

## **You Might Be Right - Separation of Powers - Transcript**

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**Cass Sunstein:** Our amazing experiment in our country, which is a shining light all over the world, if it owes anything to one idea above others, I think the separation of powers is the prize winner. It's the foundation for what's led to an extraordinary couple of centuries.

**David Lewis:** The president's ability to expand their own powers depends on the willingness of the other branches to relinquish it. With Congress being divided and narrow majorities, things being so politically polarized, it's become difficult for Congress to check the president, and courts have neither the person nor the sword.

**Marianne Wanamaker:** Welcome to "You Might Be Right," a place for civil conversations about tough topics, brought to you by the Baker School of Public Policy and Public Affairs at the University of Tennessee, with funding support for members of our Producers Circle. To learn more about how you can support our work, visit [youmightberight.org](http://youmightberight.org).

The U.S. Constitution established three independent branches of government and a series of checks and balances to keep any one branch from becoming too powerful. In this episode, our hosts, former Tennessee Governors Phil Bredesen and Bill Haslam, and their guests explore the intricate dance between the branches of government. Does the framer's vision of independence and equality hold up in current practice? And if not, what reforms are needed?

**Phil Bredesen:** Well, Bill, this looks like a particularly apropos subject we're talking about right now.

**Bill Haslam:** I think we keep saying that. There's just a lot of hot topics these days. A lot of this conversation is around exactly how much power does the executive have, what's the role of the three branches of government, and when they intersect and collide, what happens?

**Phil Bredesen:** It's part of the fundamental idea behind the Constitution, and we've obviously, over the years, tested it in lots of different ways. But the idea of that separation of powers is held up, I think, very well and firmly and to our benefit over the years, and it's a little scary right now.

**Bill Haslam:** I've always thought that one of the brilliant things our founders did was realize that, while we were people who had great promise and potential, we also were people who were susceptible to failure and to being wrong. And that's why we have this idea of checks and balances, and I think it's what's made our system particularly great.

**Phil Bredesen:** Yeah. And, of course, in the environment when the Constitution was written, it was in reaction somewhat to an English system with the king that did not have the appropriate checks on those powers. So I think the founders were very focused on that issue of how do you keep too much power from accumulating in the executive branch.

**Bill Haslam:** Let's hear what our guests have to say.

**Phil Bredeesen:** Okay. Bill, we have as our guest now, Cass Sunstein, I think this is going to be a very good session. He's the Robert Walmsley University Professor, that's a particularly distinguished professorship at Harvard, and the founder and director of the Program on Behavioral Economics and Public Policy at the Harvard Law School, served in the Obama administration as administrator of the White House Office of Information and Regulatory Affairs and in the Biden administration as counselor to the Secretary of Homeland Security, and finally received the Holberg Prize in 2018, which is awarded by the Norwegian government and regarded as one of the highest honors in law and the humanities. So we are in the presence of somebody who knows what they're talking about.

**Bill Haslam:** Cass, thanks for joining us. You're somebody that's been in the middle of— the discussion we're having about separation of powers today is not new, and every administration feels that push and pull back to our founders. Maybe, put this in some historical perspective. Why did our founders put separation of powers in place? How has that played out over time?

**Cass Sunstein:** Okay. Great. Thank you. So they put it in place because they wanted to avoid tyranny, and they wanted to preserve liberty. So the fundamental idea is that if the powers are intermeshed and the executive has judicial power or the legislature has executive power, then the people are extremely vulnerable because a single person wielding all those powers can put people in jail, can shut people up, can deprive them of religious liberty, can force everyone into a mold.

So separation of powers is really fundamental to them. I live in Concord, Massachusetts, where the American Revolution started. And the idea of a king, it still has a kind of bad smell to it in Concord because that's where Paul Revere came. And it's worked out over time. I'd say our country isn't perfect, but I think it's fair to say spectacularly well that we have the oldest constitution on the face of the Earth that's still in effect. And for all the problems Americans have, certainly after the Civil War, we're all free.

**Phil Bredeesen:** Just in looking at things now, it certainly appears, I think, to a lot of people, certainly to me, that this is broken down somewhat. In particular, it's broken down in that the legislature or the Congress is no longer willing to exercise its independent judgment. First of all, do you think that's correct? And second of all, does that have any basis in history as well?

**Cass Sunstein:** It's a great question. So I was in DC in two kind of runs in relatively recent years, and I dealt with members of Congress, and I admired them, both the Republicans and the Democrats. They were friends, the ones I dealt with. It's really hard to get the right number of people in agreement on the right specific thing. And right now, party is really more important than institutional loyalty for many of them.

So the Democrats will think our Democratic colleague is now in the White House. We should

mostly agree with them, or someone who's a Republican is the White House, and we should mostly not agree with them, and Republicans will think exactly the same thing. So I think it's fair to say that in important ways the framers' fear, which was that Congress was the most dangerous branch, has been kind of outrun by reality.

Congress isn't the most dangerous branch anymore. It's kind of struggling to assert itself at times, and that's just because— Hamilton saw this, that to get one person to do something isn't that hard. So that's why he wanted a single president, because sometimes you need energy and dispatch. To get a large number of people together to do things can be really challenging. I think Hamilton underestimated how hard it could get. And you're right, that's where we are. Now, we do get appropriations, and we do get laws. And a lot has happened in the last 10 years, but the executive has a kind of primacy in Washington now.

**Bill Haslam:** And so that idea has been carried on to this idea of the unitary executive that the president, if it's not in the legislative branch or the judicial lane, everything else is the decision of the president. Talk to us about that concept and how it's worked or not worked.

**Cass Sunstein:** Okay. So in 1935, the Supreme Court upheld the independence of the Federal Trade Commission. So what the Supreme Court did was to say that if Congress wants to create independent agencies which aren't subject to full presidential control, it can do that. And that decision in 1935, it's been the law for a long time. It's controversial in some circles. It means that Congress can create the Federal Reserve Board, which isn't subject to the president's full control by any means. The Federal Communications Commission, which has a degree of independence from the president. Nuclear Regulatory Commission, and there's a large number of them.

That's kind of non-unitary executive in the sense that some people who are implementing the law operate free from the president. And if this seems a little dry, you could think it's not dry at all. It's horrible that you get people who are really important policymakers. The Nuclear Regulatory Commission, it's not accountable to the president.

Or you could think it's really important and good that if the president had control of, let's say, the Federal Reserve Board, he could do things with interest rates that would not be in the long-term economic interest of the country, but to make sure that he or the people he likes get re-elected. Or if the president had complete control of the Federal Communications Commission, then the president would have a lot of power to, say, punish enemies and reward friends. And that wouldn't be very good for the system of free expression.

So for many decades, the presidency has not been fully unitary. There's a civil service which is protected against the president's political retribution, and the Supreme Court has said on many occasions that you can have a civil service which has a degree of protection against politics. And there are some reasons why that might be a good reading of the Constitution. A lot of people have said so, and I think so.

In recent years, some presidents have said that the Supreme Court was wrong in 1935 and that the civil service can't be independent. That Article II of the Constitution says executive power is vested in a president of the United States. "What part of that do you not understand?" says the president exercising executive power. Unitary, which means that the independent agencies are unconstitutional and the civil service has to serve at the pleasure of the president. So that's one of the most fundamental debates in, not just constitutional law, but in our country.

**Bill Haslam:** So you talked about those agencies. So let's also talk about departments within the administrative branch clearly is the Department of Justice, the president has the appointment authority, et cetera. And yet traditionally, the President's kind of taken sometimes more than others, but taken a step back and said, "I'm not going to get actively involved in whether it's the FBI or the department deciding who they're going to prosecute for what, et cetera."

Obviously, that's in the news today with President Trump and his Department of Justice, but give us again a little historic perspective. Has DOJ always truly been seen as outside of the political stream?

**Cass Sunstein:** That's also a great question. So the idea that the Department of Justice is the president's kind of lawyer, in terms of criminal prosecution and investigations, that's very unfamiliar to us. So after Watergate, the creation of a strong norm of separation between politics and the Justice Department got firmed up because the thought was, that under Nixon, it wasn't firm enough. But if you look at Johnson and Truman and Roosevelt, at least much of the time the notion was the Justice Department has a degree of independence.

Now, for Roosevelt with World War II, sometimes, there was a pretty good connection between what the president wanted and what the attorney general would do. But at least since Watergate, and that was a long, long time ago, the idea has been the Department of Justice, not by law, it's not an independent agency, has independence.

I worked in the White House under President Obama, and the idea that there'd be political leadership, let's say, by the president for prosecutorial decisions, et cetera, that wasn't on the table. The idea was the attorney general knows the president, gets general guidance from the president, but there's a sense that the nation's leading prosecutor is not a political actor.

**Bill Haslam:** We've mainly talked about the relationship between the executive branch and legislative. We also have the judicial branch of government, and we're seeing some lots of issues brought up. One of those today is President Trump's saying, "Well, how can one single district judge when I can go bring a case anywhere, stop the action of the president of the United States all across the country, a national injunction, if you will, by a district judge?" Give us your view maybe historically on how we've seen that, historically how much that's happened, and maybe even your view of how you think it should or should not happen.

**Cass Sunstein:** Okay. So there are two different issues. Let's take the easier one first, which is

can a district judge decide with authority that what the president of the United States has done is unlawful. And then we'll get to the remedy in a moment.

So on the question whether the district judge can say that President Biden, let's say, school loans program, the forgiveness program is unlawful? Absolutely. And can forbid its application in the case at hand. Can enjoin, if there's Texas suing and saying the school loan program's unlawful in Texas, that can be enjoined and the president might think, I'm sure, I know both Republican and Democratic presidents have thought, "Who is this person, and why do they get to tell me that what I've done is unlawful? We looked at the law pretty carefully, and I got elected."

The right remedy for that is to appeal to the appellate court and then to go to the Supreme Court, if you're still dissatisfied. So let's just say the authority of Article III is clear and the president can lose and the president has to be bound.

Now, there's the more technical question, which is a nationwide injunction. So let's suppose a president does something on immigration. It could be Biden. It could be Trump. And I choose this because Biden and Trump were challenged a lot, first Trump and then Biden, on immigration issues. And they lost a lot in lower courts.

What's the remedy? So let's suppose Texas says you have this dumb immigration policy and we're going to get overridden by people who don't deserve to be here. And then the court says, "You're right, Texas," and then enjoins the Biden practice, let's say. Then what happens outside of Texas? What happens in Georgia? What happens in California? The district judge might issue a nationwide injunction saying it's unlawful, and I'm not sure how to think about that.

So the idea that nationwide injunctions are by their nature horrible might be right, but it's not clear it's right. So if a district court finds that President Biden, let's say, has let a bunch of people in unlawfully, then for the district court to say, "Look, it's unlawful," it's unlawful, not just here. It's unlawful everywhere. And if the president disagrees, the president goes through the appellate process. And there's a lot of technical stuff which is more interesting, I think, that it might seem, where a president can ask to stay the order on the ground that there's going to be a lot of harm in the interim. And the district court might stay the order pending appeal. That happens.

So I find the nationwide injunction issue or not, one where reasonable people have different views, I get President Trump's point. It's not outlandish that the injunction should just be limited to the particular people or maybe the particular area that the suit involves and not go nationwide. But if you're drawn to that view, you might think, suppose the president of the United States does something extraordinarily unlawful and a district court says so, let's say, in Oklahoma, then is the extraordinary unlawful thing going to be in play everywhere except in Oklahoma? That's not ideal.

**Phil Bredezen:** This issue we've just talked about of the accumulation of power in the executive branch and, at least in my case, complaining a little bit about the lack of interest in the part of

the Congress in exercising its role in this, have there been times in American history when there's been a similar kind of concentration of power in the executive branch and the Congress has had to act in some ways to right the ship?

**Cass Sunstein:** Not as much as the period we're now in, I don't think. Though to be very confident about that, we need a metric. And then we need to see in comparison to the metric, is this period unique? So I'm going to talk more impressionistically.

For Congress, the key point is that Congress is a they not an it. So for Congress to get together and do something is super challenging given the plurality of people there. Of course, you know this. But since we mentioned immigration, there was an initiative, a Republican-led initiative that was super hard to get sufficient number of votes on. It was led by Senator Lankford from Oklahoma who's a fantastic senator in person in my view. And he produced something that was kind of a miracle, where he had the votes, but it took a long time and a lot of intense effort. Then President Trump said, "I don't think this is a good idea." And that basically—

**Bill Haslam:** Who was out of office at that point, right?

**Cass Sunstein:** Yeah. He was out of office. And he said he didn't like it, let's not do it. And that was authoritative. Now, whether or not you think at that point former President Trump was right or not, it's just an example of how hard it is to get them all in accord. And to your point about the unprecedented nature of it, think of the amount that the executive branch can do without any congressional action. That's probably larger now than at any point in our history and just bracket the question whether what any particular president doing is unlawful.

They're just lawful authorities to do a ton. You can go big on climate change as the Biden administration did. And if you're careful, you can fall within legal bounds because the Clean Air Act gives the president a lot of discretion. Or you can go small on climate change or get rid of all the Biden things. And if you are very careful, you can do all that because the Clean Air Act allows a president who's not excited, at least, to scale back a lot. Think of airline stuff. There's a lot of regulatory action you can do. I don't know if you've taken advantage of the Global Entry and TSA Pre programs. Those are all executive branch creations. There's congressional authority. But the number and breadth of the grants of discretion to the executive branch, more now probably than at any point in our nation's history, and presidents have learned over time how much you can do.

In wartime, think of the war on terror, there are domains where the president can do a lot because Congress enacts new authorities. So President Bush had a lot. And President Roosevelt certainly pushed a lot of boundaries in World War II and got grants of authority. So I'm thinking to compare the Roosevelt administration to the Biden or Trump administration, we need to figure out what's the metric to know who had more discretion, which president, but the breadth of what a current president has strips what Roosevelt and Truman had.

**Bill Haslam:** So a lot of discussion and people throwing around the term where we're in a

constitutional crisis or we're headed toward one today, that feels like to me only happens if the executive branch disagrees and doesn't follow through on a judicial ruling. A, has that ever happened? And B, if it does happen, then what happens?

**Cass Sunstein:** Yeah. I like your definition that we're in a constitutional crisis if and only if the president refuses to obey a judicial order. We don't have a lot of clean cases like that. There were cases in World War II where the Supreme Court was given by President Roosevelt the signal in the case where he was going to execute some people that if he told him he couldn't, he was going to anyway. That was not usual and, what's the right word, horrible. But basically, it's hard to think of examples of that.

I'm hopeful. I think President Trump has said he would obey judicial orders, though the vice president has said things that are in, at least, apparent tension with that. Courts have some devices available. They can hold people in civil and criminal contempt. They can get money from people. They can jail people, and there's probably an ascending set of strategies courts would have.

The enforcement question is real. So if the Department of Justice says, "We're following the president and not you, court," then the court might run out of bullets. But then the courts have their own people. They're marshals, and they can go to banks and say, "The money from this person has to go to the place where fines go."

So I'm hopeful that we're not going to get to the domain of the constitutional crisis as you, I think, rightly define it. Some people, including some law professors, have a different conception of a constitutional crisis, who say if there's a large array of unconstitutional actions by one of the three branches, then it is a constitutional crisis, even if there's been no disobedience of a court. I would say that even under that definition, it's extremely far from clear we're there yet, but there has been an exercise of executive power by the president in ways that, let's just say, extremely unusual. And a number of them are legally vulnerable.

**Phil Bredeesen:** This podcast is named after one of Howard Baker's admonitions to people, which is basically to the other person might be right, and that's why you need to listen. You've been through a very complex life with a lot of issues. I'm curious if there's something you can think of in your own history where you had one opinion and, through the miracle of listening to another person, dramatically changed your opinion on something that was important to you.

**Cass Sunstein:** Thanks for that. A lot of them. So I used to be more enthusiastic about affirmative action policies than I am now. So I don't hate affirmative action policies, but I used to be more unambivalently in favor of them. So movements toward race neutrality, that seems to me there's a lot to be said for that. That's a change.

With a lot of people, I used to think the idea of same-sex marriage was not reasonably on the table. So I don't know what age I shifted, but the idea that men could marry each other, women could marry each other, seemed to me at some stage just that doesn't make any sense at all.

That's not what marriage is. And now, I'm very comfortable with same-sex marriage and the idea of forbidding it seems to me wrong.

On abortion, I'm more in the direction of pro-life than I was, which isn't to say that I would criminalize abortion broadly, but the idea of a 12-week period, let's say, that seems to be very reasonable. So I have pro-life friends who've moved me on that issue also being a father. So I'd say I feel very keenly the force of both the pro-life and the pro-choice side and the idea of saying that after a certain stage – I don't want to send mothers to jail or people who don't want to be mothers, I don't want to send them to jail – but the idea that the law should make an expression that you get this banned. The terribleness of abortion, even if people have a right to do it, I get that. So that's something.

On the unitary executive, and forgive the length of this answer, I've been like a baseball team that go back and forth. So I now am very ambivalent about the idea of a strongly unitary executive. I think the Constitution's history just doesn't justify that. But that's based on research that I haven't done. It's been done by legal historians in the last five years, which seemed to me explode an idea that at one point I thought was true, which is that the founders really wanted a strongly unitary executive. That's not what history supports. So I've changed on that one.

**Bill Haslam:** Cass, I'm impressed or I'm struck by the fact that of your "maybe I didn't have it right before" answers, a couple of those are things which folks would say you've moved right on. And a couple of things are things people say, "Well, he's moved left on." If we gave you a final word and you got to speak a word to the country about your concerns as you think about separation of powers, do you have a final word for us?

**Cass Sunstein:** Yeah. So our amazing experiment in our country, which is a shining light all over the world, if it owes anything to one idea above others, I think the separation of powers is the prize winner. It's the foundation for what's led to an extraordinary couple of centuries, and let's hold onto that one.

**Bill Haslam:** Pretty well said. Thank you very much. You've been a terrific guest, and we really appreciate your time.

**Cass Sunstein:** Thank you, an honor to get to talk to you.

**Bill Haslam:** Well, Phil, what do you think?

**Phil Bredeesen:** I think he knows what he's talking about.

**Bill Haslam:** I was impressed. He obviously comes from a Democrat point of view. He served in the Obama and Biden White Houses, but he had a thoughtful approach to issues that seemed to supersede whatever the moment is that we're in right now. And I find that really helpful, people that can get past the current moment of our politics, whenever that is, and look at a longer view of things and both the precedent before us and the precedents that we're setting



going forward.

**Phil Bredesen:** I think that's very good. And I was impressed with the way he answered that, the question about places you've changed your mind as you pointed out. Some of them have gone leftward, some of them rightward. And that's exactly what you would hope would happen with people. And these are on subjects that people don't usually change their mind on.

**Bill Haslam:** Yeah. I also loved his phrase when he talked about remember the legislature is a they, not an it. And when you think about, "Well, how does a legislature do something," you have to remember it's a they, and it's a lot of they. It's 535 of them.

**Phil Bredesen:** But I think over the years, the Congress has developed processes to make that work, the idea of committees and subcommittees and work there, and that moving beyond, and it's the fault of both Democrats and Republicans, but that moving beyond that regular order into the way things work now really gets in the way of the Congress acting in a sensible fashion with all these issues on the table.

**Bill Haslam:** Well done. We have another good guest coming up.

Phil, our next guest is David Lewis. He's the Rebecca Webb Wilson University Distinguished Professor at Vanderbilt University. But particularly appropriate to us now, his research focuses on the presidency, executive branch politics, and public administration. He's received a lot of awards, which I won't go into, but suffice it to say, he's well respected in this field. Prior to being at Vandy, he was at Princeton and the College of William & Mary.

**Phil Bredesen:** Maybe he wants you to go over all those awards he got. Anyway. David, thank you. Thank you very much for being here with us.

**Bill Haslam:** So a lot of conversations today about the whole idea of the unitary executive with the president being, if it's not legislative or judicial, then it's all under the presidency, and up to and including the Federal Reserve and Nuclear Regulatory Commission, et cetera. Help us understand that. Like I said, if we don't spend our day studying this, just what is the president's authority and how far does the executive branch go?

**David Lewis:** Yeah. First, thanks for having me. Yeah. This is really at the heart of many of the current debates between the administration and the Democrats in Congress. And the administration has adopted a view of the Constitution that you described or labeled as the unitary executive theory. And the idea here is that the Constitution says in Article II that the executive power is vested in a president of the United States, and the idea is that all executive power is vested in the president.

And so the idea there then is that the president is supreme and has expansive powers within the realm of executing. So what that means is I get to fire people if I want to. I have expansive authority over spending once Congress has appropriated money. I get to kind of control and

withhold money that Congress has given. And so there is this idea that the administration has adopted that many of the laws that exist now, that Congress has enacted in the past and presidents have signed, are actually unconstitutional. They're unconstitutional infringements on the president's authority as the unitary executive. So that's the idea. And it's at root of many of the things that the administration has chosen to do.

**Phil Bredeesen:** And you've studied it. Is that your interpretation of the Constitution?

**David Lewis:** It's not my interpretation of the Constitution. I think that, while I respect very much the scholars who have sort of worked in this tradition, I think the historical record is much more complex and that actually if you look over the history of our country, there's been a lot more interchanging of the executive power.

So just to give you an example, in the 1790s there were these cases where district court judges are getting facts in. And their job clearly is to take a maritime issue, determine the facts, and then what they do is they sort of take these facts and they give them to the Secretary of Treasury to resolve. So we've got this kind of weird case where the judicial branch is doing stuff and then giving it to the executive branch to resolve or the attorney general, all the way up until 1870, if you look at official government documents, many of them list the attorney general as part of the judicial branch and not part of the executive branch.

So there was a lot of mixing of executive power and judicial and legislative power during this period, which I think suggests that the early understanding of the separation of powers was a lot more murky, that it was separate institutions sharing powers more so than a strong separation.

**Bill Haslam:** So let me follow up on that and stay right there. While the president has the clear authority to appoint the attorney general who oversees the Department of Justice, historically, like I said, maybe as a prior guest point out to us, at least, since Watergate, presidents have kept their hands off of DOJ in terms of who we were going to prosecute and who we were going to investigate. Are we just doing that by tradition, or is the president supposed to do that, or does he or she have to do that?

**David Lewis:** There's a lot in our governance, which is based on tradition and mutual understanding that's also reinforced by political dynamics. So I think there are cases in the past where presidents have been involved in prosecutorial decisions.

So even Thomas Jefferson, when he assumes office, encourages the dropping of suits related to people prosecuted under the Alien and Sedition Acts. But in general, there was this notion that people that are involved in law enforcement have a different boss. They have both a boss that's the executive, but also a boss, which is the law.

And so there was kind of a norm of adherence to this idea that the law had its own power apart from elected officials. And there's been a little bit of struggle back and forth. And so my own sense is that this notion that the law has its own power has been part of our political tradition up

to this point and also reinforced by political stuff. So if you violated these norms, there were often political consequences that were associated with that. If those political consequences go away, then the norms can tend to break apart.

**Phil Bredeesen:** We live in a world today where there at least appears to an awful lot of people, certainly myself included, that there's a very strong attempt to accumulate power at the executive branch level and that the Congress is either unwilling or incapable in some way of fulfilling its constitutional role as a separate source of power. Do you think that's right? And if you do, what are the possible solutions here above and beyond just exhorting Congress to do their job?

**David Lewis:** Yeah. I think that the history of separation of powers in the country suggests a gradual accretion of power in the executive in general. And there are lots of reasons for that. I think it crosses party lines. Republicans and Democrats that are presidents have had strong incentives to expand their power, partly because in elections folks say, "If you elect me, I'll make your wildest dreams come true." And then you get into office, and in order to make people's wildest dreams come true, you've got to accumulate the power to try to make that happen. But the president's ability to expand their own powers depends on the willingness of the other branches to relinquish it, to allow them to have it. And in the current moment, with Congress being divided and narrow majorities and things being so politically polarized, it's become difficult for Congress to check the president, whether it's the president of the Republican or Democratic Party. So they've been incapable of fulfilling a historic role of being the first branch of government and maintaining their own power.

And courts have neither the person nor the sword. So they don't really have the ability to rein presidents in on their own. It's not like they can rule against the president and send marshals over and throw presidents into jail. Their power is judgment and the power of judgment depends on people's willingness to go along with that judgment.

**Bill Haslam:** So there's a lot of people, depending on where you sit on the political spectrum, where you say we're either having a constitutional crisis or we're about to, or no, that's silly. But one of those, I think, would be if the courts made a judgment and then the executive branch said, "That's fine, but we're going to ignore that." Has that happened in the country before? I guess that's part one and part two would be what happens if it does happen?

**David Lewis:** Yeah. I guess I want to start with just a distinction. I think there have been cases—So the cases where presidents have said, "A court decision has been made, and I'm going to ignore it," are rare. Cases where presidents have dragged their feet in compliance with court decisions have been more common. So an example would be something like *Brown versus Board of Education*. It's decided in 1954, but there's no substantive desegregation in the South until the mid-1960s, and that's the result of Congress and the president passing the Civil Rights Act.

So courts have made decisions that presidents have been reluctant to use the power of the

national government to enforce, but explicitly saying, "You've made your decision and now I'm going to ignore it," is rarer, at least publicly. The only examples I could come up with are cases in wartime, where judges have made decisions and presidents have said, "I'm not going to do that."

So there was a case in the Civil War where Justice Taney demands that somebody that's been arrested under martial law be able to show up in federal court to have their case heard and understand what the charges are. And basically, the Lincoln administration says, "No. We're not doing that." There is another case in World War II where German saboteurs show up in New York and in Florida. They get arrested. They asked to have their cases appealed in district court. FDR says, "No. We're going to try them in military tribunals." And there is some discussion informally between the attorney general and justices basically saying, "If you decide to support these German saboteurs in this case, we're going to do what we want anyway." And so the court then is reluctant to pick up the case.

So those are extraordinary circumstances. They're rare and happen only very rarely. But I agree with you that if the president were to say, "No, I don't accept your right to determine what the law means," that would be an extraordinary moment of constitutional crisis.

**Phil Bredesen:** And what would happen in the country then?

**David Lewis:** Well, I guess the one thing I would say is the primary protection against presidents asserting too much authority is elections. And so the primary protection we have is not the Bill of Rights or separation of powers or checks and balances. The expectation would be, hopefully, voters would say, "Yeah, that's not the country we're living in. We don't want that kind of system. We're going to vote this person out."

The primary protection, though, really would probably be impeachment. So we'd have to rely on Congress to say, "No. I'm sorry, Mr. President, but if you don't comply with the court decision, that's an impeachable offense, and we're going to take you up on that." There are some actions that judges can take short of that, that make it harder for presidents to not comply. But the two main things would be elections and impeachment.

**Bill Haslam:** I think our founders had a brilliant vision for the separation of powers in government that has stood us in great stead for these 200-plus years. Are there any reforms that are needed to that vision of the separation of powers in your opinion?

**David Lewis:** I think it's a great question. And I think you, both having worked in separation of powers systems, probably have some sense yourselves about when they work well and not. There are some things that I think probably could help. So if we made some structural reforms to strengthen Congress to increase its staffing. Congress has, I don't know many folks realize this, but it has about, at least the House, has half as many professional committee staff as it did in 1980. They've sort of consciously chosen to limit their sources of information and their own expertise, which weakens them. So I would support some efforts to strengthen.

**Bill Haslam:** Let me stop. Why have they consciously chosen to do that? That's interesting.

**David Lewis:** I think there was partly an ideological reason that— it was motivated when the Republicans took control of the House of Representatives in 1994 under the leadership of Newt Gingrich, and they came in, and they felt like, in their efforts to do cost-cutting, that it only made sense for them to trim back the legislative branch as well. And so they cut half the professional staff and some other congressional staff agencies at the time to sort of look like they were tightening their belts. But that was a big one.

But I would strengthen Congress. Another thing I would do is try to establish some more independence for some of the things that we think are necessary in a rule of law system. So more independence for the Justice Department, more independence for the Internal Revenue Service, some places like that where we think the power of the state should not be used in ways that are politically biased one way or the other. Those would be some of things that I would consider.

**Phil Bredezen:** One of the issues obviously that comes up with the current administration and attempts to strengthen executive branches is this unitary view of the executive that Bill talked about, in particular regard to these independent agencies that exist really all throughout government and Federal Reserve, obvious example.

What's your sense of that? Do these congressionally created independent agencies that have some executive power, are they contrary to the Constitution? Are they necessary to the operation of a modern, complex nation like ours?

**David Lewis:** That's a good question, and I think this is a really difficult area of constitutional law because the Constitution itself doesn't say anything about removal. It just talks about appointment, and it gives Congress authority to determine how people are appointed, particularly at lower levels, but it doesn't say much about removal. And so throughout American history, there have been disagreements about the president's power to fire people, whether people at the top or people are lower down in the personnel system.

There are a couple of important court decisions in the 20th century that establish the president's right generally to fire the top officials, but established in precedent, at least, some limitations on the president's ability to fire people.

And where I would say conservative legal theorists and others disagree is on this idea of were those decisions right when they were made? And if you think that the president in a strong separation of power sense should have the right to govern things the way that they would like, they should have the ability to remove people who are underperforming. And that's kind of the idea there.

I think established precedent and law now suggests that these limitations on the president's

ability to fire people at will are constitutional, but the president disagrees and is challenging those provisions and wants the court to overturn those. I think the historical record suggests that, at least in our understanding historically, it's been relatively common for Congress to put limitations on the president's ability to fire people. But maybe, we were doing things wrong all this time.

**Bill Haslam:** One of the questions that we ask everybody, David, is in the spirit of Howard Baker asking or reminding us that always remember the other person might be right, when it comes to this topic in terms of separation of powers, the executive's privileges, et cetera, can you think of an example where maybe you didn't have it right or you've changed your opinion as time has gone on?

**David Lewis:** Yeah. With regard to presidents and the separation of powers, I would say my understanding of why people have certain favorites as presidents has changed over time. So historically, presidents like Coolidge or Hoover have been relegated to the lower rankings and presidential rankings. And I've had conservative students who I admired, say, "Professor Lewis, maybe a more limited conception of presidential power is what's needed for this republic and that our expectations for presidential leadership are way too high and impossible for anyone to meet."

And what they admire about some of these presidents in the 1920s is a more restricted role for presidents, robust in certain spheres, but limited in other spheres. And I've come to respect that view, I think, more than I did when I first started teaching the presidency.

**Phil Bredesen:** Well, this has been very, very helpful and informative, and this topic is not going away. We'll be back to it again. But thank you very much for your time here today and your expertise. It's been great.

**Bill Haslam:** Thanks, David. We appreciate you helping us think through what are not just important but very timely questions for our country.

**David Lewis:** It's my pleasure.

**Phil Bredesen:** Well, so far, we haven't found anyone who disagrees with the notion that this is a somewhat extraordinary time with concentration of power in the executive branch. And that is concerning, but a lot of water yet to go over the dam, I think.

**Bill Haslam:** I think that's right now. I think they're also saying, "Hey, there's a lot of things that are sort of ill-defined and nebulous about what is the executive's role to things that maybe historically the president has kept hands off of, either respect for precedents or thinking that's not in my lane," but it's maybe not constitutionally required to do that. And maybe certain some of the times we have will cause us to we need to do a little better definition.

**Phil Bredesen:** Yeah. I have enormous respect for the Constitution, but it did not come down

from the mounts with engraved on stone tablets. It's a work of human beings, and I think a lot of what we've done in this American experiment is okay, taking this as a starting point, how do we just actually make things work? I think of a little bit similar to free market capitalism, totally in favor of it, but we have found things we needed to do to actually make it work. We're careful about not letting monopolies be created with the effects that they have and so on.

So I think a lot of this stuff is in that category of how do you take this great idea and adapt it to changing situations and keeping the underlying thoughts the same, but also just recognizing realities that the founders could not have ever foreseen.

**Bill Haslam:** Yeah. I think the important thing, I think, what you heard from our guests, I think what we would both express, even though we were executives and felt the strong need for executive have clear authority over certain issues is that our founders were brilliant with this idea of separation of powers. And I think it came out of sort of the Judeo-Christian heritage world they grew up in with people as being both created in the image of God and susceptible to failure both. And because we're both of those things, that's why we need the separation of powers.

**Phil Bredesen:** I think also, remember that the revolution was a reaction against the style of a kind of government—

**Bill Haslam:** Absolutely.

**Phil Bredesen:** —from England. And so they were very sensitive to the notion of tyrannical concentration of power in one place.

**Bill Haslam:** They knew that it didn't end well. So thanks. It's been a great session. And like I said, I'm grateful to guests and, hopefully, that our listeners are doing what we're doing, thinking through what is, the time we're in right now, forcing us to think about what we believe.

**Phil Bredesen:** Perfect ending.

**Marianne Wanamaker:** Thanks for listening to "You Might Be Right." Be sure to follow on Apple Podcasts, Spotify, or wherever you listen to your favorite shows. And please help spread the word by sharing, rating and reviewing the show.

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