

MODULE 5

The Federal Executive Power

Youngstown · Nixon · nondelegation · major questions · Chadha · the tariff case

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Where presidential power comes from

Article I grants what is “herein granted.” Article II just vests “the executive Power.”

ARTICLE I

“All legislative Powers herein granted shall be vested in a Congress ...”

HAMILTON — INHERENT EXECUTIVE POWER

- The difference in wording is deliberate.
- The President holds power beyond the list.
- Example: executive privilege.

ARTICLE II

“The executive Power shall be vested in a President of the United States of America.”

MADISON — NO INHERENT POWER

- The President is limited to the text, like Congress.
- Otherwise the branches are out of balance.

Youngstown is where the Court had to choose.

Youngstown, 1952: the steel seizure

A steel strike in the middle of the Korean War. The President seized the mills.

THE CLAIM

- Inherent power to avert a national catastrophe.
- The Commander in Chief power.

THE COURT (BLACK)

- Power “must stem either from an act of Congress or from the Constitution itself.”
- Seizing the mills is lawmaking — “a job for the Nation's lawmakers.”

AND CONGRESS

- Silent now.
- But in 1947 it refused to give the President this power.
- The Court reads that as disapproval.

What other Presidents had done did not matter. This was domestic action, not military.

Frankfurter: what Congress had already said

History counts — but it has to be the right history.

CONGRESS

- Provided for seizures at least 16 times since 1916.
- Always with limits and safeguards.

PRESIDENTS

- Seized without a statute three times, all in 1941.
- “[T]hese three isolated instances do not add up.”

THE PRINCIPLE, FROM BRANDEIS

Separation of powers was adopted “not to promote efficiency but to preclude the exercise of arbitrary power.”

My board's shorthand: inefficiency is the price of the separation of powers.

Jackson's three situations

The concurrence the doctrine actually runs on.

1 WITH CONGRESS

- Express or implied approval.
- His power and Congress's together.
- Struck down only if the whole federal government lacks the power.

2 CONGRESS SILENT

- A “zone of twilight”:
concurrent authority.
- Turns on “the imperatives of
events and contemporary
imponderables.”

3 AGAINST CONGRESS

- Power “at its lowest ebb.”
- His own power minus
Congress's.
- Valid only if Congress acted
outside its power.

Youngstown is category three: Congress had already said no.

Executive privilege: United States v. Nixon

Subpoenaed tapes, a criminal trial, and a President who said only he could decide.

NIXON CLAIMED

- An absolute privilege.
- That he alone decides what is privileged.
- That the tapes were privileged.

THE COURT DECIDES

- All three claims rejected.
- The Court says “what the law is” on privilege — Marbury.
- In camera review is available.

THE BALANCE

- A “broad, undifferentiated” claim of confidentiality is weak.
- Against it: a criminal trial and the defendants' rights.

“The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”

Expanding executive power by statute

When Congress and the President agree, is that the end of it? Two theories.

1 • THE COURTS DECIDE

- Even an agreed statute must fit the Constitution: *Marbury*.
- The line-item veto: *Clinton v. City of New York*.
- Nondelegation: *Schechter* and *Panama Refining*.

2 • AGREEMENT IS ENOUGH

- If Congress and the President agree, it is OK.
- *Whitman*: an “intelligible principle” suffices.
- The administrative state rests on this theory.

On how much power Congress may hand over, theory two wins. On how a law is made, theory one wins.

Nondelegation: never overruled, nearly dead

Only two statutes have ever failed the test. Both in 1935.

1935

- Panama Refining: no standard at all for banning “hot oil.”
- Schechter: industry codes for the whole economy.

THE TEST

- Congress must supply an “intelligible principle.”
- Whitman, 2001: “requisite to protect the public health” is enough.

SINCE 2019

- Gundy, 2019: upheld 5–3. Three dissenters would revive the doctrine.
- Consumers' Research, 2025: upheld 6–3. Roberts joins the majority.

My board: not overruled, but severely limited.

The administrative state

One agency can enforce the law, write rules, and decide cases.

EXECUTE

- Enforce the statute.
- Investigate and sue.

LEGISLATE

- Regulations, through rulemaking.
- Quasi-legislative.

ADJUDICATE

- Administrative law judges.
- Quasi-judicial.

THE APA — AND WHAT CHANGED IN 2024

- The APA governs how agencies make rules, decide cases, and get reviewed in court.
- Loper Bright: courts, not agencies, decide what the statute means.
- Jarkesy: a fraud penalty needs a jury, not an agency judge.

Your clients meet the federal government here, not in Congress.

Major questions: West Virginia and Nebraska

A big claim of agency power needs clear words from Congress.

THE RULE

- In extraordinary cases, the agency must point to “clear congressional authorization” for the power it claims.

WEST VIRGINIA v. EPA, 2022

- Power-plant rules built to shift the grid away from coal.
- Not within the Clean Air Act.

BIDEN v. NEBRASKA, 2023

- About \$430 billion in student loans cancelled.
- “Modify” allows small changes, not a rewrite.

Nondelegation asks whether Congress could give the power. Major questions asks whether it did.

The line-item veto: Clinton v. City of New York

Congress and the President both wanted it. The Court said no.

THE STATUTE

- After signing a bill, the President could cancel spending items and certain tax breaks.
- Congress and the President agreed to it.

THE PRAGMATIST VIEW

- Function over form.
- Both branches agreed, and the result is sensible.

THE COURT: FORMAL

- “There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”
- Only an amendment could change the process.

My second example of the same move as Chadha.

The legislative veto: INS v. Chadha

One House of Congress overruled the Attorney General's decision to let a man stay.

THE DEVICE

- Congress delegates, then keeps a veto for one House.
- No Senate vote. No presentment.

THE COURT

- The House changed “the legal rights, duties, and relations of persons ... outside the Legislative Branch.”
- That is lawmaking. Full process required.

WHAT CONGRESS STILL HAS

- Amend or repeal the statute.
- Both Houses, and the President.

White, dissenting: “the death knell for nearly 200 other statutory provisions.”

The tariff case: Learning Resources, 2026

A statute lets the President “regulate ... importation.” Does that include tariffs?

THE JUDGMENT, 6-3

- The statute does not authorize the tariffs.

SIX VOTES: THE TEXT

- “Regulate” does not usually include taxation.
- Congress grants the power to tax separately and expressly.

THREE VOTES: MAJOR QUESTIONS

- Roberts, Gorsuch and Barrett add the doctrine.
- Kagan, Sotomayor and Jackson decline to join that part.

My reading: taxing is not regulating — the line Roberts drew in NFIB.

Questions for discussion: the rent freeze

Your client owns a 40-unit apartment building.

THE FACTS

- The President declares a housing emergency.
- An agency freezes rents in buildings with federally backed mortgages.
- It cites a statute letting it “regulate” insured loan terms.
- Congress rejected a rent-control bill two years ago.

QUESTIONS FOR DISCUSSION

1. Which of Jackson's categories is this?
2. Is there an intelligible principle?
3. Is this a major question?
4. After the tariff case, does “regulate” reach rents?
5. What do you file, where, and what does your client do on the first of the month?

Module 5 on one slide

One line per case.

THE LINE, ONE CASE AT A TIME

- Sources: “the executive Power,” with no “herein granted.” Hamilton says inherent power; Madison says none.
- Youngstown: a statute or the Constitution, or nothing. Jackson's three categories sort the cases.
- Nixon: privilege is real, but a general claim yields to a criminal trial's specific need.
- Nondelegation: an intelligible principle is enough. Two statutes have ever failed.
- Major questions: extraordinary claims need clear authorization from Congress.
- Chadha and Clinton: laws are made and unmade only by the full process.
- The tariff case: “regulate” does not include “tax.”

Next — Module 5A: who appoints the officers, and who can fire them.

Next: Module 5A — Appointment and Removal. Readings on the course website.