

Trump v. United States and the National Security Constitution

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[00:00:04.3] Lana Ulrich: Welcome to Live at the National Constitution Center, the podcast sharing live, constitutional conversations and debates hosted by the Center, in-person and online. I'm Lana Ulrich, vice President of Content. In this episode, International and National Security Law experts, Harold Koh of Yale Law School, Deborah Pearlstein of Princeton University, and Matthew Waxman of Columbia Law School, joined for a conversation to explore Trump v. United States and the updated edition of Koh's Landmark book, *the National Security Constitution in the 21st century*. Jeffrey Rosen, president and CEO of the Constitution Center, moderates. Here's Jeff to get the conversation started.

[00:00:45.8] Jeffrey Rosen: Thank you so much for joining us, Harold Koh, Deborah Pearlstein and Matthew Waxman. Professor Koh, I had the great privilege of taking your class in law school. No one better explains the history and current practice of national security law than you. And it's very fortunate that we have you today at USV. Trump has just come down with the landmark decision on presidential immunity. Tell us, if you will, how your book, tracing the evolution of executive power throughout American history, in some ways predicts today's decision and how does today's decision change or not the law of Executive power and the Constitution?

[00:01:38.9] Harold Hongju Koh: Well, thank you, Jeff. All of your listeners know that the Constitution is driven by a principle of checks and balances. The question is, do those checks and balances actually apply in foreign affairs and national security? And the surprising answer is that, unfortunately, they don't. It's become an exception to the notion that our system of separation of powers is supposed to check executive unilateralism. And what the book does is it says, America, we have a problem. The problem is structural, not just personalities. And so we need structural solutions. So what is the structural problem? That we have a system of bad incentives. The executive has an incentive to overreach and to engage in unilateral activity. Republicans tend to do it proactively. Democrats tend to do it reactively. The courts defer and acquiesce, and then the Congress tends to do nothing. So what happened here is that back in 1982, when I was actually clerking for the Supreme Court, the Supreme Court had two decisions which appeared to limit the scope of immunities for the president and also for high executive

officials. But nobody at that time, absolutely nobody, thought that the president had absolute immunity from criminal prosecution.

[00:03:09.8] Harold Hongju Koh: In fact, that was the default assumption when the DC Circuit ruled in favor of the notion that there was no immunity. Everybody thought that there would be either a cert denial or a summary affirmance. The Supreme Court didn't even need to hear it. But what happened today instead is that the Supreme Court has shifted from a presumption against immunity to a very dramatic expansion of immunity. This furthers these negative incentives for all three branches. I was a lawyer for the executive branch. If the president now wants to do something that's at the edge of the law, you have to now explain, well, you now have a very serious possibility of getting immunity. After all, if Trump got it, for trying to steal an election and you're trying to do something urgent in foreign affairs, the likelihood that you're going to be held accountable for that is very low. This is exactly what Reagan said during the Iran-Contra affair, "The American people will never forgive me if I fail to get them out over this legal question." The courts have deferred and rubber-stamped, as the book predicted. As the dissent pointed out, through brute force, they created immunity that has no basis in text, no basis in function, and would clearly create a situation where the president could do all kinds of official activities and then be called immune.

[00:04:40.7] Harold Hongju Koh: So, for example, the president talking to the Attorney General about Watergate, as Nixon did to John Mitchell, would be beyond the scope of any judicial examination. And finally, when Congress does intervene, as it tried to do, in terms of creating an obstruction statute, the Supreme Court actually intervenes to strike it down, which is what happened the other day in the Fisher case. So you couldn't have a clearer example of the president now giving greater incentives to overreach, the courts, using their power to maximize that unilateral action, and then Congress being disempowered even when it tried to act. So the net result is, what drove this throughout the opinion is a fear of what Chief Justice Roberts called enfeebling the presidency. In other words, we need a vigorous president who's unfettered so he can protect us against national security threats. What it doesn't account for is what we saw under the first Trump administration. What if the president is himself a national security threat? There's no constraint against that because the president's official conduct has been placed outside the rule of law. And that's what makes it such a devastating opinion.

[00:06:04.8] Jeffrey Rosen: Fascinating. Thank you very much for that powerful introduction. Deborah Pearlstein, Professor Koh has just suggested that this is a decision that will dramatically expand executive power by making it possible for Congress to respond and allowing the courts to rubber-stamp. Do you agree with that analysis, and tell us, you've read the decision in what ways do you think it will change the law and empower the president?

[00:06:31.7] Deborah Pearlstein: Well, I entirely agree with Harold. This is just an extraordinary decision in almost every way, and one that dramatically expands the sort of constitutional understanding of the scope of the president's power in a way that we have not understood for the last 200 plus years. For these purposes, let me distinguish between what the decision says and does with respect to the particular case of the former president, Donald Trump, and why it is that it seems to sweep much, much more broadly than that. In Trump's case, and in general, it says, look, there's sometimes immunity for what the president does while in office and

sometimes not. It establishes three categories: Certain core executive functions, there is absolute immunity. So, for example, if the president issues a pardon, he can never be held criminally liable to the extent that that is a core, constitutionally exclusive power reserved to the president. So, absolute immunity for that category of things. There is, as the court says, presumptive immunity for official acts. So, it defines broadly, but also vaguely, what might count as an official act within the scope of the president's authority. And there it says, the president has presumptive immunity unless the prosecution can overcome that presumption, and we can talk about how and why that might be possible.

[00:08:03.9] Deborah Pearlstein: And then the court says, look for private acts while in office, the president is not immune. And it carves open, to some extent, the possibility that some of what is alleged in the case of Donald Trump counted as a private act. So, Amy Coney Barrett writes separately in concurrence to say, to the extent that Trump is accused of interfering with or promoting fraud in false electors in the 2020 election, that seems like a private act to her, which would not be immune. So, in the case of Trump, the effect of this is to send it back all to the lower court. And I think there's going to be a huge amount of litigation and a long time before we get to anything that looks like an actual trial, but plenty of discussion at the lower courts. The reason why this, I think to Harold and to me, seems, and to most constitutional law professors seems so much more consequential, is because the court spends a long time characterizing extraordinarily broadly what is included in the scope of the president's core powers for which he is absolutely immune, and what is included within the scope of the president's official acts.

[00:09:15.8] Deborah Pearlstein: So, for example, any conversation with the Department of Justice about anything, even if the conversation is the president, calls up the attorney general and says, "Hey, I don't like MSNBC or I don't like The New York Times. I think we ought to prosecute them because we got to get rid of them." That conversation, because it's with the Department of Justice, even, no matter what the president's motives are, even if they are overtly political, absolute immunity. And in Justice Sotomayor's dissent, she goes through some of the hypotheticals that were raised in oral arguments and says, if the president orders Navy SEAL Team Six to assassinate a political rival, immune. If the president organizes a military coup to hold on to power, immune. And it's a remarkable moment in the dissent, but I think the opinion bears that out. It has the most sweeping language about the scope of executive power in any decision of the Supreme Court of the United States I've ever encountered.

[00:10:14.3] Jeffrey Rosen: Thank you very much for that. Matthew Waxman, I know you're traveling. You've not had the chance to read the decision closely, but you served as Director of Policy Planning at the State Department under President George Bush and a distinguished scholar. Can you attempt to defend the majority decision as within the scope of national security visions of executive power that justices are clearly concerned about? A president being prosecuted for drone strikes, for example. As you try to look at the majority decision, what might they have had in mind and what can be said on its behalf?

[00:11:00.3] Matthew Waxman: Yeah. So, well, thanks very much for having me. And I'm excited to talk further about Harold's book, as he laid it out, he's really talking about one of the core dilemmas that any democracy faces. Especially one that's gonna be active in world affairs and that's a dilemma that pits on the one hand the need for some flexibility, some energy in an

executive with a system premised on checks and balances and how do you reconcile those two? And as there's much in Harold's account quite a bit that I agree with. I look forward to also talking about some things where I would disagree a bit. Coming to the opinion from today, let me just make a couple of points. One, is as constitutional lawyers around this virtual table we like to look to the constitution law to solve problems. And if you're worried about Trump or you're worried about any president abusing his or her powers and in the case of Trump you should be worried. We're talking about somebody who is criminal and immoral and erratic and ignorant. The solution is more in the ballot box than the courtroom.

[00:12:25.3] Matthew Waxman: Law is important, and we can talk about legal reforms that can perhaps better them in a president, where a president should be hemmed in. But ultimately, we need American politics to right itself if we're gonna solve the problem of Trump. So that's one point I would just make about that decision. The other is, to me, one of the things that's interesting, or quite remarkable about this opinion and the timing of it is that here we have an opinion today with the Supreme Court, in a sense, pulling back on some checks on the president, saying, one of the things we really need to make sure is that the president has the requisite flexibility, agility to deal with certain problems. But it was only last week that the Supreme Court issued another opinion where it overturned the so-called Chevron doctrine. And we don't have to get into all the details of administrative law, but the basic gist of the Chevron doctrine was that it gave administrative agencies a lot of leeway in interpreting vague statutes. And the Supreme Court overturned that doctrine essentially on the grounds that, it's problematic to have an executive branch that has too much flexibility, too much discretion, able to flip in its policy, and perhaps do so in ways that are insufficiently tethered to what Congress has set out as American policy and lets Congress off the hook.

[00:14:14.6] Matthew Waxman: And I think Harold is quite right in his book in saying we really have two very different visions going on of the way in which our checks and balances work, that there's a sort of a system of checks and balances for domestic affairs where oftentimes the court speaks in terms of the need for very robust checks. But once we entertained the area of foreign affairs or national security, there's a tendency to place extreme weight on this idea that we need to be careful about fettering the president too much. And I also just think Harold is that those two worlds, the domestic policy world and the foreign policy national security world, have never been neatly separated, and they're really not separated when we're talking about President Trump and the possibility of President Trump 2.0.

[00:15:24.9] Jeffrey Rosen: Thank you very much for distinguishing the domestic and national security framework and also introducing the recent Loper-Bright decision within this discussion. Harold Koh, another beat, please, because it's so important on the effects of this decision, how will it insulate executive branch officials in foreign affairs, for example, to engage in arguably illegal activity without oversight? And then I'm going to ask you to use your masterful powers to kind of sum up how we got here. In the book, you identified two visions of the national security Constitution, one, which you call Curtis Wright, involving executive unilateralism. The other, involving shared power rooted in the Youngstown case. If you can, in your wonderful, distilled way, tell us about the roots of that Curtis Wright view back to Hamilton and the Pacificus letters. Is this executive unilateralism rooted in original understanding or not? And how did it culminate in today's decision?

[00:16:26.2] Harold Hongju Koh: Yeah. Thank you. So, first of all, to the decision. What Matt said about the ballot box being a check obviously doesn't apply in the second term. And both Trump and Biden, if they were elected, would be in the second term. So the check will not be at the ballot box. Secondly, if autocrats are trying to steal elections, democracy is not the solution to correcting that problem. And there are constitutional remedies like impeachment or criminal prosecution. But what we see is whenever there's a violation, say, the Iran Contra affair, then there's a cover-up. And then the question is whether the COVID up, which usually involves using official tools to prevent exploration of the violation, can the president be prosecuted for that, for obstruction of justice? And what we saw with Trump is he interfered with elections. He got impeached twice, but there was no basis to impeach him because of the very political considerations that Matt mentioned. And now what we see in this opinion is if the president, say, fires the attorney general, who would challenge him, that's totally immune, because it's within the scope of the plundering power. If he engages in obstruction of justice, but uses official tools that can't even be looked at or be used as evidence, if he collaborates with private actors to subvert our foreign policy, then if we use any official tool that can't be brought into the evidence.

[00:18:10.1] Harold Hongju Koh: So in other words, this sweeping official immunity cloak that's been placed over all of the present actions allow things like Watergate, Iran-Contra, and other kinds of things to occur with zero or no check, because official conduct has been placed outside the rule of law. Now, this could not be further from the original constitutional vision, because if there's one thing that we know, it's that you didn't want a king, and that even the advocates of executive power, like Hamilton, didn't argue that the president should be unchecked in foreign affairs. And indeed, the original vision had Congress in the lead, which is why Article I of the Constitution gives Congress so many foreign affairs powers.

[00:19:03.4] Harold Hongju Koh: But over time, and it occurred quite quickly in the Washington and Adams administration, in Jefferson, the president took the lead and Congress became the reacting entity, as constitutional scholars say, the president proposes and Congress disposes. But the courts were regularly overseeing and reviewing the legality of presidential conduct under both the Constitution in the Prize Cases, for example, and also under international law. John Marshall had many more decisions under international law than he did under constitutional law. But what has happened now is that a vision set forth in 1936 in a case called US versus Curtis Wright says that the president is the sole organ of the nation in foreign affairs, and it's not subject to constraints of either the Constitution or international law.

[00:20:00.0] Harold Hongju Koh: And when I was in the Reagan administration, we Justice Department lawyers called that the Curtis Wright so I'm right. Cite. Because if you just cite that case and that language, you can get away with anything, really, literally, you could get away with murder. And now we see it being applied by a president who says, I could murder someone on Fifth Avenue, and there be no consequence. And the Supreme Court goes out of its way to protect that power. Now, against that vision is the one that we know from the Steel Seizure case, which is, as Justice Jackson put it, the president's powers are not fixed, but they fluctuate depending on its concurrence with Congress. But what's fascinating about today's opinion by Chief Justice Roberts is he starts by citing Youngstown, the Steel Seizure case, and then uses separation of powers as a sword to strike down anything that would invalidate the president's conduct. It's a

heads I win, tails you lose situation where if Congress tries to restrain the president, for example, by legislative veto or judicial oversight, it's unconstitutional, whereas if the president takes certain kinds of actions, it's consistent with the separation of powers.

[00:21:22.6] Harold Hongju Koh: That's the asymmetry of this decision. So the net result is it dramatically furthers the trend toward executive unilateralism, which I think sets the stage, on the one hand, for a Donald Trump who will be very unconstrained in the second term either by internal or external checking balances. But even for President Biden reelected, what is to stop him from, with all good intention, getting dragged deeper and deeper into a war in the Middle East if he's trying to support Israel against Hamas, Hezbollah, Iran, and the Houthis, all at the same time. Because this structural pattern, presidential overreaching, congressional acquiescence, and judicial rubber-stamping will allow that to happen. So that's the problem that we're trying to identify, and we have to take it very seriously. It's not just about personalities. It's about structure.

[00:22:25.8] Jeffrey Rosen: Very powerful. Thank you, Deborah Pearlstein. The majority cites Hamilton, and in his *Pacificus* essays, in the first of the seven, Hamilton produced what would become the most influential defense of broad executive power in American history. He said, the general doctrine of our Constitution is that the executive power of the nation is vested in the president, subject only to the exceptions and qualifications expressed in that instrument. And Harold has argued that the Supreme Court in the *Curtiss Wright* case exaggerated the scope of executive unilateralism and then in subsequent cases constrained Congress from checking the president, creating a kind of asymmetry, as he put it, that allows executive overreach and makes Congress powerless to constrain and leads to judicial Rubber stamping, is that And help us understand even more how we got from Hamilton's vision of the unitary executive in the *Pacific* essays to the broad vision of executive power the court ratified today.

[00:23:35.7] Deborah Pearlstein: Yeah, thanks. So, I think this actually points out exactly how different what the court has done today from even what the court was doing in *Curtis Wright* itself, and much broader than the vision that Hamilton laid out. So, Hamilton, *Wright*, for example, says the executive. This is in the Constitution, not Hamilton, but the executive power is vested. The court today, picking up on dissents from Justice Scalia from years past, says the entirety of the executive power is vested. Now, the word "entire" may not be in the Constitution at all, nor is the word "all the executive power," which often gets used. This is even broader. So, specifically, quite a bit beyond what the text of the Constitution does. And then Hamilton would say, did say. The reason why we need the energy vested in the executive, which is what he often talked about, was because the executive has unique institutional advantages, the ability to act with unity, secrecy, and dispatch. And these are the advantages, the sort of Hamiltonian virtues that are trotted out and celebrated by the court in *Curtis Wright* from 1936. And the *Curtiss Wright* court is talking about things like, well, secrecy is important.

[00:24:53.6] Deborah Pearlstein: If the president needs to negotiate treaties, which is a power given to the president and the Constitution, it might not be helpful in the interest of the United States or treaty negotiation to have to share all of our thinking about treaty negotiation with his 500 closest friends in Congress, or if the United States is subject to attack and the president needs to make a decision immediately about how to respond and how to act in defense of the

United States. Speed there. Time there is of the essence. And this is why we need to leave the president and the executive a sort of broader breadth of power than we might otherwise afford. The other branches here, the court, are not talking about the Hamiltonian virtues. It's not quoting the Constitution even specifically or the sort of key passages from Hamilton or Curtis Wright. What the court here seems to be worried about is just flexibility, presidential flexibility in the abstract. And to the extent it points to a particular problem it's concerned about. The problem the court seems to be worried about is that if any criminal prosecution of any president is allowed, what will happen is, as the court puts it, the presidency will cannibalize itself.

[00:26:08.3] Harold Hongju Koh: Every subsequent president will pursue criminal prosecutions of their predecessor. And this will become a sort of infinitely politicized cycle of criminal prosecution. And to explain why that's a worry, the court discounts every check that exists in our current criminal justice system, including the relevant dependence on the Department of Justice in making prosecutorial decisions, to the function of the grand jury, to the function of the petit jury, to the due process protections that apply in all criminal prosecutions. And it says, notwithstanding having to proceed, prove any criminal charge in any criminal case beyond a reasonable doubt to a jury of one's peers, all of those things are not enough to protect a future president, former president, from potential prosecution. What we have to have here, because, again, the criminal justice system as it functions is not sufficient, is absolute immunity in certain cases. It is a rule of law reading of remarkable and disturbing, I would say, scope.

[00:27:21.2] Jeffrey Rosen: Thank you very much for that, Matthew Waxman. It is important that our listeners hear the arguments on all sides of these important cases. Six justices embrace this broad vision of executive unilateralism, and many consider themselves originalists and believe it to be consistent with constitutional history. Can you, for the sake of argument, defend the majority opinion as being broadly consistent with a Hamiltonian vision? And then after you've done that, you can perhaps tell us whether or not you agree with that defense.

[00:27:54.5] Matthew Waxman: Yeah, I actually think that those who root somehow an unconstrained presidency in the areas of national security and foreign affairs, those who root that in originalism, I think are wrong. I agree with Harold on this descriptive point that over time, through the actions and inactions of all three branches of government, we've moved from an original vision in which the president was much more checked in the areas of foreign affairs and national security than he is today, moved away from that system of very robust checks and balances to one in which the president is much, much is quite unconstrained. And we were talking about Curtis Wright. I'll just say that opinion is a mess. That opinion is a mess. I can't think of any other Supreme Court opinion that matches it in terms of the delta between its influence and its coherence. But it is an influential one because it has this line that Harold quoted before about the president as the sole organ of the nation in its foreign affairs. So I agree with Harold that there has been quite a big evolution, quite a big change from a very constrained presidency to an unconstrained one.

[00:29:32.3] Matthew Waxman: I think where I would differ from Harold would be in what factors I'd emphasize as the cause of that shift and differ with him in an assessment of the dangerousness in terms of why we end up over time with an erosion of these checks. I think Harold's points about the institutional features of the three branches as a cause are right. I think a

lot of it also, though, did have to do with dramatic changes in American power, American interests, and the American place in the world. We're talking about a Constitution that was written, and we're talking here about provisions of the Constitution that have not been amended. A Constitution that was written for a weak proto-state that grew into a global superpower, written for a state with virtually no standing army to a nation armed with nuclear weapons, humanity capable of human extinction. We've moved from a nation with an aversion to so-called entangling alliances to one that's the primary guarantor of a system of alliances around the world. None of that was predicted at the time of the founding. And all of those and other developments in American power, American foreign policy, have required some adjustments to the system of checks and balances, including, I would argue, a stronger executive branch.

[00:31:23.4] Matthew Waxman: Now, do I think that we need, in order to protect American interests, a completely unconstrained executive branch? Absolutely not. Absolutely not. We do need Congress to play a stronger role. And to me, one of the most interesting aspects of Harold's suggestions. Recommendations in the book is a set of recommendations for how to get Congress to, let's say, up its game. We talked a moment ago about some of the institutional virtues that many argue are vested in an executive branch. Speed, flexibility, secrecy. And these are very different virtues than you'd find in a Congress, which is designed to be sort of slow and cumbersome.

[00:32:21.3] Matthew Waxman: And Harold has some interesting recommendations at the end of the book for how we might get Congress and within Congress's control, how could Congress reorganize itself to develop better expertise, capacity for more flexible, agile action, especially in crises, to better protect secrecy, to better bring together expertise in diplomacy, intelligence, military affairs, which, as currently organized, are split among a wide range of committees, separate committees in each house of Congress. So, there are some ways, I think, that Congress can up its game in order to rebuild some checks while still also maintaining some of the important, let's call them, Hamiltonian virtues that are important for maintaining American leadership in the world, especially given that today the United States still plays a key and indispensable role in underwriting global stability through its system of alliances, especially in Europe and East Asia.

[00:33:47.0] Jeffrey Rosen: Many thanks for that, Harold. I do want to talk about the reforms you suggest in your book. But before we do that, I really would like you to tell the remarkable historical story, which is also a personal story for you, about how we got here. In the book you describe, have you worked for four presidential administrations? You got a call to write the first version of this book after, in 1987, after you wrote a law review article about the Iran-Contra affair. The Reagan years, as you described it, were really a turning point of the move toward executive unilateralism. So, give us a sense of the arc of the book. How this Curtis Wright vision expanded in the Reagan years, was adopted by attorneys, advisors like the one who used to be your point of contact in the OLC in the Reagan administration, John Roberts. And then how we got to where we are today.

[00:34:45.9] Harold Hongju Koh: Yeah, I mean, I think this is what brought me back to this topic 38 years after I wrote the first book. I went into the Biden administration on Inauguration Day 2021, and I felt as if I was in a government in which one muscle had been shot with steroids

for the last 30 years. In other words, the national security counterterrorism muscle power had been centralized in the executive, it had been centralized in the national intelligence entities. The assumption was that Congress would do nothing, that the courts would defer. And this was just accepted as the way in which things were to go. And in this story, the president emerges as a victim, as a villain, because the president is not only obliged to respond, everybody thinks that he's the only one who will respond. Congress can sit it out. And then the courts rarely get brought in, and when they do, they reject the external challenge. So, there's no accountability in this system. Now, this, I thought, let's trace this back to the beginning of the republic and through the various periods that Matt mentioned America's infancy, its rise to a dominant regional power.

[00:36:10.8] Harold Hongju Koh: It's becoming a global hegemon, the creation of a national security system in 1947 with the National Security Act. And then that was quickly followed by the ratification of that constitutionally, by the Steel seizure case. But then the parts that I lived through, the Cold War, post-Cold War period, the age of terrorism, and now the age of globalization with Trump and Biden. And I just come back to the Trump opinion today, the Supreme Court is living in a different world. They're thinking, as Deborah said, about the poor future presidents who might be pursued by their successors, and they're ignoring the president that we just had. Donald Trump, who showed how a president can use a Curtiss Wright theory to nullify the rule of law for his own administration under his view of Article II, which he says is absolute. And he said this even more bluntly with regard to the future. Any challenge to him, coming from inside the government, violates the principle of the unitary executive. Any principle coming from outside violates the principle of separation of powers, and any effort to hold him accountable. Subpoenas? He litigates.

[00:37:35.7] Harold Hongju Koh: If criminal investigations occur to his subordinates and they're prosecuted, he pardons them. Even after he leaves office, he holds classified materials in his home. And now he has very broad claims of immunity, even for acts which have absolutely nothing to do with foreign policy and national security. That's the most striking thing about this opinion, is they cite these principles of core presidential authority when the president is making a speech calling for people to attack the Capitol. And this, to me, is an amazing diversion away from the notion that the president is protecting us from national security threats and ignoring the way he becomes a national security threat if, as in his two impeachments, he works to try to coerce a foreign power to steal an election, or secondly, he encourages his own supporters to try to undo an election.

[00:38:31.0] Harold Hongju Koh: An attack on an election is as severe a national security threat as an attack on New York by terrorists, and it ought to be treated as a national security threat. So, in other words, the system has to be adjusted to address this kind of concern. And this is exactly what these reforms are. We have to take some pressure off the president. We have to put more of a burden on Congress to organize itself and respond.

[00:39:00.5] Harold Hongju Koh: We have to turn to the courts to reduce their ability to not do their job and to not use various kinds of canons of construction to expand presidential power well beyond its scope. What we saw today from John Roberts is someone who thinks he's applying textual principles historically, and in fact, is doing the exact opposite. And he's doing it in such a

way that is distorting the Constitution that we inherited and weakening the checks and balances that are supposed to apply in these circumstances.

[00:39:41.6] Jeffrey Rosen: Thank you for that, Deborah. Some more light on the practical effects of this decision. Justice Sotomayor, in her dissent, suggests that a president could say that he wanted to stop his rival from passing opposing legislation and then assassinate the rival. And under the majority's decision, you wouldn't be able to introduce evidence of the speech to prove the intent because that was an official act. Might that indeed make it harder to prosecute active attempts to undermine an election by enlisting a foreign power, as Harold suggests? And maybe because I know you've read the decision, Justice Amy Coney Barrett suggested a more modest approach that would've first, asked whether the criminal statute covers the conduct in question, and second, whether applying the statute to the president intrudes unduly on executive authority. Might that have created less havoc? And what do you think of the alternative approach, and why didn't the court adopt it?

[00:40:44.3] Deborah Pearlstein: Yeah. So I guess let me answer the question narrowly and then back up to the big picture that Harold Washington was talking about, and Matt, to some extent, as well. So, in this opinion, Coney Barrett writes, I think, an important sort of very specific, narrow but important concurrence in the judgment in which she says, look, we don't have to decide everything about executive power. There is a huge amount that actually we have in common here. There's probably broad agreement even among the dissent that the president shouldn't be criminally liable for acts of pardoning people. Which is a power he's given expressly under the Constitution, or, for example, the veto power. No criminal liability should attach when the president exercises his express power to veto legislation, and examples of that nature. And that some statutes, some criminal statutes, while sort of generally written, may not apply to particular acts of presidential power. And if that's the case, then the president should be able to make those arguments. The former president should be able to make those arguments in court and should be able to take an immediate appeal of any decision to get those resolved promptly.

[00:42:01.2] Deborah Pearlstein: But questions of evidence, what was actually going on here? Should come in because the prosecution has to be able to make its case for why this matters. As she says, if it's a case of the president offering a pardon in exchange for a bribe, for example, the pardon is an official act. The bribe, for which the president has no authority, is not an official act. But if you are trying to prove a case of quid pro quo bribery against the president that the president committed, you have to be able to show both the quid and the quo. You can't just show one. And the effect of the court's sort of bizarre five-vote evidentiary, the majority of five evidentiary ruling is to say, you have to be able to make your case only showing one side of that equation, and how that actually plays out in the lower courts when this is remanded, and what exactly each of the Justices thought they were doing there, I think is left vague in the majority opinion and is the reason why I think this is going to take a while to sort out, and I'm not clear how this will come out when it comes back to the court.

[00:43:12.9] Deborah Pearlstein: So that's the specific question about this. But I want to back up, if I can, just for a second, to the broader question of accountability or checks, any checks and balances on the presidency. And you can think about three potential pots of vectors for checks from which one might draw. One are sort of the Madisonian branches, Congress or the courts

could help check the presidency. That's one. A second set of checks might come from the popular, from the voters, from the press, from others. That's a second. And a third is internal checks, which Harold was talking about, and which many of his reforms, I think, importantly point to how do we tighten up the checks inside the executive branch, change the way legal advising works, for example, of the president, which I think are really important here in the national security and foreign affairs context. Popular checks are always really hard to use because national security and foreign affairs are so often wrapped in secrecy or classified information. So what we might hope for is an effective popular check is relatively more disabled in the national security context, even for a first-term president.

[00:44:23.5] Deborah Pearlstein: Today, the Court says, well, Congress. It doesn't say Congress isn't going to act, but even when Congress acts, you can't use these criminal laws that Congress passes to prosecute the presidents through the judicial system, essentially taking the Madisonian branches out of the business of checking the president, which leaves us only the internal checks. And maybe in the next round, we can talk about how and whether it's possible to strengthen them. The final point I just make here is the argument that the majority was making today is, because of their sense of unitary executive power, Congress shouldn't have any power to control even the kinds of advice that the president gets. In other words, pointing to, we're not so sure about the effectiveness of internal checks either. That's what makes this a pretty frightening set of decisions.

[00:45:18.0] Jeffrey Rosen: Thank you for that, Matthew. Let's introduce this question of how, in practice, it's possible to strengthen the checks that the framers clearly had in mind, which is that all the branches would do their part in preventing the president from being a king, and while still ensuring a vigorous executive. You know the polarization that afflicts our political system, the difficulty Congress has in acting at all. And you identified this asymmetry of the courts trying to prevent power from flowing to the executive in domestic policy, in the Lopez, Brighton, and Chevron arena, while seeming to do the opposite dynamic in foreign affairs. In practice, given our actual political realities in America today, what do you think could be done to resurrect some of the framers' vision of a constrained but vigorous executive?

[00:46:11.8] Matthew Waxman: It's going to be very hard, and I wish I had a more optimistic account to lay out for you, but here's why I think it's hard. And again, I'd come back to my earlier point, that a lot of the solutions are going to lie in the ballot box, and that means, if we want to correct the current state of affairs, we need to elect different leaders. And I'm talking here not just about the executive branch, but perhaps even more so, Congress, because Congress hasn't been playing its proper checking role. In some ways this should be a very propitious time for reform of the national security state, the national security constitution. It should be a propitious for a number of reasons, you're coming out of a recent Trump presidency which I didn't just reduce with many eyes the faith in Hamiltonian virtues of the executive branch but also I seem to run counter to some of the other virtues often attributed to the executive branch, the expertise, the idea that they are internal checks within the executive branch that can function effectively as breaks on bad dangerous, abusive policy decision or personal decisions, so that's one factor.

[00:47:49.5] Matthew Waxman: And by the way, even on the other side of the aisle, there's deep distrust of President Biden as holding the appropriate presidential values. So distrust in the

presidency. This also comes at a time when, on both the political right and the political left, you have a lot of calls for a foreign policy of greater restraint, especially when it comes to the use of military force. And a lot of that, I think, stems from the terrible mistake of the Second Iraq War. So in many respects, this should be a propitious time for reform, much like the post-Vietnam, post-Watergate period was a propitious time for reforms. Many of those reforms failed, for reasons Harold details in the book. But it was a moment where there was the will and capacity to pass a number of statutes to better check presidential action, the War Powers Resolution, the Hughes Ryan Amendment, to put some checks on covert action, restrictions on arms sales, and so on. But here's why this is not a propitious moment at all for reform, which is that Congress is terrible. We sometimes, when focused on the problems of a Trumpian president, we sometimes adopt a sort of romanticized view of a Madisonian Congress and its deliberative virtues.

[00:49:33.1] Matthew Waxman: And, yeah, it's slow and cumbersome, but that's great because it takes into account a wide variety of interests and is slow in its careful deliberations. That's not the Congress we have at all. We have a Congress that can barely keep the lights on in the federal government. It's distracting. It's inexpert. It's deeply, deeply polarized. It's chaotic, it's often paralyzed. And so we're now in a situation pretty rare in American history, where I think both political branches are in some state of crisis. And so both, I think, are in need of some serious repair. Again, I would put a lot of emphasis on the ballot box as the source. As the key source of some of that repair. I take Harold's point that law and constitutional law in particular, have an important role to play here. But I do think ultimately, we need to correct our politics if we're going to solve the problem I just described. I would have appreciated it. One of the great aspects of Harold's book is the way in which he draws on his own personal history inside the government to inform both his descriptions, but also his prescriptive set of recommendations.

[00:51:09.3] Matthew Waxman: And I look back on my own time in the George W. Bush administration. As there, again is one that was deeply, deeply ideologically committed to an unconstrained presidency. I would say, to a great fault, not just because that deep commitment to removing constraints led to some abuses. I think it was wrong on the constitutional law, but it also just led to bad policy. So I saw up close some of the pathologies of an unconstrained president, but I also saw, in the second term, sort of the national security constitution striking back. You had both the courts and Congress pushing back on certain policies, I'm thinking torture in particular, as well as warrantless surveillance on certain policies, like detention without trial. All three branches got involved. I think a lot of critics of Guantanamo don't like the result, but you did have all three branches kind of getting in the game. So it's not that long ago that we had a much better system of checks and balances. I think one of the big things that's changed in the last 20 years is, sadly, American politics.

[00:52:49.8] Jeffrey Rosen: Thank you so much for that. Well, it's time for closing thoughts in this important and very illuminating discussion. Harold, one of the many virtues of your important and timely new book, *The National Security Constitution in the 21st Century*, is that you have chapters on the first Trump and Biden administrations. Final thoughts with responding to some of the points that have been made. Give us a sense of how you think the reforms that you suggest might fare in a second Trump or Biden administration and any other closing insights for our We the People listeners.

[00:53:28.1] Harold Hongju Koh: Yeah. First of all, the ballot box is not the solution. If you throw the rascals out, as we've seen, the rascals can return. It's a structural problem, and you need to make structural fixes. There is a problem of attitude, which is that they're nothing. The politicians are not inclined to do that. And we are waiting for a period where our politicians return to being Americans first, rather than talking about America first, to try to do the right thing. But I think it's wrong to say that Congress is terrible. They're excellent congressmen. They just need to organize themselves in such a way that they can. The experts on national security can present themselves, as I propose in the book, as a joint committee on national security, like the Joint Committee on Taxation, which does a very effective job. It's a feature of how things are organized more than anything else. And finally, I think we have to look at the lessons of the recent past. Some administrations are proactively extremely unilateralist and try to use this approach. George W. Bush and Trump, and then the next administrations, Obama and Biden, under-correct. And so the pendulum keeps moving further and further toward unilateralism, aided and abetted by the courts and by Congress's own acquiescence.

[00:54:51.5] Harold Hongju Koh: And that's what's shaping our, or misshaping our constitution beyond recognition and taking it so far away from the original design. I favor a strong executive, but it has to be a strong executive within a strong constitutional system, which is what the framers intended. And we have a so-called originalist Supreme Court, which is taking it in a very, very different direction, something that the framers wouldn't recognize.

[00:55:19.6] Jeffrey Rosen: Many thanks for that. Deborah Pearlstein, final thoughts about the national security constitution and the future?

[00:55:29.3] Deborah Pearlstein: Well, first of all, thank you for including me. It's been a wonderful discussion. I think it's a worrisome time. I guess I'd just like to return to two points I think we've talked about before. One is the extent to which this distinction between the national security constitution and the constitution or issues of national security and issues of any other kind of policy, whether it's climate change or AI or biological threats of any kind. These are issues that were never really especially separated. They are especially difficult to separate and keep separate today. So to the extent we see carving out exceptions for national security, we have to assume those are exceptions that will come to infect all of constitutional interpretation. And the second is simply to say, this is as perilous a time for democracy as I've certainly faced in my lifetime. I think there's a case to be made as perilous a time as we faced in US history, helping what the National Constitution Center does and helping Americans to understand the stakes of what we're really talking about here that go so far beyond classic disagreements about foreign policy and into much more fundamental questions about what does it mean to have a constitutional democracy under the rule of law. I think, is an essential service. So I want to thank you for doing that again, and thank Harold for this wonderful and timely contribution at this moment.

[00:57:02.3] Jeffrey Rosen: Thank you so much for that. It is an honor for the National Constitution Center to convene scholars like you to cast light on these urgently important questions involving the future of the Constitution. And in that spirit, Matthew Waxman, the last words are to you for your thoughts on the future of the national security constitution.

[00:57:21.3] Matthew Waxman: Sure. First, I very much appreciated Harold's comments about how we can't just rely on the ballot box. We also need some structural reform. I think there's a chicken and an egg problem here, though, because it's going to be difficult, maybe impossible, to get that structural reform without some change to the politics. I'd like to see both, but I think, I still think you're going to need to get the politics right. I want to come back to a point that I'm glad Harold just raised because it was a point of his book that I commended earlier, which is this idea that there is, Congress can unilaterally strengthen itself by, for example, reforming its own procedures and its own committee structure in order to give itself better expertise and a bigger seat at the foreign policy and national security table. I think those are good recommendations. And if you get some of these reforms to the way in which Congress does its business, as Harold also mentioned, individual members of Congress, individual committee chairs can exercise some pretty powerful checking functions if they have the political will, even lacking a legislative majority. And so we need to think about strengthening Congress's hands in ways that don't require it to legislate statutes into positive law, because that's going to be extremely difficult in the current political environment. I would focus on Harold's recommendations for strengthening internally how the Congress operates.

[00:59:23.9] Harold Hongju Koh: Do you have 10 seconds Jeff, our alternatives are acceptance of the state of affairs, which I don't think we should do, despair. I think we need to be discouraged or reform. And it's either reform now or developing ideas for reform that we can do later when the politics allows. And I think the whole point of being an academic is you give the people the ideas that if the spirit to reform comes about peace, me, or comprehensively, those ideas are there to be picked on.

[00:59:57.0] Jeffrey Rosen: Thank you so much, Harold Koh, Deborah Perlstein, and Matthew Waxman, for illuminating, broad ranging, and valuable discussion of the future of the national security constitution, as well as today's decision in *Trump v. The US*. Dear We the People listeners, your homework is first to read Harold's book, *The National Security Constitution in the 21st Century*, and to read the decision *Trump vs. US*. Both the majority opinion, the concurrences, and the dissenting opinions. And as always, make up your own. Harold Koh, Deborah Perlstein and Matthew Waxman, thank you so much for joining.

01:00:26.5] Lana Ulrich: This program was live streamed on July 1st, 2024. This episode was produced by Tanaya Tauber, Bill Pollock, and me, Lana Ulrich. It was engineered by David Stotz and Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith and Yara Daraiseh. Check out our full lineup of exciting programs and register to join us virtually @constitutioncenters.org. As always, we'll publish those programs on the podcast, so stay tuned here as well. Or watch the videos available in our media library @constitutioncenter.org/medialibrary. Please rate, review, and subscribe to live at the National Constitution Center on Apple Podcasts, or follow us on Spotify. On behalf of the National Constitution Center, I'm Lana Ulrich.