

Executive Power 101

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

Regardless of their political ideology or partisan stripe, modern presidents regularly raise constitutional controversies when they exercise executive authority.

President Obama’s 2014 DAPA program (which would have postponed deportability for several million undocumented parents of U.S. citizens and permanent residents) was twice declared illegal by lower federal courts.

And, the Trump presidency has already generated more than its share of controversial executive orders – including the firestorm erupting around late-January orders to temporarily close U.S. borders to immigrants and other entrants from seven predominantly Muslim countries.

These recent developments make it especially appropriate for this podcast to provide an “Executive Power 101” primer – so that *listeners* will understand what’s in the background of the inevitable controversies that will likely unfold.

The core principles surrounding the president’s power to act are fairly straightforward -- although application of these can be especially detailed and difficult. The basic guidelines were stated in the 1952 decision in *Youngstown Sheet and Tube Co. v. Sawyer*, in which six justices ruled that President Truman could not by executive order seize the nation’s steel mills to avert a strike threatening Korean-War-era steel production. Justice Hugo Black’s *Youngstown* majority opinion stated that the Constitution affords the president two alternative paths to power.

First, the president can legitimately claim to act as the agent of Congress. Article I of the Constitution provides the Congress with a variety of powers, such as authority to regulate commerce. And since the late-1930’s, constitutional doctrines have recognized the necessity of Congress delegating authority to the president or other executive-branch officials to ongoingly implement congressional commands.

Second, quite apart from gaining power through congressional delegation, Article II of the Constitution gives the president his own executive powers. Principal among these are the “commander in chief” power and the power to “faithfully execute the laws of the United States.”

The bottom line? Whatever the political or other merits of presidential orders, their *legal* validity depends upon a showing that the president is either acting as Congress’ legitimate representative or acting within his own powers.

Of course, this seeming clarity can quickly become fuzzy. For one thing, figuring out whether the laws passed by Congress permit executive discretion or create a mosaic of statutes the president is “faithfully executing” requires in-depth analysis of the words, legislative history, and purposes of past enactments. These “legislative intent” indicators are subject to multiple interpretations and spirited argument.

A second complication comes from the two competing tendencies long used by judges and other officials in assessing claims of presidential power. Sometimes, the approach is highly “formalistic”, emphasizing strict compliance with “finely wrought” distinctions between executive and legislative power. At other times, a majority has been more “pragmatic” – recognizing, as Justice Robert Jackson wrote in his Korean-War-era *Youngstown* concurrence, that “in the actual art of governing,” whether the president’s claim of power prevails depends “on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”

One ultimate complication is that, even if the president and his underlings have the *power* to do what they are claiming, the individual-liberties protections in other parts of the Constitution may constrain them. Thus, had the *Youngstown* Court decided that President Truman had the *power* to order steel mill seizures, the Court would then have had to decide whether Truman’s order was nevertheless illegal because it threatened property rights enshrined in our founding document. And, even if the Trump Administration is deemed to have the *power* to issue his Muslim-country travel ban, it might still violate due process of law or rights against religious discrimination.

Such is the constitutional tightrope that any president must walk!