

Transatlantic Law Forum 14th Annual Conference
Technocrats, Bureaucrats, and the Law
Oslo, June 19-21, 2025

The Times, They are
a'Changing ... Yet Again.



ANTONIN SCALIA
LAW SCHOOL

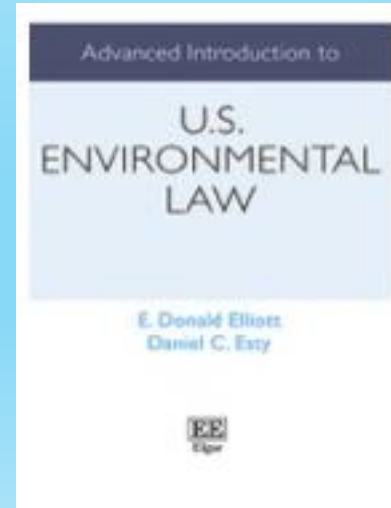
E. Donald Elliott

Winter Doyle Distinguished Visiting Professor of Law (2025-2026)



Yale Law School

e.donald.elliott@yale.edu



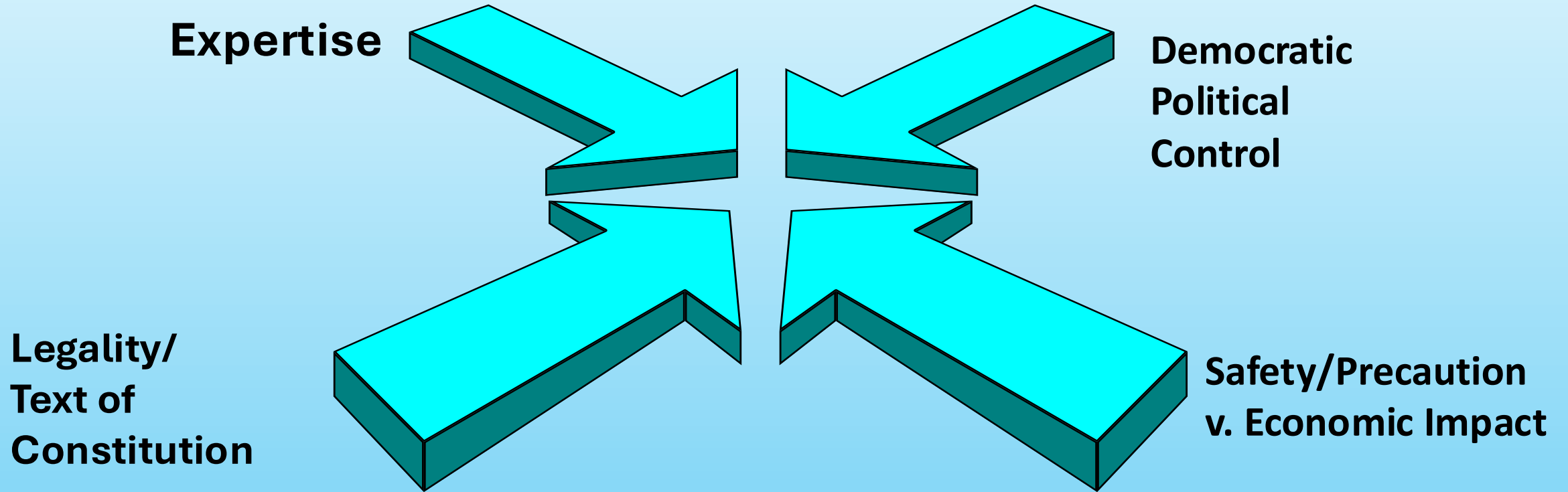
Introduction

- Humans are “pattern seeking” animals
 - *The argument from familiarity*: “it may not be required by a legal text but it has been that way for x years”
- “The Tyranny of the Familiar”
 - *Antidotes*: history, comparative law, law and economics
- My Thesis: *Most of what is going on in US today has happened before and is likely to be upheld 6-3 by Supreme Court*
 - Classic reactionary attempt to return to a so-called “Golden Age.” (MAGA)
 - Some indefensible (law firms, universities)
 - Some policy disagreements (climate)



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Legal Questions Often Require Balancing Competing Norms that “Collide or Conflict”

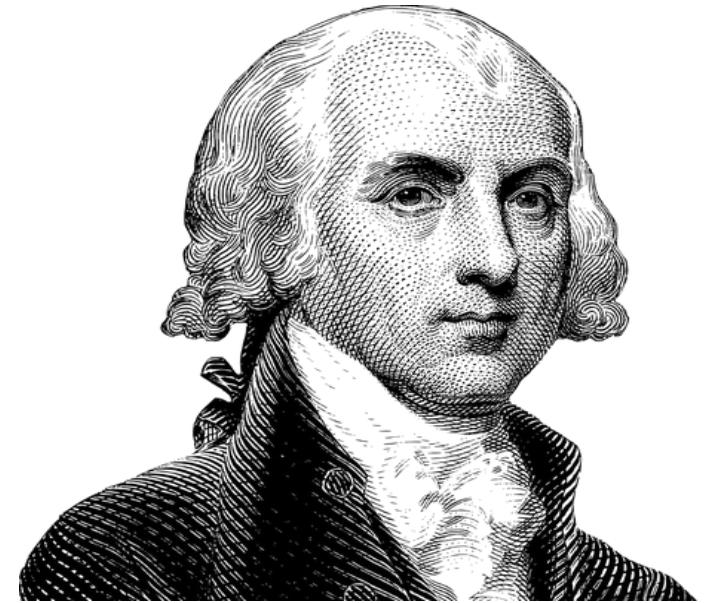


Melvin A. Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV.L.REV. 637, 649-653 (1976)

<https://www.jstor.org/stable/1340217?origin=crossref>

U.S. Constitution Institutionalizes A Struggle for Power (But Only at the Margins?)

- The Constitution “vests” the “**executive power**” in a single President.
 - U.S. Const., Art. II, sect. 2
 - Implications of this “**unitary executive**” are controversial.
- BUT the Constitution also vests “**all legislative power**” in Congress including “**power of the purse.**”
 - U.S. Const., Art. I, sect. 7, cl. 1



“Ambition must
be made to
counteract
ambition”
James Madison,
Federalist 51

Coleridge's Law

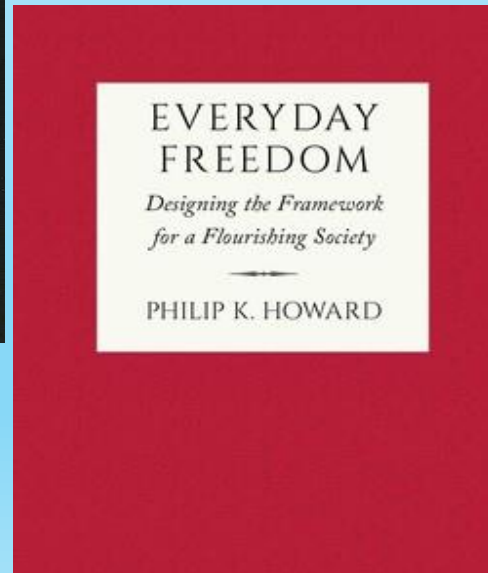
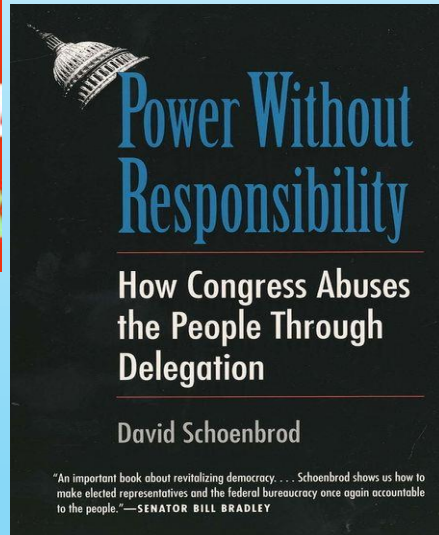
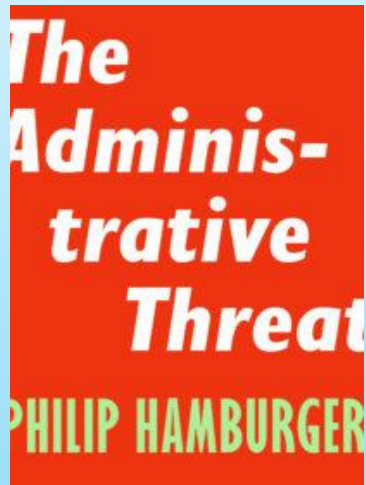
“Every reform, however necessary, will by weak minds be carried to an excess, that will itself need reforming.”

~ SAMUEL TAYLOR COLERIDGE BIOGRAPHIA LITERARIA 13 (1817; ed. Ernest Rhys, 1906).

<http://www.archive.org/details/biographialitera027747mbp>



Some Modern Scholars Argue the Administrative State Has Gone Too Far

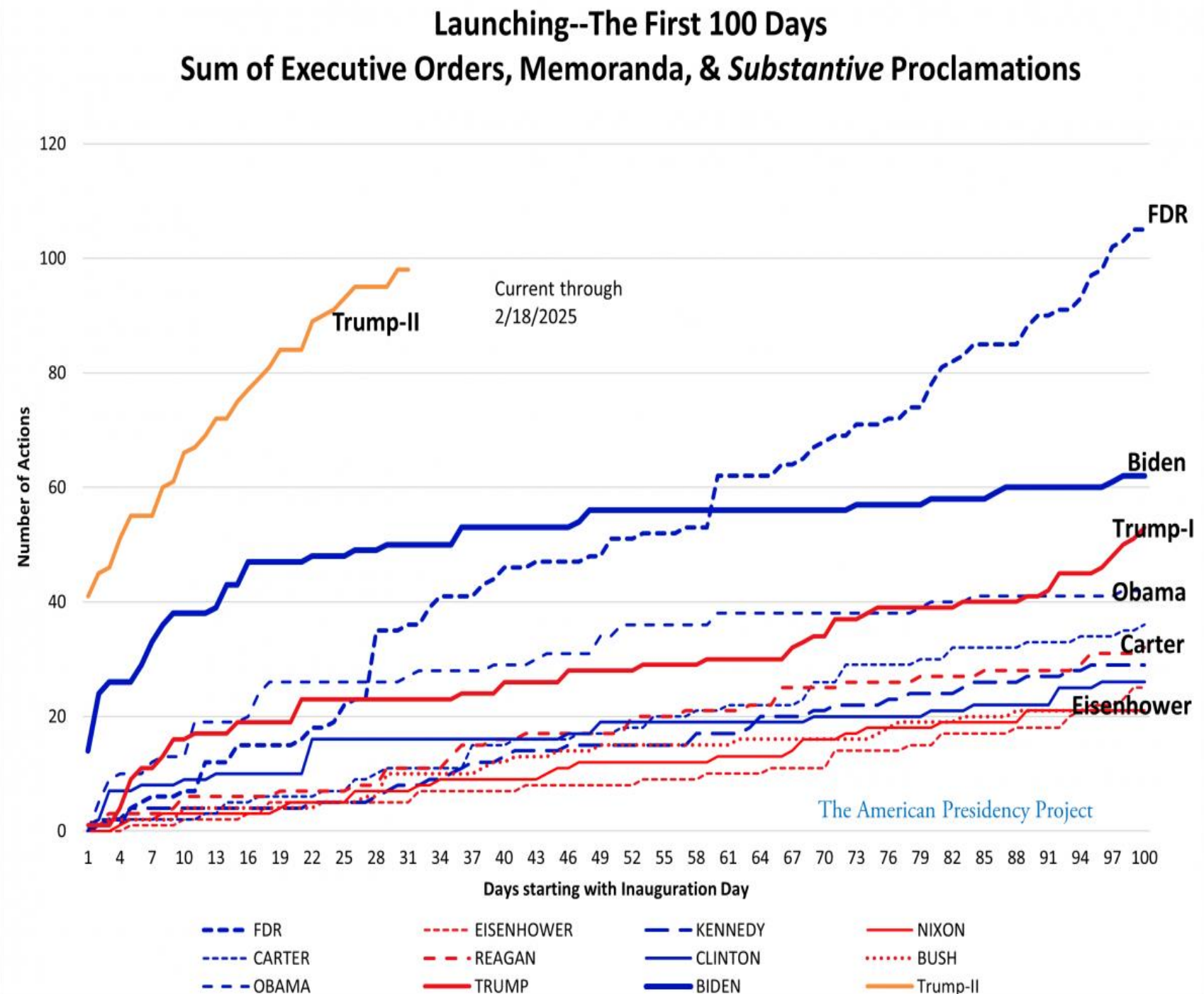


- Columbia Law Professor Philip Hamburger
- U. Chicago Law/NYU Professor Richard Epstein
- New York Law School Professor David Schoenbrod
- Phillip K. Howard, *Everyday Freedom* (2024)

“Trump's record number of executive orders are testing the limits of presidential power He's quickly undoing Biden's orders, too.”

Meridith Conroy 538,
ABC NEWS (Feb 6, 2025).

[Chart UCSB](#)



Trump's Actions Have Created a Constitutional Crisis, Scholars Say

Law professors have long debated what the term means. But now many have concluded that the nation faces a reckoning as President Trump tests the boundaries of executive power.



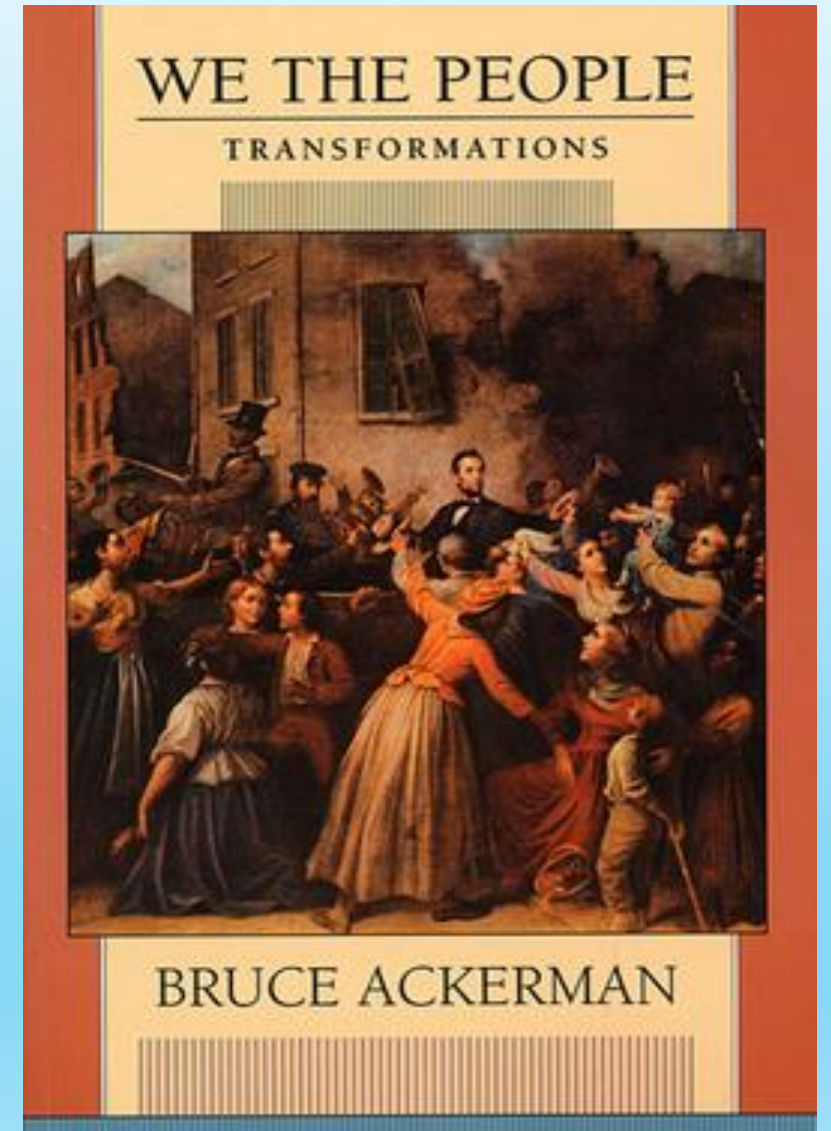
By Adam Liptak

Reporting from Washington

The New York Times (Feb 10, 2025),
<https://www.nytimes.com/2025/02/10/us/politics/trump-constitutional-crisis.html>

or a “Constitutional Moment” *ala* Ackerman

1. **Claim of Power** not currently recognized
2. **Popular Acceptance** over time
3. **Legitimation**
 - Art IV amendment of Constitution as optional
e.g. Creation of Administrative State, Civil Rights Revolution
 - Bruce A. Ackerman, *The Storrs Lecture: Discovering the Constitution*, 93 Yale L. J. 1013 (1984).
 - **We the People** (1991, 1998, 2014)
3 volume constitutional history of the U.S.
 - **“positive constitutional theory”** - describes actual practice worldwide



Example: Are Agencies “Independent” or Must They Follow the President’s Policies?

The Appeal of Neutral Experts

- Plato’s vision of a governing class “Guardians” in *The Republic* (~380 BCE).
- Copied from Prussia under Bismarck.
- James Landis (1939):

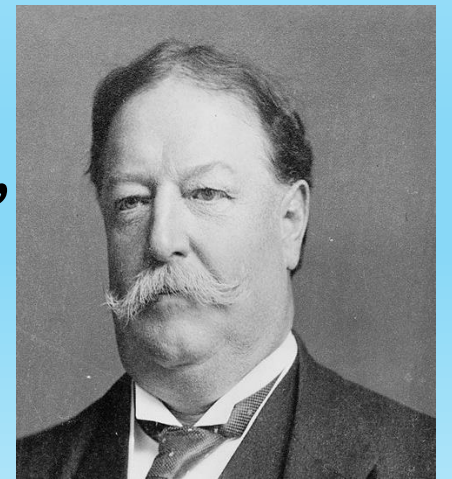
“The administrative process is. ... our generation's answer to the **inadequacy of the judicial and legislative processes** [to cope with the modern world of large enterprises]. It represents our effort to find an answer to those inadequacies by some other method than merely increasing executive power.”



The original understanding:

Broad presidential powers to hire and fire based on vesting clause and “duty to take care that the laws are faithfully enforced”

- 1871 Attny General Opinion - 13 U.S. Op. Atty. Gen. 516 (August 31, 1871)(President may fire anyone in Executive Branch)
- ***Myers v. U.S.***, 272 US 52 (1926)(Taft, C.J.)(8-1) (statute requiring Senate to “advise and consent” to firing of local postmaster unconstitutional)



Hiring and Dismissal of “Officers” of the U.S.

19-20th Century Erosion of Presidential Power:

Dismissal became a “shared power” with Congress which creates agencies?

- **Civil Service System (1883)**(Ends “spoils system” for hiring).
 - Philip K. Howard (2017) – Today President appoints only 2% (4000) of federal employees.
- **Public Employee Unions (1962)** -Collective Bargaining
 - Philip K. Howard, *Not Accountable* (2023)-97% rated above average
 - After election but before inauguration, Biden appointee signs [union contract](#) giving 42,000 Social Security Administration employees right to work remotely until 2029.
- ***Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).**
 - “For cause” limitations permissible if, but only if, enacted by statute for head of administrative agencies with “quasi-legislative” and “quasi-judicial” functions.
 - Kennedy Center: “Per the Center’s governance established by Congress in 1958, the chair of the board of trustees is appointed by the Center’s board members. There is nothing in the Center’s statute that would prevent a new administration from replacing board members; however, this would be the first time such action has been taken with the Kennedy Center’s board.”

REVIEW & OUTLOOK

Are 'Independent' Agencies Constitutional?

President Trump has launched a legal offensive against "independent" agencies, and last Friday the Supreme Court denied him a quick legal win—at least until Wednesday. The issue is whether Mr. Trump can fire Hampton Dellinger as head of the Office of Special Counsel. But even if that case somehow peters out, there are more to follow.

In a separate dispute, Mr. Trump is being

dent's policies depends on chance?

Under the law, NLRB members may be fired "for neglect of duty or malfeasance," and only after a hearing. Ms. Wilcox was dismissed in a "late-night email" that cited policy differences, according to her lawsuit: "Although Ms. Wilcox has no desire to aid the President in establishing a test case, she is also cognizant of the fact that, if no challenge is made, the President will have

**Trump says no, teeing up
Humphrey's Executor
for the Supreme Court.**

Dismissal of “Inferior Officers”

21st century-on going “reconsideration”- claw back Presidential power lost under FDR and Nixon?

- *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 US 477 (**2010**)(5-4)(appointment of **inferior officers** by department head is constitutional but **“for cause only” firing is not constitutional**)
<https://supreme.justia.com/cases/federal/us/561/477/> - tab-opinion-1963375
- Two laws extending *Humphrey’s Executor* for cause only firing to inferior officers subsequently held unconstitutional.
 - *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (**2020**).
 - *Collins v. Yellen*, 594 U.S. ____ (2021)(7-2)(FHFA remedy).
- Aditya Bamzai and Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756-1844 (2023)(**“one of the oldest constitutional disputes”**)

Trump v. Wilcox

https://www.supremecourt.gov/opinions/24pdf/24a966_1b8e.pdf

6-3 (U.S. Sup. Ct., May 22, 2025).

Kagan dissent: “For 90 years, *Humphrey’s Executor v. United States*, ... has stood as a precedent of this Court. And not just any precedent. *Humphrey’s* undergirds a significant feature of American governance: **bipartisan administrative bodies carrying out expertise-based functions with a measure of independence from presidential control.**”

Majority: “Because the Constitution vests the executive power in the President, ... he may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents, see *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U. S.197, 215–218 (2020). **The stay** reflects our judgment that the Government **is likely to show** that both the NLRB and MSPB **exercise considerable executive power.**”

Dismissal of “**Employees**” of the U.S.

- Trump 47 Jan 20, 2025 Memorandum “Restoring Accountability for Senior Career Executives” (Agency heads should “reassign agency SES members to ensure their knowledge, skills, abilities, and mission assignments are optimally aligned to **implement my agenda**”) – cites *Seila* above as authority.
 - <https://www.whitehouse.gov/presidential-actions/2025/01/restoring-accountability-for-career-senior-executives/>
- **Senior Executive Service** (SES)(0.4% of employees) -based on Civil Service Reform Act of 1978 enacted under Jimmy Carter
- **Schedule F** (Trump 2020 E.O.) – expand to all “policy –influencing” employees- revoked by Biden (2021)- Trump 47 (2025 E.O.) re-instates
 - Opposing bills pending in Congress to authorize and to repeal/prohibit

Coleridge's Law

“Every reform, however necessary, will by weak minds be carried to an excess, that will itself need reforming.”

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<http://www.archive.org/details/biographialitera027747mbp>



Not Everyone Agrees ...

“During President Trump’s first 100 days, his government has advanced problematic interpretations of these exemptions to repudiate a wide range of **established practices**. ...

“[T]he Office of Information and Regulatory Affairs in the Executive Office of the President is asserting the authority to review the rules of 40 “independent agencies” to see if they satisfy cost-benefit criteria even **though Congress explicitly insulated these agencies from direct control by the White House to prevent the abuse of power**. The statutory techniques deployed to promote agency independence are different in different cases: But these important differences should not obscure Congress’ larger ambition—**which is to protect all independent agencies from presidents seeking to use them as weapons against their political opponents.**”

SLATE

✱ MEASURED, REFLECTIVE, AND OCCASIONALLY ANIMATED

JURISPRUDENCE

The Drafters of a Key 1940s Law Feared an American Dictator. Trump Is Blowing That Law Up.

BY BRUCE ACKERMAN AND SUSAN ROSE-ACKERMAN

MAY 12, 2025 • 5:46 PM



<https://slate.com/news-and-politics/2025/05/apa-american-dictator-donald-trump-doge.html>

Why Now?



- Anomaly of **6 Justices appointed by Republican** presidents but only **3 by Democrats**
 - Three strict textualists who only consider text and early applications but not structure or purpose. (Thomas, Alito and Gorsuch)
 - E. Donald Elliott, Fixing a broken process for nominating US Supreme Court justices, The Conversation (October 15, 2018), <https://theconversation.com/fixing-a-broken-process-for-nominating-us-supreme-court-justices-104629>
 - Ian Ayres, Opinion: The Supreme Court's lack of accountability is worse than you think, L.A. Times (June 10, 2024), <https://www.latimes.com/opinion/story/2024-06-10/samuel-alito-clarence-thomas-supreme-court-accountability-term-limits>
 - Biden [proposals to reform Supreme Court](#); pending bills to fix number of Justices at nine; existing law since Judiciary Act of 1869.
- “The avuncular state” - limiting individual choices “for their own good” because elites know what is good for them better than people know for themselves
 - e.g. Congress overturns California’s 2035 ban on gasoline vehicles.

PROPOSED Take Aways



- The Constitution institutionalizes power struggles between Congress and President. (Madison)
- “Reforms in every generations will be carried to an excess ... that will itself need reforming.” (Coleridge)
- “Sometimes the bears win; sometimes the bears win; but the HOGS never win.” (Wall Street Saying)
- Extreme actions are unlikely to survive one’s successors. (Elliott)
- SO FAR, most of Trump’s efforts to expand presidential power are within the normal/permissible range; most are likely to be upheld in the courts; most of this has all happened before. (Elliott)
- Some colleagues I respect see parallels to the rise of Fascism in what Trump *may* do in the future.

CONSTITUTIONAL OPINIONS

Is America Really in a Constitutional Crisis?

Whether it is a 'constitutional crisis' or a 'constitutional moment' depends only on which party is implementing the reforms.

by E. DONALD ELLIOTT

April 22, 2025, 10:05 PM



E. Donald Elliott, *Is America Really in a Constitutional Crisis? Whether it is a 'constitutional crisis' or a 'constitutional moment' depends only on which party is implementing the reforms*, THE AMERICA SPECTATOR (April 22, 2025), <https://spectator.org/is-america-really-in-a-constitutional-crisis/>

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