

10-4-2017

The Supreme Court vs. the President: How the Court Decides the Constitutionality of Challenged Presidential Actions

Laura Wittern-Keller

University at Albany, State University of New York, lwitternkeller@albany.edu

Follow this and additional works at: http://scholarsarchive.library.albany.edu/campus_conversations

 Part of the [United States History Commons](#)

Recommended Citation

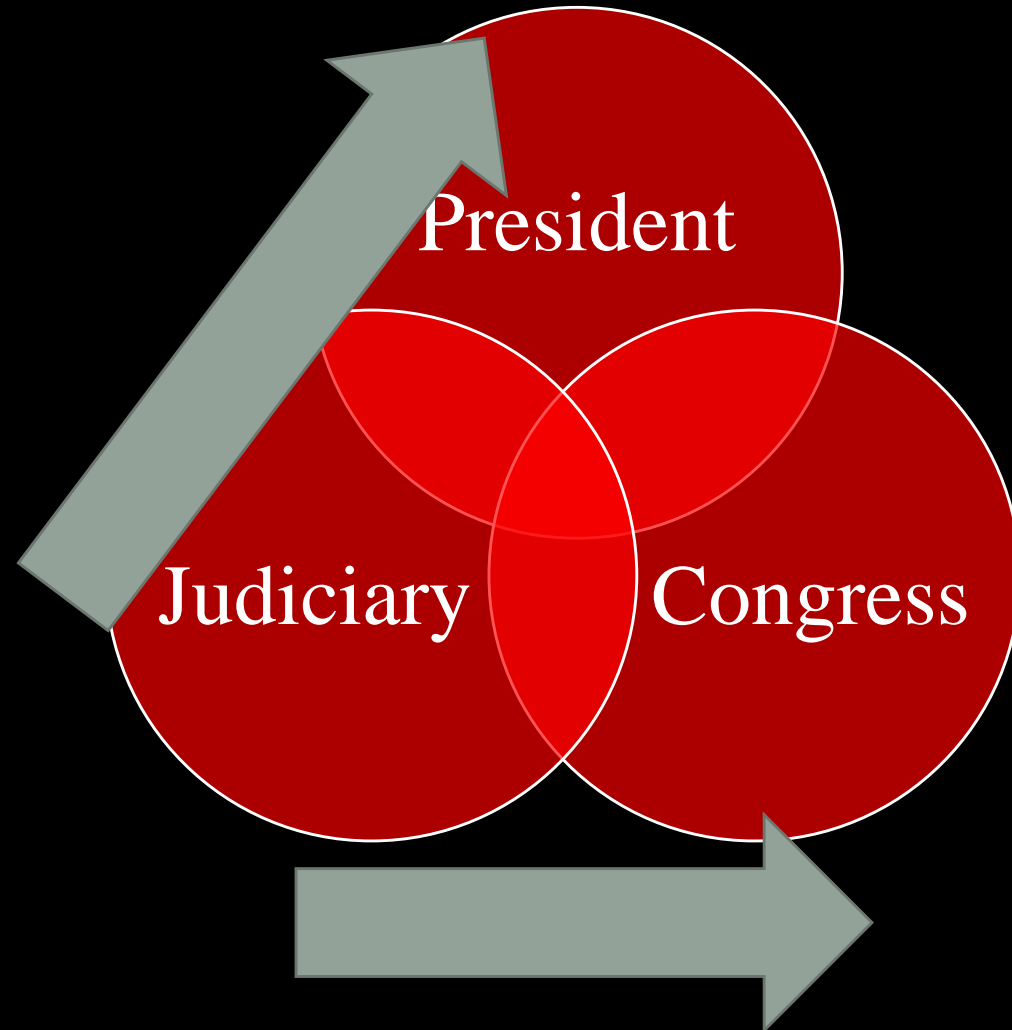
Wittern-Keller, Laura, "The Supreme Court vs. the President: How the Court Decides the Constitutionality of Challenged Presidential Actions" (2017). *Campus Conversations in Standish*. 6.
http://scholarsarchive.library.albany.edu/campus_conversations/6

This Article is brought to you for free and open access by Scholars Archive. It has been accepted for inclusion in Campus Conversations in Standish by an authorized administrator of Scholars Archive. For more information, please contact scholarsarchive@albany.edu.

The Supreme Court vs. the President

How the Court decides the constitutionality of
challenged presidential actions

The theory of balance of powers



Precedent

noun

1. Law. a legal decision...serving as an authoritative rule or pattern in future similar or analogous cases.

Source: dictionary.com

A tale of two articles

- **Article III: the judiciary**
- **Article II: the president**
- **President's powers come from two sources:**
 - **First:** Constitution itself (Article II)
 - The administrator of the laws
 - Foreign affairs
 - Commander-in-chief of military
 - **Second:** an act of Congress
- **“an errand boy for Congress”?**
 - Or the “unitary executive”?

Its job is to settle
disputes arising
under the
Constitution

He can
recommend
legislation to
Congress

What methods have presidents used to expand their authority?

- **Five main tools**

- Executive orders and Memorandums
 - Usually directing government officials
 - No statutory regulation except publication
- Proclamations: for the public
- National security directives: secret
- Signing statements: becoming more important (problematic?)

Examples: executive orders/ proclamations

- Louisiana Purchase, 1803
- Emancipation Proclamation, 1863
- Japanese-American internment, 1942
- Desegregating the U.S. armed forces, 1948
- Sending troops to Little Rock, 1957
- Affirmative action, JFK, LBJ, Nixon, Clinton & Obama

Unilateral actions

- **Divided governance &**

- Makes unilateral action more

- Example: Obama's frustration

- DACA and later DAPA

- Result? legal challenge

- A new pattern?

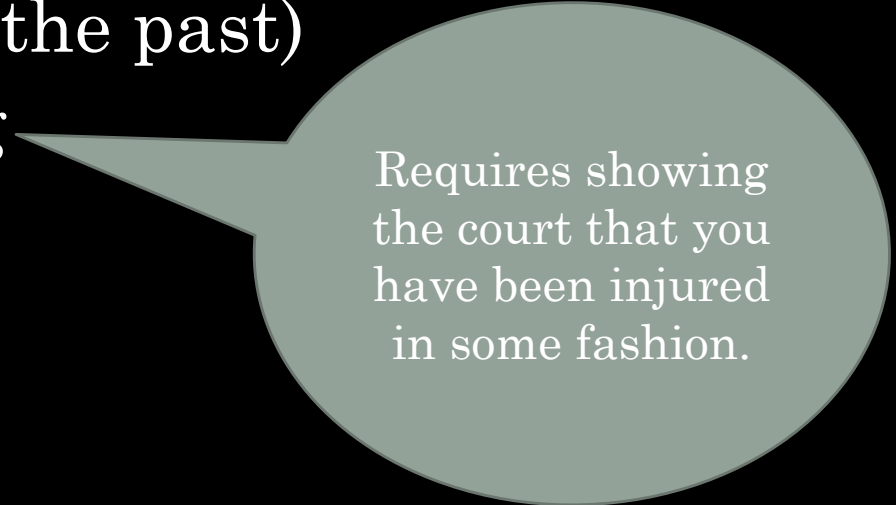
- **How to stop unilateral action if unconstitutional?**

"When a president releases an executive order, one of the instant responses is to try to tie it up legally....this can be an incredibly effective tool to stop presidents from doing things that you don't want them to do."

Julian Zelizer

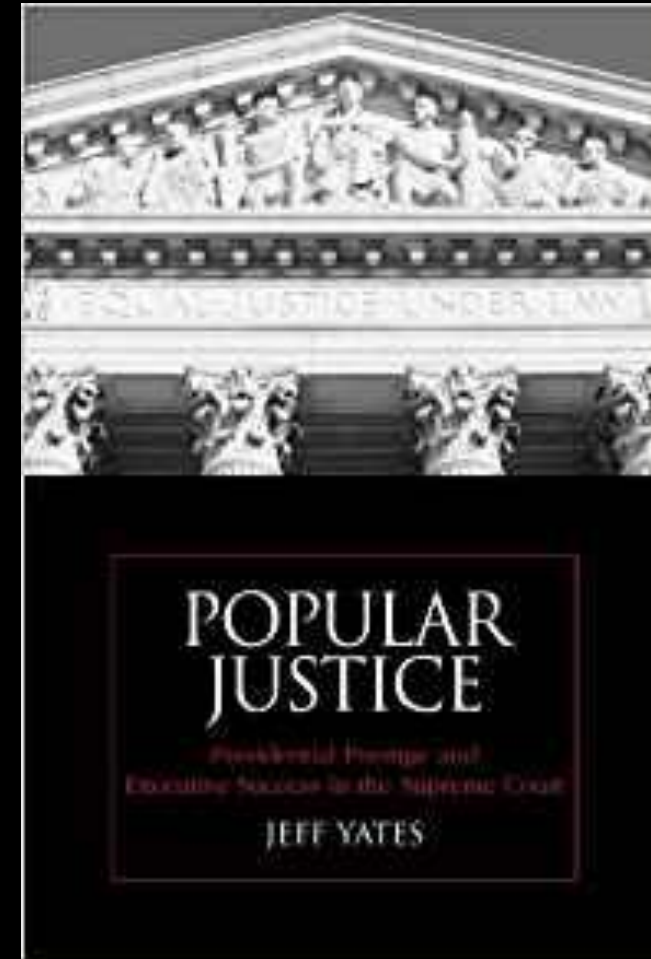
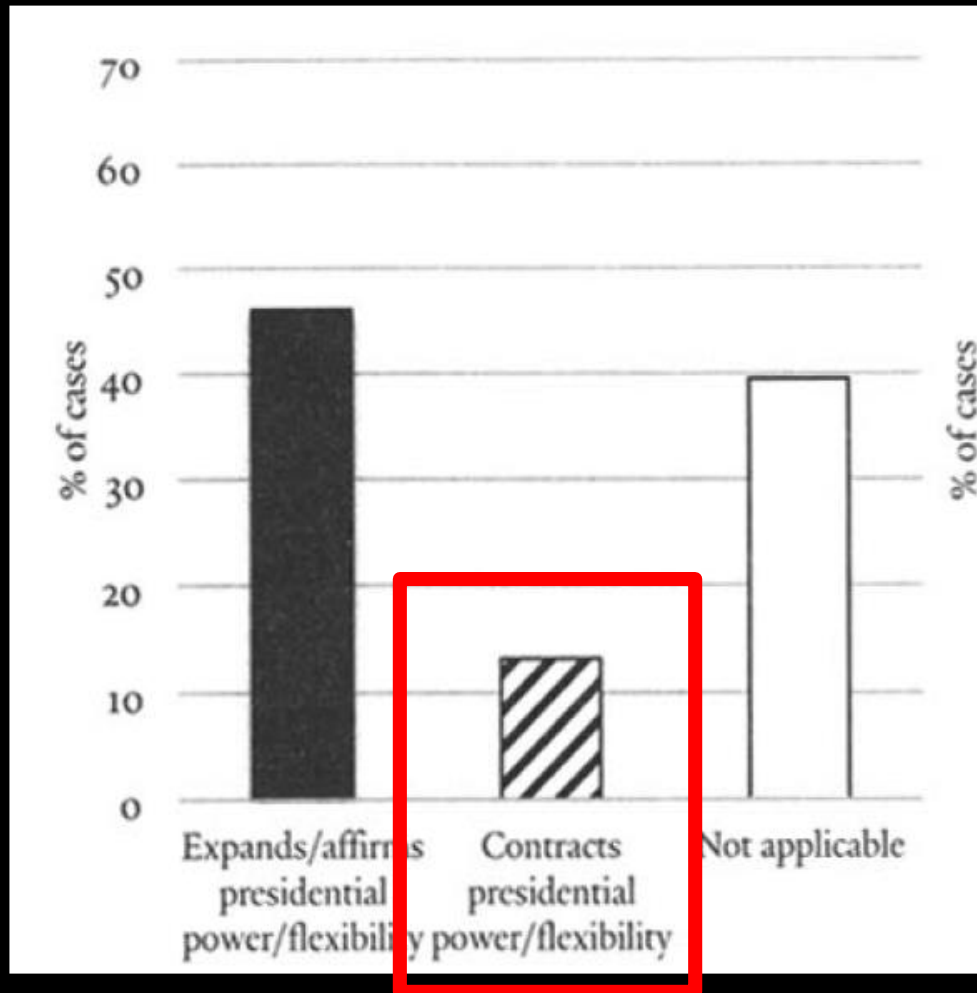
Checking the president

- How often does a challenge to the president's authority to act reach Supreme Court ?
 - Rarely (in the past)
 - Standing



Requires showing the court that you have been injured in some fashion.

How successful the challenges?



Source: "Executive Orders in Court," Yale Law Journal, 2015

What types of challenges have there been?

- Use of executive orders
- Removal of appointees
- Conduct of foreign affairs
- President's actions during wartime
 - Suspension of habeas corpus
 - Blockade
 - Use of military tribunals/detention
 - Seizure of private property: the case that set the standard.



• **Associate Justice Robert Jackson**

• **1941-1954**

Truman and The Court

TRUMAN EXPECTED
TO TAKE SOME MILLS
FOR COMBAT STEEL

ntation

chief

Truman Insists Courts, Congress
Cannot End His Inherent Power

By ANTHONY LEVIERO
Special to THE NEW YORK TIMES.

ot authorized

Steel Mills Must Roll, Says Truman

President Ready to Use Taft-Hartley
or Other Laws to Avert Jan. 1 Strike

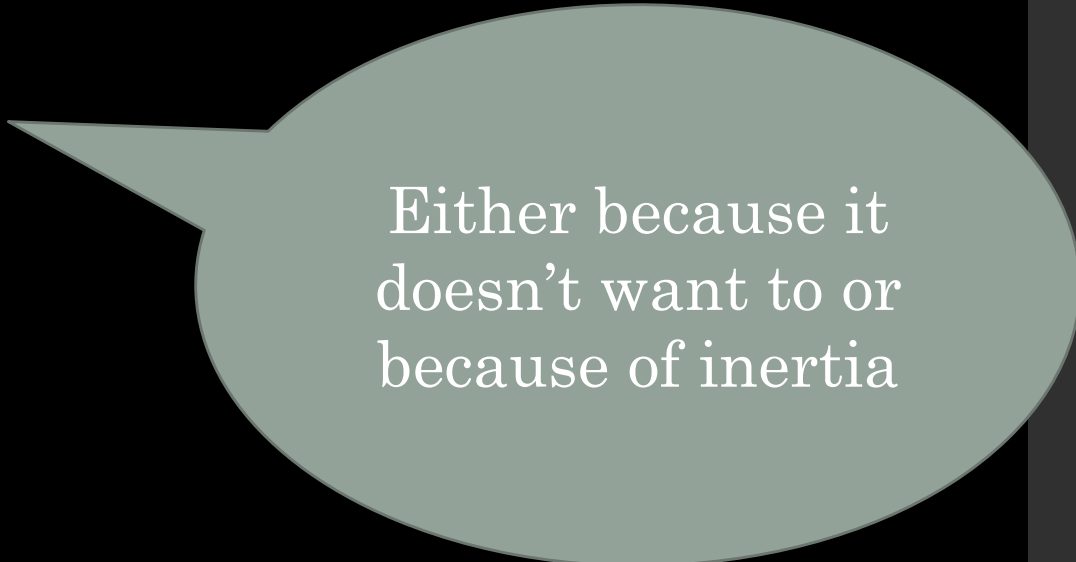
U.S. Seizes Steel Industry; Strike Canceled; Truman's Action Touches Off Court Battle

Youngstown Sheet and Tube v. Sawyer (1952)

- Truman's executive order
- Justice Jackson's three-part categorized presidential actions
 - #1. when "the President acts pursuant to an express or implied authorization of Congress"
 - At the height of his powers: constitutional

At its height because it's all the president's power PLUS all the power Congress can delegate.

- #2. “in absence of either a congressional grant or denial of authority”
 - “zone of twilight” where president may act if
 - New situation
 - Congress has failed to act
 - A gray area



Either because it doesn't want to or because of inertia

- #3. when “the President takes measures incompatible with the expressed or implied will of Congress”
 - Against the will of Congress
 - President must assert both “exclusive” and “conclusive” power
 - President at his weakest

Examples

- **#3: at the lowest**
 - Truman and steel seizure
- **#2: “zone of twilight”**
 - 2014 recess appointment case
 - thru 2015, 83% upheld president
- **#1: the height of presidential authority**
 - Japanese-American Internment order

Can Congress Sue the President?

- **1979: Supreme Court said no**
 - *Goldwater v. Carter*
 - No standing/co-equal branch
- **Shift recently**
 - 2013 case opened the door (*U.S. v. Windsor*)
 - If one house agrees to bring suit
 - If no one else can bring suit
 - And presidential action nullifies act of Congress

- **Two cases now pending**
- **2014 House suit over Obamacare payments to insurers**
 - Congress's "power of the purse"
- **2017: Democrats' suit over emoluments**
 - Untested to this point

Cases since *Youngstown*

- **The Guantanamo cases**

- Habeas corpus cannot be denied to

- American citizens

- Non-Americans

- Military tribunals not legal

- 2006 Military Commissions Act struck down

- Habeas corpus must apply if accused of violating American law (wherever)

- **Taken together, major curtailment of executive war power expansion AND slap at Congress**

Hamdi v. Rumsfeld,
2004

Rasul v. Bush,
2004

Hamdan v.
Rumsfeld, 2006

Boumediene v.
Bush, 2008

Jackson's test modified in 2008

- *Medellin v. Texas*

- “zone of twilight” now only if long-standing Congressional “acquiescence”
- Effectively ends Jackson's gray area?

Most recent Supreme Court decision

- **Obama and the DAPA**
 - *United States v. Texas* (2016)
 - 4-4 Supreme Court upheld injunction against
 - No reason given



Current case at Supreme Court

- *Trump vs. International Refugee Project*
 - The travel ban
 - Proclamation of new travel ban
 - Arguments delayed—moot?

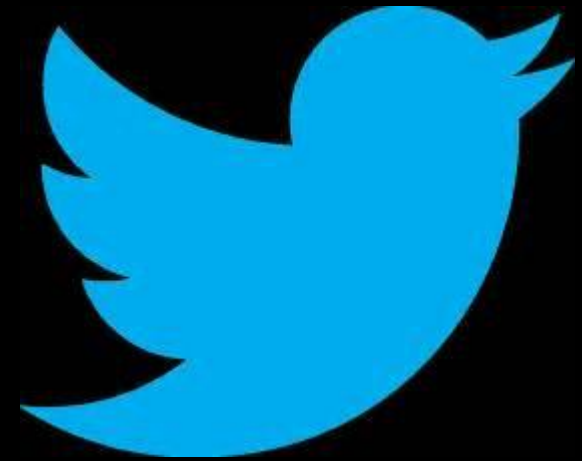
The screenshot shows the White House website's press release page for a presidential proclamation. The page includes a navigation bar with links like 'BRIEFING ROOM', 'ISSUES', 'THE ADMINISTRATION', 'PARTICIPATE', and '1600 PENN'. The main content area features a sidebar with categories such as 'From the Press Office', 'Speeches & Remarks', 'Press Briefings', 'Statements & Releases', 'Nominations & Appointments', 'Presidential Actions', 'Executive Orders', 'Presidential Memoranda', 'Proclamations', 'Legislation', and 'Disclosures'. The main headline is 'Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats', dated September 24, 2017. Below the headline is the text of the proclamation, which begins with 'I, DONALD TRUMP, PRESIDENT OF THE UNITED STATES OF AMERICA' and 'A PROCLAMATION'. A callout box with a wavy border is overlaid on the bottom left of the screenshot, containing the text 'Takes effect October 18'.

Other cases in lower courts

- Emoluments clause
- Transgender military ban
- Sanctuary cities' federal funding
- DACA and now DACA termination
- *House v. Price* (Obamacare)

And a new issue....

- Presidential speech



- [one] may be surprised at the *poverty* of really useful and unambiguous authority applicable to concrete problems of executive power...
- [Indeed, a] century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected resources on each side...



Source: concurring opinion, *Youngstown Sheet & Tube v. Sawyer*, 1952

To learn more

- Number of executive orders by president
- Executive orders by year
- President Trump's executive orders
- Supreme Court: scotusblog.com
- Lwittern@albany.edu

**SUPREME COURT
EXPANSION
OF
PRESIDENTIAL
POWER**
Unconstitutional Leanings
LOUIS FISHER