

The Supreme Court and the Trump Administration

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[00:00:00.6] Jeffrey Rosen: In February, the NCC convened a superb group of legal commentators in Miami to explore the relationship between the Trump administration and the Roberts court. 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. In this episode, Jamelle Bouie and David French of the New York Times, Sarah Isgur of The Dispatch, and Melissa Murray of NYU School of Law explore the Supreme Court and the second Trump administration. They discuss how the Court might respond to a range of challenges about the scope of executive power and preview the most important cases of the term. Enjoy the show. Let's jump right in. David, you have described the legal challenges to the new executive orders as a kind of hydra. Tell us what that means and give us your sense of as that hydra works its way up to the Supreme Court. How the Supreme Court ultimately this year is likely to respond to the challenges that it confronts.

[00:01:12.4] David French: Yeah, I use the analogy of a hydra because we had this campaign. I mean, some people have called it shock and awe of just a giant number of executive orders just flooding the zone all at once. And not just executive orders, but also executive actions that were not written down in the form of executive orders, but are being enacted throughout the executive branch. And so at first you get this kind of questioning, like tell me about this order and this order and this order. And you have to go through order by order obviously and the courts will do that to evaluate them one by one. But there's a central theme to all of it, and you can't miss that forest for the trees. And the central theme is he's very aggressively testing the bounds of presidential power and authority, very aggressively, maybe more aggressively than anybody else in a shorter amount of time. I mean, FDR may have something to say about that as well, but certainly in the modern era. And so what you're looking at is a very, very direct challenge to the constraints around the presidency.

[00:02:12.2] David French: And what's interesting is this is occurring, this is a perfect illustration of the difference between what I would say, the Trump right and the pre-Trump right.

So a lot of the energy and effort, particularly the pre-Trump legal movement, was to constrain the executive, to limit the power of executive agencies, to limit the unilateral authority of the executive, to the Chevron doctrine, Loper Bright reversing Chevron. That's a perfect expression of pre-Trump judicial conservatism. But we're in a completely different era here. And so what we're having is a, we're going to have a collision between a Trumpist right movement that has some elements of pre-Trump conservative judicial philosophy and legal philosophy in it, but also has an enormous element that wants to just challenge, essentially mount a very broad challenge to the idea even of judicial review of executive branch actions. And so this is where the tension is gonna come. It is a post Trump conservative. Well, I don't like using the term conservative post Trump right wing movement, populist movement in many ways confronting a pre-Trump judiciary that has a very different philosophy of executive power.

[00:03:31.8] Jeffrey Rosen: That's such an important distinction between the conservative effort to limit executive discretion over the administrative state and the conservative movement to expand presidential power over the executive branch. And both movements arguably were initiated by Ed Meese during the Reagan administration, as Steve Calabresi describes in his really great new book on the centrality of Ed Meese in the Constitutional aspect of the Reagan Revolution. But they seem in this case to be pointing in opposite directions. Jamelle you've argued that the effort by President Trump is a presidency unbound from the Constitution. Tell us about what you think that means and how you think the court will respond.

[00:04:19.1] Jamelle Bouie: So I think one of the things that's important to recognize about the Trump administration's maybe sort of theory of the case, the president's theory of the case, is that it is first not grounded in what I would understand as like a traditional element of like Anglo American political theory, that you see the president again and again and again say something, and his allies say again and again and again, something to the effect of the president represents sort of like the singular will of the people. The president is this embodiment of the will of the people. The entire executive branch has to operate according to what the White House wants, because the president is the will of the people. Elon Musk, in his joint interview with the president on Fox earlier this week, says if the government isn't following the president, who is the will of the people, then it's no longer a democracy. And the thing about all those claims is that part of the point of the structure of the American system of government is a recognition that there's no such thing as a singular will of the people, that the president maybe represents one expression of what some constructed majority wants.

[00:05:29.0] Jamelle Bouie: But Congress also represents an expression of what some constructed majority wants. And in any case, action by the federal government requires compromise, negotiation amongst all these groups under the recognition that you have to build some sort of durable consensus and that there's no sort of inherent majoritarian will that actually exists in a practical sense. And so when I say that the Trump administration sees the presidency

as almost unbound by the Constitution, it's because this claim that the president is making about the courts can't intrude on executive action, the administration's open disregard for Congress, even a Congress led by its allies. To me that is actually an expression of this idea that the president isn't simply one constitutional officer among many, but is almost something like a sovereign over the entire political system, a sovereign that embodies this organic will of the people, and that is not constitutional. That has no grounding in our political traditions. That is in fact something very foreign to how Americans have traditionally understood what the executive is, even what the president is.

[00:06:56.4] Jamelle Bouie: I know the president has always had this sort of symbolism around them, but there's never been that kind of claim, really, that there is a singular, indivisible will of the people expressed organically through the personage of the President. That's novel. I'll say that. That's novel. And in my mind, it grounds this attempt to kind of assert what I perceive as, in a lot of ways, an extra constitutional level of authority over the entire political system.

[00:07:30.9] Jeffrey Rosen: Such a powerful way of stating the American theory, as you put it, that the President is not a king and does not embody the sovereign will of the people, but the sovereign will is parceled out among the branches. George Will blames a vision of the populist presidency on Woodrow Wilson and Theodore Roosevelt, who in 1912, insisted that the President was a steward of the people, but even they never insisted that he was the sole steward. And you're suggesting that we need to separate power in order to maintain the Framers' vision. Sarah, what's the case on the other side? We've heard Yuval Levin and Josh Blackman express confidence that the US Supreme Court will enforce the separation of powers, will be deferential to the President, perhaps upholding aspects of the unitary executive theory, but would repudiate any attempts to change the constitutional system. What do you think?

[00:08:26.9] Sarah Isgur: So, first, I feel like where we are in terms of this presidency and its extra constitutional theory is the logical conclusion of the Progressive era of the last hundred years. I don't mean the progressive movement politically. I mean the Wilsonian, Rooseveltian view of having experts having a quicker, more efficient, less deliberative, less stuck legislative process. They wanted an invigorated and vigorous presidency, and here we are. How does everyone like it? And you say that it's novel, but it's really just been one little step after another. This starts with Obama allowing Congress and immigration reform, comprehensive immigration reform, to languish in Congress. Admittedly, the House Republicans said they didn't want to continue moving forward. And instead of Obama saying, no, we must, what can I offer? What can we do to get this back on track? He says, I've got a pen and a phone, and if Congress won't do it, I will go to the American people directly. That is the same idea, right? I am the will of the American people, and I am the singular vessel for that. So I'll do DACA and DAPA by myself, along with 79 other executive actions.

[00:09:46.8] Sarah Isgur: That's one step along this very long trail. So what's the Supreme Court gonna do about it? I sort of think of these in three buckets. Three different buckets. I love buckets. Birthright citizenship bucket, for instance. And I'll name them with specific stuff, but you can see what might fill into that bucket otherwise. For birthright citizenship, I would argue that the Supreme Court will, I think, most likely led by a Roberts and Kavanaugh swing in the middle there, say we're not even gonna decide whether the 14th Amendment does in fact establish birthright citizenship. What we definitely know is that the president, acting alone, doesn't get to redo this. So come back to us when Congress has something to say and we'll actually reach the merits. Until then thanks for playing. Please go home. Bucket number two, let's call the unitary executive bucket. That's gonna be the firings, the independent agencies. I'll borrow from Josh Blackman. Humphrey's executor, as a case, is as dead as Humphrey was. That's over. We're not gonna have independent agencies anymore that are independent. That doesn't mean we won't have agencies. It's their independence that is dead, not the agencies themselves.

[00:11:07.3] Sarah Isgur: You can still have a Federal Trade Commission and an SEC. They just have to be within a branch of government. That branch most likely being the executive branch. But for instance, when we talk about the Federal Reserve, it's very possible for that to be a legislative agency. So that's gonna be a really interesting part. You have again, I think, Justice Kavanaugh and his experience as a Unitarian coming up through the Bush administration will feel very strongly about that unitary executive part, but only in the lane. The president has control over his branch, not that he has control over any other branch. And that gets us to the impoundment stuff. This is the idea that Congress tells you to do X and then you as the President, say, no, thank you. I would prefer not to do that. I think that's a real jump ball. I think it's gonna depend a lot on which action gets to the court first, whether they take that, let that ball go over the plate and wait for one that they wanna swing at more. And I think we'll know a lot based on which of those cases that they take as well. It's a mistake that this administration made with shock and awe. There's a lot of good reasons to do the chainsaw method instead of the scalpel, all of that. But one of the downsides is going to be that they don't get to pick their perfect vehicle to challenge the Impoundment Act at the Supreme Court. They're gonna have to take it as it comes.

[00:12:33.2] Jeffrey Rosen: Very helpful division into the three buckets, birthright citizenship, the unitary executive cases and impoundment. And we'll take them up in turn. But first, Melissa, whether you blame it on the Progressive era and Woodrow Wilson, as Sarah and George Will do.

[00:12:53.7] Sarah Isgur: I can blame everything on Woodrow Wilson. Is it raining outside? It's his fault.

[00:12:55.1] Jeffrey Rosen: Well, there's an incredible new book that shows how virulent his racism and sexism was, in addition to his illiberalism in imprisoning his critics. And it's well worth bashing Woodrow Wilson. But whether you blame it on Wilson and the progressives or on Ed Meese and the conservatives of the Reagan era, the claim is that executive power is expanding in ways that the Framers wouldn't have imagined. Who do you blame it on? And if the Supreme Court blesses these expansions of executive power, would that represent just another incremental movement toward a vigorous executive, or would it transform the system and subvert the separation of powers?

[00:13:39.8] Melissa Murray: So I think an underlying premise of this entire panel is that somehow the court is going to redeem us, save us from whatever looming constitutional crisis is lurking out there. And I just want to sort of say for the record, we already are in a constitutional crisis. We were in a constitutional crisis on January 20th when the Supreme Court had upheld the TikTok ban, a law that was passed by both houses of Congress in a bipartisan fashion. And the president said that rather than enforce the Law as written by Congress and upheld by the Supreme Court. He was going to unilaterally do some side deal with the management of TikTok. That's a constitutional crisis, like literally giving the finger to two coordinate branches of government. So we are already there. And whether this Court has laid a foundation for what we find ourselves in and whether it will redeem us from what we may find ourselves in going forward, I think those are really big questions, I will say, and I think Sarah is right. This idea of an energetic, vigorous executive is one that can only happen when other branches cede some of their power and create a vacuum in which the President can step in.

[00:14:53.5] Melissa Murray: And Congress has become just absolutely sclerotic, just riven with partisanship to the point that it is immobilized. We saw this with President Obama and immigration reform. On whether you want to blame President Obama for moving forward or just recognize the sort of political economy of the moment, that was a moment where Congress could have acted. There could have been bipartisan support in moving forward, and there wasn't. And that allowed the Executive to step forward and to fill that void. It's also worth noting that the Court is in part responsible for the mobilization of Congress Congress's paralysis. The Court has steadily over the course of the last 30 years, stripped Congress of a number of its opportunities to act. And lots of its heads of authority to act have narrowed the scope of the Commerce Clause and narrowed the scope of Section 5 of the 14th Amendment. So this is not simply that Congress isn't acting. The Court has limited the arenas in which Congress is authorized to act. So there's that. The Court has also created the conditions in which Congress is less representative than it used to be. You know, we talk about the Chief justice as an institutionalist, and yet he has written some of the decisions that I think are the most corrosive to the institutions of democracy.

[00:16:13.4] Melissa Murray: He is the author of 2013 Shelby county versus Holder, which essentially hobbled the preclearance regime of the Voting Rights Act. He is the author of 2019's

Rucho versus Common Cause, which said that there is no rule for the federal courts to play in policing partisan gerrymandering. And he was the author of last term's Trump versus the United States, which expanded the scope of presidential immunity. And I think very clearly has laid a foundation for what we are seeing now, or it certainly has given some indication to the current administration that there is a court ready, willing and able to bless whatever tomfoolery they want to advance as a proper exercise of executive authority. So we do live in a landscape where there are vacuums, there are power vacuums. And many of these power vacuums have been facilitated by the Court. And the Court itself, I think, has been a midwife to this moment that we are now in. And this emboldened, overly vigorous president who feels unchecked by whatever our coordinate branches of government are supposed to do and doesn't really heed the entire idea of a separation of powers. And we have to come back to that question of constitutional design.

[00:17:29.0] Melissa Murray: The whole point of separation of powers is that we divide the power of the federal government between the three coordinate branches so that no single branch can consolidate power and become a dictator. And we are here in this moment where Congress has been stripped of authority and has conceded what's left of its authority. And all that really is left is for the courts to step in to check this. And as David said, the zone is flooded and a lot of things are going to come through, and we can't count on the courts to stop everything.

[00:18:01.0] Jeffrey Rosen: Let's focus on this question of the unitary executive which all of you have set up so well. So last Tuesday, President Trump issued an executive order asserting the president's control over independent agencies and requiring them to submit proposed regulations to him in advance. This is teeing up an invitation to the court to overturn this case called Humphrey's Executor 1932. In the middle of the New Deal, Franklin Roosevelt wanted to fire a commissioner on the Federal Trade Commission, which has been established to say you can't fire commissioners except for malfeasance or corruption for some kind of cause. He challenges this as an incursion on executive authority. And the U.S Supreme Court unanimously in 1932, including the four conservative horsemen and the liberal justices, all uphold Congress's ability to establish independent agencies, saying as long as they exercise quasi legislative or quasi judicial functions that are not purely executive, it's perfectly consistent with the separation of powers to establish independent agencies. David, how is the U.S Supreme Court likely to confront this? Who might vote to overturn Humphrey, who won't? And do you think they should overturn Humphrey's Executor or not?

[00:19:22.5] David French: Well, I'm gonna agree with Sarah. I think Humphrey's Executor is not gonna survive. I don't know exactly in what form, as if, in other words, if say, the SEC or others are then brought completely and totally under the executive branch umbrella or not. But I do think where you're gonna see the most sympathy for Trump's position is around agency leadership. That's where you're gonna see the most sympathy for Trump's position. I think you're basically gonna see a version of unitary executive that goes like this, which is the president is in

charge of the lawful, underline lawful circle, exclamation point, lawful operations of the executive branch. Now that means, and I think that is also gonna mean that the court's gonna say that the President has the ability to hire and fire your policy making employees, your agency heads and things like that. I do not think it is going to mean that the Merit Systems Protection Board and all of that is just gonna fall away. I don't think it's gonna mean that at all. I do think if the reason for discipline, and this is a point I think is so important, I agree with Melissa completely that you can't look at the Supreme Court to "save us" but maybe for a slightly different reason.

[00:20:41.1] David French: And that is the Supreme Court just answers questions, right? It's going to receive cases and it's gonna choose which cases and answer the questions that it thinks are sort of the most constitutionally significant or where the division is most profound, where they have to reach in and settle in. The only governmental body that can mount the kind of full spectrum resistance or challenge is Congress. I mean, it's the one that can turn off the money spigot, correct? But the Supreme Court, a lot is gonna depend on what they take. If they take a case that is Donald Trump is trying to get rid of a head of an independent agency or the governing entities and an independent agency, that's gonna be a clear signal, in my view, that they're gonna uphold what the Trump administration is doing. If they're gonna take a case where it is, we're firing all the merit system protected employees, I think that's a signal they're gonna take that and say the unitary executive doesn't go this far. But my basic assessment of how this will go with the Supreme Court is they're gonna say the President is in charge of the lawful operations of the executive branch.

[00:21:44.1] David French: And that's gonna be the fundamental principle. Now, that does not mean that the President can extinguish part of the executive branch that Congress has established. But once Congress has established that part of the executive branch, the President is in charge of its lawful operations. And I think that that's gonna be a distinction that will come to the fore. Is Trump trying to run this or is Trump trying to destroy this? Those are different kinds of questions. And I think the Supreme Court will say yes, Trump can run no, if you have a statutorily created entity like a Department of Education or USAID, he cannot destroy that. He has to run it. And running it can't mean destroying it.

[00:22:27.7] Sarah Isgur: Can he merge it? You know, you and I have talked about the overlapping responsibilities. Justice Kavanaugh wrote this, what was it, 2013 or something, law review article. And he talked about all of the overlap between what was it, the DOJ and the FTC or all these independent agencies have some overlap within an executive branch, a pure executive branch agency. But if you're saying they can't get rid of it, how's he supposed to run the executive branch?

[00:22:52.3] David French: Well, he can run it by directing the agencies, but merging them when they have been created statutorily by Congress for specific purposes even if the Venn diagram shows some overlap between the agencies, I don't see under unitary executive as I've understood unitary executive, he can just decide, well, what college Congress did about the DOE or what Congress did about USAID, that's too repetitive of some of the other foreign aid that the State Department administers. So no, I know there's a statute that creates this. I'm gonna merge it under my own authority. I don't know if that is beyond the unitary executive theory that I'm familiar with.

[00:23:30.4] Jeffrey Rosen: Jamelle, much of the debate over the unitary executive goes back to a debate between Chief Justice Taft and Justice Brandeis. And Chief Justice Taft in the Myers decision said that the president should have broad authority to fire postmasters and exercise control over the executive branch. And Justice Brandeis dissented on Jeffersonian grounds. And he said the point of the Framers of the Constitution wasn't to achieve efficiency, but liberty and to prevent the election of an autocrat. Those were his specific words. What happened to the Jeffersonian tradition on the Supreme Court, which is rooted in Jefferson and certainly the anti-Federalists, but all of the Framers fear of the president being a king. And can you imagine any of the current Supreme Court justices, such as Justice Gorsuch, who has expressed some concerns about the excesses of executive power resurrecting this tradition and resisting the consolidation of executive power.

[00:24:28.0] Jamelle Bouie: I always hesitate to make any kind of predictions about what the justices are going to do. I'll say that I think as far as what has happened to the Jeffersonian tradition, which it's worth saying, there's like a little irony there in that Jefferson himself was willing to wield executive authority quite broadly when he thought it was necessary. But this suspicion of concentration of executive power, I will grant to Sarah the observation that this is a, this cannot be the concentration of executive power cannot be like placed at the feet of Donald Trump. That's certainly not the case. But I do think that there is a way of recognizing the way to have sort of a energetic executive branch able to govern the country and able to deal with its challenges is not incompatible with the sense that we need to still look for ways to avoid the undue concentration of authority that in some sense is like the theory of the independent agency. We're gonna ask the executive branch to do more. We're gonna ask the executive branch to engage in an exercise of federal power that may not have had a direct antecedent.

[00:25:58.5] Jamelle Bouie: But recognizing that this is putting new responsibilities onto the federal government and into the executive branch, we're going to insulate this from direct presidential control under a recognition, as per Melissa's observation, that separation of powers isn't simply about creating narrow silos and bright lines, but creating overlapping means of accountability. Congress having a statutory authority when it comes to executive branch officials is some overlapping authority that moderates the concentration of power. And my concern is that

in this zeal to say that the President is the executive power solely vested in the President, the President needs to be able to control the executive branch. In this zeal, we're doing two things. The first is we're making an historical error, and we're kind of imagining an American past where the President had that kind of authority, but that past didn't really exist. Like, you can very easily read about complaints in the 1840s and '50s about the difficulty of the President being able to control some of the agencies that existed, not particularly large agencies. This is still a 19th century government. But there was a recognition that there was autonomy happening within the executive branch, that the President didn't necessarily have direct control over.

[00:27:28.3] Jamelle Bouie: The federal bureaucracy, the federal system has always been this sort of joint project of the executive, of the legislature, of the judicial branch. And I am very wary of this attempt to give it sole custody to the executive branch, 'cause I'm not sure, A, that's necessarily in keeping with how things have actually operated in practice, and B, I think it is running up against this classic Framers era worry about the concentration of power and the concentration of authority, not just in technical ways, but in how one can influence the entire political system, which we literally just witnessed yesterday, with the meeting between the president and governors, where the president asked Janet Mills of Maine, the governor, are you going to comply with this executive order over trans athletes? And the governor said, we'll comply with state and federal law. And the president said, I am federal law. So, okay, maybe we want the president to have total control of the executive branch, but do we want to create a situation where the president believes themselves to be some kind of final arbiter over what the law means? We don't.

[00:28:46.1] Jeffrey Rosen: Sarah, Jamelle raises the strong challenge. There's no historical justification for making the president a king. None of the Framers wanted it. Hamilton, who is invoked as authority for the unitary executive theory in the Pacificus letters, insisted the president is amenable to impeachment and expected Congress to be the main power. And Jefferson was devoted to shrinking presidential power, although he did switch, as Jamelle says, once he became president. Could you imagine an originalist case? Any justice making the case against the consolidation of executive power? Will the liberal justices be the only ones who are Jeffersonian on executive power and Hamiltonian on congressional power and also share with us what would the practical consequences be if Humphrey's is overturned? How much power will President Trump be able to exercise under the new regime?

[00:29:49.2] Sarah Isgur: Okay, my head's going to explode because we have been conflating unitary executive power with the consolidation of all power in the executive branch. Those are literally the exact opposite things. The Supreme Court has been striking down executive power, and they have been widely criticized by the left for it. So eviction moratorium, COVID vaccine mandate, the bump stocks ban. Each time it was, how dare the Supreme Court strike down a gun control measure. How dare they take away the president's power to forgive student loan debt?

All of those things the Supreme Court actually just said, the president does not have the power to do this. That is a congressional power. If Congress wants to have an eviction moratorium, more power to them. They wanna forgive student loans, which they had been debating. They can do it. They didn't bump stocks. There was a bill pending in both houses of Congress. Don't forget, this was a Trump thing, not a Biden thing. And Trump was the one who stepped in and was like, ooh, I don't want Republicans taking a hard vote on the Second Amendment. I will bump stocks by myself and make it a crime Tuesday that wasn't a crime on Monday. And the Supreme Court said, no, you can't do that. So they have been the ones trying to pull back executive power. And when they talk about the Major Questions Doctrine. They are called evil in Ruth's paper. Where's Ruth?

[00:31:18.7] Jeffrey Rosen: Sure, you're here in spirit.

[00:31:20.7] Sarah Isgur: How many think pieces about how the Major Questions Doctrine is a conservative conspiracy? I don't know what. When it is in fact, limiting executive power, that now all of a sudden people want to limit executive power. My goodness, what has changed in the last six months, I wonder?

[00:31:36.3] Jamelle Bouie: So, I mean, I'm gonna say I have not in the past written anything to the effect of, I love executive power when President Biden has it now I'm against it when President Trump has it, I'm making critiques that I made in the first Trump administration. I'm not that old, so I can't point to anything I wrote during the Bush administration. But I'm always hesitant when saying, well, the left thinks this. I mean, let's speak about particular people and particular arguments.

[00:32:06.5] Sarah Isgur: That's why I called out Ruth.

[00:32:11.4] Melissa Murray: Let's leave Ruth out of this. Ruth is catching strays for something she has nothing to do with. I think one of the differences, Sarah, with those examples is that if you are concerned about the consolidation of power within any one branch, all of those cases actually reflect the irrigation of power to the judiciary. And that's what liberals were calling out. So the major question doctrine is by itself an aggregation of power to the courts. The courts get to decide whether a question has enough salience among the American people that it is major. Like who gets to decide what is major. The court gets to decide, and that is an arrogation of power to the judiciary to make those decisions and then to act on those decisions. The question with regard to the Biden student loan relief program went to the question of whether the Heroes Act authorized the president to modify or alter and in doing so, to waive those debts. It was a statutory interpretation question where the court got to decide what the scope of that act was and whether the president had acted within that remit. So I think when people were objecting to it, it wasn't because they were mad that the court had sort of cut down President Biden, although I

think many people who felt that they were in a different economic position at time one than they were when the court finished at time two were certainly mad about that.

[00:33:30.0] Melissa Murray: But I think for most of us who were critical of those decisions, it wasn't about who the president was. It was about what the court was doing with regard to power. I mean, we are talking about this question of constitutional design. And ensuring that no particular branch consolidates too much power. And I was just as mad with the judiciary doing it as I was with the president doing it now. And I actually think it's even more profound now because the court has amassed a considerable amount of power, the president is amassing a considerable amount of power, and Congress has literally rolled over for all of it.

[00:34:05.4] Sarah Isgur: Right, which is why you need the court to say the president acting alone cannot change environmental policy. For instance, in *West Virginia versus EPA*, where they said Congress has to do this. The president cannot do a clean power plan for Obama, then change it for Trump, then change it back for Biden.

[00:34:21.8] Melissa Murray: But they're also making decisions that Congress has to step in and do this without any kind of recognition that the Clean Air Act was written broadly such that we didn't have to go back to Congress for everything.

[00:34:33.8] Sarah Isgur: Which is it? Do you want the executive to have a lot of power to interpret the Clean Air Act, in which case Trump is going to get to interpret the Clean Air Act when he gets elected?

[00:34:39.9] Melissa Murray: Or alternatively, you have actual experts who understand particulate matter as opposed to Marjorie Taylor Greene, and they make those decisions as opposed to having to feed it back to Congress every time. The whole point of drafting those laws and making them broadly textured in terms of what was required is that it would be inefficient and you wouldn't be able to meet the exigencies of the moment.

[00:35:01.7] Sarah Isgur: Indeed inefficient is the word.

[00:35:04.0] Jeffrey Rosen: It was Brandeis's. I think we'll have one big last intervention on this crucial question. So I want each of you to distill your wisdom. And, David, you'd been pretty bullish on the Supreme Court before the Trump administration and had agreed with much of its efforts to resurrect structural limitations. And what are areas where you think that this Supreme Court may push back? There's broad consensus about birthright citizenship, but do you think on impoundment or other significant issues, the court may push back on President Trump? And in the end, will the pushbacks be significant enough to preserve the separation of powers or not?

[00:35:44.0] David French: So earlier I said, I think the way I understand unitary executive theory is that the president controls the lawful operations of the executive branch. And I think a way to think about the current court is they have a very similar view. But when you get to the phrase lawful operations of the executive branch, that's a much narrower bundle of powers. That is the way that with major questions doctrine, the possible you keep smelling non delegation in the air a little bit. So I think what you would see is on the one hand, you would see a lot of folks on the Trump side liking this sort of vision of unitary executive, that the president is running the lawful operations executive branch, and then will immediately find that the lawful operations of the executive branch, in the view of this court, is pretty much more narrow than they want. It is not broad enough to impound funds appropriated in mandatory language by Congress. It is not broad enough to destroy executive agencies created by Congress in mandatory language. It is not broad enough to strip through the Merit Systems Protection Board and statutory language that's mandatory.

[00:36:53.9] David French: So I think you're gonna see this sort of two phase, sort of this two stage, like first take, double take, first take. Oh, yeah, Donald Trump runs the executive branch. Double take. And that's not as much as you thought it was. It's not as powerful as you thought it was. And, so I think that that's a way to sort of harmonize if you look at the broad sweep of the Supreme Court's approach and including the Supreme Court's approach to Trump 1.0, he had a bad record at the Supreme Court. He had one of the worst records of any modern president at the Supreme Court, in part because of that very thing that the Supreme Court was in this process of narrowing executive power when he was trying to expand it, the census change for example, comes to mind. So I think that that's where we're going to end up. We're going to end up with a more firm idea that the President controls all of the agencies of the executive branch. But with the president ending this period with more explicit rulings limiting his power, I don't think he gets impounded. I don't think that's a jump ball.

[00:38:03.0] David French: I think that that's gonna be not that close if the language is mandatory, if the language is mandatory, which there's a lot of confusion out there because sometimes the language isn't mandatory on spending. And if it isn't mandatory, then the President's got discretion. So I really think we're moving into this world where the President's in charge of a diminished branch legally over the next five to ten years.

[00:38:28.9] Jeffrey Rosen: Jamelle, your final thoughts on if the court does endorse an executive branch where the President has control, but it's diminished, would that represent success in the President unbounding himself from the Constitution or not?

[00:38:43.9] Jamelle Bouie: If the court goes in the direction that David thinks it does, I do think Trump will be quite disappointed at that outcome. I think this is why it's important to actually ground so much of what the president believes in as an actual kind of political theory of

how he views the presidency and how he views himself in relation to the entire nation. Because I think in that outcome, the chances of the president just trying to outright ignore a ruling of the Supreme Court go up considerably. Because in that outcome, what the court is saying is that while you have this formal control over the branch, you do not have the kind of royal power that you seem to imagine that you have. And it's precisely because the president clearly thinks he has something like a sovereign power over the entire nation that that's, I think, gonna produce a pretty dangerous clash. And again, I mean, I'm gonna look to the past week of examples of Trump expressing these things. I think yesterday there was mention of the fake Napoleonic quote. I must say, I think it was called a Napoleonic quote. It's a quote from the 1973 movie Waterloo, which is notably not actually Napoleon.

[00:39:58.3] Jamelle Bouie: Good movie, good double feature with the Russian War and Peace. It's funny, right that Trump would go to a movie for this, but is it a joke? Sort of like Hail to the King kind of stuff. Trump does envision himself as this kind of royal figure, sovereignty imbued in him. And so any Supreme Court decision that maybe narrows the scope of executive power, even if it gives him greater control over the executive branch, I think is gonna run into, there's gonna be a political clash. And so I really urge people to take seriously the political claims that Trump is making about presidential power, not simply focus so much on the legal claims being made. There are clear political claims being made that must be taken seriously.

[00:40:51.6] Jeffrey Rosen: Sarah, David offered a vision of a diminished but strong executive branch. Jamelle raises the prospect of defiance of the court. We have seen some efforts to avoid or delay compliance with orders of lower courts, although arguably no outright defiance. How do you see things ending up?

[00:41:15.1] Sarah Isgur: So, first, the best thing that could possibly happen in the next four years is a Supreme Court further eroding the powers of the president vis a vis Congress. That would be a wonderful outcome here because you would have the legal conservative right cheering it on, and you'd have the left cheering it on for different reasons. And perhaps that's a moment of bipartisanship that we could all really enjoy. I think that a question will come when the Trump administration abides by an order from the Supreme Court or a decision from the Supreme Court as to the specific parties before it, but does not agree to their interpretation of the Constitution and goes back to the idea of departmentalism where each department gets to interpret the Constitution on their own. We have had many a president flirt with it. We have certainly not had a modern president really explore it fully. I think we could here. And I think the fear for me will be actually John Roberts reaction to that in the sense of potentially changing the Court's behavior to avoid the conflict or the direct confrontation with the presidency, which I think in the darkest moments of the Supreme Court, that has been a motivating feature. A court that thinks that it can guide itself through dangerous waters or speak to the cultural moment

instead of the law. I think the best that the Supreme Court can do is say here are the facts in the law before us. Here I stand I can do no other.

[00:42:57.2] Jeffrey Rosen: Great historical analogy. John Marshall tried to avoid a direct confrontation with Thomas Jefferson, and he is John Roberts' hero. Last word to you, Melissa Murray.

[00:43:08.1] Melissa Murray: So just to clarify, when David mentioned that the Trump administration has the poorest record before the Supreme Court in terms of winning, that is true, but I think it has to be sort of nuanced to some degree. When The Trump administration 1.0 went up before the court and they did lose, it was often on procedural or jurisdictional grounds. So DACA, for example, the Court determined that the President and the administration had not followed the appropriate protocols as described under the Administrative Procedures Act. And for that reason, the rescission of DACA was invalid. It said nothing about the substance of the question, the merits of the question. It was like focused on that jurisdictional issue. And a lot of the questions came up in that posture. So we actually haven't really seen the Court delve into whether or not they are fully MAGA in terms of their sort of commitments on the merits questions. And I think we are going to see that going forward. And that's something to think about. With regard to this particular court and what it may do, all I will say is that this is a court which in the three years that it has had a 6 to 3 conservative super majority, has overruled a major precedent in each of those three years.

[00:44:20.6] Melissa Murray: And I think this will be the fourth year it will be Humphrey's Executor. And that should give us pause because that too is a consolidation of power that is as dangerous and as worrisome as the President accumulating power for himself. And the fact that these things are happening in tandem should really give us pause. Finally, to the question of departmentalism, I completely agree with Sarah. I'm less worried about the President acting in utter defiance of the Supreme Court in as much as I am worried about this administration taking whatever the Court announces and reading it through its own lens. We are already seeing that with regard to the executive orders relating to DEI. We haven't really talked a lot about the DEI orders over the course of the weekend, so I'll raise it here. But the DEI order that was recently elaborated by Craig Trainor at the Department of Education speaks specifically of the Court's decision in 2023 in Students for Fair Admissions versus Harvard, and it is a complete over-reading of that decision. That was a relatively narrow decision that was focused on the question of higher education admissions.

[00:45:33.2] Melissa Murray: And this letter from Trainor reads that decision to authorize the Department of Education to essentially rescind any kind of affinity group programming at colleges and universities, activities that I think would violate academic freedom, might violate the First Amendment rights of various organizations, might violate a whole range of

constitutional rights, and implicate a number of constitutional questions. And so for me, what is actually worrisome is not the President saying let him enforce it, but rather the President taking those pronouncements and putting his own spin on it.

[00:46:06.9] Jeffrey Rosen: Please join me in thanking our panelists.

[00:46:18.3] Jeffrey Rosen: This episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock and Advanced Staging Productions. Research was provided by Samson Mostashari and Cooper Smith. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination and debate and who isn't. Check out the new Constitution 101 course launched in partnership with Khan Academy at constitutioncenter.org/khan101. Sign up for the newsletter at constitutioncenter.org/connect and always remember when you wake and sleep that the National Constitution Center's a private nonprofit. This podcast and all our work is made possible thanks to 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 @constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.