

“The Law According to Trump”
Panel 1: The Executive Branch and Executive Power

Constitutional Background on the Executive Power

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My main task as moderator of this panel, in addition to introducing the panelists, is to provide a brief contextual introduction to the topic of federal executive power under the Constitution of the United States.

We can start with [Article II](#) of the Constitution, which is devoted to the power of the President. Probably the most important constitutional power granted to the President is “the executive Power.” Art. II, § 1 provides: “The executive Power shall be vested in a President of the United States of America.” Art. II, § 3 goes farther, imposing a duty on the President to “take Care that the Laws be faithfully executed.”

The scope of the executive power has been hotly debated since the Constitution was framed. Broadly speaking, some have argued that Art. II’s grant of “the executive Power” limits the President’s executive authority to the implementation of statutes enacted by Congress; others (beginning with Alexander Hamilton) have contended that the President possesses some inherent executive authority to take actions beyond mere enforcement of legislation.

In addition to “the executive Power,” the Constitution also grants other, more-specific powers to the President. Art. II makes the President “Commander in Chief of the Army and Navy of the United States” (§ 2, cl. 1). It gives the President the powers to “grant Reprieves and Pardons” (§ 2, cl. 1), to “make Treaties” “by and with the Advice and Consent of the Senate” (§ 2, cl. 2), and to “appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States,” also “by and with the Advice and Consent of the Senate” (§ 2, cl. 2). The President also has powers that relate to the legislative process, including most prominently the powers, granted by Art. I, § 7, to “sign” a bill into law, or to “return it, with his [sic] Objections,” to Congress (i.e., to veto it). Art. II, § 3 also confers upon the President the authority to “convene both Houses [of Congress], or either of them” “on extraordinary Occasions,” and to “adjourn them” “in Case of Disagreement between them, with Respect to the Time of Adjournment.” These specific powers exist in addition to the President’s general “executive” power and, like that more-general power, their boundaries are contested.

One complicating factor in assessing those boundaries is the fact that there is relatively little judicial case law helping to establish them. Many Executive Branch actions are never assessed by a court, either because no one possesses standing to challenge them, or because their validity constitutes a “political question” that the courts will not entertain,

or because they become a *fait accompli* before a lawsuit can be filed, or for some other reason.

I want to focus here, briefly, on Art. II's general grant of "the executive Power" to the President, which is the most important source of the President's power, both historically speaking and perhaps to a greater extent in recent times. The past century has seen an enormous expansion in the importance of the executive power. This is primarily because Congress has delegated an enormous amount of authority to agencies within the Executive Branch to work out the details of legislation. Congress has done a lot of legislating in the past hundred years or so, and clearly Congress itself cannot manage the particulars of how every statute it enacts will be interpreted and enforced in practice. This function is delegated by Congress to the Executive Branch, which administers federal legislation, through its various departments and agencies, primarily in the form of administrative rulemaking. At the head of the Executive Branch is the President – ultimate possessor of "the executive Power" – which means that, with some caveats that I will gloss over here, the President ultimately controls the rules and regulations by which federal legislation is implemented.

In addition to controlling the "execution" or implementation of federal statutes, the President, as the "CEO" of the Executive Branch itself, has the authority to supervise how that branch operates. So the President, for example, can dictate (within the limits of collective bargaining agreements and civil service protections) the relationship between the executive branch and its employees, of which there are millions. The President can influence the terms of the federal government's relationships with its (many) private contractors, including imposing policy-driven restrictions or requirements on those contractors as a condition of doing business with the government. And so on.

Recently – perhaps within the past three presidential administrations – the trend toward the expansion of executive power has been accelerated by partisan gridlock in Congress and between Congress and the Executive Branch. When partisan dysfunction prevents the enactment of full-blown legislation, a President who wants to accomplish her policy goals has little choice but to use the instrumentalities of the Executive Branch to do so unilaterally, to the extent that is possible. So, for example, in its first seven years, the Obama administration promulgated 560 "major" regulations – "[those classified by the Congressional Budget Office as having particularly significant economic or social impacts.](#)" This is almost fifty percent more major regulations than the previous (George W. Bush) administration issued during its first seven years.

So what are the *checks and balances* on the President's use of her executive power? The honest answer is that they are relatively few, at least in an era of partisan dysfunction. Theoretically, Congress could *amend its statutes* to prohibit the Executive Branch from enforcing its statutes in a way of which Congress disapproves (or to require it to enforce those statutes in a way of which Congress approves). Or, less directly, Congress could withhold funding from Executive Branch agencies that do not act the way Congress wants them to act. The obvious problem with this remedy, of course, is that the very dysfunction that opens space for unilateral executive action also prevents Congress from

enacting legislation to check that action. Even if Congress could muster a majority in both Houses to check the President in one of these ways, the President herself could always veto the resulting bill, requiring an even-less-likely two-thirds majority in both Houses for an override. *See* Art, I, § 7.

Short of actual legislation, Congress can, and frequently does, hold *hearings* to put pressure on Executive Branch officials to do or refrain from doing certain things. In an environment where major legislation is unlikely, the point of these hearings typically is to raise the public visibility of an issue and thus intensify political pressure on the Executive Branch to reconsider its policy. This suggests a bigger-picture potential check on executive power: *electoral pressure*. The President, during her first term, must worry about re-election, and thus she has some incentive to avoid controversial uses of executive power. There is [some evidence](#) that this concern can in fact temper a President's unilateral activity, at least during an election year. Of course, a President in her second term does not need to worry about re-election. *See* [Amend. XXII](#). Moreover, as a teacher of procedure, I harbor a profound cynicism about the extent of the average citizen's genuine concern for procedural niceties such as the separation of powers. My admittedly unscientific suspicion is that most members of the public care more about the substance of the President's policies than about whether those policies have been effected through full-blown legislation, administrative rulemaking, executive order, or for that matter incantation of mystic runes.

Finally, and perhaps most saliently, the Executive Branch can be *sued in court* for exceeding its power. Judicial review [has in fact been the most successful method](#) for keeping the Executive Branch in check in recent years. But the courts are a fickle dance partner. Their reliability as a check on executive power depends, first of all, on their personnel, that is, on judges (and at the top, Supreme Court Justices) who are willing to play that role. The next President will appoint at least one Justice and, in all likelihood, more than one, and it remains to be seen (to put it mildly) whether the Supreme Court we will have in two or three years will be capable of meaningfully checking executive power. And even with a willing Court in place, there are other obstacles to judicial review of executive action, including justiciability requirements; a very incomplete and indeterminate legal background for such challenges; the considerable expense of litigation; and the fear of reprisals against those who challenge the President's authority.

For me, then, the bottom line is this. In an era of partisan dysfunction in Congress, the likelihood of meaningful checks on the executive power seems to depend primarily on (1) an independent judiciary and (2) a vigilant public. There are reasons to worry about the efficacy of both factors. Stay tuned.