adam White: And what worries me the most about this era of presidential-centered politics, which again goes back decades upon decades, is that we have all of the power without any of the self-restraint, and without any of the spirit of self-restraint among those who put the wind in the sails of these presidents. If there's going to be a constitutional crisis, it's going to be that. It's gonna be a crisis of political ambition in the presidency with no spirit of self-restraint, 'cause ultimately, the courts can't save us from ourselves. Congress can't save us from ourselves. The only thing that we have is the republican virtues of self-restraint that Madison, Hamilton, Washington, and others, they said we needed, and they showed that we needed. And that's what I worry is draining out of our political system. If we have a crisis, it'll be from that.

[00:41:43.1] Jeffrey Rosen: Beautiful. Ilya, the last word in this powerful conversation is to you.

[00:41:47.3] Ilya Shapiro: I agree with a lot of what Adam said. What I wanna punctuate is that Trump is singular as an individual, as a personage, as a character in our national narrative, whatever you wanna call it. But a lot of the things that he's done that people decry, the narrative from the left-biased media, pales in comparison to when Congress won't act, I will. I have a pen and a phone. The Supreme Court has ruled, but we have a different way of doing the same thing. Again, I don't go in for whataboutism. I think this is a structural problem, as Adam said, and as Stephen said, about the abdication of Congress and the warping of our powers at a very basic fundamental level. But if you remove just the theatrics and the weirdness and the entertainment value of Trump and Elon Musk and all the different things, the reality TV show aspect of what's going on, and you have over... Until the tariffs, everything Trump was doing was very, very popular. He had his first plus ratings, positive ratings, presidential approval. And so the

American people think that something has gone fundamentally wrong with our institutions, with the people who control our institutions. And even if Trump is imperfect, he was willing to disrupt that and he... I think we have much more fundamental structural problems that go beyond Trump or the Trump administration that need to be addressed. But it's taken decades to get to where we are, and it'll take a long time to reverse.

[00:43:40.8] Jeffrey Rosen: Friends, moderating these constitutional conversations is always a privilege, and the best thing about them is I always learn from them. For modeling civil constitutional dialogue, please join me in thanking our panelists.

[applause]

[music]

[00:44:06.1] Jeffrey Rosen: This episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock and William Hutchison. Research was provided by Samson Mostashari and Gyuha Lee. Thank you so much to our friends at George Washington's Mount Vernon and the Mount Vernon Ladies' Association for making this conversation possible. It was so inspiring to join you at George Washington's home. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate. Please check out the Constitution 101 course that we launched with Khan Academy at constitutioncenter.org/khan101. Sign up for the newsletter at constitutioncenter.org/connect. And always remember in your waking and sleeping moments that the National Constitution Center is a private nonprofit. This podcast and all our work is made possible only because of the generosity of people from across the country who are inspired by our nonpartisan mission of constitutional education and debate. Please consider supporting our efforts by donating today at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.