

POWER STRUCTURE IN UNITED STATES: WHO HAS THE SUPREMACY – THE CONSTITUTION, CONGRESS OR THE PRESIDENT

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The whole world knows that the U.S. President is the most powerful person and has tremendous powers, and may be called the most powerful individual. But few know that the President draws all of his powers from the law of Presidential power. However, there are endless questions about what the law of Presidential power does, and does not, allow the United States President to do. This article offers some answers. It explains laws that govern Presidential power by describing what the President can do, and how he can do it. The article also addresses the opposite side of the question, concerning what the President cannot do, and who has the legal power to stop him. The article explains that the United States Constitution makes it very difficult for any President to introduce significant reforms on his own. The article will take you on a journey through the text of the U.S. Constitution as well as many other sources of authority that empower, yet at the same time limit, the presidential power. Though the significance of these legal sources is complex and sometimes disputed, embarking on this journey is vital in a democracy.

Keywords- Checks and balances, tyranny, president's nomination, veto power, executive power

Introduction

Donald Trump, in his 2016 Republican National Convention speech before millions of viewers, claimed that “Nobody knows the system better than me, which is why I alone can fix it.”¹ Trump’s election campaign promised many reforms, including constructing a wall on the Mexico border, completely stopping the entry of Muslims into the United States, repealing the Affordable Care Act (Obamacare), and dismantling various other

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1 Convention Speech of Donald Trump, available at <https://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974>

regulations.² Trump promised that he would do all these things alone. But within two weeks of his Presidency, Trump got a rude shock from the United States' constitutional doctrine of checks and balances between Congress, the President, and the Executive.

On 3rd February, 2017, the President's lawyers appeared before the District Court to defend the legality of Trump's order banning Muslim travelers from seven countries from entering the U.S. The suit, named *Washington v. Trump*, was filed by the State of Washington. Judge Robart held that the State of Washington had demonstrated a substantial likelihood that the travel ban violated U.S. law. As a result, travel bans could no longer be enforced anywhere in the United States.³

Shocked, President Trump questioned whether a federal district judge could single-handedly put his travel ban on hold. He said on Twitter, "The opinion of this so-called Judge, which essentially takes law-enforcement away from our Country, is ridiculous and will be overturned!"⁴ Thereafter, on 6th February, 2017, the President again tweeted, "just cannot believe a judge would put our country in such peril. If something happens blame him and Court System. People pouring in. Bad!"⁵ But when the Appellate Court also upheld Trump's order, President Trump withdrew his first travel ban order and issued a revised travel ban. However, the federal court again put even the revised restrictions on hold.

In another court, when a different federal judge froze another executive order, the White House again questioned the legitimacy of the federal judiciary and called the court's order "egregious overreach by a single, unelected district judge."⁶ Thus, in the first 100 days of Trump's Presidency, his major campaign promises, the "100-day Action Plan to Make America

2 Jenna Johnson, Donald Trump Calls for 'Total and Complete Shutdown' of Muslims Entering the United States, *Washington Post* (Dec. 7, 2015), available at <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/>

3 *Washington v. Trump* (2017) WL 462040 (W.D. Wash).

4 Donald J. Trump (@realDonaldTrump), February 4, 2017, available at <https://twitter.com/realdonaldtrump/status/827867311054974976?lang=en>

5 Donald J. Trump (@realDonaldTrump), February 6, 2017, available at <https://twitter.com/realdonaldtrump/status/828342202174668800>

6 The White House Statement on Sanctuary Cities Ruling, 25th April, 2017, available at <https://www.whitehouse.gov/briefings-statements/statement-sanctuary-cities-ruling/>

Great Again,” remained unfulfilled.⁷ It happened because President Trump overlooked that the U.S. Constitution creates a checks-and-balances system for dividing powers, to prevent too much authority from concentrating in one person’s hands. The U.S. Constitution intentionally created this division between the different branches, as well as between the States and the Federal Government.⁸ But these judicial rulings gave President Trump a public lesson in civics. These judicial rulings confirm that while the law grants the President immense power, it also imposes significant limits, and that the “President is not above the law.”

The Limit of President Power

The limit of the President’s power had already been explained in 1952 by President Harry S. Truman, while observing the situation that incoming President-elect Dwight D. Eisenhower, a former Army general, was likely to face. Truman said: “He’ll sit here, and he’ll say, ‘Do this! Do that!’ And nothing will happen. Poor Ike! - It won’t be a bit like the Army. He’ll find it very frustrating.”⁹

The U.S. Constitution makes it impossible for a President to make significant changes alone. U.S. constitutional history confirms that Presidents attempting major reforms alone have failed. The obstacles to such unilateral reforms come not only from the courts but also from the U.S. Congress, the States, and many other important forces. Only those Presidents who secured the cooperation of all the affected parties, both political and legal, succeeded in enacting dramatic change.¹⁰ President Obama explained that one reason for the delays in fulfilling his campaign promises was that “a President is not a king,” but “rather he is only the head of the executive branch of government and is required to follow the

7 Donald J. Trump, 2016, Donald Trump’s Contract with American voters, available at <https://apps.washingtonpost.com/g/documents/politics/donald-trumps-contract-with-the-american-voter/2268/>

8 Sanford Levinson & Jack M. Balkin, Constitutional Crises, 157 U. Pa. L. Rev. 2009 p. 707 & 711, available at https://scholarship.law.upenn.edu/penn_law_review/vol157/iss3/1/

9 Robert H. Ferrell, Harry S. Truman: A Life, University of Missouri Press, 1997 U.S.A, P. 379.

10 William G. Howell, Power without Persuasion: The Politics of Direct Presidential Action, Princeton University Press, 2003.

law.”¹¹ The Constitution imposes a powerful checks-and-balances doctrine and grants the President authority to hold office for a term of four years. The U.S. Constitution does not vest authority in a dictator.¹²

An important consequence of this “checks and balances” doctrine is that it gives every citizen the power to keep a check on the President. Democracy in the United States survives on it. Benjamin Franklin recognized the reality of “checks and balances” from the very start. One day in the year 1787, he was asked by a woman, “Well Doctor, what have we got, a Republic or a Monarchy?” Franklin gave her a very crisp answer, “A Republic, if you can keep it.”¹³

How Does the Doctrine of Checks and Balances Create Roadblocks for U.S. Presidents?

John Adams, in his letter to Thomas Jefferson, observed that “power must never be trusted without a check.”¹⁴ The founders of the United States preferred conflict over harmony. According to them, conflict is a sign of good government. The absence of conflict leads to an accumulation of authority. “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”¹⁵

For preventing this threat of tyranny, the founders drafted the Constitution by defining powers and distributing them among different governmental actors, whether appointed or elected. Because of this system of checks and balances, no one in the U.S. Government, or even the President, can have an unchecked ability to make or revise the law.¹⁶

“Checks and balances” in the U.S. constitutional structure operate as a very powerful roadblock. There are many examples of when this doctrine caused difficulty for U.S. Presidents. For example, it caused the first U.S.

11 Univision news. (Jan. 31, 2013) President Obama’s interview with Univision, ABC NEWS, available at https://abcnews.go.com/ABC_Univision/Politics/transcript-president-barack-obama-interview-univisions-maria-elena/story?id=18365068

12 U.S Constitution Article II, Section 1.

13 Max Farrand, Records of the Federal Convention of 1787, at 85, available at http://oll-resources.s3.amazonaws.com/titles/1787/0544-03_Bk.pdf

14 Lester J. Cappon, Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson, Abigail & John Adams, 1987, p. 463.

15 In Federalist No. 47 by James Madison, 1788, available at <https://www.taraross.com/post/the-federalist-papers-no-47>.

16 James Madison, Federalist No. 51, 1788, available at <https://www.taraross.com/post/the-federalist-papers-no-51>.

President, George Washington, to fail to appoint his preferred nominee for a position in the Navy, because the Senate blocked it. President Washington was angry but succumbed to the Senate's decision. The law gives the Senate the legal authority to reject the President's nominees for certain high-level positions.¹⁷ Even George W. Bush, after his re-election in 2004, threw his full weight behind his project to privatize social security, saying, "I earned capital through this campaign and now intend to spend it." But Congress refused any help, and without its support, Bush's proposal remained only a proposal.¹⁸

Similarly, when President Barack Obama took office, he signed an executive order instructing the Government to close Guantanamo Bay, an American-run detention camp in Cuba, no later than January 2010.¹⁹ This order triggered resistance and legal roadblocks from Congress, because Congress had enacted a statute barring the transfer of such prisoners into the U.S.²⁰ It thwarted Obama's efforts. Even over his two terms as President, Obama could not fulfill this campaign promise.

Legal Structure of United States Government

The Constitution creates the National Government and thereafter divides its powers among its branches. These include the Legislative, Executive, and Judicial Branches. The Constitution also imposes a separate division of power between the U.S. States and the National Government. Additionally, it gives citizens certain protections against the Federal Government or the State Governments. Thus, the Constitution does not concentrate power in one person, in one branch of government, or even in one government. Thus, it is described as "a government of laws and not of men."²¹

17 Origins of Senatorial Courtesy, U.S. Senate Historical Office, Senate Stories, July 5, 2022, available at <https://www.senate.gov/artandhistory/senate-stories/origins-of-senatorial-courtesy.htm>.

18 William A. Galston, 21st September, 2007, Why the 2005 Social Security Initiative Failed, and What it Means for Future, available at <https://www.brookings.edu/research/why-the-2005-social-security-initiative-failed-and-what-it-means-for-the-future/>

19 Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), available at <https://www.presidency.ucsb.edu/documents/executive-order-13492-review-and-disposition-individuals-detained-the-guantanamo-bay-naval>.

20 National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137 (2011); Statement by the President on H.R. 6523, Jan. 7, 2011, available at <https://obamawhitehouse.archives.gov/realitycheck/node/24934>.

21 Marbury vs Madison. (1803) 5 U.S 137, 163.

Division of Power Among the Branches of Government

The Constitution divides the powers of the U.S. Government among three equal branches. First, the Constitution creates the Legislative Branch, which consists of the U.S. Senate, made up of 100 members, two from each of the fifty States. Each Senator is elected for a term of six years through an election that involves all voters of the State. The number of members representing a State depends upon the number of people living in that State.

The second branch is the Executive Branch, which is headed by the U.S. President. It is a very large branch, comprising over 100 federal agencies, including, among others, the Department of Labor, the Social Security Administration, the Department of Justice, and the Environmental Protection Agency. Each of these agencies is created by Congress, not established by the Constitution. Millions of people working in the Executive Branch help the President exercise the power the Constitution calls “Executive Power,” a power that carries out and enforces all the laws enacted by Congress.²²

The third and final branch is the Judicial Branch. This Judicial Branch interprets the law in deciding lawsuits that come before the courts. The design of the Judicial Branch is such that the Constitution creates the Supreme Court and the federal courts.

Congress created two layers of federal courts. The first layer is the district courts, in which cases are filed and decided. The second layer is the Courts of Appeals, in which judges review the district courts’ decisions. Thus, in the judicial hierarchy, the district courts are at the lowest level, and the appellate courts are in the middle.²³

But even though they sit at the bottom, federal district courts possess tremendous power. If a judge of a federal district court finds an executive branch action unlawful, he or she might issue an order halting the action nationwide, not just within that judge’s own district. The ability to issue this type of injunction is an extraordinary power.²⁴ Yet, unless and until an appellate court overturns the district court’s ruling, a nationwide injunction will block the executive branch action across the entire country. President Trump experienced this firsthand when Judge Robart put the

22 U.S Const. Article II, Section 1.

23 28 U.S.C. § 41 (establishing the courts of appeals); 28 U.S.C. § 132 (creation and composition of the district courts), available at <https://www.law.cornell.edu/uscode/text/28/41> and <https://www.law.cornell.edu/uscode/text/28/132>.

24 Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417 (2017), available at <https://ssrn.com/abstract=2864175>.

first travel ban on hold. Each judge is appointed through a President's nomination and the Senate's confirmation. Once they are seated, the Constitution guarantees them lifetime tenure and salary safeguards.²⁵ As a result, most of these judges remain in office long after the end of the term of the President who nominated them. Constitutional protections shield judges from political pressure, allowing the Judicial Branch to operate independently of the Government.

Power Division between State Government and Federal Government

In reference to the division of powers between the Federal Government and State Governments, Justice Kennedy explained that the founders of the Nation “split the atom of sovereignty.” “It was the genius of their idea that U.S. citizens enjoy two political capacities, one of State and another of Federal, each protected from incursion by the other.”²⁶

The Founders created an innovative political arrangement in the United States, where two sets of governments governed the people in the same place, yet no one was entirely in charge of the other. This phenomenon was called federalism. In the United States, fifty State Governments had control over their own affairs. Each State Government consists of a Legislative, an Executive, and a Judicial Branch. Each State has its own system for appointing judges.

The Constitution gives the Federal Government only limited powers, and expressly provides that those powers not given to the Federal Government may be exercised by the States, or by the people in those States.²⁷

People's Rights

The U.S. Constitution grants individuals certain rights that no government can infringe. These rights are “beyond the reach of majorities and officials” and cannot be violated by the Government, even if politicians (or their voting constituents) want them to do so.²⁸

1. The Government has no right to violate an individual's right to free speech.
2. It also protects an individual's right to engage in religious exercise.

25 U.S Constitution, Article III, Section 1.

26 U.S Term Limits, Inc. v. Thornton, 1995, 514 U.S 779, 838

27 U.S Constitution, Xth Amendment

28 West Virginia State Board of Education v. Barnette, 1943, 319 U.S 624, 638

3. It also stops the Government from establishing a national religion.²⁹
4. The Fifth and Fourteenth Amendments provide due process clauses. This means that the Government is prevented from taking a person's life, liberty, or property without proper due process.³⁰

Powers of the President of the U.S.

Despite all these restraints and roadblocks, this does not mean that the U.S. President lacks power. Rather, each President enjoys sweeping powers in international affairs. In the year 1952, in the case of *Youngstown Sheet & Tube Company v. Sawyer*, the Supreme Court issued a significant decision on the powers of the President.³¹

The facts of the case were as follows. During the Korean War, the U.S. Army needed a continuous supply of steel, but the Steelworkers' Union threatened that its members would strike unless they received an increase in wages. The steel companies' management refused to increase the steelworkers' wages until the Government increased the price of steel. The U.S. President, Harry S. Truman, asked the union and the companies to resolve their disagreements. But in April 1952, fearing that a strike could lead to a steel shortage, the President, just hours before the steelworkers' strike, ordered government officials to seize control of private steel mills and operate them. In response, steel mill company owners filed a case before a federal judge to block Truman's order. The steel companies' cases led to a series of cases that culminated in the *Youngstown Sheet Co.* case, addressing the legal limits of the President's powers. The Supreme Court held that the President had acted beyond his powers, because the President's power to issue an executive order arises from Congress or from the Constitution. The Supreme Court held that neither the Constitution nor any law passed by Congress gave the President the power to nationalize private steel mills, so control of the mills was returned. This decision sent a clear message to the President: there are limits on presidential power, and the law defines those limits. Justice Hugo Black, in this case, said, "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." The President's power is grounded in two sources: (1) the Constitution, and (2) laws passed by Congress. However, the Constitution provides a wide range of powers to the President, including the "power to veto bills" passed by the U.S. Congress.³²

29 U.S Constitution, Amendment I.

30 U.S Constitution, Amendments V, XIV.

31 1952, 343 U.S. 579, 585

32 Patricia L. Bellia, *The Story of the Steel Seizure Case*, in *Presidential Powers Stories*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147039

What Does the Constitution Say About Presidential Powers?

The Constitution establishes the office of the President and grants the President the following powers:

- Recommend laws to Congress
- Veto or sign bills passed by the Houses of the U.S. Congress
- Appoint Supreme Court Justices and other government officials, subject to Senate approval
- Enter into international treaties, subject to Senate approval
- Pardon federal criminal offenses³³

Despite the brevity of this list, the Constitution grants the President a great deal of authority, set forth in its explicit text or implied from its language and structure.

The Power to Recommend and Veto Legislation

Only the Congress has the power to make law. This power is not given to the U.S. President. Article I, Section 1 of the Constitution states, “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” However, the Constitution gives the President two express powers that enable him to influence the legislative process:

First, the Constitution empowers the President to recommend laws to Congress that he deems “necessary and expedient.”³⁴ However, the Constitution does not require Congress to accept what the President recommends. For example, in 1993, President Bill Clinton delivered to Congress a legislative blueprint for universal health insurance, but very few members were willing to support it, so the President’s proposal never became law.³⁵

However, this constitutionally conferred power can help a President persuade Congress to enact major legislative reform. For example, President Lyndon B. Johnson pushed the Civil Rights Bill through Congress, and it ultimately became law. Today, the Civil Rights Act is considered one of the landmark pieces of legislation in the field of civil rights.³⁶

33 U.S Constitution, Article II, Section 2, clause 1.

34 U.S Constitution, Article II, Section 3

35 Robert Pear, Clinton’s Health Plan: The Overview, 28th October, 1993; available at <https://www.nytimes.com/1993/10/28/us/clinton-s-health-plan-overview-congress-given-clinton-proposal-for-health-care.html?pagewanted=all>

36 Richard E. Neustadt, Presidential Power and Modern Presidents: Politics of Leadership from Roosevelt to Regan, 1990

Second, in addition to recommending laws to Congress, the Constitution also allows him to veto legislation, meaning he can block its passage.³⁷ Through this veto power, the President can forcefully push back against Congress's agenda.³⁸

However, there is a condition: when Congress submits a bill to the President for his consideration, he must either approve the entire bill as passed by both Houses of Congress for it to become law, or veto the whole bill. He cannot sign only part of a bill into law.³⁹ If the President chooses to veto a bill instead of signing it into law, he usually returns the entire bill to Congress with an explanation. Even after a bill has been vetoed, Congress can enact it into law with a two-thirds majority of both Houses of Congress.⁴⁰ The Constitution provides only to the President the power to appoint high-ranking officials and federal judges. However, this power is limited by the requirement of "the advice and consent of the Senate."⁴¹

The Power of the U.S. President to Remove Officials

The Constitution gives the President a contrasting set of powers. The President is never able, under any circumstances, to remove a federal judge from office. Federal judges can be impeached only if they are impeached by the House and convicted by the Senate. Thus, judges have powerful protections against political reprisal. But, in contrast, the Constitution provides the President significant authority to fire officials who help execute the laws. It means that the President can fire high-ranking officials for any reason.⁴²

However, even the President's authority to remove high-ranking officials is not without limits. If Congress wants to limit this power, it can do so by passing a statute. The U.S. Supreme Court held this limitation to be constitutionally permissible.⁴³ Congress generally imposes these kinds of limits on the President's removal power when it wants to protect certain high-level officials from presidential influence.⁴⁴

37 U.S Constitution, Article I, Section 7, clause 2

38 Vetoes, United States Senate available at <https://www.senate.gov/legislative/vetoes/vetoCounts.htm>

39 Clinton v. City of New York, 524 U.S. 417 (1998).

40 U.S Constitution, Article I, Section 7, clause 3

41 U.S Constitution, Article II, Section 2, clause 2

42 Free Enterprise Fund v. Public Company Accounting Oversight Board, 2010, 561 U.S 477, 514

43 Humphrey's Executor v. United States, 1935, 295 U.S 602, 632

44 Morrison v. Olson, 1988, 487 U.S 654

The President's Power to Execute the Laws

The Constitution states that “the executive Power shall be vested in a President of the United States” and that “he shall take Care that the Laws be faithfully executed.”⁴⁵ This authority makes the President responsible for implementing and enforcing the nation’s many laws, which govern everything from air quality to Social Security benefits, from drug laws to national safety.

The President is the Commander-in-Chief of the armed forces. However, this clause has given rise to many interpretations. One view is to interpret the clause broadly, to provide legal authority for “any Presidential action in relation to the armed forces.” Such an interpretation gives sweeping powers to the U.S. President.⁴⁶ Another view interprets the clause narrowly, meaning “that the country’s armed forces ultimately remain under the supervision of the President, rather than a military leader or a dictator.”⁴⁷

In the context of this clause, the Youngstown case reflects, among other things, the fact that the Constitution expressly grants some military-related powers not to the President but instead to the U.S. Congress. The Constitution expressly contemplates that both the President and Congress shall be responsible for the country’s military-related decisions. The Youngstown case explains why the President has such sweeping legal authority to conduct military operations if Congress gives him express authority to do so. A current example is the 2001 terrorist attacks. After the terrorist attacks, the U.S. Congress passed a bill that authorized the President to take action against those whom the President determined had committed or aided terrorist activities.⁴⁸

Based on these powers, President Bush ordered military operations in Afghanistan. After President Bush, Presidents Obama and Trump also used this statute to take military action against ISIS. Before this statute, Congress had passed the War Powers Resolution in 1973, which imposed various consulting and reporting requirements on the President, requiring him to engage with Congress when the nation is at war. It also restricts the President’s ability to commit armed forces to military action for more

45 U.S. Constitution, Article II, Section 1, clause 1; Section 3

46 Youngstown, 343 U.S. at 637

47 Michael D. Ramsey & Stephen I. Vladeck, Commander in Chief Clause, available at <https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/345>

48 Authorization for use of Military Force, Public Law. No. 107-40, 2001 available at <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>

than 60 days without obtaining congressional authorization.⁴⁹ However, the War Powers Resolution did not end the power struggle between the U.S. President and Congress in international affairs. Members of Congress still want to clarify the law on the use of nuclear weapons, specifically whether, as Commander-in-Chief, a President is allowed to order a nuclear attack without the approval of Congress.

Some legislators proposed a bill providing that if Congress has not declared war, the President has no authority to order a nuclear attack. The stated rationale was that nuclear weapons are extremely powerful, and that the Constitution places the “monumental decision to go to the war” in the hands of the people’s representatives, meaning Congress, rather than in the hands of a single President.⁵⁰ However, this legislation has not been enacted.

The President’s Power to Negotiate International Treaties

The President is empowered by the Constitution to negotiate international treaties.⁵¹ However, a treaty can be ratified only if two-thirds of the Senators vote in support. After ratification, a treaty becomes the law of the land. The U.S. Senate, in its first 200 years, approved more than 1,500 treaties and rejected only 21.⁵²

Conclusion

Thus, at face value, the President of the United States wields tremendous power. Yet, the President has power only because some source of law grants that power. The U.S. Constitution is a major source that gives the President the ability to perform specific tasks. In addition to the constitutional provisions, the statutes enacted by Congress provide vast powers to the President. Thus, the conclusion is that, whether constitutional or statutory in origin, the President’s power comes from a source of law. And the same source of law defines limits on power.

49 War Powers Resolution, Public Law No. 93-148, 87 Stat. 555 (1973), available at <https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter33&edition=prelim>

50 Restricting First Use of Nuclear Weapons Act of 2017, 115th Congress

51 U.S. Constitution, Article II, Section 2, clause 2.

52 Treaties, U.S. Senate, available at <https://www.senate.gov/artandhistory/history/common/briefing/Treaties.html>