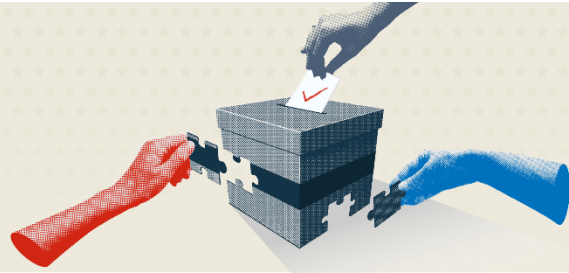


DEMOCRACY IN QUESTION

BROOKINGS



THE BROOKINGS INSTITUTION *Democracy in Question* podcast

“Is it the courts’ job to check executive overreach?”

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Episode Summary:

The U.S. judiciary has a long-established role in checking executive power, tracing its authority back to common law traditions and *Marbury v. Madison*. However, the Trump administration presents an unprecedented challenge by systematically enacting policies that conflict with existing statutes. In this episode, host Katie Dunn Tenpas and Senior Fellow Benjamin Wittes explore consequential pending court cases along with the statutory questions and constitutional considerations they raise.

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TENPAS: Hi, I'm Katie Dunn Tenpas, a visiting fellow in Governance Studies at the Brookings Institution and director of the Katzmman Initiative on Improving Interbranch Relations and Government. And this is season two of Democracy in Question, a podcast where we examine current events through the lens of America's political foundations, thinking about how recent events fit into broader stream of democracy that runs throughout our history. You can find episodes of this podcast at Brookings dot edu slash DemocracyInQuestion, all one word.

On today's episode, I'm posing the question, is it the courts' job to check executive overreach? Mass firings of federal workers, the deportation of people without due process, the detention of pro-Palestinian protestors, and the defunding of key research institutions. As of today, March 18th, 2025, these are just a few of the Trump administration's recent actions that have sparked serious questions of constitutionality. So how far can a president go? And where does a judiciary step in to check the executive branch?

In this episode of Democracy in Question, we're diving deep into the vital role of the courts in safeguarding constitutional boundaries. We'll explore some of the most consequential pending court cases since President Trump's inauguration along with the statutory questions and constitutional considerations they raise. We hope to give you a clear, thoughtful understanding of how the judiciary works to keep executive power in check when it matters most.

I'm thrilled to be joined by my colleague, Ben Wittes, a senior fellow in the Governance Studies program at Brookings and co-founder and editor-in-chief of Lawfare. Together, we'll break down these critical issues and explore what's at stake for American democracy.

Welcome, Ben. I'm eager to dive into the discussion with you about how pivotal of a role the courts play in maintaining our system of checks and balances.

WITTES: Thanks. Good to be here.

TENPAS: So why don't you just take it from there, from that intro, what are you thinking?

[2:13]

WITTES: All right, so let's start with the easy part, which is the question of do the courts have a role in checking the executive branch in the legality of its action. And the answer to that question in our historical system is yes, absolutely. And that goes back really a very long way. So, obviously the right of judicial review of the constitutionality of legislation of congressional action is claimed as early as *Marbury vs. Madison* in 1803.

But the idea that the courts might restrain executive activity is actually even older than that, right? So the idea of habeas corpus, where you're challenging the legality of somebody's detention is in the common law predating the Constitution. The idea

that that the courts might seek to restrain the executive branch from unlawful action is quite early established in in the American tradition. So that's the easy question.

The hard question, and one that we have never really confronted before, is what happens when a president comes into office and immediately, across a wide range of diverse programmatic activity, starts doing things that are in conflict with statutes. Now, notice that I didn't say illegal. Because in each of these cases, he has some theory about why he's in fact allowed to do this. But there's at least somebody who would say, no, you're not allowed to do this because this law says you have to behave this way. Right?

And so he comes in and just, you know, with it's got an everything everywhere all at once quality, throws a million legal questions at the wall all at the same time. And of course, because these are not hypotheticals, these are real people getting fired, they're real people getting deported, they're real people getting put on administrative leave, or they're real people having their expected grants withheld, right? they immediately sue.

TENPAS: Right, there are consequences and there are plaintiffs.

[4:56]

WITTES: Right, there are plaintiffs. You're mostly not dealing here with situations where, you know, you can do it in slow motion because there's not really any immediate harm to somebody. It's kind of a hypothetical, right? Congress passes a law that theoretically would affect the following people negatively in the following ways, but nobody's actually been prosecuted under those laws. We're not dealing with that situation.

We're dealing with thousands and thousands of actually harmed people who are claiming the executive branch is behaving illegally all at the same time. And that is a problem that I don't think we have ever faced before. We've faced situations where the president is alleged to have done one really big thing illegally: seizing the steel mills, suspending habeas corpus, right? And you kind of have some time to figure it out. But there is a deep challenge to the courts in the doing everything everywhere all at once problem and pivotally doing it while talking about your authority to defy court orders. So you're kind of putting the courts on notice, I'm gonna do all this stuff that you might think is illegal and if you say it's illegal, I'm gonna do it anyway. And that's the nature of the current challenge.

TENPAS: And I understand that as of this point, there's over 100 cases that have been filed. Is there a way to categorize them or to prioritize them? Is there some sort of hierarchy where you see some of these challenges as the most significant to our democracy?

[6:39]

WITTES: Yeah, okay, so let me divide them into four categories of cases. I used to say three, but now I think there's now meaningfully a fourth category. So the first category, which is the smallest, is the category of cases where the administration is

taking a substantive policy position that somebody finds objectionable and illegal, and that substantive view of policy is being challenged.

So the most prominent example of this category, which I say is the smallest category, is the birthright citizenship case. Right? The administration comes in and says the Constitution has always been understood to stand for, you know, you're born here as a child of illegal aliens, you're a citizen anyway. We think it doesn't mean that, and we direct the executive branch to behave otherwise. Somebody comes in and sues and says, no, it actually means what it appears to say, right? So that's category one.

Category two is firing people. And these are all in the government people, right? So it's some of them involve people who were the heads of independent agencies. Some of them involve line people at FBI and at the Justice Department who have civil service protections. But in each of these cases, the president is taking the position, I, under the Appointments Clause, have the authority to control the executive branch, and that means if you work for the executive branch, I can fire you.

TENPAS: Yeah, and I wanted to add in one more subgroup there that I think is kind of interesting. It's the inspectors general, right?

WITTES: Yes.

TENPAS: Because they're congressionally mandated.

WITTES: Right. So, well as are the independent agencies. So in each of these cases the president claims the authority to control the executive branch and there's some statute that Congress has passed that gives this person some category of protection. So you know, civil service protections, right? Or by law independent agencies you can only remove the heads of independent agencies with some form of cause, right? And inspectors general who also have that for cause removal. And also ... it's not even a for-cause removal, it's a notification requirement.

TENPAS: I think it's like two weeks or something like that.

WITTES: Yeah, it's some like notification period. So in each of these, the administration says, no, we can ignore the law because the president's authority to control the executive branch is broad.

TENPAS: Well, does that mean then that this notion of civil service protections, I mean, I think most observers of American government have always sort of thought that one of the good things about working for the federal government is that you do have protections.

[9:32]

WITTES: In each of these cases, the strongest position of the executive branch would be that, you know, we get to do this and laws that get in the president's way in this regard are invalid.

Now, I think the higher up you are in the government, the more you're in a policymaking role, the more likely that claim is to have legs in the courts, particularly

as they're currently constituted. I doubt very much that the courts will say the president can override civil service protections, but that's, you know, gonna be the claim. And so that's category two.

Category three is, you know, this thing that has, you know, cropped up in its variety of different contexts, but there are DOGE, you know, sort of shutting down federal agencies entirely, right? dismantling federal agencies. They often involve what's called an impoundment where Congress has said, you must spend money on X, Y, and Z, and the president says, no, I'm not spending that money, right? And sometimes that shows up in a foreign policy context like the USAID cases. And sometimes it shows up in a more domestic context like some of the freezes on, you know, federal grants, right? And so there is this broad category of cases that involves some measure or another of impoundment.

And there's a related set of cases that involve, okay, we're going to dismantle this agency, even though Congress required that this agency exist, right? So what if we what if we strip it down to the bone? How far can we go in getting rid of the CFPB, the Consumer Financial Protection Board, without running afoul of the statute that creates it. And by the way, if we do run afoul of that statute, can we get away with it anyway? So that's category number three.

Categories two and three account for an enormous percentage of the litigation. This brings me to category four, which I think really came to fruition this week, which is litigations involving immigration detainees and people who are to one degree or another slated for deportation. And those have become particularly acute since the president issued an order invoking the Alien Enemies Act of 1798.

TENPAS: Older than *Marbury v Madison*.

WITTES: Older ... usually *Marbury versus Madison* is the oldest thing that gets cited in a con law discussion that's not the Constitution itself. Not today. So those cases, again, they're relatively small in number, but they're super, super important because they involve, you know, people getting detained at airports, right? and then denied entry to the country despite an apparently valid visa, or a few hundred Venezuelans being put on planes and flown to Panama despite a court order that says the planes have to turn around. And so these are, you know, acute separation of powers questions that really impact the liberty of human beings.

TENPAS: And from your perspective, which do you see as the most threatening to democracy, American democracy?

[13:20]

WITTES: Okay, so they're very different in that regard. So the most profound tectonic question, it does not involve, you know, human liberty or anything, is in my opinion the impoundment question, because this is a question of whether Congress really has the power of the purse or whether one of the purse strings is held by the president. So, I think if you're thinking about the sort of tectonic plates of democracy, this is the most profound and important question. If you're thinking about the costs for human liberty, it's really hard to argue with the immigration cases.

And if you're thinking about the cases that are fundamentally about the president's control over the executive branch, those are really, really important for the question of whether the president can turn the executive branch into an instrument of his personal will.

And so I would say they're really important for different aspects of democracy. And the, you know, the one that I think is the least important is ironically the ones that challenge, you know, substantive policy areas. You know, I believe in birthright citizenship, but there are democratic countries that have it. There were democratic countries that don't have it. You know, I believe in it very deeply, but I don't think the fate of the Republic turns on it.

TENPAS: So I have this fear that Congress, by sort of ceding a lot of its authority, including impoundment and the ability to control the purse strings, which they seem to be ceding, is it something like once you lose these powers, I guess we don't know because we don't have this prior example in history, but let's say 10 years from now or even less, can Congress sort of reassert its authority and capture back what it gave to the executive?

WITTES: I take it in your question you're assuming that the president gets away with it for now and that the courts do not stop it.

TENPAS: Well, I guess what I'm concerned about is that members of the Republican Party in Congress are not protesting this.

[15:34]

WITTES: Right. So I think there are two mechanisms other than a change of heart on their parts that you could imagine arresting it. The first is that the courts actually say no, that statute says you have to spend the money, and you know, that's not discretionary.

Now, over what time period they would have occasion to say that is an interesting question. The courts will not be in a rush to reach an impoundment question. They will figure out every way to avoid it. But eventually, he's doing some impoundments here. And—

TENPAS: Was Nixon the last president to do this?

WITTES: Well, he was the last president to claim the authority unilaterally.

TENPAS: Right, okay.

WITTES: And, you know, eventually they're going to have to argue that the Impoundment Control Act, which was put in place to counter Nixon's claims, is unconstitutional and the president is allowed to do this. They have not argued that yet. What they've argued is that these aren't impoundments. So there's a whole sequence of questions that they have to lose on before they lose. They're gonna lose on a lot of them because they're in fact impounding money. But that's gonna take some time.

TENPAS: And what do you mean by some time? Like eight months or a year or?

WITTES: Well, I don't know. It depends how aggressive they want to be about it. If if you want to do it in a way that's as deniable as possible, you have to be more subtle about it, right? And if you're subtler about it, you create other arguments for yourself and it can take a much longer period of time.

On the other hand, if you don't give the National Endowment for Democracy its money, which is a clear line item in the budget, right? they're going to sue you, which they've done. And by the way, the government paid them almost as soon as they sued.

WITTES: Oh, really?

WITTES: Yes.

TENPAS: In the interest of full disclosure, Benjamin Wittes' spouse, Tamara Cofman Wittes, also a former Brookings scholar, is the president of the National Democratic Institute, a beneficiary of the National Endowment for Democracy.

WITTES: And so, one question is, you know, does the government really want to force these issues, or do they want to be, you know, to thump their chests, but then when you really call them on an actual impoundment, they'll back down. I don't know the answer to that question. How aggressive they are about it will guide how quickly, you know, a case comes before Supreme Court that presents the issue squarely.

TENPAS: Don't the prior 50 days suggest that they will continue to be extremely aggressive?

WITTES: So, again, they're mixed, right? They're they are being very aggressive in the first instance. When the USAID suit happens, you know, they are aggressive about appealing it, but they don't admit that it's an impoundment. And then when they're ordered to pay out \$2 billion, they ask the Supreme Court for relief, and when they don't get it, they start paying.

Eventually the courts are going to confront these issues, but the fact that they, you can call it backing down, you can call it ultimately complying with court orders, you can call it something else, but they're actually taking steps to avoid having to go to the courts and say, yeah, we impounded this and damn it, we're allowed to, right? That's not what they're doing.

TENPAS: And do you think that's a strategy because they know that it's not gonna pass muster in the courts?

[19:25]

WITTES: I think if you are the Solicitor General, it is probably very important if you know you're gonna have to litigate this, you want the right facts to litigate it with. And, you know, the facts where you haven't made a specific decision, it's a blanket thing, we're freezing all of this and you have malaria kids and ... right? That's not a good set of facts to litigate the we get to not spend this money thing.

And so I think from a litigation point of view, if you're trying to manage this litigation from the government side, getting the government to back down in the most

egregious situations where you're just going to lose, you want to wait until you have a set of facts that you have a chance with. That's what I think is going on. But I don't know.

TENPAS: So I think I sidetracked you, though, but tell me the impoundment is the one that you believe to be sort of the most ...

[20:24]

WITTES: Yeah, I think this is the most important to the functioning of a democracy. It is the least important from a human liberty standpoint. But look, in a world in which you are trying to concentrate executive power, and you're trying to get the courts to tolerate that, this is a big piece of the enchilada.

And so I think there's really only two ways that this gets corrected. One, as if the courts ultimately force it. But the second is, if the composition of Congress changes, and this problem will go away as soon as Congress says, nice White House helicopter you have there, it would be a shame if we put restrictions on your ability to fly in it and spend money to fly in it, right? And so Congress's ability to prevent the president from spending money, or you know, you wanna take over Greenland, good luck getting any money to spend on that, right? And once Congress decides that it wants to deal with a question like this, it has a lot of ways to make its will felt. The problem now, as you described, is that Congress doesn't want to do that.

TENPAS: And how are you feeling these days about the Supreme Court? I know last summer was the big presidential immunity case. And I know that sort of predicting the outcomes of some of these cases is difficult, though. But do you think sort of at core, they are likely to uphold some of these constitutional separation of powers principles?

[22:11]

WITTES: So, I think the principles are very different from one another. And even within one basket, the merits of things can vary. So for example, I don't believe the statutory for cause restrictions on removing independent agency heads, I think the Supreme Court's going to side with Trump on that.

TENPAS: Oh, you do?

WITTES: I do.

TENPAS: And why?

WITTES: Because they've all but said so in a previous case. And I think the old Humphreys Executor case from the '30s is a dead case walking. But I don't think that's true of civil service protections, right? And so I think the lower down the executive food chain you go the more attractive the idea that Congress can regulate the executive's management of the executive branch becomes. And so even within the zone of what are called appointments clause issues I think they're going to end up being a bit of a mixed bag.

I don't know how to count five votes on the Supreme Court for the idea that the president can impound lawfully appropriated money. But look, I also didn't count five votes on the Supreme Court for the idea that the president was absolutely immune from criminal prosecution for a wide range of his activities. And so I'm modest about my ability to predict these things.

TENPAS: What do your tea leaves tell you about the birthright citizenship case should that get to the Supreme Court?

[23:50]

WITTES: So, you know, no judge in the country has held that anything other than that the Constitution means what it says on the subject of birthright citizenship. And I would be shocked if there were more than two votes, maybe three, for anything else at the Supreme Court. I think that one's the easiest to predict.

TENPAS: And do you think that sort of what's occurred over the past 50 years is sort of a series of the boldest challenges to our Constitution? Or do you think they will keep sputtering through throughout the first year or second year until there are midterm elections and the equation changes?

[24:26]

WITTES: Well, it won't continue at the current pace. The pace is already slackening. It will continue. They do continue to do things. And the more things you do, the more opportunities there are to create plaintiffs. And some percentage of those plaintiffs sue. So this is going to be a litigation heavy environment for the next two years.

By the way, that's not a bad thing. Any bold agenda by any administration is gonna create a lot of litigation. What's novel about this is that first of all, they're gonna lose so much of the litigation, particularly at the lower court levels. And then secondly, that the litigations are so dramatic because the underlying policy objectives are so bold.

TENPAS: Do you think there's partly a strategy in by coming out with this rapid pace and rapid set of aggressive moves that that their hope was to overwhelm the courts, in which case a lot of these policies can continue? Like, people have lost their jobs and it's gonna take a while before they get rehired based on a court case, right?

[25:36]

WITTES: Yeah, so I don't know if the goal is to overwhelm the courts. The courts, you know, we have 900 federal judges and a hundred big-ish admin law cases. It's a volume, but it's not going to overwhelm the courts. It's overwhelming the public. But the courts, you know, chug along and they're they're built for this.

Look, I think you just identified one of the fundamental problems here, which is they're gonna lose a lot of this litigation and they're gonna win anyway. And the reason is, you know, if you fire a whole lot of people and then it ultimately turns out two years later that you fired them illegally, but, you know, they've gone on and gotten other jobs. And the goal wasn't specifically to get rid of them as individuals, it

was to destroy the agencies that they work for. And so you can lose a lot of cases and still win.

Now it's a really cost-ineffective way to reduce a workforce, because, you know, you're gonna end up having to pay them back wages, you're going to have to end up paying their pensions. Firing somebody illegally is a very ineffective, from a cost point of view, way to get rid of them, and it's a really bad way to downsize a workforce.

But if the question is, is the Consumer Financial Protection Board still around, you know, the answer may still be no at the end of the day. And that's true of USAID, and that's true of ... And so you can win the war after losing every legal battle because you've just reduced the place to a wasteland.

TENPAS: And that may be all that they were after, right?

[27:31]

WITTES: I fear that may be right, that, you know, that they're willing to lose a lot of litigation because the point is to wreck things. And it's much quicker this way, right? You wreck everything and then yeah, you'll pay a lot of damages later.

TENPAS: So just to return to the episode's question, is it the courts' job to check executive overreach, you would say absolutely, yes?

WITTES: Yeah, there's no doubt that it's the courts' job, but I will say something else about that. The courts should not be the primary people doing this job. If you wanted to do this job maximally effectively, the courts would be in a supporting role vis-à-vis Congress. And the primary lead would be done by Congress.

TENPAS: Right. We'll get there maybe? Hopefully?

WITTES: Someday.

TENPAS: One last question that I've been asking all my guests is, imagine you're teaching high school students about democracy. What is one lesson you'd want to leave them with? What's the most profound lesson that you believe, especially right now, given the current context?

[28:38]

WITTES: Voting is a necessary but insufficient account of your civic obligations. And we have this idea that, you know, you vote, you pay taxes, and, you know, once every few years you do jury service. And those are your civic obligations. And I think that's wrong. That's like saying, humans need clothing, food, and shelter, right?

TENPAS: There's so much more.

WITTES: And there's so much more that you need, and you need to think about your civic obligations in terms of a much richer conception of citizenship, you know. And I've been struck by how many people are showing up at town meetings to talk to their members of Congress. How many people are, you know, doing political protests

for the first time in their lives. And I I think we all need to think about what the boundaries are of our civic participation in a more ambitious fashion than we have. And so if I were in front of a high school class, I would say don't think you've done your job when you cast your vote.

TENPAS: Great. That's actually good for everybody, including high school students for sure. And thanks so much for your time today. That was a really interesting discussion. You really helped sort of lay the groundwork because I feel like I'm in the middle of a snowstorm and there's all of these cases that are coming down and it's hard to sort of understand them in a clear manner. And I think you helped us organize our thoughts. So thank you so much.

[music]

WITTES: Thank you.

TENPAS: *Democracy in Question* is a production of the Brookings Podcast Network. Thank you for listening. And thank you to my guests for sharing their time and expertise on this podcast.

Also, thanks to the team at Brookings that makes this podcast possible, including Fred Dews, producer; Daniel Morales, audio engineer and video manager; the team in Governance Studies including associate producer Adelle Patten, plus Antonio Saadipour, and Tara Moulson; and our government affairs and promotion colleagues in the Office of Communications at Brookings. Shavanthi Mendis designed the beautiful logo and show art.

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I'm Katie Dunn Tenpas. Thank you for listening.