

**[00:00:00] Lana Ulrich:** Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates, hosted by the center, in-person and online. I'm Lana Ulrich, senior director of content. As part of the Renewing the Republic series, the National Constitution Center has teamed up with the SNF Agora Institute at Johns Hopkins University. Together, we're bringing you conversations about how to restore the guardrails of American democracy.

Today's topic, the role of the president in our constitutional system. How much power is too much or too little? What was the original conception of presidential power and how has it expanded over time? And what reforms, if any, may be necessary? We hear from three experts on presidential power. Jessica Bulman-Pozen, law professor at Columbia Law School.

Sai Prakash, law professor at the University of Virginia, and author of *The Living*

**[00:01:00] Lana Ulrich:** Presidency: An Originalist Argument Against Its Ever-Expanding Powers. And Stephen Skowronek, political scientist at Yale University. Jeffrey Rosen, president and CEO of the National Constitution Center. moderates. This conversation was streamed live on November 22nd, 2021. Here's Jeff to get the conversation started.

**Jeffrey Rosen:** It's a great pleasure to introduce our panel. We have three of America's most distinguished scholars of presidential power, and I know it's going to be a wonderful conversation. Jessica Bulman-Pozen is the best professor of law and the director of the Center for Constitutional Governance at Columbia Law School. She has written extensively about administrative law, constitutional law and federalism, including in such articles as federalism as a safeguard of the separation of powers, partisan federalism, and administrative states beyond the presidential administration. Sai Prakash is James Monroe Distinguished Professor of Law, and the Albert Clark Tate Jr. Professor of

**[00:02:00] Jeffrey Rosen:** Law at the University of Virginia. He was a member of the Constitution Center's Madisonian constitution for all commission and his most recent book is *The Living Presidency: An Originalist Argument Against Its Ever-Expanding*. And Steve Skowronek is Pelatiah Perit Professor of Political and Social Science at Yale University. He recently joined us for a wonderful panel about patriotism and descent. and his pathbreaking books include *The Politics Presidents Make: Leadership from John Adams to Bill Clinton*, and most recently, *Phantoms of a Beleaguered Republic: The Deep State and the Unitary Executive*. Thank you so much for joining us, Jessica Bulman-Pozen, Sai Prakash and Steve Skowronek. Sai, I think I'll start with you because you're, the title of your most recent book so clearly encapsulates your thesis. And I think it'd be great to put it on the table so your colleagues can

**[00:03:00] Jeffrey Rosen:** respond. Why do you argue that the living presidency violates the originalist argument that the framers had in mind when they created the presidency? And what is the originalist argument against its ever-expanding?

**Sai Prakash:** Well, it's great to be here with you, Jeff, at America's Town Hall, and of course with Stephen and, and Jessica as well. Um, the, the book that you kindly mentioned is a book

that tries to describe why the presidency has expanded over time and how it's expanded. And so as far as, so where it's expanded, I talk about, uh, law execution, foreign affairs and, uh, the commencement and regulation of warfare. And the, the latter category is very familiar that the president has basically seized the authority to wage war without congressional authorization. And even when Congress does authorize, the president is very aggressive in reading those statutes to cover situations that Congress has not quite contemplated in its, uh, authorizations to use military force. And so that's part of the reason why

**[00:04:00] Sai Prakash:** we're fighting both Al-Qaeda and ISIS under an authorization to use military force. And then I think the bigger, other big area is law execution. The president is, uh, basically a creature of laws, in the sense that he's supposed to execute the laws, but in the modern era, uh, presidents not only execute laws, they make them, and then they cheat on the side by misconstruing them to advance their policy goals. And why, why have they done these things? Why have they expanded their authority? Well, I think because we expect more of our presidents than the founders contemplated. Presidents are seen as problem solvers and doers. They run on a platform which was sort of unforeseen and, and not done at the founding, right? Candidates for president ran on the record, they did not run on promises. The first promise was a promise not to run again. That's how limited the conception was. And so when you make promises and people expect you to keep them, when you have a sort of background conception that the constitution can change over time, that's still living constitution approach, it's just not surprising that presidential power has, has grown

**[00:05:00] Sai Prakash:** over time because a, a large part of our constitutional understanding is that constitutions can and should change with the times. And if that's so, why would it be less true for the president?

**Jeffrey Rosen:** Jessica Bulman-Pozen, your important scholarship argues that the growth of the administrative state in particular is not simply a result of presidential power grabs as, uh, some argue, but a result of an acquiescence of congressional delegation, presidential acquiescence and accumulation, and judicial acquiescence as well. Tell us about the growth of the administrative state and how it has contributed to the evolution of presidential powers.

**Jessica Bulman-Pozen:** Well, thank you, Jeff, for having me, and it's such an honor to be here with you, Sai and Stephen. So thanks for having me in this conversation. I think what I would say in response, both, Jeff, to that question and also to the points that Sai was just leading with is, it's true that presidential powers have expanded over time and that presidents are doing

**[00:06:00] Jessica Bulman-Pozen:** more now, uh, than we would have maybe expected 200 years ago, I think that's inevitable. Um, but I think an important piece that may be missing from some framings of that conversation is not just that Congress has acquiesced, uh, but in fact that Congress has constructed an administrative state, and that to the extent we're worried about presidential power, we shouldn't be worried in the abstract about presidential power as such, but we should be thinking about how presidents operate within a system that has been created by Congress and that should still be superintended by Congress. So for example, in recent years, we've seen a lot of arguments, and I think Sai was maybe alluding to some of them, about trying to constrain, uh, the power of the president with respect to the administrative domain. So saying presidents shouldn't be making laws or shouldn't be making policy. Um, now I think there are

times when that argument may be availing, but as a general matter, because Congress has created a vast administrative apparatus, many agencies over which the president has at least some ability to engage, to direct, if not outright control, uh, administrative action, right? Then we should think

**[00:07:00] Jessica Bulman-Pozen:** first about, well, what has Congress said here? And if Congress has said among other things, which it often does, that it wants to have either presidents or agency officials making certain determinations, that's not just a matter of broad presidential power, but it's a matter of Congress using the power it's had since the founding and, uh, increasing in the year since the founding, to create our government, to structure our government. And then we should worry more, I think to the extent we're concerned about presidential power, about what the back-end checks might be on that. So maintaining, and, and maybe ways we can discuss in this hour, maintaining ways that Congress can be involved beyond that initial construction of the administrative state, to have oversight responsibilities, to have control over what is happening with the administrative power. And then also to think about Congress creating certain checks within that administrative domain, um, whether through states, which I've written about as you say, or through agency officials or through others. And I think actually those are the checks that the unitary executive theory and that those who are often pointing to originalist conceptions of the presidency actually opposed,

**[00:08:00] Jessica Bulman-Pozen:** but in my mind, seemed the most promising ways to restore the sorts of checks and balances we should all be interested in.

**Jeffrey Rosen:** Thank you for putting those important reforms on the table, and look forward to a discussion of them in a bit. Stephen Skowronek, your new book, *Phantoms of a Beleaguered Republic: The Deep State and the Unitary Executive*, has another very clear and, uh, as well as engaging title. And in it, you argue that the convergence of these two factors, the deep state and the unitary executive, under the Trump presidency in particular, has transformed the presidency. Tell us more about the thesis of your book.

**Stephen Skowronek:** Thank you for having me. Our book was interested in the interdependence of these two concepts of the deep state and the unitary executive. These are conjectures, both conjectures, I think. And, uh, but they haunt the shadows of the constitution. And for most of our history, they were repressed by informal arrangements that produce the kind of modus vivendi between president

**[00:09:00] Stephen Skowronek:** and Congress and the executive branch. But in recent years, given the current system of presidential selection, and the drive of presidents, uh, as Sai was saying, the drive of presidents to change things and to change things quickly and to work those changes through administration that exacerbates this subterranean tension that's always there between a deep state and a unitary executive. So a president who's driven to change things through control of administration will evoke resistance from the administrators because they've been endowed with formidable powers or authority by the Congress to resist in positions. By the same token, that resistance will draw out the president's claims to represent the people and to subordinate administration, to the executive

**[00:10:00] Stephen Skowronek:** power. So this drive to change things through administration exacerbates this conflict between the deep state and the unitary executive. I think behind this all,

uh, is what I would see as the stillborn solution of the constitution. The stillborn solution of the framers. The framers were willing to vest the executive power in the president, but the condition was that the presidency would be detached from political interests, from cabals, from popular enthusiasms, through this indirect and convoluted selection system. We've talked a lot about the vesting clause in recent decades about the scope of the vesting clause. But so far as I can tell, very little of that discussion extends to what immediately follows the vesting clause in article two, uh, section

**[00:11:00] Stephen Skowronek:** one, which is this elaborate and convoluted selection system that detaches that executive power from politics, once that fusion is made, uh, and it was made almost immediately, right? Then the whole ball game changes. And I think that's when we have to think about other ways of relating presidential power to executive branch management.

**Jeffrey Rosen:** Thank you so much for that. Well, much for each of you to respond to, in each other's arguments, but I want to put on the table a case that's currently being decided by the D.C. Circuit, and that is the question of whether former presidents can assert executive privilege. Sai, you recently wrote a piece for the Washington Post with a very clear headline, which of course you didn't write, as we writers don't write our own headlines, but it does make the argument of the piece clear, Trump is right, former presidents can assert executive privilege. He might not win his case, but his argument has merit. That's obviously a simplification

**[00:12:00] Jeffrey Rosen:** of your argument. Give us a sense of what your argument is about the Trump subpoena case and, and the relevance of the Nixon versus General Services Administration case, in which president Nixon challenged the law that directed the General Services Administration to take custody of his papers and, and, and the court made some important holdings.

**Sai Prakash:** Sure, Jeff. So executive privileges the idea that the president should be able to get candid advice from his, uh, near associates in The White House and in the, uh, the cabinet agencies. And that that advice should be kept confidential and not be open to the courts or to Congress. And the court endorsed some sense of this idea in a case called United States versus Nixon, which was the Nixon tapes case. And then several years later, they confronted the question of whether former president Nixon, this is now 1977, had a right to the continued confidentiality of his presidential records. And what the court said in Nixon versus GSA is, uh, former presidents can be heard to

**[00:13:00] Sai Prakash:** have an executive privilege as well, because obviously the interest in confidentiality doesn't end as soon as you leave office. But precisely how that would play out in future cases, vis-a-vis Congress or the courts, the court didn't quite say, uh, Nixon versus GSA was a very narrow case about access to those records by members of the archives of the United States and not by Congress or not by the courts. And so we're just left struggling to figure out what the court would say about a situation where Congress wants to investigate the January six riots, and a former president, Trump, doesn't want to hand over the information. And all the article said is that given what the court has said previously in Nixon versus GSA, we don't know whether President Trump will prevail or not. A lot of these invocations of executive privilege are really just designed to delay the, uh, release of the records. Trump knows that if the Republicans take over in 2023, they win that election. They come into office in 2024, they're going to

**[00:14:00] Sai Prakash:** end the January six panel. And so one of these, one of the reasons why you invoke privilege or things like that is just to delay the release of documents, hoping that something will change in the political environment and then the, the, uh, investigation will go away. And so that's part of the litigation strategy of, of former president, Trump.

**Jeffrey Rosen:** Jessica Bulman-Pozen, you have argued that the two dissents in the Nixon case offer a different way to look at the question and that Justice Rehnquist's dissent would have allowed the former president to assert executive privilege over documents created during his time in office, because the privilege resides with the person, not the office. How do you, uh, read the Nixon case and do you imagine that, even if the court were to accept a stronger version of that, that President Trump would prevail or not?

**Jessica Bulman-Pozen:** Yeah, thanks, Jeff. I think that's actually a good example, akin to not writing one's own headlines, of giving a long quote and then having a little tiny piece of it, um, actually quoted in the source. So, um, I, I think what I was trying to get at in discussing these cases with respect to the past president versus the current president, or the president as a person versus the president

**[00:15:00] Jessica Bulman-Pozen:** as an institution, the presidency, um, is just to think about these inevitable tensions that are going to keep arising, but both what the court has said about them and how we might think about them. And my, my own view, looking both at the Nixon case, that litigation, um, including not just the dissents, um, and as well as the broader principles of separation of powers and executive, uh, privilege that may exist, is that there is executive privilege that can be claimed by the presidency, but really it is the current inhabitant of the office who's in the best position to make those determinations. So I think we have, on the one hand, the dispute between President Trump and President Biden, um, where I think President Biden is the person who is authorized at the moment to make these decisions. But it's also just important, I think, in this context to recognize, um, and this, I think maybe speaks a little bit to Stephen's point about the merger of sort of the constitutional structure with a certain kind of politics, um, and how we, how we engage in that mediation, that Biden is also, he's the president, but he's also trying to take responsibility for the constitutional system. And to see Congress requesting records that may allow Congress in its

**[00:16:00] Jessica Bulman-Pozen:** investigative capacity and its oversight capacity and its critical constitutional role to investigate, um, a violent insurrection and attempted coup in the United States and that the interests, uh, for Congress to obtain this information are paramount. And so it's not simply a matter of Congress versus the executive or Trump versus Biden, but broader constitutional principles. And as I said, leaving this to judicial resolution that, that goes on and on and on is, is largely about delaying, about obstructing rather than in fact about reaching correct conclusions about executive privilege. And that's what we saw with the, the Trump litigation and in the Maser's case, with respect to congressional oversight, or it's a very effective strategy, but it's not one I think that really appreciates the constitutional principles at stake.

**Jeffrey Rosen:** Steve Skowronek, uh, Bobby Dunham asks, can you please explain exactly what you mean by the deep state? And then as we begin to address possible reforms, I want to put on

the table legislation proposed by House Democrats called the protecting our democracy act, which would make it harder for presidents to

**Jessica Bulman-Pozen:** refuse to respond to oversight, subpoenas, to make it harder for them to bestow pardons in situations that might raise suspicions of corruption, harder to secretly freeze funds, contrary to congressional appropriations to fire inspector generals, and to take a monuments while in office. Your view, not so much on this as a policy matter, but on it as a kind of congressional oversight that might be salutary or not.

**Stephen Skowronek:** Well, first on the deep state, I would like to make a distinction between, uh, administrative depth as an asset to the state, something that underwrites competence and stability and administration, and the deep state as a kind of conspiracy against the presidency, that line was blurred but, during the Trump administration, but I think it's worth holding on to. One of the important questions is how can we protect administrative depth at a time when, uh, we have, uh,

**[00:18:00] Stephen Skowronek:** candidate-centered campaigns and, uh, presidents who claim mandates to change things quickly, if not immediately, and, and using the administrative arm of the presidency to make those changes, uh, as quickly as they can. So that has a tendency to strip away depth, strip away the insulation, the protections for scientific integrity, for professionalism, for, uh, neutral advice and administration, uh, that mobilized plebiscitary presidency is driven to strip away administrative depth. And I think that's not just, that's not just, uh, President Trump. And so I think that making this distinction between the deep state as a kind of conspiracy against the president's mandate, and administrative depth as a valuable resource for a state, is a critical

**[00:19:00] Stephen Skowronek:** one to make, especially now, and to figure out how we can protect administrative depth, uh, against the predations of an overreaching presidency. My view on the pr- uh, protecting our democracy act, I think that a lot of these reforms are useful as far as they go on, like the whistleblower protections, the greater protections for inspector generals, the restrictions on presidential spending and freezing without congressional authorization, are like the reigning end of the use of acting appointments. I think that these are really useful things, but this whole reform effort strikes me useful as it is as a series of whack-a-mole responses to Trump era transgressions. It seems to me that Trump was pushing on an open door. He seized an opportunity in the current configuration of presidential democracy. The problem lies in the arrangements that preceded Trump and that made Trumpism possible. Those arrangements are

**[00:20:00] Stephen Skowronek:** larger than Trump. They're about the system of American government as it's evolved to date. And in particular about the relationship between political mobilization around the presidency and governmental management of the executive branch. And I think that an effective reform program that's going to protect us in the long run is going to have to reconfigure that relationship, the relationship between how we mobilize and how we manage.

**Jeffrey Rosen:** Let's now focus on each of your suggested reforms. Sai, uh, Prakash, rather than a kind of what, uh, you described, just called a sort of presidential whack-a-mole, you argue that the Trump presidency reflects larger trends, trends that have expanded executive power from the failure of presidential accountability, the expansion of presidential war powers, the presidential

role in foreign affairs, the president's role in legal execution, and unicameralism. And then you have a series of

**[00:21:00] Jeffrey Rosen:** very, uh, specific and provocative reforms in your new book about the presidency. And I'll just s- start with them and, and let you highlight some of the ones you think might be most important, from checking the president's principal advisers, augmenting congressional staff, stop delegating legislative powers to the president, ending signing statements, reigning and executive privilege. Give us a sense of, of some of the reforms that you'd like most to share with our great America's Town Hall audience.

**Sai Prakash:** Well, I want to, uh, echo what, what Stephen said. I, I, you know, president Trump was singular in many ways, but I don't believe that the issues that we're talking about, or at least the ones that I'm talking about, really began with Trump. Most of my book isn't about Trump, it's actually about his predecessors and the expansion of executive power over the last 50 years. Uh, and so, you know, I think Trump has sort of more of the same with more braggadocio and, and more bravado and, uh, more chest beating, but I don't think it is fundamentally different. Trump is acting on his advisors, you know, advice and they

**[00:22:00] Sai Prakash:** tell him what they think he can do and then he sort of acts accordingly. But he, he's not, it's not as if he was a, you know, a deep student of the presidency and, and understood all these things about the presidency before he came to office. On, on the reforms, I, I think Jessica is right, that Congress has been asleep at the switch. And, and part of that has to do with being two chambers. It's easier for one person to act than to have two chambers act in response. And then there's always the last mover advantage, right? President does something, Congress responds and then the president can just decide to ignore what Congress does. And if Congress wants to do anything about it, it's got to, to disinter the creaky machinery of impeachment, which we've seen multiple times just doesn't do the job. So I, I think it's great that Congress is considering reforms. I think it's not a good idea to just focus on the perceived problems under Trump. You have to think about the problems over the long haul. And it would be great, you know, if Republicans and Democrats could sit down behind a veil of ignorance. They don't know who the next president is going to be, it's, it's sort of the

**[00:23:00] Sai Prakash:** perfect time to think about how to reform the presidency more broadly and not just focus on the emoluments clause. Which, you know, is an important clause, but I don't think it really affected President Trump's behavior very much, um, in, in office. Uh, I just don't think that that's the most important thing about the presidency. I think the tendency of presidents to misread statutes to advance their goals, it is telling, Jeff, that the one area of legal continuity was the rental freeze that started by Trump and then continued by Biden. To me, that's an area of executive misreading of a statute. It was done by the CDC, they thought they could impose a moratorium on evictions. I think that was a very exceedingly broad reading of the statute, and, and the Supreme Court agreed. And I think it's just telling that they both agreed that they could do this. Uh, you know, it was a handoff and it was like continuity, with respect to this. There's just too much of a sense that the president both has legal authority to write regulations or the executive branch more

**[00:24:00] Sai Prakash:** generally. And then even when there's a statute passed by Congress, there's just too much executive gamesmanship in the interpretation of this. And, you know,

another Trump example would be the border wall. He got a billion dollars from Nancy Pelosi and then he went ahead and found billions more through some, you know, uh, interpretive trickery. That, that's just an amazing fact, right? That he was able to get a billion dollars and then found a billion more just by rereading the statutes. It's just not a plausible reading of those statutes.

**Jeffrey Rosen:** Jessica Bulman-Pozen, in your piece, *Federalism as a Safeguard in the Separation of Powers*, you note that Congress could in theory limit the power it delegates to the executive. But in, in practice, delegation has tended to empower presidents. But you emphasize the possibility of competitive federalism, which could challenge executive consolidation, where states take a more active role in challenging executive exercises of reported statutory authority. Tell us more about that and other reforms that you think might be useful.

**Jessica Bulman-Pozen:** Yeah, so, I mean, I guess starting with the reforms that, that we've been, uh, talking about, I

**[00:25:00] Jessica Bulman-Pozen:** largely agree with, with Stephen and Sai, with respect to what's happening with the protecting our democracy act, as, you know, as sort of a whack-a-mole, is responding to the particular and extreme ethics violations of the last administration, but in a way that maybe doesn't speak to the broader questions about presidential, uh, power in balance. I think there are a couple of important things still, even within that narrow conception, and then I want to say why I think it's a little broader. But even with respect to releasing tax returns, stopping presidents from, uh, gaining in a private way from their public office, right? These sort of ethics kinds of reforms. Um, one thing is to reform the presidency, you usually need the president to go along unless you have the power to override a presidential veto. So it's sort of a moment in which we can see some reform, but we'll be inherently limited in scope if it's going through this legislative route, given that it requires the sign off of the president. But I do think it's important to see Congress, um, as has been said, taking on this role, at least saying, "We want to come back and, um, articulate some limits, articulate some rules here, even if, um, it's not talking about all of the questions of the presidency." And I will just add that I think with

**[00:26:00] Jessica Bulman-Pozen:** respect to the act itself, beyond those more ethics-focused rules, there are a number of provisions that do, in my view, speak to broader kinds of separation of powers dynamics that could restore a broader congressional power or limit presidential power going forward, including with respect, most pertinently, I think to congressional oversight, but also, Sai mentioned the border wall and sort of the use, not just by President Trump, I agree, but other presidents, uh, declarations of emergencies, pursuant to the National Emergencies Act. Um, for example, to get sort of additional authorities. When that act was initially conceived, it allowed presidents to declare emergencies, but subject to a legislative veto that would've allowed Congress to superintend those declarations and to, to countermand them. Um, then because of the Supreme Court's decision, um, in the

**[inaudible 00:26:41] Jessica Bulman-Pozen:** case, where the court said the legislative veto is unconstitutional, that provision gets removed. And so we live in this world in which presidents then have free reign to declare emergencies. Um, and Congress doesn't have that same ability to stop the declaration and the Protecting our democracy act is also trying to address that. So I think



there are some broader pieces of the act, but I guess coming, Jeff, more to your question, what I would

**[00:27:00] Jessica Bulman-Pozen:** say is, I think it's a misguided approach to seek to limit presidential policy-making or power as such whether through a revival, as we see sort of on the table, at least if not fully being pursued in the context of the non-delegation doctrine, um, which I think Sai would be referring to a little bit as well, um, or in trying to prune Chevron Deference, which allows certain kinds of acceptance of administrative interpretations of legislation. I think these attempts to try to limit presidential power, administrative power, um, are misguided. And so the better response to me to this vast administrative state where the president is going to have very substantial authority and agencies are going to have very substantial authority, is to think about how do we see checks and balances? How do we see a diffusion of authority within that realm? One of the main ways we've seen Congress recognizing, we Congress won't be able to be active, we won't be able to make all of these decisions, is to try to empower multiple other actors, right? So in our environmental laws or our healthcare laws

**[00:28:00] Jessica Bulman-Pozen:** or a number of other laws, to say, "Yes, the federal executive branch and the president had these authorities, but so too, states have certain authorities, maybe local governments have certain authorities." And so we can see not just this, uh, feared monarch of a presidency making, uh, decisions unilaterally, but some more checking and balancing within that administrative domain, at Congress' creation.

**Jeffrey Rosen:** Steve Skowronek, in your new book, you and your co-author argue that rigid thinking about the separation of powers is an obstacle to reclaiming the institutional creativity that Congress showed earlier in American history, when it surrounded the presidency with institutions that help it serve its broader purpose in the early 20th century in enacted laws that make the president responsible for agenda setting and created what's now the office of management and budget. But you argue that formalism on the courts as well as congressional inaction makes that tougher. Give us a, you know, a historical sense of the degree to which Congress

**[00:29:00] Jeffrey Rosen:** and the courts have to work creatively together to imposing countability on the presidency. And what prospects do you see for that kind of work moving forward?

**Stephen Skowronek:** Again, I think that we, we have to begin with, what I see as the failure of the framers formula. And that was a formula where you would invest the president with executive power and then you de-politicize the presidency. That proved to be a non-starter. We live in a presidential democracy, I think in a presidential democracy, the key relationship may not be between president and Congress or thinking about the ba- we think the president has too much power, we think about, well, the solution is to redress the, the balance between president, Congress and court. In a presidential democracy, I think the key relationship is between how you mobilize around the presidency and how you manage the executive branch.

**[00:30:00] Stephen Skowronek:** I think that in the post constitution, reform movements have all grappled with this problem. Once you have a, once you accept presidential leadership, once you accept the president as an agent of political change, once you accept mobilization around the

presidency, then you've got to come up with other creative ideas for how you're going to secure a safe administration of government. One thing that the framers understood was that a politicized mobilized presidency is a threat to the stable administration of the laws. Hamilton's nightmare was a politicized presidency. He said this, this w- this

**[inaudible 00:30:42] Stephen Skowronek:** disgraceful and ruinous mutability in the administration of government. Every insurgency, at least up until recent times, has understood that. That if you're going to have a politicized presidency, you've got to find other ways to insulate

**[00:31:00] Stephen Skowronek:** administration or at least to make administration a more cooperative enterprise. So the constitutional solution, post constitutionally, has been to relax the separation of powers and to make administration a more cooperative enterprise. We see this early on, I think w- with the 12th amendment, the Jeffersonians immediately put slap on congressional nomination of the president. They put the Congress, here comes the first mover in presidential selection, the constitutional convention had spent a lot of time trying to figure out how to get the Congress out of the business of presidential selection. After that convention nominations, coalitions of local party machines would control the presidency. After that the progressive era, separate politics and administration, insulate the administrative arm from presidential politics. In recent times, all of that has been stripped away. We're left with

**[00:32:00] Stephen Skowronek:** candidate-centered mobilizations and worse than that, a stricter reading of the separation of powers. Everybody's doubling down on the separation of powers. Everybody wants the president to control the executive branch. This combination of a stringent reading of the vesting clause with our current system of selection produces exactly what the framers were trying to avoid, which is a personalized, politicized, charismatic presidency. So if I was thinking about reforms, I would think about ways to reconfigure the selection system, right? To make it less of a vehicle for personalized power, to figure out ways to make the presidents, to depersonalize presidential power by bolstering collective controls on presidential

**[00:33:00] Stephen Skowronek:** elections. I would strengthen parties, first and foremost, as we have pa- a lot of partisanship in American politics, we have pretty weak parties. To make parties again, controlling agents over candidate selection. Uh, things like that I think would go a lo- these are systemic changes that I think would go a long way toward, um, depersonalizing power, and the American system now, which I see as the most serious malady of the current arrangement.

**Jeffrey Rosen:** Sai, I'd love your response to Stephen's very provocative statement, which I, although I suspect that you might agree with the goal of depersonalizing presidential power, but perhaps not, with the proposed solution of a less strict approach to separation of powers. So what's your response?

**Sai Prakash:** I think it's interesting that, I think, I think two of the, my co-panelists, don't believe that stripping away power from the executive isn't the solution. If I hear Jessica right, she thinks, you know, that we should

**[00:34:00] Sai Prakash:** continue giving administrative agencies, and therefore in my view, the president authority to create laws. And I, I think Stephen thinks, you know, the way around this is to strengthen the parties. And I think, you know, I certainly would agree that if the parties were stronger, they would, they would perhaps serve as a check on the presidency. I've been an advocate of the unitary executive, but I understand the unitary executive to be a claim that the president controls law execution, not regulation. And if Congress wanted to, it could strip away the regulation from the executive branch and create some other entity that would create all these rules. But in so far as prosecution is concerned, of these violations of the law, whether they're created by Congress or elsewhere, the unitary executive claims that the president gets to, you know, gets to superintend prosecution. And, and as far as the bureaucracy grows, it's, it's interesting, you know, there's, I think the president effectively controls the bureaucracy, but it's, it's either right away, is what the cabinet or two years down the line. There's a, there's an interesting piece by my friend, William

**[inaudible [00:35:00] 00:35:00] Sai Prakash:** whose name is escaping me now, who's written that, you know, with the passage of time, the president ultimately controls all of these bureaucracies sooner or later. And so the main effect of these so-called independent agencies and the stagger terms that they have is to just delay presidential control of those bureaucracies as well. Uh, and so I, I don't see the point of that. Um, eventually President Biden will gain control of the independent agencies by appointing a majority of the people on those panels or a combination of Trump appointees who are Democrats with, uh, Biden appointees. So I, I don't really see what the point of the independent agencies are in the modern era when the presidents inevitably will control them after some passage of time. Uh, so I, I don't think that the unitary executive is, is the problem in the way that Stephen is saying.

**Jeffrey Rosen:** Jessica, because this is such an interesting colloquy, where do you come down in this discussion that Stephen and Sai are having?

**Jessica Bulman-Pozen:** I certainly agree with, with Stephen's point that when we think about

**[00:36:00] Jessica Bulman-Pozen:** the balance of power, separation of powers, we need to think about the broader ecosystem in terms of how presidents are being selected and trying to look at that focal point. I mean, I think generally with respect to this conversation, we should be thinking also about protecting representative institutions, protecting the right to vote, protecting democracy, that's all part and parcel. We can't just think about the institutions themselves. But with respect to these questions of balance of power, I think it's not surprising, of course, that Sai has a more nuanced and, and sort of careful take on the unitary executive than we often see in political discourse or even in, uh, judicial opinions. Um, and so I think to the extent the unitary executive is being mobilized, it's really to say the president must have control over the administrative state full stop, not just, um, sort of pieces of it, um, which just really sounds quite president aggrandizing and can be. And we've seen it in recent cases about appointments and removal, especially which speak to size concern about our independent, you know, agencies independent anyway, um, they're going to be less independent of course if the precedent just automatically has appointment and removal powers of the sort- the Supreme Court has been looking to lately, but what

**[00:37:00] Jessica Bulman-Pozen:** concerns me, and this is why I've looked to the states, for example, rather than independent agencies, to try to find places where we have true separation, true independence, and not just a sort of contrived political relationship between agencies and, and the president. But other sources of regulation, other sources of interpretation that are not bound up with presidential power, even if not in a strictly constitutional sense. But I think, I still think that trying to limit this administrative domain, um, I think this is what size calling, you know, my view that the president should make law. I wouldn't call it that, but I think this idea that Congress can in fact delegate substantial authority to the administrative state, that agencies, and again, perhaps in conjunction with the president, but perhaps in conjunction with other actors as well, can interpret those delegations and can set policy. I think is a sound constitutional approach, even with respect to, uh, the founding document and certainly with development since and it's a sound policy approach. And so it's not to say there's no concern about checks and balances about constraining presidential power, I think there absolutely is, but

**[inaudible 00:37:57] Jessica Bulman-Pozen:** it has to come, uh, from different places.

**[00:38:00] Jeffrey Rosen:** Well, there are so many great questions and it's time to address them. Many focus on executive orders. And, uh, we have a class from Barry University in Miami asking, uh, "We'd like to hear about the constitutionality and legality of executive orders and signing statements from our presidents and many other questions about executive orders. Steve Skowronek, can you give us a sense of their history? Certainly, uh, p- President Washington issued something like 10, left up to around 50 under Lincoln, went back down, then skyrocketed under Roosevelt in the progressive era. The first Roosevelt. These numbers are from memory, something, you know, in the 300s or more. And then 3000 under FDR. And then they went back down and settled into 100s per term nowadays. Tell us about their history and how the use of executive orders has changed.

**Stephen Skowronek:** Well, I think that in recent times, at least the numbers I've seen, the, the number, the absolute

**[00:39:00] Stephen Skowronek:** number of executive ord- orders is going down, but the number of significant executive orders is, policy impacting executive orders is increasing, which suggests that presidents are trying to make policy, uh, through their control of administration. It is an instrument of presidential policymaking and presidential policymaking through administration. So, is this a problem? It's a problem only to the extent that the president, what does the president represent? If the executive branch simply becomes an extension or a representation of the strong arm of the president's personal party, then I think that's a real problem. Because the executive branch, as I understand it, is the embodiment of the collective commitments of the federal government. And to turn that over to the president's personal following, I think that's the framers

**[00:40:00] Stephen Skowronek:** nightmare. So again, you know, I come, I'm s- sorry to hammer on this single, single theme, but I think that the issue is how do we depersonalize presidential selection? How do we counter this candidate-centered plebiscitary presidency with collective solutions that are democratic, but not populist.

**Jeffrey Rosen:** Sai, John Tilipski asks a version of the question from a, an originalist perspective. He says, what's the intent of executive orders or executive orders being used by presidents as they were intended to be used? So give us a sense of the original understanding of executive orders, and then maybe, uh, do you agree with Stephen, that the office should be depersonalized? And if the use of executive orders is the framers nightmare, what is your solution? Because I think it is different to some degree than Steve's.

**Sai Prakash:** So for John's question, you know, you, there's no phrase in the constitution executive order,

**[00:41:00] Sai Prakash:** uh, an executive order, I think in the modern era is the president directing executive officers to do or not do certain things. And they're legal or not depending upon what they order them to do or not do. Right? And so every executive order should be just be understood as a, as a directive to lower officials to do something or not to do something. And they're controversial because it turns out that under the, in the modern era, presidents have a lot of statutory authority. And they vigorously flex that authority in legal and illegal ways. And so when you think about an executive order, don't, don't think about the vehicle, if it's just an order. If the president issued a letter to the bureaucracy and it said the same thing, it would be just as good or just as bad. Every executive orders to be

**[inaudible 00:41:44] Sai Prakash:** read and understood by virtue of its legality, not the, not the guise regard that it takes. But I think that it, reason why we're so disquieted by it is that you see every president come into office and issue 20 or 30 executive orders changing or reversing some policy

**[00:42:00] Sai Prakash:** of the previous presidency. And it's precisely because they have broad authority under the statutes, or they claim broad authority under the statutes, that things like abortion policy and other sorts of things change in radical ways once they come into office. So they are disquieting, but it's, it's not because of the vehicle, it's because of what they contain.

**Jeffrey Rosen:** Jessica, Barry

**[inaudible 00:42:21] Jeffrey Rosen:** asks, are executive orders a method of making a more efficient process to allow the president to get around Congress in driving policy? And then you were writing about the complicated interactions between Congress, the states and the presidency, w- what executive orders allow the president to circumvent efforts by the states, for example, to engage in the kind of oversight that you think would be good?

**Jessica Bulman-Pozen:** So I hate to give a sort of maybe kind of answer, but I agree with size response here, which is that we have this sort of rhetoric of executive orders that suggest there is something about the form itself that is suspect. Whereas in fact, um, it's the content that is the question. And so it's variable. And, um, I think one thing we actually see often in executive orders is not even an

**[00:43:00] Jessica Bulman-Pozen:** order, but, um, sort of a suggestion or a request, um, to other parts of the bureaucracy or to other government actors. Um, it could even include, usually

doesn't, but could include those outside of the federal government. Um, and I think this is a place actually, or besides the point before about, um,

**[inaudible 00:43:15] Jessica Bulman-Pozen:** and the, and the independent agencies are not so independent, really comes to bear. It may not matter on the ground that much, whether we have a president ordering in the sense of propping to give a legal command versus simply requesting. If in fact, we have a political polarization such as it is, partisan alignments such as they are, a presidential presidency that's sort of personalized such as it is, where, where the administration wants effectively or go- or government agencies want to comply with what the president is asking, regardless of whether there's an order there, which again, suggests to me the need, not only to think about what is the legal mechanism, what is the constitutional status, but also how are these operating in practice? How are they operating on the ground and are there other actors who can come in? So I think executive orders, as, as I said, had been an area we've seen a lot of regulatory

**[00:44:00] Jessica Bulman-Pozen:** whiplash, a lot of back and forth from one administration to another. One thing, again, it's imperfect, but one thing that state involvement in some of these regulatory programs can do is to tamp down a little on that whiplash so that we have some more durability across the time. We have presidents changing, but we may have states carrying out policies consistently across the time. If you think California or you think Texas, we see, see some more continuity there even while the presidency changes. So I think it's, in some sense, a me- a mechanism outside of this executive order whiplash.

**Jeffrey Rosen:** A historical question from Claire Gerry for Steve Skowronek, uh, what has been the role for [inaudible 00:44:33] of the advancement of what [inaudible 00:44:35] has named the rhetorical presidency in these changes should presidential rhetoric be interpreted in a more originalist way, and you've drawn an important distinction between the powers of the presidency that invite transformative and disruptive action. Do we see both transformative and non-transformative presidents using rhetoric differently than they did at the time of the founding or not?

**Stephen Skowronek:** I do think that the presidency is, uh, as I

**[00:45:00] Stephen Skowronek:** said, a kind of engine of political change. And the presidency is often an agent of, or a spearhead for, uh, political insurgencies. And that these insurgencies look to the presidency to repudiate, rhetorically repudiate received governing arrangements, and to upend those arrangements in practice. I also think that these insurgencies have empowered the pr- they, the presidency, as we see it today as a political institution is a product of these insurgencies that have swept across the American government and transformed it. They've transformed it into this preeminent engine of political change. And the rhetoric of, uh, President Biden, right? I'm going to change it on day one. I can change it on day one. This is the president who is

**[00:46:00] Stephen Skowronek:** going to respect the scientists, this is the president who is going to respect the justice, but I'm going to change everything on day one. Th- there's a built-in tension, right? [laughs] Between the president's drive to change things and the expectation that the president is going to change things and change everything that every president will in fact

become an administration unto himself, or create his own administration. But what, uh, the implications of that are, an extraordinary volatility in American government, a government that was really designed to stabilize the affairs of state. So, uh, yes, I think this rhetoric of change, this rhetoric of repudiation and disruption, you know, we said Trump's presidency was surrounded with this rhetoric of the great disruption, but all presidents disrupt things. What has happened in the current configurations of presidential power and presidential democracy is that those

**[00:47:00] Stephen Skowronek:** disruptions are cutting deeper and deeper one administration to the next.

**Jeffrey Rosen:** There are lots of other great questions, but I think it is time for closing statements. Our panelists can incorporate the question into their final thoughts as you formulate them, but I'm, I'm just going to ask, uh, a version of a theme that's emerged throughout our excellent conversation and, and Sai, just to prepare you, the first round of this is to you. Do you believe ultimately that the modern presidency as a constitutional matter is the founder's nightmare? And if you had to identify a single constitutional reform to address that predicament, what would it be?

**Sai Prakash:** Well, I think, you know, if the founders beheld the modern government, they'd find many different nightmares. I don't think it's just the presidency. I think they wouldn't recognize Congress as the limited legislature that they thought they were creating, or the courts, which I think are doing far more than they were designed to do. All three branches have, I think, gone beyond what the founders intended. But certainly that's true of the president.

**[00:48:00] Sai Prakash:** I think the question is, is the presidency in need of reform? I say yes. And I, I think Stephen's onto something about trying to depersonalize the presidency. It's hard to see how you do that. People expect the president to make promises and they expect him to change Washington when he gets there. And it's really hard to sort of put the genie back in the bottle. I don't know how you do that. Uh, that's why I sort of, I think in my book, I focused on more concrete and, and narrow reforms, but I'm in favor of all kinds of reforms, uh, well, beyond what the, what's being proposed in Congress now. I think if you try to reform the presidency and focus on the, the problems that afflicted one particular president, you're just not really understanding all the problems that are occurring. And, and I do think, unlike my fellow panelists, and I do respect them greatly, that there is a problem with making the president the chief engine of lawmaking in the country. It breeds, uh, an arrogance, it breeds a dismissiveness towards Congress. And today presidents go to Congress for

**[00:49:00] Sai Prakash:** appropriations. It's just not obvious to me why that might not change in the future. Just like many other things have changed. But thank you so much.

**Jeffrey Rosen:** Jessica Bulman-Pozen, is the modern presidency the framers nightmare? Are you concerned, if you think it is the framers nightmare or not? And if you had to identify a single constitutional reform, what would it be?

**Jessica Bulman-Pozen:** I mean, so I'm, I'm wary of, of founder fetishism for, for lots of reasons. I think, you know, there's a sense in which maybe it's a nightmare, but as Sai actually says, you

know, everything is, um, a nightmare in some sense, vis-a-vis the, the original vision either with respect to intent or even just original public meaning. And part of our constitutional systems development is to accept and account for changes both through official channels, like constitutional amendment, that have occurred since that founding moment and through other kinds of, uh, movements and, and politics. So I think, again, my concern would be not to go back to what did the founders expect or intend, um, so long ago about the presidency, given, and tried to, to impose that on the presidency we have today. I think that's a, a misguided effort for both constitutional and

**[00:50:00] Jessica Bulman-Pozen:** political reasons. But I do think if I were trying to, to articulate in brief what the kind of reform that's an order is, I would say it's trying to think about checks on the presidency, checks and balances that don't necessarily have to conform to a rigid understanding of separation of powers, but rather think about accepting the vast expansion of powers, and then trying to control that power, trying to balance that power. Congress needs reform to do so. It needs to, uh, improve its own workings, its own capacity, its own ability to superintend the president at the back end. And the courts need to accept that kind of role as well. So I would think more in those terms.

**Jeffrey Rosen:** And Steve Skowronek, last word is to you, you've already said clearly that the modern presidency is the framers nightmare. The solution is to depersonalize the office.

**[inaudible 00:50:41] Jeffrey Rosen:** asks, is it really realistic to depersonalize the office of the president? So if you had to identify a single reform that realistically could depersonalize the office of the presidency, what would it be?

**Stephen Skowronek:** Well, first let me say that I don't think that there's any going back. I think that the framers formula,

**[00:51:00] Stephen Skowronek:** presidential management without political mobilization, that that was a non-starter. And the second thing to say is that all reform movements up until the present have understood that. That the framers fo- the constitutional formula is a non-starter. Now that doesn't mean that they resisted or tried to s- impede presidential leadership or the politicization of the presidency. They recognized the politicization of the presidency. They promoted presidential power, but in the process they pulled back presidential control on presidential control over the executive branch. They all sought more cooperative modes of management of the executive branch, more collaborative modes of managing the executive branch. And what s- seems to me today to be the problem is that we're stripping away that

**[00:52:00] Stephen Skowronek:** collaborative mode of administration, we're stiffening the separation of powers. The president is stripping away this administrative dept, and doing that in the name of this kind of plebiscitary mandate, candidate-centered presidency. So I don't think that there are any magic bullets, I don't think that there, uh, this is a systemic problem. I think it's a serious problem. I think the system is seriously out of whack, and there's not going to be one reform that solves the problem. But the good news is that we have rearranged the system fundamentally several times in American history.



We've had several different systems, right? And we know how to do it, and we know how to do it, how to do it is by rearranging the relationship between the selection system, the mobilization system and the management system, how you control the executive branch. By focusing on that relationship,

**[00:53:00] Stephen Skowronek:** not on Congress checking the presidency or the court checking the presidency. That is a pretty spotty track record. But a more systemic change in the relationship between how you mobilize the electorate and how the president manages the executive branch. I think that that would be constructive. And the reforms I would look toward are those that reorganize our parties to be more robust, collective controls on the presidency, a reconfiguration of the selection system and a reconfiguration of the relationship between the permanent government and the executive. And in each of those areas, I would look to make the politics less personalized and more institutionalized to make it more institutional. So, you know, there's a whole bunch of reforms that you could hang on that. And it's exactly the opposite direction of the current system. The current system is running hot in the

**[00:54:00] Stephen Skowronek:** direction of the personalization of power. And to suggest that we should arrest that, sounds like you're anti-democratic, you know, your top-down rather than bottom-up or something. But I think that that really is the only way to restore presidential democracy in a way that would be safe and effective.

**Jeffrey Rosen:** Make presidential power less personalized and more institutionalized. Thanks for those great last words in this excellent debate and conversation. Thank you so much, Sai Prakash, Jessica Bulman-Pozen and Steve Skowronek for illuminating our understanding of the crucially important, uh, institutional changes in the presidency and ways that we might reform it. Thanks to our friends and partners at the SNF Agora Institute and the Stavros Niarchos Foundation. And Mike and Jackie Bezos for helping the Constitution Center convene some of the great thought leaders in America, like the ones we've just been hearing from, to identify institutional

**[00:55:00] Jeffrey Rosen:** ways of restoring the guardrails of democracy on a nonpartisan basis. And to all of you, thank you for taking an hour out in the middle of your day, at the beginning of Thanksgiving week, to educate yourself about the constitution. It's so wonderful to learn with you. Thanks again to our panelists and to everyone. See you soon.

**Lana Ulrich:** This episode was produced by Melody Rowell and Tanaya Tauber. It was engineered by Kevin Kilborn and the National Constitution Center's AV team. This program was presented as part of the Renewing the Republic series, in partnership with the SNF Agora Institute at Johns Hopkins University. And as part of the National Constitution Center's restoring the guardrails of democracy initiative. It was made possible with support from the Stavros Niarchos Foundation and Mike and Jackie Bezos. Visit [constitutioncenter.org/debate](http://constitutioncenter.org/debate) to see a list of resources mentioned throughout this episode. Find the full lineup of our upcoming shows and register to join us virtually. You can join us via Zoom, watch our live YouTube stream,

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