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CONTINUITY, CHANGE AND CONTESTATION

Executive Power at the Start of the Second Trump Administration

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The first months of the Trump administration have raised urgent questions about the nature of presidential power. Actions at—or beyond—the outer limits of executive authority have sought to remake the American state, economy, and civil society.¹ For instance, new forms of executive power are being exercised to shutter large swaths of the federal government and to reorganize much of the rest.² The invocation of a vague and contested statutory authorization serves as the basis for a trade war aimed at refashioning the global economy, and reshaping America’s place within it.³ Meanwhile, key sources of countervailing power in American society, such as universities, media and the legal profession, now face substantial pressure to comport with demands made by the executive branch.⁴ These are but a few examples of the novel and drastic ways that President Trump has asserted power since the start of his second term in office.

At the same time, many of these developments fit with trends that predate the new administration.⁵ The distribution of power within the American government changed substantially in recent years—both in terms of the formal allocation of legal powers between different parts of the government, and in terms of how different parts of the government are able to wield their respective powers to realize their ambitions.⁶ In other words, attempts to use

¹ See HERITAGE FOUNDATION, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE (2025) (outlining both the plans and aims associated with many executive actions taken in the early months of the Trump administration).

² See, e.g., Elena Shao & Ashley Wu, *The Federal Work Force Cuts So Far, Agency by Agency*, N.Y. TIMES, May 12, 2025, <https://www.nytimes.com/interactive/2025/03/28/us/politics/trump-doge-federal-job-cuts.html> (charting reductions-in-force estimated to have affected twelve percent of the federal workforce through mid-May—when many of these actions were temporarily stayed by federal courts).

³ Exec. Order No. 14257, 90 FR 15041 (2025).

⁴ See, e.g., Exec. Order No. 14263, 90 FR 15615 (2025) (targeting a prominent law firm with a range of limits on its access to the federal government); Exec. Order 14279, 90 FR 17529 (2025) (seeking to reform the university accreditation process to target institutions that undertake diversity, equity and inclusion initiatives).

⁵ For a recent statement of continuity in the expansion of presidential power, see Jack Goldsmith, *We Have to Deal with Presidential Power*, N.Y. TIMES, May 5, 2025. For touchstone statements of this position in jurisprudential and academic debates, see *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997) (offering prominent examples of the call for greater presidential control over the executive branch).

⁶ There is a complex interaction between *de jure* and *de facto* powers of the coordinate parts of government, which require close attention to untangle.

executive power in new ways—and toward new ends—do not arise from an entirely novel vision of the presidency.⁷

The following identifies key trends in executive power that predate President Trump’s second term. It then provides a brief overview of how these trends are facilitating the new administration’s efforts to remake the American state, economy and civil society.

CONTINUITY: PREEXISTING TRENDS IN EXECUTIVE POWER

Three dimensions of executive power shifted substantially even before the start of the second Trump administration. The first major change involves a more formal view of the separation of powers between the executive and coordinate branches of the government.⁸ The second relates to the privileges, immunities, and powers afforded to the President.⁹ The third concerns the relationship between the executive and administrative state. In each domain, there have been significant instances of deepening presidentialism in the structure of American governance.¹⁰

SEPARATIONS OF POWER

The Supreme Court’s interpretation of federal power turns upon two broad commitments: to ensure that the federal government is able to effectively execute its enumerated powers¹¹, while also guaranteeing that each part of the government is positioned to prevent the others from exceeding the boundaries of their limited authority.¹² Presidential power has long been rearranged with reference to these twin aims of effectiveness and constraint.¹³

In fact, both goals have provided the basis for the expansion of executive power in recent decades. This expansion includes the consolidation of presidential power over foreign affairs,¹⁴ the protection of the executive from certain mechanisms of accountability,¹⁵ the increased

⁷ See *supra* note 5.

⁸ This shift has taken place both within the federal government, and in the relationship between the executive and state governments—the following analysis focuses especially on the former, and the development of a more formal view of the separation of powers between branches of the federal government. *Compare with* The Federalist No. 47 (James Madison) (arguing that the separation of powers does not mean that one branch is precluded from exercising powers enumerated to another, but rather that “where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted.”)

⁹ This pertains to both the individual serving as President and the broader operations of the executive branch.

¹⁰ Juan J. Linz, *The Perils of Presidentialism*, 1 J. OF DEMOCRACY 51 (1990).

¹¹ *McCulloch v. Maryland* 17 U.S. 216 (1819).

¹² *Marbury v. Madison* 5 U.S. 137 (1803).

¹³ *Compare* The Federalist Paper No. 51 (James Madison) (explaining the separation of powers as a means of constraint through ‘ambition counteracting ambition’) *with* The Federalist Paper No. 70 (Alexander Hamilton) (defending the need for an “energetic executive” to ensure the effective exercise of federal power in the wake of the Articles of Confederation).

¹⁴ See, e.g., *Zivotofsky v. Kerry*, 576 U.S. 1 (2015). This longstanding trend is especially salient in lieu of recent debates over the Administration’s bombing of Iranian nuclear facilities.

¹⁵ See, e.g., *Trump v. United States*, 603 U.S. ____ (2024).

emphasis on presidential control over the administration of the federal government¹⁶, as well as stricter limits on the ability of the legislature to prescribe the executive function.¹⁷

Justifications for these shifting limits to presidential power are often explained with reference to Justice Jackson’s famed concurrence in the 1952 *Steel Seizure* case.¹⁸ This touchstone for modern understanding of the presidency followed President Truman’s attempted seizure of the nation’s steel mills after a strike threatened their operations during the Korean War.¹⁹ In his influential concurrence, Justice Jackson identified three different sets of circumstances that determine the permissible scope of any exercise of presidential power.

First, the President’s authority is at its greatest—and embodies the full extent of the federal government’s power—when the executive branch is exercising its enumerated Article II powers in addition to a grant from an “express or implied authorization of Congress.”²⁰ Second, Presidential authority operates in a “zone of twilight” when both branches have concurrent power and when Congressional “inertia, indifference or quiescence” appears not to challenge the executive’s assertion.²¹ Finally, presidential powers are at their “lowest ebb” when the President acts against the “expressed or implied will of Congress” in such a way that would require the courts to characterize the executive power being exercised as “conclusive and preclusive.”^{22,23}

Justice Jackson grounded this framework in the principle that any potential advantages from the efficient exercise of executive power in a particular instance must be carefully weighed against the dangers that the further concentration of power poses to the broader constitutional order.²⁴ While the framework emerged amid heightened suspicion of executive power, its recent invocation has often justified the expansion of presidential authority. This follows a reformulation of the relationship between effectiveness and constraint that this authority is organized around.²⁵ In recent years, the Court has often stressed the need to ensure the effective

¹⁶ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

¹⁷ *INS v. Chadha*, 462 U.S. 919 (1983). In the early months of the new Trump administration, this trend has also extended to limiting the circumstances when the federal judiciary can act in response to the exercise of executive power. See, e.g., *Trump v. CASA Inc.*, 606 U.S. ____ (2025) (curtailing the ability of courts to issue nationwide injunctive relief, including with respect to potentially unconstitutional assertions of executive power).

¹⁸ *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952) (Jackson, J., concurring) (colloquially referred to as the *Steel Seizure* case).

¹⁹ *Id.*

²⁰ *Id.*, at 635.

²¹ *Id.*, at 637.

²² *Id.*, at 638.

²³ *Zivotofsky v. Kerry*, 576 U.S. 1 (2015) (demonstrating that some powers do exist in the third tier of “conclusive and preclusive” presidential authority).

²⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (underlining that against the backdrop of both the New Deal and World War, there was recognition of the potential conveniences of a strong executive, but also a presumption of the dangers that came with such a concentration of power).

²⁵ Three distinct explanations are offered for these recent adjustments. First, there is the idea that the legislative power is inherently superior and entails a greater risk of aggrandizing more power for itself. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). Second, there have been efforts to identify an enduring history that shows the refusal of presidential administrations to acquiesce to legislative attempts to limit the exercise of executive authority. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-*

exercise of presidential power, including on the grounds that the executive must be positioned to constrain other parts of government. This reworking of the separation of powers colors the other major trends in executive power leading into the new administration.

PRESIDENTIAL POWERS, PRIVILEGES AND IMMUNITIES

Recent years have also brought a series of decisions that expand the powers, privileges and immunities afforded to the presidency. Whereas the *Youngstown* framework identifies the circumstances where the President can act without running afoul of the separation of powers, these cases focus on the legal structures that might shape how the President chooses to use their authority. They concern presidential immunity from legal liability, as well as limits on potential mechanisms of oversight and accountability related to the exercise of executive power.

Most significant in this set of cases is *Trump v. US*, which held that the President is immune from criminal liability for conduct within the executive’s “conclusive and preclusive” powers—i.e., those which neither Congress nor the Court can impinge upon under Justice Jackson’s framework.²⁶ Furthermore, the President’s official acts that do not fall within this “exclusive sphere of constitutional authority” are at least presumed immune from criminal liability.²⁷ This extension of immunity followed a series of decisions that limited the potential scope of civil liability for the President, but which did not protect the executive from some forms of accountability and oversight by coordinate branches of government (namely with respect to the President’s actions as a private individual).²⁸

Such protections identified with the presidency are often justified on the grounds of the “necessity of an energetic executive.”²⁹ Proponents of this view claim that the President not only needs a certain degree of latitude to exercise Article II powers, but that the effectiveness of these powers turns upon confidence that there will not be adverse consequences from their full exercise. Meanwhile, in Justice Sotomayor’s dissent in *Trump v. U.S.*, this was explained as a major rupture with the preexisting understanding of executive power.³⁰ In her words, this decision turned the President into a “king above the law.”³¹

Century, 47 CASE W. RES. L. REV. 1451 (1997). Third, there is an understanding that new types of governance challenges necessitate a more forceful executive. *See, generally*, Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (noting how one such shift—the rise of presidential administration to deal with the demands of the depression and increased international conflict—came alongside an antifascist commitment to limit executive power).

²⁶ *Trump v. United States*, 603 U.S. ____ (2024), at 9, 14.

²⁷ *Id.*, at 14 (noting that the Court did not need to decide whether this immunity is “presumptive or absolute” in the instant case).

²⁸ *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020); *Trump v. Vance*, 591 U.S. 786 (2020).

²⁹ The Federalist No. 70 (Alexander Hamilton).

³⁰ *Trump v. United States*, 603 U.S. ____ (2024) (Sotomayor, J. dissent) (noting a major rupture not only in the tradition of presidential power, but in understanding of the rule of law).

³¹ *Id.*, at 30.

PRESIDENTIAL CONTROL OVER THE ADMINISTRATIVE STATE

A series of rulings by the Roberts Court have also consolidated presidential control over the administrative state. This trend did not begin in the courts; rather, it is often attributed to a consensus that first emerged in the time between the Reagan and Clinton administrations.³² Across this period, presidents from both parties enacted reforms to ensure that the regulatory state served as a vehicle for enacting presidential priorities.³³ In recent years, legal developments have deepened—and transformed—this trend toward greater presidential control over the administrative state.³⁴

First, the Court drastically narrowed the circumstances when Congress can limit the President’s ability to remove the head of a federal agency without cause.³⁵ Second, the Court struck down a range of agency structures that provided certain parts of the federal government with additional insulation from presidential control.³⁶ These steps significantly curtail—if not completely reverse—longstanding precedent that allowed Congress to create certain federal entities with some degree of independence from the president.³⁷

Not all developments point in a single direction toward greater presidentialism, nor do developments that deepen executive power all do so for the same reason. For instance, the Court drastically narrowed deference to regulatory agencies’ interpretation of vague statutory delegations of power—even as these agencies have come under greater presidential control.³⁸ Recent years have also given rise to a doctrine that rejects the exercise of regulatory authority over areas of “vast economic and political significance” unless the legislature expressly authorized it.³⁹ These steps seem to place a greater burden on Congress to legislate in more

³² Compare Elena Kagan, *Presidential Administration*, HARV. L. REV. 2245 (offering an influential account and defense of this history) with Ashraf Ahmed, Lev Menand & Noah Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131 (2024) (offering a recent intervention in the legal history of presidential control over the administrative state, and showcasing the extent to which this view of presidential administration departed from preexisting understanding).

³³ This development has often been defended on the basis that it renders the administrative state more accountable to the democratic process given the President and Vice President’s status as the sole officials who are elected on a nationwide basis.

³⁴ In this way, the administrative state has increasingly been governed under a more formal understanding of the separation of powers—where it is under the control of the president, rather than subject to various forms of oversight from different branches of the federal government.

³⁵ See, e.g., *Trump v. Wilcox*, 605 U.S. ____ (2025); *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020). The Chair of the Federal Reserve Board now appears the only exception to full Presidential control. *Trump v. Wilcox*, 605 U.S. ____ (2025).

³⁶ See, e.g., *SEC v. Jarkesy*, 603 U.S. ____ (2024); *Free Enterprise Fund v. Public Company Accounting Oversight Board* 561 U.S. 477 (2010).

³⁷ Congress often created these structures to ensure that expertise and neutrality formed the basis for certain regulatory decisions and enforcement actions. This is in part because such processes offered to limit the arbitrary exercise of power by the executive. Rosenblum, *supra* note 26, at 70 (charting the history of internal separation of powers within the executive branch).

³⁸ See, e.g., *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

³⁹ *West Virginia v. EPA*, 597 U.S. ____ (2022) (marking a seminal moment in the emergence of the Major Questions Doctrine).

specific and exhaustive ways. They might also be understood to afford courts a greater power to limit the reach of the federal government given persistent gridlock in Congress.⁴⁰ Either way, such developments provide other constraints on a regulatory state that is otherwise more squarely under the control of the President. This tension raises an unresolved question that is likely to recur throughout the Trump administration: How will the aims of limiting government and permitting greater presidential control over the regulatory state ultimately weigh against each other in moments where they come into conflict? More broadly, how will these various developments toward greater presidential power weigh against other trends that are characteristic of the Court's recent jurisprudence?⁴¹

CHANGE: NEW AMBITIONS FOR PRESIDENTIAL CONTROL

The preexisting trends outlined in the prior section provide the backdrop for the forceful exercise of executive power that has characterized the start of the second Trump administration.⁴² Presidential authority is now being exercised with less regard for Congress and the courts, a heightened sense of impunity, and in order to maximize executive branch control. While these developments fit with preexisting trends, there are other ways in which they represent a sharp change—especially with respect to the ends that these assertions of power seek to effectuate.

First, executive power is being used to remake the broader structure of the American state. This includes the ongoing restructuring of the federal government. The Trump administration is acting to shutter various federal departments and agencies.⁴³ It is also leading an effort to substantially reduce the federal workforce and reorganize the rest of the government. Furthermore, the administration is attempting to reshape the relationship between the executive and other branches of the federal government. For instance, administration officials are calling for the defiance of court orders, if not taking active steps toward this end.⁴⁴ The administration has also claimed authority to withhold expenditures appropriated by Congress⁴⁵, and to disclaim statutory

⁴⁰ Ahmed, Menand & Rosenblum, *The Making of Presidential Administration*, *supra* note 33 (noting the relationship between increased presidentialism and recent decades of deregulation).

⁴¹ In addition to limiting the reach of the federal government, these broad trends under the Roberts Court include the growing influence of originalist interpretation and the heightened importance of federalism.

⁴² The claim is not that these legal trends caused these recent assertions, but that they have created a more permissive environment for them.

⁴³ This includes USAID, the Department of Education, and much of the Consumer Financial Protection Bureau.

⁴⁴ See, e.g., JD Vance (@JD Vance), X (Feb. 9, 2025, 7:13),

<https://x.com/JDVance/status/1888607143030391287?lang=en>; Devlin Barrett, Justice Dept. Leader Suggested Violating Court Orders, Whistle-Blower Says, N.Y. TIMES, June 24, 2025,

<https://www.nytimes.com/2025/06/24/us/politics/justice-department-emil-bove-trump-deportations-reuveni.html>;

J.G.G. v. Trump, No. 25-766, slip op. at 1 (D.D.C. Apr. 16, 2025) (noting probable cause that the Government was in criminal contempt for “willful disregard” of court orders related to the return of individuals deported to prisons in El Salvador).

⁴⁵ Tony Romm, *Trump Administration Wrongly Impounded Infrastructure Aid, Watchdog Finds*, N.Y. TIMES, May 22, 2025, <https://www.nytimes.com/2025/05/22/us/politics/trump-federal-funds-gao.html>.

requirements imposed on the executive branch—like those responsibilities that Congress delegated to the Department of Education.⁴⁶ Finally, the administration is recreating how the federal government relates to both state/local and international institutions. With respect to state and local governments, the administration is demanding that they work to advance its priorities, such as those related to immigration enforcement. It is asserting control over local law enforcement and national guard to ensure that they do so.⁴⁷ Meanwhile, the administration-led Department of Justice is also targeting government officials who are challenging its policies in the discharge of their official duties.⁴⁸ With respect to international legal commitments, the administration is retreating from a set of international organizations and treaty commitments to which it is bound.⁴⁹

Second, the President is undertaking a series of executive actions to substantially reshape the American economy. Most notable is the invocation of power to impose tariffs on a near-universal basis. There have also been substantial efforts to cut regulation, curtail already-appropriated government spending, and roll-back longstanding economic governance norms, like the independence of the Federal Reserve. At the same time, the administration is empowering a certain subset of actors in various sectors of the economy, such as cryptocurrency investors in finance and fossil fuel stakeholders in the energy sector. These steps are being taken with little regard for potential conflicts of interest between the assertion of public power and the potential for private benefit redounding to President Trump, administration officials and those who ally with the administration.⁵⁰

Third, the Trump administration is unilaterally attempting to remake who gets to reside in the country, participate in its economy, and contribute to its civil society institutions. Presidential authority is also being used to dictate change in how civil society institutions operate.⁵¹ These shifts are being effectuated through threats of legal action, funding cuts and mobilization of other

⁴⁶ See, e.g. *New York v. McMahon*, (D. Mass. 2025) (order on consolidated plaintiffs’ motions for preliminary injunction); *New York v. McMahon*, 606 U.S. ____ (2025) (staying the preliminary injunction during the appeals process).

⁴⁷ See, e.g., *Department of Defense Security for the Protection of Department of Homeland Security Functions*, WHITE HOUSE, June 7, 2025, <https://www.whitehouse.gov/presidential-actions/2025/06/department-of-defense-security-for-the-protection-of-department-of-homeland-security-functions/>.

⁴⁸ Isabelle Taft, *A Wisconsin Judge Was Indicted. Here’s What We Know*, N.Y. TIMES, May 15, 2025, <https://www.nytimes.com/2025/04/26/us/wisconsin-judge-hannah-dugan-arrest.html>; Bill Chappell, *Rep. McIver is indicted on federal charges related to tussle at immigration facility*, NPR, June 11, 2025, <https://www.npr.org/2025/06/11/g-s1-72175/mciver-indicted-federal-charges-immigration-new-jersey>; Sudhin Thanawala, *Trump administration sues all 15 Maryland federal judges over order blocking removal of immigrants*, ASSOCIATED PRESS, June 25, 2025, <https://apnews.com/article/trump-immigration-judges-lawsuit-170f6b00cc80b88f0120a079ac8818b0>; Tracey Tully, Luis Ferre-Sadurni & Alyce McFadden, *Newark’s Mayor Arrested at Protest Outside ICE Detention Center*, N.Y. TIMES, May 9, 2025, <https://www.nytimes.com/2025/05/09/nyregion/newark-ice-protest-arrest-ras-baraka.html>.

⁴⁹ See, e.g., Exec. Order No. 14155, 90 FR 8361 (2025) (withdrawing the United States from the WHO).

⁵⁰ Peter Baker, *As Trumps Monetize President, Profits Outstrip Protests*, N.Y. TIMES, May 25, 2025, <https://www.nytimes.com/2025/05/25/us/politics/trump-money-plane-crypto.html>.

⁵¹ This is not only an attempt to remake various areas of law, but an attempt to refashion how law gets made—shaping who gets to engage in private self-governance and influencing the ‘relative autonomy’ of the legal process.

forms of state power to extract commitments from the legal profession, universities and media.⁵² These pressures seek to prevent civil society institutions from responding to disfavored social challenges, like systemic inequality. At times, they even seek to compel active support of the new administration's agenda. These pressures are also being used to undermine actors that seek to protect the rule of law and other longstanding governance norms, like those who have investigated the President and other administration officials for their conduct. In short, institutions that have long exercised countervailing power in American society are now being subjected to new pressures from the executive branch.⁵³

CONTESTATION: LAW, DEMOCRACY & THE FUTURE OF THE PRESIDENCY

The above analysis charted the Trump Administration's assertion of executive power in new ways and toward new ends. It also suggested that many of these developments reflect the acceleration—and reconfiguration—of preexisting trends that increased the power of the presidency across recent decades. Whether new assertions of presidential power will deepen these trends and achieve their intended effects depends upon their legitimacy—both as they are adjudicated in the courts and through the democratic process.

Questions concerning the proper scope of executive power will shape whether the Trump administration can accomplish its various goals to remake the American state, economy and civil society. As this brief has suggested, these decisions will also have a substantial impact beyond the realization of any single policy or political goal. Instead, they will continue to reshape how the constitutional order is understood, and the options that others have for continuing to engage in our collective self-governance. In this way, today's legal questions about the power of the presidency will dictate the future possibilities for American democracy.

⁵² *supra* note 3-4.

⁵³ JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1952).