

# Presidential Powers

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# Disclaimer

- Topics over the next 4 weeks may upset you. You have a right to feel and believe whatever you want.
- **It is okay to disagree with someone. It is not okay to be disrespectful.**
- This class focuses on what power is, who is supposed to have it in our system and examples of where the goals of that system are failing to match reality.
  - Examples will be from current and past presidential administrations.

# Expanding Presidential Power- In Wartime

- Lincoln-
  - Recruited soldiers for the Civil War (Congress)
  - Suspended Habeus Corpus (Courts)
  - Military Trials of Civilians (Courts)
- FDR-
  - War Powers Act-
    - Reorganized entire bureaucracy and independent agencies to support war effort
  - Censored the Mail
  - Broke Census Records privacy to allow for Japanese Internment Camps

# Expanding Presidential Powers- In Crisis

- In an emergency the President/executive branch moves faster than Congress
  - Many delegated powers started being delegated in these times
- Congress has passed many laws that when invoked delegate powers to the executive
  - **The National Emergencies Act of 1976 (NEA):** Formalized the War Powers Act- still in law, but has been ‘tweaked’ after court cases (1980s)
  - Provides a formal procedure for presidents to declare a national emergency & 6 mo. checks by Congress to verify emergency still exists
  - When invoked unlocks over 120 statutory powers scattered throughout the U.S. Code.
  - A president can access authorities covering matters from military composition to communication control and freezing assets.
  - <https://www.congress.gov/crs-product/R46567>

# FDR's Massive Expansion

- With landslide election became 'legislative leader'
  - Had party majorities in House & Senate to support his agenda
- FDIC insuring Banks, Securities & Exchange Commission (SEC) created- oversee stock market
- Civilian Conservation Corps (CCC) & WPA paid individuals from federal funds to complete projects
- Social Security Act- Older Age Pensions, unemployment compensation etc.
- Wagner Act (National Labor Relations Act 1935)- Workers collective Bargaining Act
- Fair Labor Standards Act 1938- Federal Minimum Wage

# Courts Rein In FDR

- Congress was controlled by same party as FDR, so courts only stop on his power grab.
- National Recovery Administration (1933) – parts were ruled unconstitutional in 1935
  - The agency established 557 basic codes and 208 supplementary codes that affected about 22 million workers.
  - FDR Threatens to Pack the Courts in 1937 in retaliation
  - <https://guides.loc.gov/national-recovery-administration>
- Many of the NRA policies were brought back in later legislation and withstood court cases against them.

# September 11 & the Patriot Act

- Detaining Enemy Combatants at 'off country' locations for 18+ months with no trial or legal rights
- Secret surveillance in domestic issues
  - Warrantless surveillance (FISA Court expansion)- can target individuals.
  - Access to electronic communications
- National Security Letters
  - Required businesses to turn over customer records without probable cause or warrant
  - Eventually ruled unconstitutional and 'reworked'
- \$\$\$- Financial surveillance to combat money laundering

# Current Events Chosen by YOU



# Random topic

- Presidents are the ONLY elected officials who receive 'pay for life'
  - Rest are treated as regular federal employees and get pension/benefits based on their # of years of service
- Former Presidents Act of 1958 sets the pay at what a cabinet secretary makes each year
  - For 2025 it is about \$250,000
  - <https://www.archives.gov/about/laws/former-presidents.html>
- Former presidents, their spouses and minor children also receive secret service
  - Vice presidents and other 'high profile' people get 6 mo guaranteed then its up to the sitting president

# Topic 1- Ignoring Court Orders

- If the president ignores a Supreme Court order he is in violation of his constitutional oath.
- Article II, Section 1, Clause 8: *Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:– I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.*
  - Recourse would be for Congress to impeach and remove the President.
  - There is no other constitutional way to ‘force’ a president to comply beyond that person losing an election.
    - Founders expected Congress to hold the power.

# Topic 2- Pardon Power

- Article II, Section 2, Clause 1:
- *The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.*
  - Can literally pardon anyone for anything (federal crime only) so long as it wasn't an impeachment
  - Pardons CANNOT BE UNDONE

# Topic 3- Birthright Citizenship

- Fourteenth Amendment, Section 1:
  - *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside...*
  - The question of children of ‘ineligible parents’ was decided by the *Supreme Court in US v Wong Kim Ark (1898)*
  - Children ARE Citizens per current court understanding
- Current Supreme Court could overturn *US v Ark (1898)*, but so far has only ruled on not liking ‘nationwide injunctions’
  - Would be an “activist court” decision overturning 125+ years of precedence

# Citizenship laws across the world

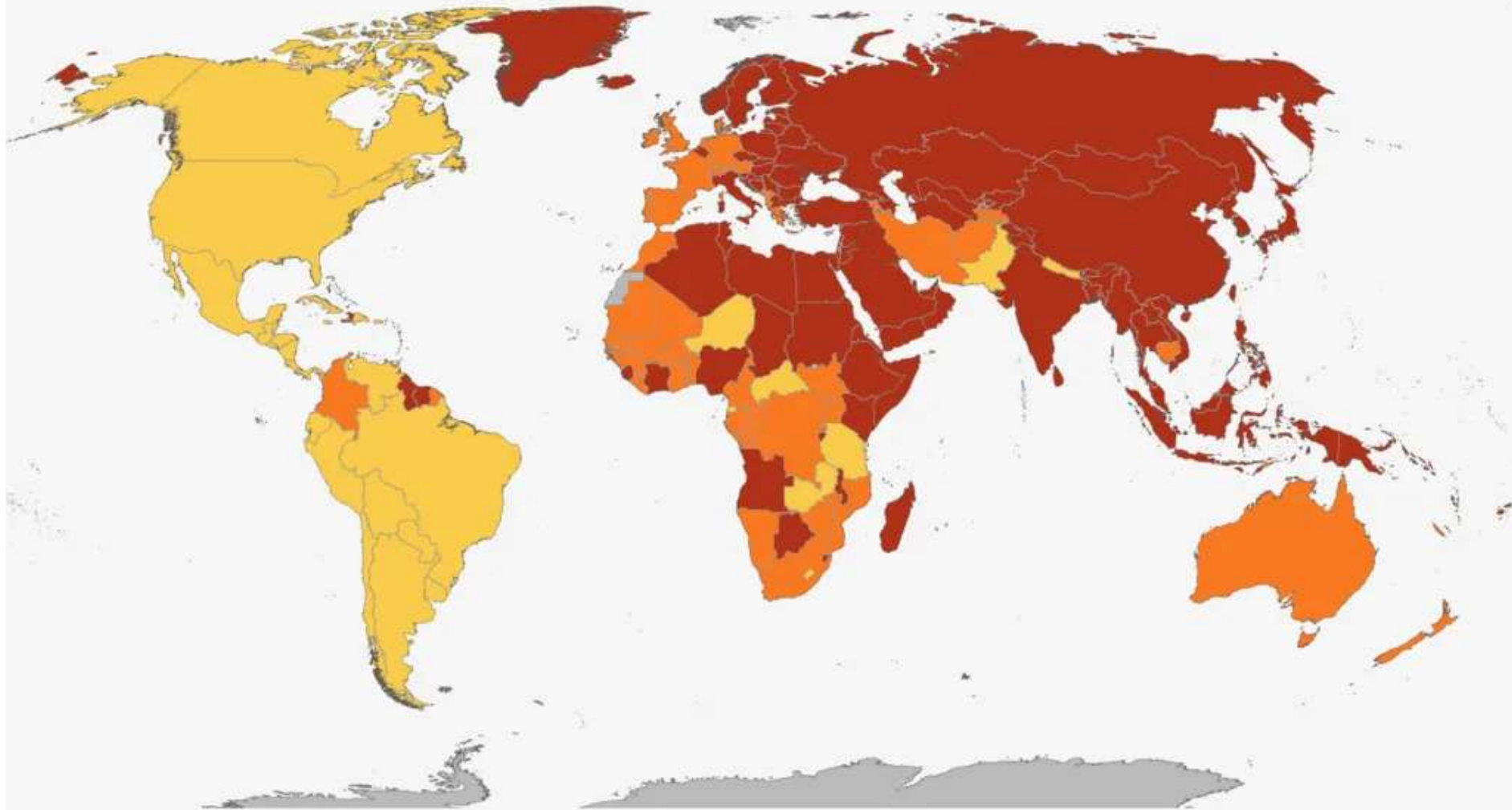
## By birthplace



## By family line



## Mixed policy



Note: No data for areas shown in grey

Source: IMF

# Birthright Citizenship

- The bureaucracy supplies birth certificates, social security cards etc. to children, so the executive branch is directly involved with the question (SSA, State Department, Homeland Security etc.).
- Current administration's case rests on the 'illegal status' of the mother/parent and claims that this means they aren't subject to the laws of the US, so the child isn't either.
  - The order outlined two categories of individuals “born in the United States and not subject to the jurisdiction thereof,”
    - Child of an undocumented mother and a father who is not a citizen or lawful permanent resident OR
    - Child of a mother who is a temporary visitor and a father who is not a citizen or lawful permanent resident.
  - The order would make ancestry a criteria for citizenship – it requires children born on U.S. soil to have at least one parent with U.S. citizenship or a green card to be born a U.S. citizen.

# Topic 4- Impounding \$

- At issue- \$400+ Million dollars allocated by Congress that the administration has not released/spent- frozen funding, cancelled programs, or taken back from awarded grantees
- Laws/Rules governing “recission” of funds from a bipartisan source: <https://bipartisanpolicy.org/explainer/budget-impoundment/>
  - Programs include- support to farmers, address food insecurity issues, adapting to climate change etc.
- Impounding money that the president didn't agree with started with Jefferson and has been happening since.
- Current court cases still pending.

# The process

- Constitution grants Congress the “power of the purse” when it comes to federal spending
  - Executive Branch has to administer the funds
  - Current process ruled under the ICA (Congressional Budget and Impoundment Control Act of 1974)
- President cannot impound money without requesting and receiving approval from Congress (in 2025 he asked for 9.4B, congress agrees to 9B)
- 2 different types of requests for withholding funds-
  1. Deferral- temporary delay in spending- OMB oversees deferrals. Do not necessarily need Congress’s approval because funds will be spent (think disaster relief funding- no target community until disaster hits)
  2. Recission- formal request from OMB to Congress- cancel the budget part
    - Congress has 45 days to approve or deny during which time the OMB ‘holds’ the funds
    - If congress does not act the funding must be released.



# Enforcement

- The GAO monitors the impoundments and reviews- can sue the executive branch to release improperly withheld funds
- GAO (independent/non-partisan watchdog of the government- works for Congress, President, Agencies etc.) ruled administration illegally withheld NIH funding, FEMA funding etc. (so far 6 rulings from them)
- <https://democrats-appropriations.house.gov/weeks-away-end-fiscal-year-trump-blocking-410-billion-funding-owed-communities-nationwide> has a list of current programs cancelled/blocked/still awaiting funding (deadline to spend funds is Sept 30)

# The opinions

- **President's position:** The administration claims that the Impoundment Control Act of 1974 (ICA) is unconstitutional and that the president has inherent authority to impound funds. A related argument, referred to as "pocket rescissions," claims the ICA allows the president to cancel appropriated funds without Congress's approval.
- **Critics' position:** Opponents, including the Government Accountability Office (GAO), argue that the Constitution grants Congress the exclusive "power of the purse". The GAO maintains that impoundment is only permissible under the strict procedures of the ICA, which require congressional approval for rescissions.

# Topic 5- Presidents & Independent Agencies

- Type 1 always subject to the President
- Types 2 & 3 were designed to be independent.
  - Staggered terms for commissioners, intended to serve like Judges-only terminate by gross malfeasance (per 1935 S.C.)



## Independent Agencies

### Independent Executive Agencies

- ☐ Subject to presidential control
- ☐ Similar to Cabinet departments



### Independent Regulatory Commissions

- ☐ Independent of the president
- ☐ Often exercise quasi-judicial & quasi-legislative powers



### Government Corporations

- ☐ Subject to presidential control
- ☐ Set up to carry out business functions



*Humphrey's Executor v. United States (1935)*

<https://supreme.justia.com/cases/federal/us/295/602/>

# Type 2 & 3 Agencies

- In February 2025- Trump signed an executive order giving himself more control over these agencies  
(<https://natlawreview.com/article/more-executive-orders-aimed-improving-operation-federal-government> )
- Independent agencies created by Congress to serve the public interest. They are led by experts in their fields and are not meant to be impacted by administration changes.
- Republicans' argument is they are part of the “enacting the laws of the land” so President should have control or else they are an “unconstitutional 4<sup>th</sup> branch of government”
- Fired dozens of their commissioners/officials
  - They sued and ‘lost’ in court
  - Supreme Court said Monday they WILL hear a full case and possibly overturn the 1935 decision- expect decision next year

# Topic 6- Presidents and Departments

- If congressionally created- NO cannot close a department.
- The Departments of Homeland Security, Education, State all created by Congress- Only way their Secretary can be in the order of succession for the presidency.
  - They have to enforce/interpret law made by Congress.
    - If agency is not doing so up to Congress/courts to force their hands
    - Dept. of Education right now- student loan lawsuits, IEP related programs
    - THIS is where Presidents can try to enforce their agenda (DEI programs, trans athletes etc.) it's the power of \$ given to the schools.
    - Money is allocated by Congress for schools; current administration can create strings for the schools getting the \$
    - DEI programs also argued are Unconstitutional as don't ensure 'equal protection under the law' (14<sup>th</sup> Amendment)

# Topic 7- Withdraw from treaties

## 3 types of international agreements

- **1- Treaties-** Article II, Section 2, Clause 2: *He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; ...*”
- **2- Executive agreements-** grouped into three categories based on the President’s authority.
  - A. Congressional-executive agreements authorized through legislation enacted through Congress
  - B. Executive agreements made pursuant to a treaty based on authority derived from treaties previously approved by the Senate
  - C. Sole executive agreements based on the President's constitutional powers
- **3- Non-binding instruments-** do not modify existing legal requirements, may establish moral and political incentives to comply
  - The source of the executive branch's authority to make non-binding instruments is not stated in the Constitution, and the Supreme Court has never addressed the issue

# Withdrawal from Treaties

- IF IT (agreement/Treaty) was ratified/confirmed by the Senate then NO cannot just withdraw/ignore it.
  - More agreements are of type 3 or C than in the past as getting 2/3 Senate agreement or bicameral support through Congress has become harder
- Agreements not sent to Congress (3 or C), can technically be rescinded/ignored by next president exactly like an executive order.
  - Will have international repercussions
  - Will have longstanding hit to our country's credibility
  - <https://www.congress.gov/crs-product/LSB11048>
- 2016 Paris climate accord
  - Was a type B agreement – Congress didn't approve it, so Trump undid what Obama agreed to via executive orders.
  - Obama argued it was a continuation of the US commitment to the United Nations, Trump disagreed and we withdrew in 2017, Biden put us back in the agreement in 2020, Trump again signed an executive order in 2025 to pull us out.
  - Removal process takes 4 years. Rejoining takes zero time.

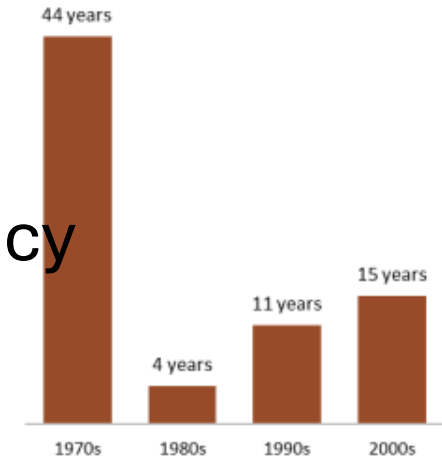
# History of breaking our agreements

- US has a long history of breaking our treaties
  - Many times broke treaties with Native American Nations (1784, 1809, 1835, 1868 etc)
  - ABM Treaty- missile defense systems with Soviet Union
  - INF Treaty 2019- Arms control agreement with Russia
- Have withdrawn from many others
  - Don't have to 'break' the agreement- many have an 'opt out' clause like the Paris Climate Accords
  - The United Nations does NOT have a withdrawal clause (same with NATO)
    - Would be a political nightmare, would need congressional approval
    - Can withdraw from participating in committees/agreements within the UN
      - UNESCO withdrawal, WHO withdrawal both recently



# Topic 8- Tariffs

- Tariffs were left to Congress per the Constitution
  - Article I, Section 8 - explicitly grants Congress the power "to lay and collect Taxes, Duties, Imposts and Excises" and "to regulate Commerce with foreign Nations“
- Since 1930's Congress has increasingly delegated this power to the President
  - 1934 was the first- Reciprocal Trade Agreement
- Law in question right now is the IEEPA (International Emergency Economic Powers Act (1977) <https://www.congress.gov/crs-product/R45618>
  - As of January 15, 2024, Presidents declared 69 national emergencies invoking IEEPA- Courts have never heard a case surrounding this law before



# Today's Tariff Cases:

- Two different types of tariffs challenged in Courts-
  1. “trafficking” tariffs, targeted products of Canada, Mexico, and China
    - Trump says they failed to do enough to stop the flow of fentanyl into the United States
  2. “worldwide” or “reciprocal” tariffs, imposed a baseline tariff of 10% on virtually all countries, with higher tariffs – anywhere from 11% to 50% – on dozens of countries.
    - Trump argued large trade deficits as an “unusual and extraordinary threat to the national security and economy of the United States.”
- The challengers in both cases argue- IEEPA doesn't mention tariffs, no president before Trump has ever relied on IEEPA to impose tariffs, and trade deficits have existed for decades and are hardly an emergency
- As of August- cases are still working their way through the judiciary.
  - One set of cases are in the Court of International Trade, one in the ‘regular system’
  - Anticipate Supreme Court having to weigh in next summer
- Where we are right now: <https://www.scotusblog.com/2025/08/the-supreme-court-and-trumps-tariffs-an-explainer/>

# Topic 9- “Shutdown”

- Be ready for the government to shut down come October 1<sup>st</sup>.
  - Democrats demanding President sit down with them and have a policy discussion before agreeing to anything.
  - Seem to be coalescing on the issue of healthcare costs- want to see a rollback of the cuts that were in the ‘big beautiful bill’
- Different types- no spending bill at all, or partial spending (some agencies have approved budgets and some don’t)
  - Currently 0 of the 12 have an approved budget (12 bills for 12 different appropriations ‘topics’ sorted into committees)
- Only discretionary spending affected- mandatory spending (Social Security, Medicare etc.) already set via multi-year budget bills.
- <https://www.crfb.org/papers/government-shutdowns-qa-everything-you-should-know>

# Correction-

- Mentioned last week about employees & pay during a shutdown- law was passed in 2019 that changed a few things-
  - Federal contractors- not guaranteed back pay
  - Social Security, Medicare etc. independently funded & paid
  - Military- have to show up, no guarantee of back pay (except Coast Guard)
  - Judges/Elected officials- show up & get paid (per Constitution)
  - Exempt employees- pay comes from fees etc. so not affected by shutdown (also USPS is like this)
  - Furloughed employees- may not work, per 2019 now guaranteed back pay. Also eligible for unemployment during shutdown
  - Essential workers- TSA, law enforcement etc- have to work, get back pay

If you want the slidedeck from today email:  
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