How Powerful is the President?

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[00:00:00.6] Jeffrey Rosen: President Trump's far reaching executive orders have given rise to a debate. Is the president acting within the American constitutional tradition? Or have recent events involving the consolidation of executive power represented a departure from our history and tradition in a way that would make the president a king? 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, a group of historians and commentators join me in Miami at the National Constitution Center's annual President's Council retreat to discuss this and more. Melody Barnes of the UVA Karsh Institute of Democracy, Charles Cooke of the National Review, Joanne Freeman of Yale University and Yuval Levin of the American Enterprise Institute discuss the American tradition of presidential power and evaluate analogies to our current moment from across American history.

[00:01:16.3] Jeffrey Rosen: It is wonderful to welcome you to the National Constitution Center's President's Council retreat. Doug DeVos put it so well when he said that our goal this weekend, as always at the NCC, is to spark curiosity and engage in lifelong learning together about this great document, the Constitution, which holds us together. It is the shining ideal that unites us in polarized times. And what's so meaningful about this weekend is we are going to have conversations not about politics, but about the Constitution, and we will explore the serious disagreements about what the Constitution means and indeed, where we are in American history. But we'll do so in a spirit of lifelong learning and curiosity that I know will spread much light. We're going to jump right in with the central question facing America today, which is what is the state of the Constitution as we approach 2026?

[00:02:23.7] Jeffrey Rosen: There are two very polarized narratives about the state of the Constitution that are hard to reconcile with each other. On the one hand, we have supporters of the new administration which claim that it is appropriately deploying executive power to shrink the government and to ensure presidential control over the executive branch in ways that, in their view, the Constitution allows. And in this sense, the president is operating well within the

American constitutional tradition, and their view is that the Supreme Court is likely to approve of many of his actions. On the other hand, we have those who say that we are approaching a constitutional crisis, although many acknowledge that an actual crisis would only occur if the president defied an unambiguous order of the Supreme Court, something that's never happened before in American history and has not happened yet.

[00:03:37.9] Jeffrey Rosen: Still, opponents of the current administration claim that the president is consolidating executive power with the aid of a complacent Congress and judiciary in ways that threaten to make the president a king, in ways which was exactly the fear of the founders and the reason for which the revolution was fought and the Constitution was drafted. So that's what we're going to debate. We could not have a better group to discuss this crucially important question. And we're joined by Joanne Freeman of Yale University, Melody Barnes of UVA, Charlie Cooke of National Review, and Yuval Levin of the American Enterprise Institute. Yuval, you've generously pinch hit. David Blight's plane is delayed. He'll be with us later this weekend. But I'm going to jump right in by thanking you for that service, by asking you to start off.

[00:04:40.3] Yuval Levin: Oh, you're welcome.

[00:04:41.9] Jeffrey Rosen: I promised him he didn't have to prep and he doesn't because he's written some of the most clarifying framing pieces on this question. And in NRO Online, you distinguished between assertions of presidential power to control the executive branch, which you think are well within the tradition of the unitary executive that the Supreme Court may bless, and the president's attempt to refuse to spend appropriated funds or to exert control over Congress, which is on a different constitutional footing, although the Supreme Court might or might not approve that. Tell us about that distinction. And broadly, is this within the American constitutional tradition or not?

[00:05:25.5] Yuval Levin: Well, thank you very much, Jeff, first of all, and thanks to all of you. There's a sense in which I'm with my people. People who will come to Miami to worry about the Constitution together are people that I want to spend a weekend with. I think that it's important to see that we're in a very dramatic moment. It feels like a very intense and active moment and a moment where a lot of big questions are open. But constitutional disputes are always a matter of pushing and pulling, of action and reaction. And we have seen the action. And not yet the nature of the reaction. That means we don't really know what kind of moment we're in quite yet. Not much has reached the Supreme Court. Congress has not done much. It may not do much. That's the nature of the problem we face, in a sense. But I think that it's important to think about. The kind of intensity and assertiveness that we're seeing from the administration to distinguish executive power in the way that you've suggested, Jeff, which is, I would say I have a rule of thumb for thinking about these executive power debates, which is broadly speaking that the

President really does command the executive branch, but the executive branch does not command the American government.

[00:06:43.8] Yuval Levin: And some of the disputes we're seeing are about the first, and some are about the second. If you're seeing a dispute about can the President fire this guy, can the president let some 21-year old idiot run this payment system at the treasury, the answer is probably yes. It is likely that ultimately, whatever process this goes through, it's going to turn out that the President can run the executive branch. If the question is can the President ignore Congress or can the President ignore the courts, the answer is likely to be no. And in the middle, there are a lot of other kinds of questions that are going to arise, questions about the nature of our system, the nature of the relations among the branches. I think it's worth seeing that this Supreme Court is not inclined to a maximal reading of executive power in the larger system, but is inclined to a maximal reading of presidential power over the executive branch. And drawing that distinction is going to be very important for us to make any sense of what's going on in the next coming months and years, because we have to see this as part of a broader disagreement between left and right about the nature of the administrative state in which the right wants to restrain the executive branch, but empower the President.

[00:08:00.8] Yuval Levin: And this Supreme Court has done both in just the last term at essentially the same time. I think we're going to see more of that now. I don't know that the administration itself is going to be that coherent. And the President does just want power over the whole system. We may see a fight over impoundment, we may see fights over the authority of the executive in the system. But I think the Court will be much less patient with that than with the notion that the second branch is run by the President. Essentially is the President. That view, I think, is going to play out, and the differences between them, the distinctions between them are going to have a lot to do with the kinds of debates we have about executive power in the coming years.

[00:08:44.5] Jeffrey Rosen: So interesting. Restrain the executive branch, but empower the President. And if that thoughtful analysis is right, it might mean, as you say, that the Supreme Court would bless the President's ability to fire independent officers by overturning a case called Humphrey's Executor, which created independent agencies, but balk at some of his attempts to impound allocated funds and not overturn the Impoundment Control Act. Melody, to take the argument on the other side, Justice Sotomayor said in her dissenting opinion in Trump v. US that the creation of broad immunity for the President's official act has turned the President into a king. And she quoted Hamilton and said Hamilton and Jefferson feared making the president a king. And the removal of that accountability, plus the fact that Congress is not doing its job and for many decades has increasingly been complacent to presidents of its own parties and refused to check him, means that if the judiciary blesses this expansion of executive authority, it would

do so in a way that the Founders couldn't have imagined. Are you sympathetic to that critique or not?

[00:10:00.5] Melody Barnes: Well, first of all, it's wonderful to be back here. Thank you for having me. It probably won't surprise you to say that I am sympathetic to that critique. And my husband and I often have these conversations in our kitchen. It's kind of like coming to Miami to hang out with people who care about the Constitution. This is what we do for fun in our kitchen. And there's language about being deeply concerned or I'm really worried that doesn't quite go far enough. And to step back for a second. For so long we have had these debates about the imperial presidency or the imperiled presidency. I mean, Gerald Ford said the president doesn't have enough power. And those who have argued that the size and the breadth and the scope of executive power has gone too far, and having worked in both institutions, spent three plus years in a White House, about a decade in Congress. I look at this, and one of my deep concerns is that the road to the constitutional crisis, and you laid it out, that point at which there is an active, clear rejection of a court order, the road to that point in time is littered with the kinds of actions that we are seeing today and the impulses that we're seeing today.

[00:11:24.9] Melody Barnes: Included in that for me, though, is what's happening with Article 1, Section 1 of the Constitution, the Congress, and having spent 10 years in Congress watching Congress also pull back so far from its exercise of its authority and not jealously guard its responsibilities is, I think, part of the crisis that we're seeing or part of the road to the crisis that we're seeing today that we absolutely have to have all three branches of government, all with specific kinds of responsibilities and authorities, working together to engage and to move the country forward. And that we're not seeing that. One of the things that I'm reminded of and just very briefly flashback to, was it 1999, and it's the Clinton impeachment and the House has acted, and I'm working in the Senate, and the Senate can see that this trial is coming their way.

[00:12:23.3] Melody Barnes: And what Republican and Democratic senators did, some who I'm sure would have been happy to see Bill Clinton impeached and others who absolutely did not think it should happen. But what they did was say, we aren't going to look like the House. We as an institution have to protect our prerogatives. We have to protect and think about how we present ourselves to the American people as we carry out our responsibilities. They go to the old Senate chamber where there are no cameras, so there is no performative action. And they go in there with two staffers and they hammer out a deal or the framework to the deal that would allow the trial to start. And the reason I use that example is because it is a fierce protection of the prerogatives and an understanding and a deep caring for what that institution means. And I think part of the challenge that we have today, in addition to the deep concern that I have about the kinds of the exercise of authority, is that the president that has control over or his party has control over Congress has chosen to completely go around Congress and Congress has said, okay. So to me, that is part of the peril that we find ourselves in today.

[00:13:42.3] Jeffrey Rosen: Thank you so much for that. I saw some nods from Yuval, and of course, you've written about the complacency of Congress as well. But your firsthand experience of how much things have changed in just the period that you've been observing is striking. Charlie Cooke, it's wonderful to have you back. I'll just share with those who weren't here last year that Charlie gave the most moving expression of what it is to be an American citizen as a naturalized citizen that any of us had ever heard. And you've also written about a movement of a group you call conservatarians, who are fiscally conservative and socially liberal. As you see conservatives embracing executive power on behalf of the effort to shrink government, essentially Hamiltonian means for Jeffersonian ends. How does this fit into the conservatarian dynamic and more broadly, is it a conservative thing to do to embrace executive power that would have made previous generations of conservatives.

[00:14:54.8] Charles Cooke: All right, well, thank you very much, Jeff. I should say thanks to Yuval for filling in. It's actually a little bit annoying that Yuval is filling in because I learned half the things I know from Yuval. A lot of my commentary this evening is going to be, as Yuval said, or to echo what Yuval thinks, because I'm a Yuval Levin conservative.

[00:15:17.2] Yuval Levin: There are two of us.

[00:15:18.3] Charles Cooke: Yeah.

[00:15:21.6] Melody Barnes: No, but I would join you. As I would say, when Yuval was on my board at the University of Virginia.

[00:15:28.8] Charles Cooke: There we go. So I think the most important thing here is that we remember that whatever is happening now is not new and is not the product of Donald Trump being president. Now, I say that as somebody who did not vote for Trump, not a great Trump fan, and doesn't like executive power. If you go back 15 years, through everything I've ever written, you will see a consistent theme. I don't like executive power and I like legislatures. But the issues that we're discussing. And Melody, you hinted this by going back in time as you have no new. Now, perhaps people are more upset about it at the moment than they have been, but the supine nature of Congress has been a growing issue in our politics for 20 years, and we can just look back at the last few years. So if you look at Donald Trump's slew of executive orders, there were a lot of them. They've boasted about them. They think this is a great thing. Most of those executive orders are within powers that have been delegated by Congress. Now, I wish they hadn't been, and I wish that the Supreme Court had, at various points in American history, pruned that delegation power, but it hasn't.

[00:16:45.2] Charles Cooke: And so most of those executive orders sit within congressionally mandated executive power. There are a couple of exceptions. One of those is that Donald Trump is refusing to enforce the TikTok Bill that was passed on a bipartisan basis in Congress and then upheld by the Supreme Court, nine to nothing. The other one is that he has attempted to redefine the 14th Amendment as it relates to birthright citizenship. But if you go back one month and two days, you'll find Joe Biden refusing to enforce the TikTok bill, and then the day after trying to create the 28th Amendment by tweet. So this is an issue that we have had. And if you go back a couple of years before that, you'll find Joe Biden trying to spend between $250 and $750 billion without Congress on student loan forgiveness. You'll find Joe Biden trying to pass an eviction moratorium that he knew at the time and said was illegal. You'll find Joe Biden trying to issue OSHA rules that he knew he wasn't allowed to do and his own press secretary had said were illegal. I don't say that to criticize Joe Biden. I say that because we have had a Congress that cheers along the president of their own party and a Congress that doesn't want to legislate for a long time.

[00:17:55.5] Charles Cooke: What did Congress do when Joe Biden did those things? If you're Republican, it complained about it, and if you're. A Democrat, you cheered it. Let's Elizabeth Warren, Bernie Sanders, Chuck Schumer, Alexandria Ocasio-Cortez, they all went on television every day, day in, day out, and they said, we need the student loan bailout. They didn't say, we'll pass it through Congress. They said, we need the student loan bailout. The reason the eviction moratorium happened was because Representative Cori Bush laid down and went to sleep outside the Congress and said, I have been homeless and I know what this is like. And so Biden changed his mind. Trump is not my cup of tea. This is not a defense of Trump. But what you're seeing now is an expression of that same underlying problem. Now, what I would like to see happen in response is I would like to see Congress take back that power, go through the law and take out the lines that say the secretary shall, in the judgment of the president, if the agency determines it, do it on a bipartisan basis so that it applies to both parties.

[00:18:54.0] Charles Cooke: I don't see anyone doing it. They're not doing it because although they complain about it, Republicans and Democrats alike, what they really hope is that next time their guy is in power, he will be able to use the authority that's been delegated in ways that they like. And until that changes, we're going to be sitting here in Miami, the three people in the Yuval Levin caucus in America, and we're going to be complaining about this. I think it would be a profound mistake to assume that this is something unique about Donald Trump. He is more brazen about it and he is probably more likely to turn it into a crisis if, for example, he tries impoundment. But at the moment, you are seeing the expression of a longstanding problem. So, no, it's not conservative, it's not conservatarian. It is our politics now. And at some point I hope that both sides get together and say, we're not going to do this anymore. We want some stability. We want to re-establish Congress's powers and they fix it. But that is not on the horizon as we sit here.

[00:19:57.6] Jeffrey Rosen: Many thanks for that. Joanne Freeman, I am so eager to ask you about history. You have written the definitive book about violence during the Civil War period, Affairs of Honor. You describe people running for Congress on the ground that their left hook is better than the other guy because they're gonna beat him up. And the negative polarization that led to war and the war came, as Lincoln said, you described so vividly. And yet in the Reconstruction period, Congress asserted itself. It was a congressional reconstruction. And Congress checked Johnson, and there was a deep sense of institutional prerogative that transcended party and partisanship. Using the Civil War period as an example, have we been there before or not?

[00:20:45.7] Joanne Freeman: Have we been there before?

[00:20:47.4] Jeffrey Rosen: Are we just seeing versions now of the same polarization that during that period led to violence but represents something within, something that could be recovered from? Or are we seeing a rebalancing of the branches exploited by both Democrats and Republicans in ways that doesn't make the Civil War period a good analogy?

[00:21:14.3] Joanne Freeman: Well, obviously, I will sit here as someone who writes about political violence and say, yes, extreme polarization is not something new. I found, I don't know, 60 or 70 or 80 physically violent incidents on the floor of Congress between 1830 and the Civil War. So there's been a lot of it. But I guess I would say one of the things in responding to what you were just saying, Charles, I do think, and obviously polarization is one of the things that's certainly not new. There's a lot about what's going on that isn't new. But particularly when you look back to the Constitutional Convention, when you look back to the nature of that debate and what they were really worried about, I mean, this is obvious, but needs to be said, it was about power and structure. And in one way or another, what they were talking about was what structures can we put up to diffuse power? Now, one of the things that I think recent years have revealed in ways that I think intellectually I knew this, but I don't think in my gut I understood this is the role of norms in upholding structures. And I think part of what we're seeing now is, you know, so in the Civil War era, there was, as I just suggested, crazy violence in Congress, but it was to a certain degree normal.

[00:22:36.0] Joanne Freeman: And even though there would usually be senators that would stand up and say, "butt the Senate," in one way or another after every incident, but those were so predictable that even those didn't really mean anything, that the structures held. But what we often see now is norms being, I don't even want to say violated, but just ignored, and in the violation of norms or ignoring norms, structures suffer. I think that we as Americans are getting a sort of smack in the face lesson about the power of those norms and the ways in which they're not legislated. There are things that we've always sort of taken for granted, and you can't take

them for granted. So, have there been other presidents that have grabbed at power? Has there been pushing and pulling? Certainly there have been all kinds. But I think at this moment, and I say this as an early American historian, what feels distinctive about this moment is that this administration isn't that interested in norms and isn't that interested in structures per se. And because of that, there's an extreme degree of contingency that we live in where we don't know how things are going to play out.

[00:23:50.2] Joanne Freeman: Now, to me, as an early American historian, part of me so I always feel as though I'm engaged in a struggle between my Joanne Freeman, American Citizen brain and then Joanne Freeman historian Brain so Joanne Freeman, Historian brain says this is fascinating because I worked on a period in which they never knew at any second what was going to happen. They thought that one bad decision was going to bring it all down. And that mentality shaped everything to an extreme degree. And we're in a sort of similar moment now. Now, those kinds of moments, any number of things can happen. On the one hand, things can go bad in a hurry. And in some ways, this goes along with my idea that we haven't been here before. We haven't had an administration that's been this focused on not thinking about norms, not really thinking about structures, but thinking about power. We haven't been there in that sense before, and we don't fully know. I mean, we experience, I'm sure, so many of us here, you wake up in the morning and you pick up your phone, what just happened overnight. I mean, we really, to some degree, don't know where we are.

[00:24:57.5] Joanne Freeman: We don't always live in times like that. So the fact that this is an administration that is kind of blatantly not interested in norms and structures and the degree to which I end up, this will probably say more about me than anything else. I end up thinking a lot about George Washington's copy of the Constitution, which I swear is true. So I'm not just saying that for this audience, but the thing about his copy of the Constitution is, so first President, what is this job? He doesn't know. So when you look at that copy, what he does is he works his way through it. And whenever there's something that involves the president, he writes in the margin, president, President. He's figuring out the job and he wants to know the boundaries. And that was his entire presidency, figuring out the boundaries. Because those structures and boundaries mattered. And the Constitution is such a framework. It leaves so much to politicians and the state to kind of figure out how it really works. He was doing the sort of thing that you just suggested earlier. People going into a room where there isn't the press and having that responsibility and working things out and understanding that this is a moment that requires respect for structures and respect for norms, to some degree, that's in a sense what in the founding era they were focused on. And that's what we don't have now.

[00:26:33.3] Jeffrey Rosen: What a great example. And you're right, it is so moving. I saw it at Mount Vernon. You can too. Washington's copy of the Constitution. He writes the president and powers like he's taking notes, doing homework, so he can inhabit his role virtuously and with

self restraint. So, Yuval, you heard a lot of agreement with your notion that this is a combination of the accretion of presidential power and Congress also not doing its job. But what about norms? And you have other presidents who've asserted broad executive power, like Andrew Jackson, King Andrew, President Trump's hero, who says he's going to kill the bank, threatens to, but doesn't defy the court. But in the end, he puts down nullification and secession because he thinks liberty and union and the Constitution requires it. Could we have if a president were unconcerned about norms and refusing to restrain himself by abiding with the Constitution? That combined with the newly complacent Congress that you've described and approving judiciary, a slow evolution into authoritarianism. And what would it take to descend into authoritarianism in America?

[00:27:52.2] Yuval Levin: Well, I want to answer that by building on exactly what's been said here by really everybody else. I mean, I think that there is a tendency now to think that our problem is an excess of conflict in the system. But there's really a way that our problem is a shortage of conflict in the system. The system is built for conflict. The nature of constitutional action and reaction is unavoidably about conflict, but it's about conflict between the branches in ways that restrain one another. And so the framers expected the president to want a lot of power, but they also expected Congress to want a lot of power and the courts and the way in which they would pursue that power would get in one another's way. So that we're going to be very tempted, I think, in the next few years to constantly think our problem is that the president wants too much power. But I think very often our problem is Congress doesn't want power enough. And that's a harder problem to see because it's an absence, not an excess. And it's driven in part, as Charlie suggested, by the way in which the separation of powers has been replaced by a separation of parties so that people in Congress understand their own success.

[00:29:05.1] Yuval Levin: They haven't really become less ambitious. They just understand their own ambition through the lens of the President's success or failure if he's in the other party, rather than through something they can do in their own institution. So that. And I think this speaks to the challenge of norms, too, because these norms are about constitutional conflict. They're about a process of containing the conflicts in our system. And so it's not really the case that everybody in the system has forgotten all the norms and are unrestrained. Members of Congress should be much less restrained than they are now. The idea that they're getting into a budget negotiation and the President is saying, "I'm just not going to spend stuff if I don't want to," well, that makes their job impossible. You can't make a deal about spending if it's not going to be kept, obviously. And so they should be demanding that the President be more limited so that they can exercise power. The only question we ask now is the Court going to stop what the President's doing? It's an important question, and I think in some ways the Court will. And there is a kind of ironic way in which the conservative legal movement has, over two generations, built a great Supreme Court that will restrain this Republican president.

[00:30:15.6] Yuval Levin: But where is Congress? Is the question to be asked. And I think to the degree that we are at risk of a kind of presidential gigantism, and maybe authoritarianism is a way to describe that. I don't know. That's not where we are, and I think we should reserve some words for when things get worse. You can't use authoritarianism now. That's not true. That is not the case. And maybe it won't be, and I hope it won't be. And there are a lot of ways that it wouldn't be. We shouldn't imagine that we're already there. But we also should have that word in reserve because it means something and precisely because we might be there. We should not rush to describe in a panic things that have not happened as though they have, because then when they do, and you use that word, people say, well, I don't know. You said that 12 years ago about Barack Obama. So what are you worried about now? We have to be restrained and Realistic ourselves as citizens, too. But I think there's no getting away from the basic problem, that the unwillingness of Congress to insert itself into the process is the driving force.

[00:31:22.5] Yuval Levin: It's the vacuum that is now being filled by an excessively assertive executive branch. And that is an old problem. Melody told a great story there. I'll tell you a quick story myself. I worked for George W. Bush when he was president, and we found ourselves a year into his second term trying to figure out what's actually involved in the President vetoing a bill. Does he sign a document? We literally had a conversation in the Oval Office because he didn't veto anything in his first term, because he had a Republican Congress for six years of his eight years in the presidency, he did not use the veto. That is a system that is not working. That is Republicans in Congress saying, we can never send a Republican president anything that he disagrees with. That's not how it's meant to work. And it's an absence of conflict, not an excess of conflict, that creates the kind of breakdown that I think we're now seeing play out.

[00:32:16.1] Jeffrey Rosen: You're so right about the need to be precise with words. And just as a constitutional crisis, according to the most persuasive definitions, doesn't occur until the President actually does defy the courts, so authoritarianism shouldn't be used lightly. Melody, what would it take to conclude that America had backslid into authoritarianism? The framers are afraid that we'll go the way of Greece and Rome and citizens will surrender their liberties for cheap corn and other luxuries and will allow Caesar to call off elections and establish himself as a dictator. And in other countries, Bolsonaro and Orban subvert free and fair elections. Is that what is required? Or is a consolidation of power in the executive, attacks on the judiciary and attacks on the independence of Congress enough to raise the specter at some point of authoritarianism in America?

[00:33:18.9] Melody Barnes: So many things to talk about. One, I think there are different ways to get there. I mean, we've talked about a clear rejection of an order from the Court, and we talk about that. One of the things that we also need to ask ourselves, because we're not there yet, but what happens if we get there and what happens next? And we know from history, and I think some have written about this, that there's a question that's put on the table about the Court having

no way to enforce its actions. It requires a president to say, I hear you, but if a president doesn't, what happens next? Again, come back to our kitchen. What happens with the military, what happens with governors, what happens with mayors? And we're seeing different kinds of skirmishes. We are talking very much on the federal level, but we're seeing skirmishes at every level. AGs are filing, attorneys general are filing cases. California is saying we're still going to enforce certain laws. So there are skirmishes that are taking place at different levels. So that's one way. Another way to think about this is described as competitive authoritarianism. When things look the same, but there's such an imbalance that's taken place that there is a lack of fairness in the system, that it isn't actually free and fair, even though, and I sometimes use this phrase, you've got kind of a paper democracy, that all the institutions still look as though they're working.

[00:35:06.6] Melody Barnes: So there are different ways to get to the question that you asked, one. Two, I also want to go back, though, to something that Yuval was talking about and this idea of engagement and congressional engagement, because I think you are right that people, the party whose president is in the White House will claim the president's victory as their own. But I also think that there's something else that's going on, which is that there is a desire, it's not even lack of engagement. It's intransitive. It's, "I'm just going to sit this one out. We are not going to participate." And I think that also has helped to create the imperial presidency in different ways. And I say this again, having been on both sides of this House, when Congress will not engage with the executive, will not debate, will not hash it out, will not participate in the legislative process, because we can wait you out. We're here when you get here. We'll be here when you're gone. Or they decide if we just hold out, this won't happen. That also, I think, precipitates an executive to say, I'm going to use my executive authority to act.

[00:36:26.6] Melody Barnes: And I think, and Charles, you were talking about different ways that Biden is acting. Again, come back to our kitchen. You won't find a lot of cheering for the student loan example that you gave. But I do think that there's a difference in degree and there's a difference in kind between that, for example, and going after birthright citizenship. But that also being said, I think it's the Congress, basically Congress won't engage with the White House. And that leads to some of the challenges that we're having here. And that's its own kind of problem, because it is fed by the kind of politics that we have today, where people can go back home, say, I really stuck it to them. I didn't do anything. And they get cheered for it, and they tweet about it and there's clickbait. And that's considered to be victory, as opposed to, quite frankly, even in the challenges. When I first started working in Congress in the early mid '90s, we really engaged. I mean, there were 13 appropriations bills, there were conference committees that didn't just last for days, but they lasted for weeks and sometimes well over a month as people hashed things out.

[00:37:42.0] Melody Barnes: And without that kind of engagement, and without citizens saying, we want that kind of engagement, we're going to continue to get this desire from the

executive to act one way or the other and Congress not to be, quite frankly, punished for not acting.

[00:38:02.6] Jeffrey Rosen: Charlie, given the phenomenon that Melody describes, you call it paper democracy when the branches don't check each other, and given the fact that there's little prospect of that kind of checking anytime soon, given this phenomenon of negative polarization, where each side is more attached to owning and hating the other side than attachment to any set of fixed principles, do you think the system might be transformed in ways that could consolidate power in ways that are not consistent with the American idea? And then, as we wrap up, we're here to discuss America at 250. We are about to celebrate 2026. And as you think about why you love America, which you described so eloquently, describing your feelings as an American new citizen, what are you going to be celebrating as 2026 approaches?

[00:39:03.6] Charles Cooke: Well, I am relatively sanguine, and that is the result of the public. The public doesn't like this. So I get very upset about Congress being supine and the president being imperial, but the public doesn't like it. Just this morning, opinion polls show that the public is not enjoying Trump's successes. Excesses, not successes. That would be a problem. And they didn't like Biden's either. And I think, in a sense, Joanne and I are engaged in a historical fight here, because while I, of course, worry about Trump, he's president right now. I'm alive right now. I think the truth is that I do not see the infractions that he has committed thus far as being unique in history. I don't think you have to go back to Washington, who I admire enormously. You have huge numbers of examples in American history of which people said, oh, my goodness, we're about to be in a crisis. You can go to Jefferson taking over in 1800. Didn't like the Alien and Sedition Act which had passed Congress, refused to enforce it for a while. You can look at Franklin Roosevelt, who tried to pack the Supreme Court and was stopped by his own party.

[00:40:20.0] Charles Cooke: But that was one of the worst moments in American history. You can look at Woodrow Wilson who came into office saying, I don't believe in the American system of government. The American system of government's Newtonian. What we need is a Darwinian system where I, Woodrow Wilson, president, represent the will of the people. And this wasn't just abstract. The Sedition act in 1917 allowed him to put pretty much anyone he wanted in prison. And he did, including his own rival, Eugene Debs, who was running for president. These are terrible things, but I think the Constitution is very strong, it's very stable and survives. And I see nothing in Donald Trump, of all the laziest people you could imagine, that is going to supersede that. Now, maybe, maybe I'll be wrong and in a year's time you'll be all sitting in your cave with no electricity thinking that Charles Cooke was an idiot. But I don't see this. I mean, again, not that I think he was a tyrant, but Joe Biden amended the student loan order on the fly to try to avoid there being standing so it could be taken to the Supreme Court. You can call that a constitutional crisis if you want.

[00:41:22.9] Charles Cooke: I think that would be hyperbolic as well. So I am more sanguine about this because I think our constitutional order is unbelievably strong. And that's why, to answer your second question, although I acknowledge, and we've talked about at this event before, the hypocrisies of the founding generation, the need for a second founding, the massive chasm that obtained between all men are created equal and what American life was actually like. We should err on the side of celebration and pride and patriotism for what we have. It has survived 250 years. Nothing else has. There's this old joke where an American and a French person are sitting together and they're trying to work out who should write the rules of engagement. And the American says, well, I should write the rules of engagement because we've had the same constitution for a quarter of a millennium. And the French person says, you guys are amateurs. We've had five constitutions. I'm much better at it as a result. But actually the one constitution is much more, much better. And the best part of it is that that Constitution and the culture it created was what fixed the evil that stayed in the system after it was passed.

[00:42:30.8] Charles Cooke: There's this Bill Clinton line he used to like he said, there's nothing wrong with America that can't be fixed by what's right about America. And that's the Constitution. It was that document that led to the flourishing of abolitionist sentiment. It was that documentary that led to the establishment of the Republican Party in the Midwest, which was concerned with women's suffrage and abolition of slavery. You know, these were ideals that were taken seriously by not everyone, but enough people that they overcame the deficit. So I hope when we celebrate 250 years, it is highly positive, with an acceptance of all of the mistakes that have been made, because to me, there's nothing like that in world history.

[00:43:13.7] Jeffrey Rosen: Beautiful. Wonderful. Well, Joanne, the last word in this great discussion is to you. Charlie has issued an invitation to reflect on history and has noted all the dark times in history when the ideals of the Constitution and Declaration have been betrayed, from Jefferson, who pardoned the Sedition act people, to Woodrow Wilson, who imprisoned his rival, to violence and other illiberal acts. But he says, despite all that, the Constitution has carried us through, has provided the ideals for us to aspire to. And for that reason, he will be celebrating in 2026. What is your view about how we should view American history and how we should celebrate?

[00:44:05.4] Joanne Freeman: Okay, so I'm going to answer that question and make one other point that I think is an important one to make about the word authoritarianism. But I'll be, as a historian, remarkably brief in answering the historical question. To me, the beauty of the Declaration of the Founding is inherent in the fact that it created remarkable ideals that were not followed through on and that marginalized people in later times, used and adapted and adopted to change America. And I don't think you can just, in isolation, celebrate what the Founding generation did without acknowledging they were in a moment in time. What they created

matters. But it doesn't matter in isolation. The importance of those documents have only become obvious to us over time, including now. And I shall now make the briefest of segues I have set myself up. I just wanted to make a point that I think is really important that has to do with the word authoritarian. I don't like us focusing on the word authoritarian because it's a measuring stick. We shouldn't be measuring. Are we there yet? Are we there yet? I think in judging what's going on now, what we should be judging is call and response that gets back to some of what people have been saying about Congress.

[00:45:29.6] Joanne Freeman: When the President is saying certain extreme things, the question is what is the response and how is that working? How is that dynamic working? And when the response is by other structures of government, huh, that's a problem. And whether we brand that authoritarianism or not, that's a problem. Now, historically speaking, before the Civil War, a moment of change happens when you have years and years and years of Southerners basically saying we're going to use violence to shut up anyone who wants to get in the way of slavery, and Northerners who'd wanted to get in the way of slavery sitting there and saying, well, if you're going to threaten violence, we're just going to sit here and not say anything. What changes is you get, actually ironically, a new party, the Republican Party, and they come into Congress and they say, literally, you can see this in the record. We're a different kind of Congressmen. We stand up, we're not going to sit down, we're not going to do the same thing these other people have been doing. And what happens? The north rises up, they elect different people to Congress. It totally alters the dynamic of what's been going on for a good five, six, seven years now, of course, then there's that Civil War, which I acknowledge.

[00:46:46.1] Joanne Freeman: But the fact that call and response and the response matters and that that response and giving a response can really empower the American people, I really think we have to own that right now.

[00:47:00.7] Jeffrey Rosen: For a superb beginning to what's going to be a great weekend of conversation, please join me in thanking our panelists. This episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock and Advanced Staging Productions. Research was provided by Jared Arise and Gyuha Lee. Please recommend the show to friends, colleagues or anyone anywhere who's eager for a weekly dose of constitutional illumination and debate. Check out the Constitution 101 course that we launched in partnership with khan academy at constitutioncenter.org/khan101. Sign up for the newsletter at constitutioncenter.org/connect and always remember that the National Constitution center is a private nonprofit. This podcast and all our work is possible only thanks to the generosity of people from across the country. Who are inspired by our non-partisan mission of constitutional education and debate. Please consider supporting our efforts by donating at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.