

Lawsuits, Courts, and Executive Authority

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Carsey Policy Hour

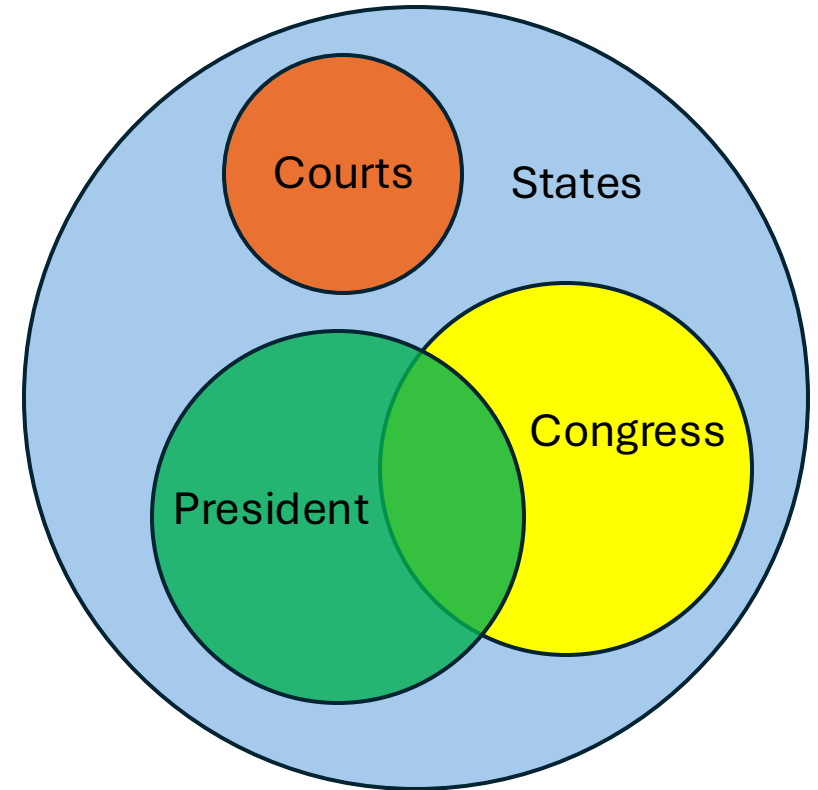
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Outline

1. General introduction to the separation of powers and limits on executive power.
2. Recent executive actions which are potentially problematic Constitutionally.
3. Predictions and analysis.
4. Questions and answers.

I. The Allocation of Powers

- Article I: Powers of Congress
- Article II: Powers of the President
- Article III: Powers of the Court
- Tenth Amendment: Powers of the States



I. The Allocation of Powers

Presidential Powers

“Vesting Clause”

- Art. II Sec. 1 “The executive power shall be vested in a President of the United States of America.”

“Appointments Clause”

- Art. II Sec. 2 “... and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.”

“Take Care Clause”

- Art. II Sec. 3 “... he shall take care that the laws be faithfully executed...”

I. The Allocation of Powers

Presidential Powers

“Treaty Clause”

- Art. II Sec. 2 “He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.”

- Art. II Sec. 2 “The President shall be commander in chief of the Army and Navy of the United States...”

“Pardon Clause”

- Art. II Sec. 2 “...and he shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”

I. The Allocation of Powers

Presidential Powers

- Historical “Constitutional Crises” involving executive power:
 - Jefferson (*Marbury v. Madison*)
 - Jackson (*Worcester v. Georgia*)
 - Lincoln (*Ex parte Merryman*)
 - FDR (court-packing plan)
 - Truman (*Youngstown Sheet & Tube*)
 - Nixon (*U.S. v. Nixon*)
 - Bush (*Hamdan v. Rumsfeld*)
- Trump’s Thematic Arguments:
 - Presidential power over foreign policy & immigration
 - Unitary executive theory and control over the administrative state
 - Presidential discretion on spending and federal funding

I. The Allocation of Powers

Limitations on Presidential Powers

- Congressional Limits
 - Congressional legislative power.
 - Congressional appropriations power.
 - Advice and consent power.
 - Impeachment.
- Judicial Review
- State Sovereignty
- Individual Rights

I. The Allocation of Powers

Judicial Approaches to Constitutional Interpretation

- Originalism
 - Original Intention
 - Textualism
- “Living Constitutionalism”
- Structuralism
- Institutionalism
- Pragmatism

I. The Allocation of Powers

Judicial Approaches to Constitutional Interpretation

Originalism/Textualism	Living Constitutionalism	Institutionalism
Thomas	Sotomayor	Roberts
Alito	Kagan	Kavanaugh
Gorsuch	Jackson	
Barrett		

II. Testing the Limits on Executive Authority

National Security and Foreign Policy

- Withdrawal from WHO and Paris Climate Agreement.
 - Authority: *vesting clause*
 - U.S. participation in WHO and Paris Climate Agreement is an *executive agreement*, not a treaty.
- Withdrawal from NATO.
 - Authority: *structural argument from treaty clause*
 - Counter: *structural argument from treaty clause*
- Designating foreign drug cartels as “foreign terrorist organizations”
 - Authority: Antiterrorism and Effective Death Penalty Act of 1996

II. Testing the Limits on Executive Authority

Immigration

- Ending birthright citizenship.
 - Authority: Take care clause, Fourteenth Amendment
 - Counter: Fourteenth Amendment, *Wong Kim Ark*
- Asylum suspension.
 - Authority: Immigration and Nationality Act §212(f).
 - Counter: Due Process Clause.
- Freeze on Refugee Admissions Program.
 - Authority: Refugee Act of 1980.
 - Counter: 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.
- Declaration of “national emergency” on the southern border.
 - Authority: National Emergencies Act.
 - Counter: Appropriations clause.
- Expansion of mass deportations.
 - Authority: Immigration and Nationality Act
 - Counter: Due Process

II. Testing the Limits on Executive Authority

Culture War Issues

- Eliminating DEI programs within the government.
 - Authority: Vesting clause, take care clause.
 - Counter: Equal protection clause.
- Eliminating DEI programs outside the government.
 - Authority: Take care clause.
 - Counter: Appropriations clause, Impoundment Control Act of 1974
- Defining “sex” in terms of biological sex at birth.
 - Authority: Take care clause and Congressional silence.
 - Counter: Equal protection clause, judicial review.
- Cutting funding to health care funding to healthcare providers offering gender-affirming care.
 - Authority: Vesting clause
 - Counter: Appropriations clause, equal protection clause, Impoundment Control Act of 1974
- Federal oversight of state education policies.
 - Authority: Vesting clause, take care clause, Title I & Title IX
 - Counter: State sovereignty and anti-commandeering doctrine.

II. Testing the Limits on Executive Authority

Executive Legislation

- Deregulation initiative.
 - Authority: Vesting clause, take care clause, *West Virginia v. EPA*
 - Counter: Separation of powers, Administrative Procedure Act.
- Making administrative agency accountable to the President.
 - Authority: Vesting clause, appointments clause
 - Counter: Separation of powers and *Humphrey's Executor v. U.S.*
- Establishment of DOGE.
 - Authority: Vesting clause, take care clause.
 - Counter: Appropriations clause, Article I, Sec. 8
- Freezing federal funds.
 - Authority: Take care clause
 - Counter: Appropriations clause, Impoundment Control Act of 1974

II. Testing the Limits on Executive Authority

Climate and the Environment

- Withdrawal from Paris Climate Agreement.
 - Authority: *vesting clause*
 - U.S. participation in Paris Climate Agreement is an *executive agreement*, not a treaty.
- Freezing Congressionally approved funds for clean energy projects.
 - Authority: Take care clause
 - Counter: Appropriations clause, Impoundment Control Act of 1974
- Halting offshore wind leasing.
 - Authority: Vesting clause, Outer Continental Shelf Lands Act.
 - Counter: Outer Continental Shelf Lands Act and Energy Policy Act of 2005.
- Halting water conservation policies in southern California.
 - Authority: Take care clause.
 - Counter: Appropriations clause, State Sovereignty, Endangered Species Act
- Rollback of Clean Air Act enforcement.
 - Authority: Take care clause, *West Virginia v. EPA*
 - Counter: Take care clause, *Youngstown v. Sawyer*

II. Testing the Limits on Executive Authority

Crime

- Restoring the death penalty.
 - Authority: Vesting clause, take care clause, Federal Death Penalty Act of 1994.
 - Counter: Eight Amendment, due process clause, equal protection clause.
- Federal control over local law enforcement (tying funds to compliance with federal directives).
 - Authority: Vesting clause.
 - Counter: State sovereignty and anti-commandeering doctrine.
- Presidential pardons.
 - Authority: Pardon clause.
 - Counter: Impeachment exception, state sovereignty

III. Predictions and Analysis

Policy	Trump's Claimed Authority	Counterarguments	Constitutional Risk
Deregulation Initiative	Take Care Clause (Art. II, Sec. 3), Vesting Clause (Art. II, Sec. 1)	Administrative Procedure Act requires process, Congress controls statutory mandates	Low
Making Agencies Accountable to President	Unitary Executive Theory, Removal Power (Art. II, Sec. 2)	<i>Humphrey's Executor</i> precedent protects some independent agencies from at-will removal	Moderate
Establishment of DOGE	Reorganization Authority (Art. II, Take Care Clause)	Congress must approve new Cabinet departments, Appropriations Clause limits funding	High
Freezing Federal Funds	Take Care Clause (Art. II, Sec. 3), Impoundment Discretion	Congress controls spending, Impoundment Control Act limits freezes	High
Freezing Clean Energy Funds	Take Care Clause (Art. II, Sec. 3), Impoundment Theory	Congress controls spending, Impoundment Control Act restrictions	High
Halting Offshore Wind Leasing	Executive control over DOI, Outer Continental Shelf Lands Act	Statutory constraints in OCSLA, Commerce Clause lawsuits possible	Low
Halting Water Conservation Policies in California	Executive oversight of federal agencies (DOI, Bureau of Reclamation)	10th Amendment protects state water rights, Appropriations Clause controls funding	Moderate
Rollback of Clean Air Act Enforcement	<i>Chevron</i> Limits, EPA Discretion, Take Care Clause	Clean Air Act is statutory law, <i>Youngstown</i> precedent limits non-enforcement	Moderate
Restoring the Death Penalty	Take Care Clause (Art. II, Sec. 3), Federal Death Penalty Act	8th Amendment concerns, Equal Protection Clause challenges possible	Low
Federal Control Over Local Law Enforcement	Spending Clause (Art. I, Sec. 8), DOJ Grant Authority	10th Amendment (anti-commandeering), <i>NFIB v. Sebelius</i> limits coercion	Moderate
Presidential Pardons	Pardon Clause (Art. II, Sec. 2)	Self-pardons untested, Impeachment Exception applies, no power over state crimes	Very Low
Withdrawal from Paris Agreement	Executive Agreement Withdrawal Power (Art. II, Vesting Clause)	Senate ratification required for treaties, international obligations under UNFCCC	Very Low

Policy	Trump's Claimed Authority	Counterarguments	Constitutional Risk
Eliminating DEI Programs	Take Care Clause (Art. II, Sec. 3), Executive Oversight	Congress controls funding for DEI programs, Equal Protection Clause challenges	Low to Moderate
Defining 'Sex' in Terms of Biological Sex	Take Care Clause, Administrative Agency Discretion	<i>Bostock v. Clayton County</i> protects gender identity under federal law, Equal Protection Clause	Moderate
Cutting Federal Funding to Healthcare Providers	Take Care Clause, Spending Power Discretion	Appropriations Clause limits presidential discretion, Equal Protection Clause concerns	Moderate
Ending Birthright Citizenship	Executive Order redefining 14th Amendment's 'Jurisdiction' Clause	<i>United States v. Wong Kim Ark</i> sets precedent for birthright citizenship	Very High
Asylum Suspension	Immigration and Nationality Act (INA) §212(f), Take Care Clause	Asylum laws protect due process, 5th Amendment concerns, Refugee Convention obligations	Moderate
Freeze on Refugee Admissions Program	Refugee Act of 1980, Presidential Discretion over Admissions	International treaty obligations (1951 Refugee Convention, CAT), statutory limits	Moderate
Declaring National Emergency on Southern Border	National Emergencies Act, Commander-in-Chief Powers	Congress controls funding and emergency declarations, Insufficient factual basis challenges	Low to Moderate
Mass Deportations	INA, Executive Discretion over Immigration Enforcement	Due Process concerns for expedited removals, Equal Protection Clause challenges	Moderate
Withdrawal from NATO	Treaty Withdrawal Power (<i>Goldwater v. Carter</i>), Vesting Clause	Senate approval required for treaty withdrawal, foreign policy instability	Low
Withdrawal from WHO	Executive Agreement Withdrawal (Art. II, Vesting Clause)	Congress funds WHO participation, unilateral withdrawal could face legal challenge	Very Low
Designating Foreign Drug Cartels as FTOs	Antiterrorism and Effective Death Penalty Act (AEDPA)	AEDPA was not intended for drug cartels, diplomatic consequences, potential statutory overreach	Low