

## President Trump's Executive Orders

Thursday, February 6, 2025

Visit our media library at [constitutioncenter.org/medialibrary](https://constitutioncenter.org/medialibrary) to see a list of resources mentioned throughout this program, listen to the episode, and more.

**[00:00:00.2] Jeffrey Rosen:** During his first week in office, President Trump issued 45 executive orders, several of which include far reaching political and legal consequences. Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, we'll discuss the legal and constitutional implications of President Trump's executive orders and preview the challenges they are already facing in courts. Joining me are two great scholars of the presidency, Steve Vladek and Gary Schmitt. Steve Vladek is Professor of Law at Georgetown University Law center and author of the New York Times bestselling book, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*. Steve is CNN's Supreme Court analyst and editor and author of One First, a weekly newsletter about the Supreme Court. He co-hosts the popular and award winning National Security Law podcast. A graduate of Yale Law School, he clerked for Judge Marsha Berzin on the Ninth Circuit. Steve, it's wonderful to welcome you back to We the People.

**[00:01:18.0] Steve Vladek:** Thanks, Jeff. It's such a treat to be with you.

**[00:01:20.8] Jeffrey Rosen:** And Gary Schmitt is Senior Fellow in the Social, Cultural and Constitutional Studies program at the American Enterprise Institute where he studies issues related to the American presidency. A former minority staff Director of the U.S Senate Select Committee on Intelligence, he was Executive Director of the President's Foreign Intelligence Advisory Board. Before joining AEI, he was Executive Director of the Project for the New American Century. Gary Schmitt's books include *McCullough v. Maryland at 200*, *Debating John Marshall's Jurisprudence*, *the Imperial Presidency and the Constitution*, and *Is Congress Broken? The Virtues and Defects of Partisanship and Gridlock*. Gary, it's wonderful to welcome you to We the People.

**[00:02:00.7] Gary Schmitt:** Thanks, Jeff. Really appreciate you having me on.

**[00:02:04.0] Jeffrey Rosen:** Well, dear We the People friends, the goal in this episode is to have an explainer and to review the legal challenges that have already been presented to some of President Trump's executive orders and to understand the arguments on both sides. Let's begin with the executive orders related to federal spending. One of them imposed a temporary pause on federal Grants, Loans and Assistance Program. Steve, tell us about what that executive order does and on what grounds it's already being challenged in court.

**[00:02:39.8] Steve Vladeck:** Sure. So there's actually a common theme across a bunch of executive orders is the Trump administration's desire and its efforts basically to temporarily cut off a whole swath of federal spending while it claims it's going to engage in various kinds of audits of these spending programs. So the most visible one of these was the memo circulated by the Office of Management and Budget on, I guess it's now Monday, January 27, where OMB purported to freeze a large chunk, although the memo was not exactly clear on how much of all federal grant money, at least that was being dispersed to non individual recipients. So local and state governments, universities, non governmental organizations, you name it. Jeff, that was not alone. I mean, there are other executive orders that have purported to freeze spending on various foreign aid programs. On USAID, the Agency for International Development, we've seen efforts to rein in spending programs within the Department of Transportation in an order issued by Secretary Duffy. So there really is sort of a broad, sweeping effort to at least press the pause button on a whole lot of federal money. And this is, as you know, triggering a fight over the president's power to impound, is the verb we use basically, to decline to spend money that Congress has appropriated.

**[00:04:08.5] Steve Vladeck:** There had been at least, I think, three lawsuits filed challenging the OMB order, which OMB purported to rescind two days after it issued it on Wednesday, January 29th. Those lawsuits are still going, partly because it's not clear that the OMB order is not producing downstream effects. And then there's also, I think, at least one lawsuit filed with respect to USAID, and I think other lawsuits challenging the foreign aid cutoffs are also probably impending. So a lot of different spending cutoffs, a lot of litigation, and some big statutory and constitutional questions in the offing.

**[00:04:45.7] Jeffrey Rosen:** Thank you so much for that. Well, let's talk about those statutory and constitutional questions. Gary Schmitt, you've argued that there are two potentially contending authorities at play here when it comes to impoundment, Congress's power to direct federal resources and the President's power to administer the daily functioning of government. Tell us about how those might clash. And broadly, how should we think about the constitutional challenges over impoundment?

**[00:05:08.7] Gary Schmitt:** Yeah, I think the key point is at one level, those just are competing principles that they're baked into the Constitution. I think one of the, I know one of the original

reasons for having created the office of the presidency the way they did in the wake of, you know, basically 10 years of poor execution of federal laws and poor execution about foreign policy was to create an executive that would have discretion to manage the daily affairs of government in a more effective and efficient way. So, there's that one principle, and then, of course, there's the other principle, which is that Congress has the power of the purse. And the truth is, at times they've come into conflict. Now, let me step back and say that the impoundment authority that a president might argue having, at least in previous times, was limited to a very narrow set of circumstances, such as efficiency or change in circumstances. And that basically was the way things were until, I would say, in the 1960s when presidents began to impound funds for, particularly weapons programs that they thought weren't needed. What happened at that point was usually the Congress and the presidency would have a known tussle about how to work things out.

**[00:06:32.3] Gary Schmitt:** And eventually they did work things out. So, there was a kind of separation of powers, check and balance system at play there. This all was the case until the 1970s, when Nixon began to argue for impoundment across a broad range of programs that he just disagreed with as a policy matter. And then, of course, then as a result of Watergate and Nixon's impoundment arguments, you had Congress pass the Impoundment Act, and that sort of tried to define how impoundments could be undertaken. And it's that act that the Trump people are now claiming is unconstitutional. And so, that's where we stand. But again, you're sort of getting a repeat from the Nixon years where Trump's talking about deferring and impounding funds for policy programs that he just disagrees with.

**[00:07:30.6] Jeffrey Rosen:** Many thanks for that. Steve, you wrote a great piece on one. First, the Impoundment Crisis of 2025 on January 28, and you lay out a series of possible statutory, textual, and constitutional challenges to impoundment. Ultimately, you conclude that if the question does get to the Supreme Court, you are skeptical that the Court will be hostile to a broad claim of presidential impoundment because the unitary executive theory that many justices have embraced doesn't make impoundment a central feature. Run through some of the great and important arguments you make in that piece.

**[00:08:09.4] Steve Vladeck:** Sure. Just first, to piggyback on something Gary said, I think it's worth stressing in some respects what the authority President Trump is claiming looks like authority President Nixon claimed. But the scale is just so radically and dramatically bigger than even anything Nixon tries. So, we're in uncharted territory in that respect. Jeff, on the constitutional argument, I realize that there are a lot of folks out there who have become cynical about the Supreme Court and about how much it's going to follow traditional understandings. But even within the executive branch, which has never been shy about aggressive views of executive power, there's never been a deep strand of believing that the president had a unilateral power to impound. So just a couple of examples, when he was in the White House counsel's

office in 1985, a junior lawyer by the name of John Roberts wrote a memo about how impoundment is not a power the President is able to exercise without at least some statutory support. The Office of Legal Counsel, which is usually in no hurry to surrender any arguments of executive authority, wrote, I think a very important memo in 1988, toward the end of the Reagan administration, about how there was no historical support for the idea of a constitutional impoundment power.

**[00:09:23.8] Steve Vladeck:** And, Jeff, if we just take a step back, it wouldn't make sense for there to be an ill defined impoundment power without clear limit, because that would effectively be transferring control over spending from the legislative branch to the President, given how critical the power of the purse was to the founders in setting up the relationship between Congress and the President in turning away from the British model, where the king regularly claimed the power to impound funds Parliament had authorized to be spent. I think that here we have a case where history and tradition are decisively on Congress's side and where I suspect the best arguments that the Trump administration is going to have in these cases, Jeff, are not going to be that the Impoundment Control Act is unconstitutional, that the President has inherent power. I suspect the government's going to try to win these cases on procedural grounds, trying to argue maybe that the plaintiffs don't have standing or that they're not the right parties to sue, or that their claims are moot. Because if we actually do get to the substantive questions here, just the weight of history, the weight of tradition, what few precedents there are, and I would just say common sense, I think really all do weigh very heavily against anything but a very, very limited presidential impoundment power. Nothing like what President Trump is claiming across the board in these cases.

**[00:10:46.6] Jeffrey Rosen:** Gary, you have an important piece at the dispatch on January 17, presidential impoundment, explain, do you note that the earliest example of a president impounding monies was in 1803 when Thomas Jefferson told Congress he wouldn't spend \$50,000, the Senate and House that appropriated for acquiring gunboats on the Mississippi River? What's the significance of the Jefferson precedent? Can you imagine any votes on the U.S Supreme Court to invoke that history to strike down the Impoundment Control Act? And how do you imagine the originalist justices on the Supreme Court might resolve these challenges?

**[00:11:20.3] Gary Schmitt:** Yeah, I think that's a great question. I mean, what happened was Jefferson had been given money to build these gunboats for the Mississippi, and the reason was because the Mississippi river had been closed off for transport from the U.S and U.S citizens. And what happened with the Louisiana Purchase is that we now had New Orleans, and so therefore we had free access to the Mississippi and to the Gulf. And so, the gunboats were not necessary. And Jefferson said, we're not going to spend that money on gunboats that are no longer necessary. So, here you have a President Jefferson who came into office complaining about the expansive, executive authorities that have been wielded by the Washington and Adams

administration. So we have a rather striking early example of a president claiming impoundment authority for fairly narrow purposes, as Steve's right, I mean, these are claims about empowerment that are quite different from the sort of broad policy impoundment arguments that the Trump people are making now. So I don't want to suggest that those are constitutional. My great worry, actually, is that when you go, when this is decided by the Supreme Court, there's a tendency for the court to draw bright lines that, in fact, are not easy to draw because, in fact, the President should have some discretion about spending monies at a certain kind of ministerial level.

**[00:12:46.6] Gary Schmitt:** And those authorities, you know, can be overridden if there's just a black and white decision that the President doesn't have any impoundment authority. And again, I get back to the, I mean, maybe this is impossible to happen, but I get back to this. I think what is the underlying system, which is that Congress has the tool to fight back against excessive impoundment claims by the President and actions if they use those tools. Now, the big problem these days is Congress doesn't seem to be wanting to use those tools.

**[00:13:21.9] Jeffrey Rosen:** Steve, you noted that the impoundment sections are also being challenged under the Administrative Procedure Act. The claim is that the OMB order is arbitrary and capricious because it doesn't give a reasonable explanation. It's also being challenged as contrary to the First Amendment because it conditions the receipt of billions of dollars on a recipient's exercise of their First Amendment rights, in particular to the degree that it relates to funding that advance Marxist equity, transgenderism and Green New Deal, social engineering policies. And then there's this question of the fact that the memo was rescinded, although the press secretary said this is not a rescission of the federal funding, but a rescission of the memoir. Take us through the complicated moves here. And in practice, what is this going to mean for federal spending moving forward?

**[00:14:10.6] Steve Vladeck:** Yeah, I mean, the press secretary, I think, did no one any favors when after the memo was rescinded, she got up in front of everybody and said, no, no, no, we haven't actually rescinded the spending freeze. So, I think it's hard to be very confident, Jeff, about what's going to happen going forward because this is such a moving object already. I mean, just last week you had the memo on Monday, you had a "clarifying memo" on Tuesday that raised more questions than an answer. And then you had the rescission on Wednesday while you had the press secretary saying, no, we're not rescinding. So, I think two things are going to happen at the same time. One, the OMB specific cases are going to go forward. I mean, as we are sitting here recording, there's a hearing set for today before Judge Loren Ali Khan in the D.C Federal District Court. I don't know if the judge in D.C or if the judge McConnell in Rhode island is going to issue a preliminary injunction wouldn't surprise me. But two, I mean, Jeff, we're also going to have litigation over the other freezes because the OMB freeze is not all that's going on.

**[00:15:17.0] Steve Vladeck:** And so, I think there's going to be a bunch of threshold procedural questions about who the right plaintiffs are about, as you say, the constellation of claims that might be brought. You know, APA claims, First Amendment claims. There's a debate over whether private parties can sue directly to enforce the Impoundment Control act, which President Trump is violating by not utilizing. You know, I think there's at least some authority in that space for the proposition that only the comptroller general can enforce that statute directly. But that has not been conclusively resolved by the Supreme Court, so a lot of litigation. I think, Jeff, the end result is probably some clarification from the courts about what the president can and can't do. But in the interim, you have all of this money that apparently is still not being released. I mean, there are stories all over the Internet about organizations that should be entitled to receive federal grants that haven't been, you have USAID and other foreign aid programs still not receiving their money. So, you know, I think this is going to be a really complicated story, not just because the law is complicated, but because what's actually happening on the ground, at least thus far, does not appear to be matching up with exactly what the courts have been ruling.

**[00:16:32.7] Jeffrey Rosen:** Gary, give us a sense practically about what is likely to happen. How will these challenges work their way through the courts? Will money, in fact, be frozen? And give us a sense historically of how unusual or not President Trump's empowerment claims are?

**[00:16:48.0] Gary Schmitt:** Well, I think going through the courts, I think Steve's probably right. I think the lower courts in particular will probably stay with the idea that appropriations are mandates. And so therefore, the executive branch doesn't have the authority to impound or defer monies based upon just policy disagreements. So, I think that's the case. Now, what happens when it gets to the Supreme Court is a different matter. As everybody knows, this is a Supreme Court, that is, whose majority is very much in tune with this broader notion of a unitary executive. On the other hand, they're also cognizant of wanting to make sure that the Congress does its job properly. They've tried to push things back to the Congress for it to exercise its authority. So, I think it's anybody's guess exactly how this plays out at the Supreme Court. Now, historically, again, I think what happens is as the government grows, you're going to get greater and greater executive discretion. It's just in the nature of the beast. And so it's no surprise that after World War II that you had more presidents impounding funds for this or that program. And the difficulty with the impoundments was they could argue that it was for reasons of waste, but oftentimes, Congress felt like these impoundments were done for programmatic purposes.

**[00:18:16.8] Gary Schmitt:** And so therefore, at that time, what you had were, again, because the committees were so important back then, you had Appropriations Senators and congressmen who really objected when the President did this. And so, there was a way in which both the White House and the Appropriations committees would work these things out and practice the,

you know, wouldn't be totally satisfactory to anybody, but at least it was done. You know, you only had a few of these, and they would be resolved, and so they would go away. It wasn't until Nixon that you got under the guise of reigning in fiscal and debt deficit spending that you got Nixon claiming much broader authority to sort of impound all kinds of programs that he personally didn't like. But also the reason why it was thought to be sort of policy impoundments was because he let go forward lots of programs that he did like, like, for example, a program to put a man on mars, which of course, was going to be incredibly expensive. So, it wasn't clear that Nixon was really all that concerned about the fiscal discipline of Congress and the country at large.

**[00:19:31.0] Gary Schmitt:** And, you know, again, I think in the case of Trump, you're getting a repeat, maybe a little bit more on steroids, about kind of a Nixon approach to what they think the executive authority is when it comes to not spending money.

**[00:19:46.8] Jeffrey Rosen:** Well, another big area where President Trump is trying to exercise control over federal spending is in establishing a new Department of Government Efficiency. And he issued an executive order on January 20 that renames the United States Digital Service, which I think was in charge of updating websites, as the Department of Government Efficiency. And that new agency, or the newly renamed agency, is being challenged by advocacy organizations, including the American Federation of Government Employees. They argue that, among other things, it violates the Federal Advisory Committee Act, which bars the delegation of decision making authority to private citizens without public access. Steve, tell us about the challenges to the creation of the Department of Government Efficiency.

**[00:20:33.6] Steve Vladeck:** Sure. I mean, I think the first thing to say is some of the challenges were filed really before we even knew much about what the actual structure was going to be. And so, the concerns about, for example, the Federal Advisory Committee Act, which are based on when the government relies on private parties in private capacities for formal guidance, those sort of dissipated as soon as we saw the executive order, which, Jeff, as you say, put this very, very sort of trolling ly named office right within the Executive office of the President. The president has the power to restructure the executive office of the President. And so, of all the things that Trump has done in the first couple of weeks, I'll just have to say, I think creating this, I mean, he can call the department, it's really an office is not high on the list of things that I think are controversial. It's what he's doing with it that I think is the problem. And so I think we're going to start seeing lawsuits as soon as this week, challenging not so much the structure of the DOGE or whatever we're calling it, but rather the role that Elon Musk and other folks who are apparently in that office are playing in purporting to shut off funds in other agencies, in controlling the payment systems at the Department of the Treasury and all kinds of other areas.

**[00:21:53.6] Steve Vladeck:** The Office of Personnel Management, where there are serious concerns about violations of the Federal Privacy Act when it comes to sharing PII, Personally Identifying Information about federal employees. So, Jeff, I think the litigation surrounding DOGE started on structural terms, and I think it's going to shift very, very quickly to a much closer look at exactly what Elon Musk and his, I don't know, aides, assistants, minions are doing, because a lot of it, at least at first blush, looks patently illegal.

**[00:22:29.1] Jeffrey Rosen:** As you say, there's controversy over the effort by DOGE personnel to gain access to classified information at the USAID. CNN reports that according to sources, personnel tried to access USAID headquarters and were stopped, called U.S marshals, they wanted access to security systems, and eventually they were in fact able to access the headquarters. Gary Schmitt, tell us both about the structural challenges to the creation of DOGE under the Federal Advisory Committee Act and to this subsequent controversy and likely litigation about the access of DOGE personnel to classified and other information. How unusual is this and how are the legal challenges likely to proceed?

**[00:23:14.5] Gary Schmitt:** Yeah, well, you know, as somebody who is the executive director of one of these advisory boards and at the White House, you know, there's a great deal of discretion by the President about who gets put on these boards and what kind of access they give. I think it's going to be very difficult for legal challenges to rebut the Trump administration's granting of authority for access to these variety of these systems. I mean, it's just the nature of the executive office of the, and the presidency under the Constitution that, that presidents really do have an immense amount of discretion and giving access and authority for access to these programs, even if it's not particularly wise.

**[00:24:01.9] Gary Schmitt:** Now, there may be, as Steve points out, there may be sort of things having to do with personnel files and privacy concerns that statutorily can be raised, and I just don't know about those in particular. I would say the big difference, though, that one has to think about is, it's one thing to get authorization, but if these advisory boards or offices try to exercise actual authority, that's something different. So, the difference between having access but then using that access to actually take control of particular policies is something outside the realm of these advisory boards.

**[00:24:42.1] Gary Schmitt:** And that could be challenged, I think, quite effectively. You know, I mean, again, I was able to run a board that we often were reporting to the President about this or that problem in the intelligence community and making recommendations. But the idea that we would have any authority to order the, you know, CIA to do X, Y or Z was just beyond anybody's imagination.



**[00:25:08.3] Jeffrey Rosen:** Wow. Well, Steve, talk about that delegation and how unusual would the delegation of this authority to these advisory boards be? And what kind of challenges or clashes could you imagine moving forward between these newly created agencies and the Constitution and the rule of law?

**[00:25:31.1] Steve Vladeck:** Well, I mean, I think one of two things is true. Either Elon Musk and his assistants are acting as what are called special government employees, in which case they are almost certainly violating a whole bunch of federal statutes that limit what the federal government can do in these cases. That structure is the relationship within the federal government that violate Jeff, among other things, the Pendleton Act, the now 150-year-old statute protecting the civil service. I mean, the list of statutes that these actions appear to be violating is mind bogglingly long, given that we're only two weeks into this administration or he's not a federal employee, in which case he's exercising governmental authority as a private person, which, Jeff, among other things, creates a whole lot of liability under tort law.

**[00:26:18.1] Steve Vladeck:** I mean, one of the reasons why we have the government engage in government functions is because the government is the sovereign and the government, as the sovereign, has sovereign immunity, which can be waived and structured and all these other things. Private parties are not supposed to be the government. There are various statutes that make it illegal to perform government functions through private parties, perhaps the most important of which is the Anti Deficiency Act, which prohibits the use of federal funds that haven't been appropriated for these purposes.

**[00:26:45.1] Steve Vladeck:** But Jeff, part of the problem is that we also don't have full insight into what's actually happening because all of this is mostly just secondhand reports and some media accounts. There used to be an organization in Washington that engaged in regular public oversight of the executive branch. It was called the United States Congress. I think one of the real problems we're seeing is not so much the power grab by President Trump and Elon Musk, it's how much congressional leaders are rolling over. So just one quote that I think really summarizes where we are from last week. Tom Cole is a Republican congressman from Oklahoma, but he's also the chair of the House Appropriations Committee. So, this is not just a random member of the rank and file. This is like the most important congressional appropriator. And when asked about some of the freezes of funds by reporters, Jeff, Cole's response was, "Well, they're just appropriations. Those aren't laws." I think part of the problem here is that we are not well set up for a world in which the only check on the executive branch is litigation. And so, we're going to have to see how that plays out in the coming days and weeks.

**[00:27:57.3] Steve Vladeck:** I suspect that litigation will be a non zero check here. I think we'll have some success. But the courts are not designed to engage in this kind of supervision of the

executive branch. And I think that's going to be a real challenge for how we figure out even what the problems are, let alone what the solutions are.

**[00:28:14.7] Jeffrey Rosen:** Courts are not designed to engage in this kind of supervision of the executive branch. Powerful statement. And I'm So glad you mentioned the Pendleton Act. After 1877, liberal Republicans abandoned their support for civil rights and turned their attention to civil service reform. And the culmination of that effort was the Pendleton Act of 1883, proposed by a Democratic congressman from Ohio, which provides that the federal government jobs be awarded on the basis of merit and competitive exams and prohibits firing or demotions for political reasons. Gary Schmitt, give us a sense of that history. To what degree does the current challenges violate the letter in spirit of the Pendleton Act and historically, how big a deal is this effort by the president to control civil service appointments?

**[00:29:05.3] Gary Schmitt:** Yeah, I think one of the things that's gotten lost in the unitary executive debate is if you step back and understand why the founders created the office of the presidency and singularly gave him the executive authority and then also made him eligible, re eligible for the office. You know, people focus in on the removal debate in the first Congress, where it was decided that the President, by most of the members of the House, that the President had, through constitutional authority, implied power for removal of senior officials. So, everybody's focused on that. What they've kind of missed is one of the reasons for the presidency that we had was, as Hamilton pointed out, was to give stability and durability to the administration of government. And of course, what happened soon after the Constitution's up and running is we have the rise of political parties and the President as the head of a political party. And as a result, appointments became a matter of spoils. And so, one can argue that the civil service reform and Pendleton as well are really kind of constitutional adjustments to try to keep the principle of durability and stability in administration.

**[00:30:30.8] Gary Schmitt:** So, you know, a lot of times, people backing the views of the Trump administration and some legal scholars about the thoroughness of the unitary executive is they tend to overlook the fact that there's these other principles at play and by and large, the courts over the years have recognized that there had to be an adjustment precisely because the political system in the United States had moved on from simply a constitutional system to one in which is overlaid with political and partisan efforts.

**[00:31:06.4] Jeffrey Rosen:** Well, yet another challenge to nonpartisan civil service appointments is the executive order issued on February 2nd, which reclassifies many federal employees under Schedule F, which would remove civil service protections under the Civil Service Reform Act of 1978. Steve, how big a deal is this? This order is being challenged by Public Employees for Environmental Responsibilities, along with other federal unions who argue that the order violates the Administrative Procedure Act and civil service protections passed by

Congress, including the Civil Service Reform Act of 1978. Steve, tell us about the order and the challenges.

**[00:31:50.8] Steve Vladeck:** Sure. I mean, so the order is sort of a ramped up version of something that President Trump had tried to impose late in his first term. And the basic idea is just to take a whole bunch of positions in the federal government that have historically been classified as civil service jobs and convert them into what are basically political positions so that the individuals holding them have no protection against being fired at will. And I think we should say more importantly that the individuals holding them become directly accountable to the president as opposed to insulated in various respects from immediate political control. So Schedule F, if it goes into sort of full, full force, would basically radically adjust the ratio of civil servants to political appointees in the executive branch in favor of political appointees.

**[00:32:45.9] Steve Vladeck:** The tricky part here is that it would not convert every single executive branch employee into a political appointee. And so, it is at least theoretically possible that you could argue that Schedule F is just drawing the civil service political appointee line, Jeff, in a different place than we've drawn it historically without running afoul of the Pendleton Act. I find that argument a little bit dubious given that the Pendleton Act, as you say, has been on the books for almost 140 years at this point and that we have pretty well developed views of where the line is and what makes a position a career position versus a political position.

**[00:33:22.3] Steve Vladeck:** But as you say, there are other claims and challenges to what the government's doing that may sort of be resolved without getting to the Pendleton Act question. If it's an APA violation because the government didn't dot the I's and cross the T's, that would absolve courts of the need to reach the merits. I'll just say, I mean, I think there are already three different lawsuits now pending challenging Schedule F. I think two of them are here in D.C and one is just across the line in Maryland. So, these are also going to move forward, unlike impoundment. I think this is an issue that hits much closer to home for the long term ideological commitments of the conservative justices on the Supreme Court, Gary mentioned the unitary executive. There's perhaps no principle that's more central to the unitary executive than direct control of all executive branch subordinates. And Schedule F is at least consistent with that view. So, I think it's a real question whether, if this gets the Supreme Court, Jeff, on the constitutional question, I don't know that there are five votes to uphold the Pendleton Act and indeed, especially if there's a way for the court to leave some of the Pendleton Act intact while upholding Schedule F.

**[00:34:40.6] Steve Vladeck:** Like, I'm much less confident that this court would strike down Schedule F than I am that it would have real problems with the impoundments we've seen. Or just take one more topic that's been in the news that we haven't gotten to yet, that this court would strike down the Birthright Citizenship Executive order. Schedule F seems much closer to

what has long been a mainstay of the conservative legal agenda, which is giving the President complete control over the executive branch. And if I can just add one editorial comment, Jeff, I think we're seeing the results of the unitary executive taken to its fullest extent, which is all of the historical justifications for some independence in the executive branch for having a civil service, for requiring there to be competent, technical, skilled, apolitical workers turning the lights on in the government. I think we're starting to see what happens when you send those people home. I'm not sure any of it is good.

**[00:35:36.8] Jeffrey Rosen:** So interesting, Gary, do you agree or not with Steve that if this question does go up to the Supreme Court, it seems less likely to strike down the reclassification of federal employees on Schedule F? And then give us a sense of this history, which is indeed amazing. The Pendleton Act arises out of the efforts by liberal Republicans and Democrats to make appointments based on merit rather than political connections. The claim is that it was Andrew Jackson who created the spoils system of appointments, and the effort here was to resurrect nonpartisan appointments. The cause is taken up by Democrats because it prevents Republicans from filling patronage offices with black employees. It gets bipartisan steam. Black employees get federal jobs over the next three decades until they're systematically fired by the white supremacists, Woodrow Wilson, who segregated the civil service by executive fiat.

**[00:36:32.3] Jeffrey Rosen:** I'm getting that history from a part of this new book I've just finished on the battle between Hamilton and Jefferson and really, really struck by how central it was in the 19th century. So, place the current debates in historical context. Is this the most significant effort by a president to control the civil service since Woodrow Wilson segregated the civil service? And do you think it's likely to succeed before the Supreme Court or not?

**[00:36:57.1] Gary Schmitt:** Well, I think it's the most serious for sure, although we've seen other attempts during Roosevelt's first couple terms in office, Franklin Roosevelt, that is. And also, the Reagan administration was also moved along these lines as well, but not nearly as severely as the Trump folks are putting forward. I Mean, one of the difficulties with the law is that there's so fairly broad language. One part of the civil service law that seems to suggest you can, you know, anybody that's involved in policy making or policy advocating or policy determining can be scheduled as a non-civil service. And now, historically, that hasn't been interpreted so broadly, but nevertheless, the language is there. So when it gets to the Supreme Court, I can imagine a lot of the Court being textualist that they are, would say that the plain letter of the law allows the Trump administration to do it. And also combined with their own views about the unitary executive, I think they would lean that way. Now, the only countervailing thing is I think there's two. One is Justice Roberts has shown an inclination not to be more conscious of sort of standing practices and precedent than perhaps some of the other justices.

**[00:38:24.0] Gary Schmitt:** So I'm not so sure he'd be so quick to jump into this, even though he's a unitary executive advocate. And the other thing I think is also the case is that this is a major reform of the civil service law in effect, and the Court has said that on such major questions of policy that it really requires Congress's role to make these kinds of changes. So if I had to guess, I had to roll the dice, I'd say it's 60, 40 that they sanction what the Trump administration is doing. But on the other hand, there are these other countervailing elements within the Court that I think suggest that they might not.

**[00:39:08.1] Jeffrey Rosen:** Well, let's now turn to the executive orders recognizing two genders and barring the federal government from recognizing transgender status. That was issued on January 20th, 2025. And that also is being challenged under a series of provisions, including the claim that it violates the Fifth Amendment by discriminating against transgender individuals, the Eighth Amendment by subjecting people's risks to life and dignity, and the Rehabilitation act by failing to accommodate gender dysphoria. Steve, tell us about these challenges and whether they're likely to succeed.

**[00:39:50.6] Steve Vladeck:** Sure. I think it's worth stressing that there aren't a lot of contexts in which the federal government's views of how many genders there are and how they should be classified directly affects private people. Jeff, it has obviously big impacts on the federal workforce. And so, we've seen a lot of aggressive policing of, for example, pronouns in email, signatures of gender neutral bathrooms in government buildings, of rewriting reports and websites, and grant proposals to scrub language. But the folks who are most directly affected are federal prisoners. And so, federal prisoners, folks who are serving sentences in federal prisons and jails are the ones to whom this produces the most immediate impact, because they are no longer under the executive order, eligible to be classified in accordance with their gender identity.

**[00:40:45.5] Steve Vladeck:** And so, the lawsuits we've seen, or at least the first lawsuits we've seen challenging this, have been brought on behalf of federal prisoners and have succeeded in obtaining temporary relief, blocking the transfer of those prisoners to units that correspond with their biological sex, but not their gender identity. I suspect that at least those lawsuits might succeed, but I don't know. The problem is, Jeff, is that those challenges will probably be limited to federal prisoners and that the broader effort of the federal government to scrub the existence of transgender identity of different sort of non binary gender status is going to have a real stigmatizing effect, even if it's only confined to the areas of federal government employment, federal government documents, that's still a whole lot of stuff that affects a whole lot of people, just not as directly as federal prisoners.

**[00:41:41.3] Steve Vladeck:** So I think we'll probably end up seeing a bit of a distinction in that space where the federal prisoner cases cash out on the side of the prisoners, but the government might otherwise be able to get away with it.

**[00:41:52.8] Jeffrey Rosen:** Gary, how do you see the challenge to the executive order about transgender status and whether or not it's likely to succeed in court?

**[00:42:00.4] Gary Schmitt:** Oh, I'd be playing in a ballpark that I have no idea exactly, because I just haven't followed it. So I defer to Steve's analysis of, you know, how this would play out.

**[00:42:12.3] Jeffrey Rosen:** Let me then put on the table the executive order issued on January 27, which bans transgender people from serving in the military. That also is being challenged in court under the Fifth Amendment, Equal Protection, as well as claiming that it is arbitrary and can't be justified by sufficient federal interests. What are your thoughts on the fate of that order in court?

**[00:42:36.5] Gary Schmitt:** Typically, traditionally, courts have allowed the commander in chief to decide all kinds of issues having to do with who can be in the military and who can be released from the military. So my sense is that the court's probably likely there may be some lower courts that want to see more due process involved. But my sense is that at the end of the day, the courts are going to defer to the president's authority as commander in chief on those kinds of issues.

**[00:43:08.7] Jeffrey Rosen:** Well, let's put on the table finally a series of other important executive orders involving immigration. And, Steve, you've written about bonus 120 by President Trump's Guantanamo memo and it purported to authorize the expansions of migrant detention centers on Guantanamo. That's also being challenged in court. Tell us about the challenges and whether they're likely to succeed.

**[00:43:35.2] Steve Vladeck:** I mean, there's a lot going on in the immigration space, and so it's hard to keep fully abreast of all of the lawsuits. So, the heart of President Trump's immigration strategy is to radically increase how many folks in the United States who are subject to arrest, removal, and being removed from the country are actually picked up. So, Jeff, by some estimates, there are as many as 12 million undocumented immigrants in the United States. There are another substantial chunk of immigrants who are here lawfully but might be subject to removal because of crimes or other misbehavior. And it has never been the case that the federal government has had the resources to find all those individuals to pursue removal proceedings against them, to detain them pending removal, and so on. And I think it's been a real priority for President Trump to ratchet up that capacity. The problem is that to ratchet up that capacity, you need Congress because you need more money for these programs, you need more personnel for

these programs. And so, what we've seen instead is the president trying to basically co-opt local and state law enforcement, including in states that don't want to assist in assisting in immigration enforcement.

**[00:44:54.4] Steve Vladeck:** We've seen the president announce that they're going to expand what's called the migrant operations center, the part of Guantanamo nobody knows about because usually it's not very active and doesn't have that many people as a place to hold up to, to 30,000 non-citizens, while, Jeff, they're in removal proceedings? And I think the key, I think, to put out here is none of this has actually happened at scale yet. No one has been sent to Guantanamo. There's been a threat to local and state law enforcement officials to assist with immigration enforcement, but no one has been prosecuted for not doing so. We've seen scattershot reports of ICE raids in a few places in the interior of the country, but not the kind of nationwide raids that some folks are worried about. So I think here we have to be a little bit sort of careful is not the right word, but just sort of nuanced in how we talk about the legal challenges.

**[00:45:51.6] Steve Vladeck:** With regard to the legal challenges, I mean, the sort of the effort to commandeer local and state law enforcement, I think will fail. Right. We saw, for example, a memo from the Secretary of Transportation, Sean Duffy last week. Well, I would have thought he had other things to worry about that, among other things, threatens to withhold all transportation funding from local and state governments that don't voluntarily assist in immigration enforcement. That strikes me as a textbook, unconstitutionally coercive spending condition, let alone one that isn't authorized by the relevant statutes. And as for Guantanamo, I mean, Jeff, there's no litigation yet because no one's been sent there, but if it happens, I'm sure there will be. So, the trick here is the president has an awful lot of authority as a matter of both statute and constitutional authority in the immigration space. Some of that authority, I think, is consistent with what President Trump is proposing, but a lot of what he's proposing isn't. And just figuring out when and where he crosses the line, I think is going to depend exactly on what happens going forward. I don't think we're there yet. The way that, for example, during the first Trump administration, you had all of that litigation that first weekend over the travel ban.

**[00:47:05.0] Jeffrey Rosen:** Gary, your thoughts on the litigation that might arise over the Guantanamo order? As Steve says, the action hasn't yet attracted lawsuits, although the center for Constitutional Rights has threatened to file suit. Complicated area. How are these challenges likely to proceed?

**[00:47:23.8] Gary Schmitt:** Yeah, I think I want to go back to the issue of how the Trump administration is going to pay for the expansion. Steve's right, you would think that this would still require the Congress and the Appropriations Committees to actually put money in the till so that they could actually do the expansion. The caveat here is that we should remember that

Trump got around the lack of funding for his border wall back in the first term by somehow forgetting exactly all the details, but was able to take money out of the Pentagon's budget and use it for the wall that he was trying to build. So, again, this gets us back to the fact that, you know, you would hope that Congress and the appropriations people would actually do their job, which is either give the money or, you know, define how exactly they're going to use that money. But it's also the case that Trump has a record of somehow bypassing the Appropriations committees.

**[00:48:25.6] Jeffrey Rosen:** Well, it's time for closing thoughts in this complicated, nuanced, and really important discussion. I'm so grateful to both of you for walking us through the various legal challenges so thoughtfully and carefully. Steve, you said something important earlier. You said some of the legal challenges may succeed, but broadly, courts are not well set up to check the executive branch. Say more about that, as you think about the many, many legal challenges that are likely to arise in the months and years ahead, how should We the People listeners think about them? And to what degree will the courts check the president?

**[00:49:04.6] Steve Vladeck:** Sure. I mean, so I think we can probably break these into three categories, Jeff. They're the actions that just won't be challenged in court, because as awful as they may be, they're also lawful. And so, we might hate them, we might think they're terrible ideas or terrible policies, but there's no obvious legal reason why the president would lack the power to do it. And obviously, the courts aren't going to be useful there. There's the second category, which is policies where there are plausible legal challenges, but those challenges fail, where at the end of the day, the government's not only going to be able to carry out these orders and these policies in the interim, but actually the courts might ultimately sustain them, as happened, for example, during the first Trump administration with the third iteration of the travel ban. And then there's the third category. And the third category is cases where the government's going to lose. And, Jeff, there are going to be a lot of these. I mean, I know we've become pretty fatalistic about the courts as an independent check on the executive, especially on a Republican president. But I'm confident that the lower federal courts and even this Supreme Court are going to have real problems with at least some of what President Trump is doing.

**[00:50:14.2] Steve Vladeck:** But even in those cases, Jeff, the courts can only do so much. They can't literally walk into the government buildings and turn the funding taps back on. They can't literally go out into the streets and ensure that folks who were wrongfully terminated are escorted back into the buildings to their jobs. And so, it takes more than just a piece of paper saying, hey, federal government, you are stopped, you are enjoined, you are blocked from doing this. To put right what went wrong, it takes actual popular support and public will. And so, you know, my sort of bottom line is, yes, the courts are going to do, I think, more than we might have expected to check Trump, but it's not going to be remotely sufficient without buy in from that other branch of government that we the people elect, Congress, that without at least some pushback from the



legislative branch, the courts are going to be, I think, dealing with the second Trump administration with one arm tied behind their back.

**[00:51:14.5] Jeffrey Rosen:** Many thanks for that. Gary Schmitt, you served in Republican administrations. How do you see President Trump's executive actions? Historically, are they unusual or not? And to what degree do you think that the courts will check in?

**[00:51:29.3] Gary Schmitt:** So I also was the Democratic staff Director on the Intel Committee. So I'm one of those old fashioned guys who actually worked for both parties or politicians of both parties. My boss in the Senate was Senator Moynihan. So, no, the big issue is I think the courts will, in fact, step in and take on the most egregious things. But I'm not, you know, we have a system in which the presidency has been given a great deal of discretion and the laws in many cases have expanded that discretion. So I think there's going to be this difficulty of curtailing egregious policies because there will be a legal and constitutional basis for some of the things that the Trump administration is trying to do. I think the larger issue is that if you, a lot of Trump supporters like to suggest that the Trump administration is going to resurrect constitutional government as it should be. But if you think about it and you step back and look at what's happening, what you see is the Trump White House actually trying to turn a system of separated powers into a parliamentary system in which, you know, the members of Congress are basically, you know, party members over and above their constitutional role, which is to be members of the Senate and the House.

**[00:52:53.0] Gary Schmitt:** Now, the courts seem to be the last resort, the last guardrail against that happening. But again, it's a case that I think the truth is the Trump administration is pushing the boundaries of overcoming what has been traditionally a system of separated powers and checks and balances.

**[00:53:13.2] Jeffrey Rosen:** Thank you so much, Steve Vladeck and Gary Schmitt for a thoughtful, deep and nuanced discussion of the initial legal challenges to President Trump's executive orders. Dear We the People listeners, it is important that together we parse the arguments on all sides of the legal challenges to executive actions. And I'm so grateful to Steve Vladeck and Gary Schmitt for having begun our learning journey so thoughtfully. Steve and Gary, thank you so much for joining.

**[00:53:43.7] Steve Vladeck:** Thanks, Jeff.

**[00:53:44.7] Gary Schmitt:** Thanks, Jeff. Really appreciate being on.

**[00:53:50.0] Jeffrey Rosen:** Dear We the People listeners, there's no better way to follow the fast moving legal challenges we discussed in this episode than to read the primary sources. In the

show notes we've linked President Trump's executive orders and to the lawsuits challenging them. Please take the time to read the documents on all sides and as always, make up your own mind. This episode was produced by Samson Mostashari and Bill Pollock, it was engineered by Bill Pollock. Research was provided by Yara Daraiseh, Gyuha Lee, Samson Mostashari and Cooper Smith. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate and, of course, extra constitutional homework, which I know all of you are going to do. Please check out the new Constitution 101 class we launched in partnership with Khan Academy. Such a great time to go back to constitutional basics @constitutioncenter.org/con101. Sign up for the newsletter @constitutioncenter.org/connect and always remember that the National Constitution center is a private nonprofit. This podcast and all of our work is only possible thanks to the generosity of people from across the country who are inspired by our nonpartisan mission of constitutional education and debate.

**[00:55:05.7] Jeffrey Rosen:** Please consider supporting our efforts by donating today@constitutioncenter.org donate on behalf of the National Constitution Center, I'm Jeffrey Rosen.