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Intelligence Squared U.S.

The president has usurped the constitutional power of Congress

For the Motion: Michael McConnell, Carrie Severino

Against the Motion: Adam Cox, Eric Posner

Moderator: John Donovan

AUDIENCE RESULTS

Before the debate:

29% FOR

39% AGAINST

32% UNDECIDED

After the debate:

38% FOR

53% AGAINST

9% UNDECIDED

Start Time: (18:33:07)

John Donovan:

Please welcome to the stage, Nicholas Quinn Rosenkranz and Jeffrey Rosen.

[applause]

John Donovan:

Hi, Nick.

Nick Rosenkranz:

How are you?

John Donovan:

Hi, Jeffrey. And the reason I'm bringing them to the stage is that tonight Intelligence Squared U.S. is in partner -- we're here because we're in partnership with the National Constitution Center. This is part of a series -- that's a good round of applause. That was spontaneous.

[applause]

John Donovan:

We're here because of this partnership which has been going on now for a few years and was conceived between these two gentlemen. Jeffrey Rosen runs the NCC and

Nicholas Quinn Rosenkranz is on the Board of Intelligence Squared U.S. And they were friends who came up with this idea. And, Jeffrey, I'll start with you. Why have a debate about anything at the National Constitution Center, particularly this topic?

Jeffrey Rosen:

Well, it is a thrill to welcome Intelligence Squared back to the NCC. And this debate series is the crown jewel of our efforts at Constitutional education.

18:34:10

The National Constitution Center, as those of you who have been here before know, has a very inspiring mission from Congress, which it is now time to recite. We are the only institution in America chartered by Congress to disseminate information about the U.S. Constitution on a nonpartisan basis. Beautiful. You see, everyone can do it by heart now. Give yourself a round of applause.

[applause]

But there is one other institution in America that has a mission to be an enclave of reasoned civil dialogue in unreasonable times, and that is Intelligence Squared. And it was during my first week on the job that Nick and I met, and we decided that it would be important for civil discourse in America to create a special series of Constitutional debates where people are encouraged not to talk about their policy preferences, but to educate themselves about what the Constitution says.

18:35:06

And these debates have been a runaway hit. We're so proud of them, and I think IQ Squared is pleased, too. And ranging from affirmative action to campaign finance, we've been traveling around the country and debating the Constitution. What's so important about these debates is that there's one rule to them. And I want you to remember it now. You need to vote based on your views, not of policy or a particularly president, but of what you think the Constitution allows or prohibits. And Nick is going to say more about this, but we're going to be talking about President Obama and executive power. It's possible that you might like President Obama, but believe that he has exceeded his Constitutional authority, or you might dislike President Obama but think he has not exceeded his Constitutional authority. And it's really important for you to make this distinction because the arguments about executive power that you'll be hearing on the stage today have been raised in criticism against presidents of both parties, Presidents Bush and Clinton and Bush before him have also been charged by their critics with exceeding their Constitutional authority.

18:36:13

Their defenders have repudiated those claims. So as much as possible, take the identity of the president out of the equation. Read the Constitution, see what it -- you think it says. Listen hard to the arguments on both sides. Make up your own mind, and please give a warm round of applause to my friend, partner, and fellow promoter of Constitutional discourse, Nick Rosenkranz.

John Donovan:
Nick Rosenkranz, everybody.

[applause]

John Donovan:
And, Nick, I will remind you, is -- he's the director of the Rosenkranz Foundation, a professor at Georgetown Law. He teaches law, and now he's going to give us a teaching moment by talking to us about the parts of the Constitution, the actual text. You've done this for us before. It gives us good guidelines for following this argument in this debate tonight.

Nick Rosenkranz:
Yeah. So the Constitution actually seems quite clear about the role of Congress and the role of the president. So Article 1, Section 1, says, "All legislative power shall be vested in a Congress of the United States."

18:37:13

We have the language here on the screen. And Article 2 specifies that the president shall take care that the laws be faithfully executed. So it seems actually rather simple. And the framers assumed that Congress would be by far the most important, most powerful branch of government. Now, the modern administrative state seems to tell a very different story. So the president now sits atop this gigantic administrative machinery and does a lot of things like executive orders, executive agreements with other countries, interpretations of federal law, promulgation of regulations. And many of these things actually look a lot like legislation.

18:38:08

They look quite a lot like legislation. And so the question that we're going to be debating is, has the president actually crossed this line? Is he actually, in effect, exercising legislative power, which is what the Constitution reserved to Congress?

John Donovan:
And do we all agree on what we mean by "faithfully executed," or is that the heart of the question?

Nick Rosenkranz:

So that's -- that is very much the heart of the question. Some would say a core aspect of presidential power is executive discretion. It doesn't say -- it doesn't say it has to completely execute the laws. It just says he has to faithfully execute them. That clearly builds in some discretion to execute them in some cases and not others. But choices like that, if made on a grand enough scale, can start to look a lot like changing the law.

John Donovan:

Jeffrey touched on this, but the motion does not say, "President Obama." It says, "the president," a very deliberate choice.

18:39:04

Nick Rosenkranz:

Yes, so, you know, you might have walked in here with an instinct about this question derived from your feelings about President Obama. So you might start out -- I think it's human nature to start out thinking, "I like President Obama, and, therefore, I don't think he's usurped the power of Congress," or, "I don't like President Obama, and, thus, I think he has," right? And a little kind of juristic, a little trick that you can try to make sure you're grappling with this question in a kind of intellectually honest way is imagine the shoe on the other foot, so, "How are you going to feel when a President Trump doesn't enforce the environmental laws?" for example, or, "How are you going to feel when a, you know, President Cruz --" et cetera. And, you know, just make sure that whatever answer you're kind of formulating in your mind about President Obama, you're also going to be comfortable with that answer in the next administration.

John Donovan:

Gentleman, you have launched us brilliantly. Thank you very much. And let's welcome our debaters to the stage.

Nick Rosenkranz:

Wonderful.

18:40:06

[applause]

John Donovan:

Okay. Let's do this spontaneously.

[applause]

"I'm not a king," the statement famously made by Barack Obama midway through his presidency, noting and possibly lamenting the fact that there are limits to his

presidential powers, that the Constitution gives Congress the ability to block him in all sorts of ways by giving Congress a final say on certain kinds of appointments, on what laws get passed, how money gets spent. But at the same time as he was lamenting this reality, the president also became one in a long line of presidents to be accused of trying to fashion various end runs around those limits.

18:41:16

And the question is whether in doing so he was fairly interpreting the Constitution or whether he was violating it, breaking the rules set in place by the framers. Well, that sounds like the makings of a debate, so let's have it, "Yes," or, "No," to this statement, "The President Has Usurped the Constitutional Power of Congress," a debate from Intelligence Squared U.S. I'm John Donvan. We are in Philadelphia at the National Constitution Center with four superbly qualified debaters onstage who will argue for and against the motion, "The President Has Usurped the Constitutional Power of Congress." As always, our debate will go in three rounds, and then our audience here in Philadelphia votes to choose the winner, and only one side wins. Let's have you vote now right away to see where you stand on this motion. Please go to the keypads at your seat.

18:42:10

Again, the motion is this, "The President Has Usurped the Constitutional Power of Congress." Look at that keypad. Look at keys one, two, and three. If you agree with that statement, if you support the motion at this point, push number one. And if you disagree, push number two. And if you are undecided, push number three. You can ignore the other keys. They are not live. And if you push the wrong button, you can just correct yourself and the system will lock in your last vote. This usually takes about 15 seconds, and then I get a signal that we're all good. Does anybody need more time? Does anybody want to admit to needing more time? That's really the question I'm asking.

[laughter]

Okay. We're good? We locked it out? All right, terrific. Let's meet our debaters. First, arguing for the motion, "The President Has Usurped the Constitutional Power of Congress," I want to introduce Mike McConnell.

18:43:09

Mike, welcome to Intelligence Squared U.S. and the NCC.

Michael McConnell:
Thank you.

[applause]

John Donovan:

So, Mike, you are a formal federal judge. You are now director of the Constitutional Law Center at Stanford where you are also a professor. And what we find interesting in light of today's topic, an anecdote about you, that years ago you were so impressed with a young Harvard law student who was editor of the Law Review that you essentially got him a job at the University of Chicago Law School. Can you tell us who that person was?

Michael McConnell:

Well, I guess that would be Barack Obama.

[laughter]

Of course, he was president even then -- president of the Harvard Law Review.

John Donovan:

And good call on your part?

Michael McConnell:

We had very productive and pleasant interchanges. And I still have a lot of residual fondness from those days.

18:44:05

John Donovan:

All right. We'll look forward to the day he listens to this debate and checks back in with you. Thanks very much, Mike, and please tell us who is your partner?

Michael McConnell:

This is Carrie Severino.

John Donovan:

Ladies and gentlemen, would you please welcome Carrie Severino?

[applause]

Carrie, welcome to Intelligence Squared.

Carrie Severino:

Thank you.

John Donovan:

You are chief counsel and policy director of the Judicial Crisis Network. That's where you focus on judicial issues like constitutional limits on government and the federal nomination process. You've had briefs filed before the Supreme Court. You testified before Congress. Your group actually took a strong position when Justice Scalia passed away on how to fill that vacant seat. You argued that people should decide -- that the people should decide by how they vote for president in November of 2016. Question, is that a political argument you're making or is it a constitutional argument?

Carrie Severino:

Well, our main driver is constitutional. First, that we have a justice who is going to be faithful to the constitution and the laws.

18:45:05

But second, that we really need to defend the Senate's right to exercise their advice and consent given to them by the Constitution as they see fit. They don't have to be a rubber-stamp for the Congress. I expect we'll get a chance to talk a little more about advice and consent.

John Donovan:

Yes. It sounds like we will. Thanks very much. This is the team arguing for the motion: The President Has Usurped the Constitutional Power of Congress.

[applause]

So, we have two teams -- two debaters arguing against the motion on the opposing team. Please, let's first welcome -- hi -- Adam Cox. Welcome to Intelligence Squared. Adam Cox.

[applause]

Adam Cox:

Thank you.

John Donovan:

Adam, also a law professor at New York University School of Law. You teach and write about immigration law, constitutional law, and democracy. You've also taught at the University of Chicago Law School, served as a civil rights fellow at the ACLU foundation. However, given all this law stuff that we're talking about, it turns out that when you were an undergraduate, you got your degree in mechanical and aerospace engineering. And so -- and you were summa cum laude. How does all of that knowledge help you in the law stuff?

Adam Cox:

Well, my dad was an engineer too.

18:46:07

And he taught me, growing up, that engineers could solve any problem, so I'll be in trouble with him if I don't say it's helped a lot.

[laughter]

John Donovan:

All right. Thanks, Adam Cox. And who is your partner?

Adam Cox:

My good friend and former colleague Eric Posner.

John Donovan:

Eric Posner, welcome back to Intelligence Squared.

[applause]

Your second debate with us. Once again, the University of Chicago Law School. You are the Esther Kane Research Chair there. Your interests include international law, constitutional law. You are among the top 10 most cited law faculty in the United States, author of many books, including "The Executive Unbound: After the Madisonian Republic." And that book had a chapter, Chapter 6, titled, "Tyrannophobia," which is what?

Eric Posner:

Tyrannophobia is the unreasoning fear that the president at any moment will become a dictator. And I wanted to mention to you, John, that I was gratified to see recently that a medical diagnostics website has listed tyrannophobia as a real condition.

18:47:08

John Donovan:

Seriously?

[laughter]

So, what are the symptoms?

Eric Posner:

Dizziness, nausea, and a propensity for saying that the president has violated constitutional powers.

[laughter]

John Donovan:

All right. Thanks, Eric Posner. The team arguing against the motion.

[applause]

Now, this is a debate. There will be a winner and a loser, and our audience here in Philadelphia will choose which team is the winner by your second vote. After you've heard the arguments, we want to ask you to vote a second time based on what you've heard. And here's how we determine who the victor is. It's the team whose numbers have moved up the most from the first vote in percentage points. So, it's the difference between the first and the second vote. So, listen closely. Judge these debaters, demand that they be persuasive, logical, coherent, and that they have what it takes to get you to vote for their side. Let's move on to Round 1. Round 1 are opening statements by each debater in turn.

18:48:07

They will be six minutes each and they will be uninterrupted. Carrie, you can start making your way. Up speaking first for the motion, The President Has Usurped the Constitutional Power of Congress, Carrie Severino, chief counsel and policy director of the Judicial Crisis Network. Ladies and gentlemen, Carrie Severino.

[applause]

Carrie Severino:

"The biggest problems that we're facing right now has to do with our president trying to bring more power into the executive branch and not go through Congress at all." Those aren't my words, though. Those are the words of then-candidate Barack Obama in 2008. He pledged, "That's what I intend to reverse when I'm President of the United States of America." Well, has he? My colleague and I agree that Obama was right, President Bush did, in many ways, usurp the power of Congress as president. Unfortunately, President Obama continued in his footsteps, and his -- their successors show many signs of going in the same direction of trying to aggrandize presidential power.

18:49:11

We believe tonight that our position actually the easy one to prove. Perhaps you agree with us that when any branch of the government transgresses the Constitutional bounds set before it, that it puts the foundations of our liberty at risk. But maybe you think Congress has -- already has too much power under the Constitution, and the president actually should have some more flexibility and freedom of action. Maybe you think that

achieving his goals might be worth breaking a few rules now and then. But if you acknowledge that he has taken actions, whether you think they're good or bad, that the institution actually assigns to Congress and not the president, then you must vote "Yes" on tonight's proposition, the president has usurped the powers of Congress. To usurp means to take power that doesn't belong to you. So under the Constitution, what powers do belong to the president? The president has the power to execute the law, but he cannot make law. He can't amend law, and he cannot repeal the law. Only the Congress has power to do that. He cannot spend money without congressional appropriation, and he cannot start a war.

18:50:10

That's for Congress. He also can't make major appointments without confirmation by the Senate, and he can't sign a treaty without a two-thirds vote of the Senate. Unfortunately, many presidents have overreached these areas. We certainly don't say President Obama's the first one to do so, and unfortunately, he will not be the last. But because tonight's problem is really referring to the current president, we are going to have to talk about him in some specifics. So we're going to divide up where my -- my friend here, Michael, will focus on the international agreement -- arena. He's going to talk about immigration, national security, war, and treaties. I'll focus on the domestic side, on the president's appointment power, his expenditure of money not appropriated by Congress, and his unilateral rewriting of some laws. I'm going to start with what I think is the most open-and-shut case, and that is an appointment. As I said, high-level appointments need to have confirmation by the Senate. But there is an exception during recesses. The Senate -- the president may make recess appointments. But not any old recess will do.

18:51:06

Super short recesses like, you know, we're taking a break for lunch, the president can't just throw in a bunch of nominees and call it good. And out of the thousands of recess appointments through the history of this country, none of them has been made in the way that President Obama did. In December 2011, the Senate knew he wanted to push through some controversial nominees that they weren't going to confirm, so they purposely did not go into a big break over Christmas break as they normally do on December 17th. They said, we're going into sessions every three days purposely and explicitly to block the president's recess appointment power. But the president said, "It doesn't matter. I'm going to do it anyway." He tried -- he put four nominees on and said he was recess appointing them when the Senate said it wasn't in recess. His excuse was, "I refuse to take no for an answer." That's hardly Constitutional reasoning. And unfortunately for him, "No" is exactly what the Supreme Court said. They said that unanimously. Every single justice, the conservatives, the liberals, the justices the president himself had put on the court agreed that he had usurped the powers in Congress. I hope you will agree as well.

18:52:05

Another example of abuse comes up in the context of the Affordable Care Act, better known as Obamacare. On 43 different occasions now, this administration has rewritten or ignored deadlines, fines, taxes, and other provisions of the statute because they wanted to ignore or postpone some of the politically painful parts of the law. People like the good stuff, but they don't want to have to pay for it, right? But the only reason the administration has gotten away with this so far because the court says the House of Representatives doesn't have standing to bring this argument. So basically, they've gotten off on a technicality so far. A final egregious example has to do with this administration's bailout of insurance companies that if you're suffering huge losses under Obamacare, and the administration asks Congress for an appropriation to help pay them back for some of the money they've been required by that law to pay out, and Congress explicitly refused to do that. But the administration brazenly decided to spend \$7 billion of your taxpayers money on that anyway. When a DC circuit court heard the case, they just recently came down with a decision that said that the administration had blatantly violated the appropriations power.

18:53:09

The Constitution could not be clearer on this. No money may be drawn from the treasury. But in consequence, appropriations made by law, period. And it turns out, as the New York Times just uncovered, that the legal team from the IRS had already told the president he didn't have authority to do this. That is brazenly usurping the power of Congress. You're going to hear about a lot of different cases and laws tonight, but don't forget that behind the discussion there is a vital principle, and that's that the structure of our Constitution is what preserves our liberty. It's what gives us a country where we have the prosperity, the civil society that our framework intended. That structural Constitution is worth fighting for. If, after listening to our debate, you agree that on any one of these areas that Michael and I will talk about tonight, the president has usurped powers that the Constitution gives to Congress, you should vote "Yes" on the proposition tonight. Thank you.

[applause]

John Donovan:

Thank you, Carrie Severino. Again, the motion, the president has usurped the Constitutional power of Congress.

18:54:08

And here to speak against the motion, please welcome Adam Cox, the Roberter A. Kindler professor of law at New York University School of Law. Ladies and gentlemen, Adam Cox.

[applause]

Adam Cox:

Thank you. Eric and I, we're here this evening to ask for your vote against the proposition that the president has usurped Congress' Constitutional power. And we're going to talk about a lot of different specific issues over the course of the next hour. But in the opening, I'll talk mostly about domestic issues and Eric will talk mostly about foreign affairs issues. I guess I want to start where Carrie left off, with the importance of Constitutional structure because I think there's a point about which we all agree, certainly everyone on the stage and probably all of you in the audience, which is that the president is in fact a very important policy maker in modern government. That's not really what the question is tonight. The question is how we evaluate the power that the president wields.

18:55:03

And that the motion on the table suggests that the president holds the power he holds because he's stolen it, unconstitutionally from Congress, right, in a power grab. A usurper is someone who seizes force, as Carrie noted, illegally, often -- often by force through seizing power. And the question tonight is why the president has the power he possesses. Now, the reality is that the president possesses power today not because he seized it by force, but instead because over the course of the 20th century, Congress has lawfully delegated to the president power to solve important and complicated social problems. Over the course of the 20th century, people began to demand more from their governments. We went through a nationalization and a globalization of our economy. We went through a Great Depression, a new deal, a couple of world wars, a civil rights revolution, and people demanded that the national government solve more and more complicated problems.

18:56:05

Congress quickly realized that it couldn't solve all those problems on its own. It didn't have the capacity or the expertise to decide, say, what the right level of sulphur dioxide emission was for trucks on US highways, or what the right way was to regulate Wall Street derivatives, to make sure that we don't have another financial calamity. And so, in statute after statute, Congress delegated power to the executive branch, to administrative agencies, and to the president, to come up with solutions to these problems. Now, over the course of the 20th century, that did amount to a kind of Constitutional revolution, and it's made the president an important policy maker. And it does mean that the system we have today is really not the system that our founders

imagined, and probably would have been one that they wouldn't have liked. But the system they imagined, the system that worked for our agrarian economy in the 19th century isn't sufficient to tackle the problems we have today.

18:57:06

Now, let me get me concrete. Let me talk about a couple of issue areas. So one of the most prominent arenas in which the president's been criticized is immigration policy. But the most important fact that I can tell you guys tonight about immigration policy is this: There are 22 million noncitizens who live in the country. 11 million of them are out of status. They're unauthorized. They're not here lawfully. That means half of the legal subjects who are regulated by immigration law are in violation of the law. That means that Congress asked the president essentially to do the impossible. To enforce the law fully, the president would have to deport 11 million people. But this president, President Obama, while he's deported more every year than any preceding president, has still managed to deport just 400,000 each year. That's a large number, but it's only 3 percent of the unauthorized population. That means inevitably the president has to pick and choose, has to decide where enforcement resources will be prioritized and where they'll be deprioritized.

18:58:13

And so the -- the signature immigration initiatives that President Obama announced, the decision not to prioritize the removal of so-called dreamers, right, immigrants who arrived as children, or the parents of US citizens, that was just a way of bringing transparency and equality to a set of decision that's the president wasn't just empowered to make by Congress but was in fact obligated to make in order to enforce the law. Now, that doesn't mean that presidents have unlimited power because, of course, what Congress gives, Congress can take away. And Congress sets up the framework within which the president must operate. Also it means that inevitably there will be disagreements about what those framework rules mean. All of us who have kids know that whenever there are rules there are disagreements about what those rules mean. And sometimes the president's interpretation of those rules succeeds in the court.

18:59:07

So with the Affordable Care Act, for example, one of the most high profile debates, one of the most high profile debates was about whether tax credits could be given to people who purchased health insurance on the federal exchanges instead of the state exchanges. The law was maybe confused on this point. There was striking disagreement among lawyers. But the Supreme Court sided with the president. But even when the president doesn't win at the court, even those losses, when a judge decides that the administration's interpretation of those rules that Congress sets to

guide the president's exercise of power don't permit something that the administration has done, that's not a sign of usurpation, as Carrie suggested, it's actually a sign of legal compliance of courts because it's just more evidence that the president is, in fact, bound by these legal rules that Congress establishes. And for that reason Eric and I urge you to vote against the motion.

19:00:03

John Donovan:

Thank you, Adam Cox.

[applause]

And a reminder of what's going on, we are halfway through the opening round of this Intelligence Squared U.S. debate. I'm John Donovan. We have four debaters, two teams of two, fighting it out over this motion, "The President Has Usurped the Constitutional Power of Congress." You've heard the first two statements, and now on to the third. Debating in support of the motion, Michael McConnell. He is the Richard and Frances Mallory professor of law and director of the Constitutional Law Center at Stanford Law School. Ladies and gentlemen, Michael McConnell.

[applause]

Michael McConnell:

Thank you, John. In preparation for this debate, I read Eric Posner's very interesting book on presidential power. And now I've heard Adam Cox. They seem to be coming at us from opposite directions. Adam Cox thinks everything the president has done is totally legal, authorized by broad delegations by Congress. In contrast, Eric Posner thinks that the very idea that the executives should be limited by laws is now, quote, "obsolete."

19:01:09

In this book he identifies what he calls, "multiple examples," in which the executive I'm quoting now -- the executive proceeded with dubious legal authority or simply ignored the laws and got away with it. In fact, he thinks the executive is now unbound by law. That's the title of his book, "The Executive Unbound." Now, Carrie and I agree with Eric Posner that the executive has frequently acted without legal authority. That in itself demands an affirmative vote on tonight's resolution. The framers of our Constitution knew the dangers of an executive unbound and attempted to protect us, their posterity, through a written constitution limiting that executive's powers. Unfortunately, recent presidents and especially Bush and Obama have systematically breached those limits. Let me get down to some specifics, beginning with immigration.

19:02:07

Now, as Adam Cox just explained, President Obama recently issued an order unilaterally giving -- he didn't mention this, though -- giving lawful status to some four million of those aliens who are here in violation of the law. Now, that doesn't mean not deporting them. That isn't just not prioritizing someone else. The actual terms of the order was to give them lawful status which includes the right to work, to sign up for Social Security, and to receive numerous other benefits. Now, obviously, Adam thinks this is good public policy. And he may very well be right about that. But it's hard to take seriously the idea that this is just routine enforcement discretion. For one thing, President Obama himself said just the opposite repeatedly when advocates were asking him to issue such an order. For example, on March 28, 2011, President Obama said, and I quote, "With respect to the notion that I can just suspend deportation through executive order, that's just not the case because there are laws on the books that Congress has passed.

19:03:17

For me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as president." Well, appropriate or not, Obama did it anyway. But here's what's interesting. Even after he signed the order, Obama did not claim he was just exercising discretion under the law or prioritizing. He candidly stated, and again I quote, "What you're not paying attention to is I just took an action to change the law." Well, if you were paying attention when Carrie listed the various powers of the Constitution vests in Congress and not in the president, that was one of them. He cannot change the law. Only Congress can do that.

19:04:02

But what matters about this is that if Obama can change this law, a future president can use so-called enforcement discretion to dispense with laws he or she doesn't like of any note -- of any sort. Tax laws, or trade laws, or laws about ethics in government. Eric Posner just wrote in the New York Times a few days ago Donald Trump as president could refuse to enforce environmental regulations -- and I'm quoting Eric here -- "just as Mr. Obama refused to enforce immigration laws." National security. Now, I don't think we have much disagreement up here that Presidents Bush and Obama both have usurped power in the national security arena. I just quote Eric Posner from his book.

[laughter]

I love this book. And Donald Trump will love it even more.

[laughter]

It'll be huge.

[laughter]

Quote, "The Obama Administration has followed Bush Administration policies on national security with the single exception of torture, including the reliance on broad surveillance powers, detention, military commissions, rendition, and targeted assassinations."

19:05:15

He calls all these policies questionable under the law. Carrie and I agree. So should you. War. Under both the Constitution and the War Powers Resolution, Congress -- not the president -- has the responsibility to decide on whether to start a war. But President Obama, on the urging of Secretary of State Hillary Clinton, took us into a war to topple the regime of Libyan dictator Muammar Qaddafi without even attempting to get authorization from Congress. According to the New York Times, June 18th, 2011, quote, "President Obama rejected the views of the top lawyers at the Pentagon and the Justice Department when he decided that he had the legal authority to continue American military participation in the air war in Libya without congressional authorization.

19:06:05

What will future presidents do with these expansive powers? Well, we don't know. It really depends on what the people decide, not just in November, but even here tonight. That's why this debate is so important, because the first step is to admit that there is a problem. Yes. Recent presidents have usurped the powers of Congress. If we're not willing to say even that, we deserve what we get.

[applause]

John Donovan:

Thank you, Michael McConnell. Again, the motion, The President Has Usurped the Constitutional Power of Congress. Our final debater making an opening statement will be speaking against this motion. That's Eric Posner, the Kirkland and Ellis Distinguished Service of Professor of Law and Esther Kane Research Chair at the University of Chicago Law School. Ladies and gentlemen, Eric Posner.

[applause]

Eric Posner:

My book, which Michael just endorsed –

[laughter]

-- is actually quite consistent with Adam's opening statement.

19:07:05

The book makes the point that Adam made as well, that our system has evolved a great deal. The original separation of powers scheme that Madison and other founders envisioned has changed a great deal. But that is because the world has changed. The United States has changed, and people demand more from the national government than they used to. I want to focus on, as Adam said, international relations. And let me hit a few of the most important issues that the critics of the Obama Administration have raised. So, first, a number of people -- and perhaps Michael -- he didn't explicitly mention this -- argues that the counter-terrorism operations in Afghanistan, Iraq, Syria, and other countries are a violation of the president's constitutional powers, a usurpation of powers of Congress. However, all of these activities have authorization. There was, first of all, the authorization for use of military force, which Congress enacted in 2001, immediately after 9/11.

19:08:06

This AUMF, as it's called, gave the president very broad authority to engage in counter-terrorism operations against Al-Qaeda, Al-Qaeda affiliates, nations that harbor Al-Qaeda, and related entities. The second AUMF in 2002 authorized the invasion of Iraq. That AUMF continues to be operative, like the first one, and authorizes combat operations in Iraq and in Syria to the extent that there have been spillover. And then finally, and most important, the president has in the constitution two sources of power that are relevant here. The first is the Commander-in-Chief power, and the second is what lawyers called the "vesting clause," under which the executive power is vested in the president. It is widely agreed among lawyers that these two powers give the president the power to use military force abroad in limited ways to protect American interests, to advance American security. Presidents throughout history have relied on these -- on this source of power for military operations overseas.

19:09:09

Michael did mention the Libya operation in 2011. This operation was not authorized by Congress, as he mentions. In this case, the president relied on his Constitutional powers. And in doing so, he followed in the footsteps of his predecessors. President Clinton, for example, used military force without congressional authorization in 1999 in Serbia. He also did in Sudan and Afghanistan in 1998 and in Bosnia in 1993. President George H.W. Bush used military force without congressional authorization in Somalia in 1991 and in Panama in 1989. For Reagan, it was Libya in 1986, Grenada in 1983, and Lebanon in 1982. And these are only the most recent examples. Truman, for example, initiated the Korean War without congressional authorization, instead relying on his

Constitutional powers. My next example are the drone operations which Michael alluded to, he didn't refer to specifically.

19:10:11

But a number of people have argued that President Obama has exceeded his Constitutional authority by using drones to engage in targeted killings, including of an American citizen, actually a few American citizens, but one in particular, Anwar al-Awlaki who was targeted. But once you grant that the president has military authority as a result of his Constitutional and statutory powers, it follows that he can use drones just the way he can use piloted aircrafts to launch military strikes. The American citizenship of Awlaki is legally relevant. It's often been the case that Americans in prior wars have gone overseas to join enemy forces. And when that happens, they lose the due process protections that one normally enjoys when one is on American soil. And then let me finish with two executive agreements that President Obama entered into. These agreements have received a great deal of attention, and again, people have criticized him for violating the Constitution.

19:11:11

So the first such agreement was in 2015. It was the Iran nuclear deal. And the second agreement was in 2016, and that was the Paris climate agreement. And so what the critics say is that a president can enter into an international agreement only with two-thirds consent of the Senate because, in the Constitution, there is a clause called "The treaty clause," which says that when the president enters into a treaty he needs the consent of the Senate. However, there's a difference between a treaty and between the type of agreement that President Obama entered into. This type of agreement lawyers usually call an executive agreement or a political agreement. Now, in the case of a treaty, normally, a treaty will directly affect the rights and obligations of Americans or lead to direct legal commandment to an entity in the American government requiring it to do one thing or another. But in the case of these agreements, all that President Obama did was agree to use authorities that he had already has as a result of a statute.

19:12:16

So in the case of the Iran nuclear agreement, he was required to raise sanctions against Iran under certain conditions. But there are plenty of statutes that allow him to do that, including the comprehensive Iran sanctions accountability investment act of 2010. And in the case of the Paris climate agreement, what he agreed to do was to reduce greenhouse gas emissions. Well, he has the authority to do that under the Clean Air Act, which, as the Supreme Court has recognized, allows him to issue regulations related to climate change. And to the extent that he needs additional authority under those agreements, he has to go to Congress as he has recognized. So the president has, in all

these cases, acting with authority that he gets from the Constitution or from Congress, and therefore you should vote against the motion.

John Donovan:

Thank you, Eric Posner. And that concludes round one of this Intelligence Squared U.S. debate where our motion is "The president has usurped the Constitutional power of Congress."

19:13:11

Now we move on to round two. And in round two, the debaters address one another directly, and they take questions from me and from you, our live audience here in Philadelphia. The motion is this: "The president has usurped the Constitutional power of Congress." We've heard the team arguing for the motion, Carrie Severino and Michael McConnell make the argument that the structure of the Constitution matters. It is critical to this nation's cohesion and to its prosperity, but that President Obama and his predecessors have repeatedly transgressed the boundaries drawn around their own powers with detrimental effects. They say even if you think it's okay to break a few rules to overcome an unfriendly Congress. That does not mean it's Constitutional that we have seen President Obama take over the Congress' role, and others, in starting wars, in making appointments, in recess periods, in rewriting laws, actually.

19:14:11

They say that if President Obama can continue to do this and this trend continues beyond him, that his successors can unilaterally change any law they want, and that is not a power that they argue should be invested in the executive, in the single figure of the executive.

The team arguing against them, Adam Cox and Eric Posner, they take a very different point of view on this. They say that there is no usurpation because usurpation suggests force and illegitimacy. But what they're saying has actually happened is that, over the course of the 20th century, as they put it, a revolution has taken place in our political system as a result of a demand from the public for a powerful executive to rise to the kinds of problems that Congress could not handle on its own, therefore Congress has, on its own, delegated powers to the president. They've given him a chain of legitimacy. And that, in their bottom line, is the reason why there is not a question of usurpation here, even though both sides actually do agree that there are all kinds of maneuvers that didn't used to be used, that are getting used nowadays.

19:15:14

So I think this is a debate where generally we're going to need to work through the examples that each side laid out, to look at, case by case, some of the claims that -- and counter claims that are made, particularly in relation to the Obama administration which is the most recent. But there were also some -- some general points brought up. So I want to start with the more general framework first and go back to the language that we discussed is in the Constitution about the president's responsibility to take care, to faithfully execute the laws of the United States. And I want to go to Mike McConnell and just ask you, what is your expectation of that phrase, "to faithfully execute"? Means what?

Michael McConnell:

What it -- this language was specifically adopted by the framers here in Philadelphia in order to negate the possibility that our executive would do what the Stewart kings had done, which was to make proclamations declaring lawful things that parliament had made unlawful.

19:16:13

This doesn't mean exercise as a prosecutorial discretion. Everyone has always understood that no law is always enforced against everyone. But it does prevent the president from doing what President Obama did in the immigration context, which is actually declaring that activities of some people are lawful even though Congress made them unlawful.

John Donovan:

And in what way did that represent a break with being faithful to the laws?

Michael McConnell:

So it's faithful -- faithful execution does not mean a hundred percent execution, but it does mean not declaring things lawful that are unlawful.

John Donovan:

Okay. I want to take the same question to Adam Cox, and you can make it probably a response to what Michael McConnell has said. What is your expectation of the phrase, "Faithfully execute"?

Adam Cox:

So I don't think that Mike and I disagree all that much at an abstract level about what that obligation in the Constitution requires of presidents.

19:17:07

It was designed to prevent the dispensing -- the so-called dispensing power from being executed. But it was understood by the framers and has been understood over the

course of American history that, of course, one of the most important functions in executive play is to exercise discretion in how the law is enforced. Now, on the example of immigration in particular, I guess I just disagree with Michael on the facts. So, you know, the office of legal counsel and the justice department and the solicitor general of the United States, Don Verrilli, when speaking to the Supreme Court about the immigration case just a month and a half ago, they both stated clearly the same thing that the Department of Homeland Security that issued this order said which was that it does not confer legal status on immigrants. A --

[talking simultaneously]

Michael McConnell:
(unintelligible) legal status is actually in the order?

Adam Cox:
No, it did not. It does say that it confers a technical regulatory --

[talking simultaneously]

Michael McConnell:
The word "technical" isn't in there. The word "Lawful status" is there and --

Adam Cox:
No.

Michael McConnell:
it enables -- this enables the beneficiaries not just not to be deported.

19:18:11

They were given a laminated photo ID which entitles them to be present in the United States, to get jobs in the United States, to sign up for social security, get earned income tax credits, get drivers licenses.

John Donovan:
Michael --

Michael McConnell:
That is not --

John Donovan:
Land that thought, then. Why does that represent a rewriting of the law so that your opponents can respond to that.

Michael McConnell:

It's because Congress -- Congress understood that not every -- our borders are porous, not everyone is going to be deported. The principal enforcement mechanism for the immigration laws is to make it illegal for employers to hire illegal aliens. When you give them this laminated card entitling them to work, there is -- the principal enforcement mechanism for the immigration laws has been completely undermined.

John Donovan:

Okay, Eric Posner, can you respond to that?

Eric Posner:

But the law explicitly gives the president the authority to allow people who remain here to work.

19:19:10

Adam Cox:

Yeah, people who are in the country unlawfully--

John Donovan:

Wait, actually I want to let -- Carrie has not had a voice yet. I want to [unintelligible] to speak. Do you want to respond to this?

Carrie Severino:

Sure. I think the clearest parallel that we can tell people that talked about this is that we know that you've been driving, you know, five miles over the speed limit, you might not get pulled over. But, if you do get pulled over and they let you off, that's also discretion, right? But it's different than if they give you a card -- a laminated card that says, "You can't pull me over," or, "If you pull me over, you have to let me off." That is -- that is a much closer parallel to what's going on here. That changes the law effectively for these people as opposed to just saying, "Oh, you got lucky this time," which is what-- we know practically speaking has happened for 11 million people and that's what's really --

Eric Posner:

But Congress has explicitly said that the president may give work authorization to these people. That is in the statute. There is no statute that says that the president -- that police or the mayor can give a card to people allowing them to speed. There is -- there is no -- there is no analogous provision in any sense.

John Donovan:

Carrie --

Michael McConnell:

No court that has looked at this has found that the statute gives that power, no court so far.

19:20:10

John Donovan:

Carrie Severino, to that point, your opponents have argued -- particularly Adam Cox made the argument that the president can't be accused of usurping power because he has this chain of legitimacy that goes back through the fact that in many cases Congress wrote laws that then delegated powers to the executive branch and all they're doing is exercising the powers that Congress gave them. What's your response to that?

Carrie Severino:

Well, there are a lot of debates about the amount of delegation we can give to administrative agencies, et cetera, but that actually doesn't come into play in the examples that we were talking about here that I gave earlier. And he talked also about how, you know, the King vs. Burwell case, the difficulty in interpreting what, "an exchange established by the state," means. I'm talking about clear examples where the law says, "This law is going to come into effect on such and such date," and the date has been actually changed, or the --

John Donovan:

Okay, let's take that as an example. Some clear change like that, is that -- is that a usurpation of power? Is that -- is that rewriting the law essentially? Adam Cox.

19:21:09

Adam Cox:

No, it's often true that Congress includes statutory deadlines in the way it imagines that a law will be rolled out. In the case of Obamacare, as the law was rolled out the administration realized that there were complexities that made it difficult to impose some of the time constraints that Congress had put into the statute. Now, it turns out --

John Donovan:

Let's take 10 seconds or I can to remind the audience what it is we're talking about so it's not so abstract.

Adam Cox:

So the Affordable Care Act, Obamacare, which provides for national exchanges and in theory affordable health care for all, rolled out over a period of a couple of years. And, as Carrie says, the statute included a number of targets. Times when certain parts of the law were intended to go online. Now, not all the parts of the law actually went online at that time. And it is, in fact, very common with respect to the Clean Air Act, with respect to the workplace safety laws. Going back decades, almost every time that

Congress enacts a large ambitious social program, the administration has taken longer to roll that law out than Congress had initially anticipated.

19:22:12

John Donovan:

Okay, just to bring it back to the Affordable Care Act, also known as, "Obamacare" -- if you don't know if by that name, the -- what we're particularly talking about or has been controversial is the fact that employers with firms larger than 50 people were obliged to start providing insurance. The deadline came and questionably it was politically difficult for the president at that point to push it through. Business community didn't like it. He moved the deadline. Your opponents are arguing that, that was not only politically expedient and, therefore, somewhat not cool, but that it was -- it was rewriting the law and it's -- that it goes beyond discretion. And I -- am I --

Carrie Severino:

Yeah, but he -- and he didn't even just move the law, that one -- once, he moved it three times. And that is just to give the broad picture. There's not enough time.

John Donovan:

Okay, so --

Carrie Severino:

There's -- 15 times he changed deadlines in the statute, seven different provisions that he had given up subsidies that weren't authorized, you know, seven different programs he invented new waivers for.

19:23:09

It says, "These territories aren't covered --"

John Donovan:

Okay, so --

Carrie Severino:

There's so many ways he's changed this law, it's almost hard to count.

John Donovan:

Mike McConnell, why doesn't he just get to do that?

Michael McConnell:

If we had elected Mitt Romney last time around and Romney had suddenly decided that the employer mandate doesn't have to be enforced, the individual mandate doesn't have to be enforced, we're going to have a whole bunch of new waivers that weren't in

this, people would be screaming bloody murder. They would realize that the Congress passed this law, it has to be enforced. Just because President Obama was in favor of the law doesn't give him the right to come back and, you know, concoct all of these exceptions in order to try to make it less politically palatable when it comes to enforcement.

John Donovan:
Eric Posner.

Eric Posner:
Yeah, I mean, the problem is that the other side here is taking this 18th century conception and trying to impress it on the 21st century.

19:24:06

What's going here is the Congress produces these massive statutes, hundreds of pages long, which are supposed to solve very difficult social problems. These statutes will have dozens of deadlines in them, sometimes even hundreds of deadlines in them. Dodd-Frank Act had something like 220 deadlines or regulations that were required. And Congress is guessing, you know, it's saying, "Well, you know, this is what we would like you to do. Please try to do it." And the -- and presidents of all type, from both parties, they implement these incredibly complex programs. Sometimes they hit deadlines. Sometimes they miss deadlines. Sometimes they adjust things because they don't work properly. Sometimes they don't. Now, you have to use common sense when you evaluate the president. If the president is trying to advance the goal of the statute, then he's clearly not usurping Congress's power. He's simply acting with more information in light of changing events, in a way that Congress could not anticipate. The problem with the Mitt Romney example is it merely brings into mind somebody who would deliberately subvert the statute.

19:25:08

If a president deliberately subverts a statute by ignoring deadlines or whatever it is that are actually essential to the operation of the statute, then at that point you can say, perhaps, that the president is usurping Congress's power. I cannot think of a real example where that's happened in recent history because presidents are relatively conscientious about rolling out the statutes--

John Donovan:
Carrie Servino can you respond to that point? What -- your opponent's well made point, that, in fact, the president is not trying to subvert the law. He is -- he's fine-tuning it, but he's obviously not working against it. And that's an important distinction.

Carrie Severino:

Right. Well, good intentions are no substitute for good constitutional law. And saying that you're -- advancing the goal of the statute, the goal of the statute, the way a court should look at it to find out what it is, is what does the statute actually say? You know, it's not actually commonplace that they just get to re-write the statutes because we want -- it's not working or, in this case, because it's not politically convenient. There were lots of other people who were Obamacare proponents at the time who were shocked -- in particular the employer mandate delay.

19:26:10

Ezra Klein was a big proponent of Obamacare. He said that was a regulatory end-run of the legislative process. Senator Tom Harkin, a Democrat, one of the authors of the ACA - he said, "This is the law. How can they change the law?" And the answer is, they can't.

John Donovan:

When the president was criticized for doing this back then, he literally said, "Well, if Congress doesn't like it, they should go pass their own bill," which made it sound like he was saying, "I'm going to legislate if they're not going to legislate," which makes it sound like he's playing into their side of the argument. What about that, Adam Cox?

Adam Cox:

Well, so, I think the reality is that the law on the books says that a court can compel an agency's action that is unreasonably withheld. That means that federal law itself builds in the idea that Eric is talking about -- the idea that complicated statutes often require more work than Congress initially imagined.

19:27:07

That's why this federal law, the Administrative Procedure Act, this thing that governs the regulatory state says -- only when that action is unreasonably withheld should a court intervene. That goes right back to this idea of faithful execution. And as Eric said, there's no reason here to think that the execution was not faithful.

John Donovan:

Well, let's take that question to Mike McConnell.

Michael McConnell:

The --

John Donovan:

They're saying there's no unfaithfulness in that.

Michael McConnell:

There was no technical or technocratic reason to delay the employer mandate. It was delayed for straightforward political reasons. It was because it was politically costly to do it. When presidents choose not to enforce the law because of their political agendas, that's a problem. And Eric, I'm astonished to hear you say that the president has not subverted the law. You can't think of a single example? Your book says that there are multiple examples where the president has done that.

19:28:05

And just four days ago, in the New York Times, you said -- and I quote -- "Donald Trump as president could refuse to enforce environmental regulations just as Mr. Obama refused to enforce immigration laws." suddenly, all these refusals to enforce and all of these violations of the law become -- I don't know, we're pushing them under the rug. I don't understand why you're changing your position.

John Donovan:

Okay. I want to go to audience questions. But first, because the swipe came your way/ I'm going to let you respond to that. After that, I want to -- start thinking of your questions.

Eric Posner:

I should be able to defend myself.

John Donovan:

You -- this is your chance.

Eric Posner:

So, let's take two quick points. Immigration law. Congress passes a law, deport 11 million people. Congress passes another law. "Here's the money to deport 400,000 people." These laws are at a contradiction. The president has to figure out what to do. What he does is he makes priorities, which is what the president's supposed to do.

19:29:04

Second point, President Reagan comes into office on a deregulatory agenda, a deregulatory political agenda to use Michael's word. First thing he does is he issues an executive order, 12-291, which says that all agencies should do cost benefit tests when issuing regulations. This will have the natural effect of limiting the number of regulations that the agencies will issue. And in addition, he cut back on antitrust law and other types of enforcement. Now, what was going on here is that the president was using delegated policy-making authority that he had received from Congress over the decades. He was doing that legitimately because Congress had given him the discretion to do those things.

John Donovan:

All right. I want to go to questions. There are a few other things we have not gotten to, the matter of recess appointments, the matter of making war. If any of your questions want to go to that, I would be extremely grateful, but you might also have your own idea. So if you'd raise your hands, again, I need you to ask a very terse question. I'm going to be pretty tough about that. Make it a question that comes down to about 30 seconds. And I'll come -- I'll start right down here.

19:30:07

And if you stand up, a microphone will be brought to you. And if you can tell us your name.

Female Speaker:
[unintelligible].

John Donovan:
Try one more time.

Female Speaker:
Hello.

John Donovan:
Hi.

Female Speaker:
Hello. Hi. My name is Gloria. I go to Temple University. I'm here at the National Convention Center. So my question would be, don't you think it would maybe take too long for every time the president would run into a speed bump in enacting a law that Congress wants to go back to Congress and ask for permission again to sort of make that amendment?

John Donovan:
Great question. Let's take it to Carrie Severino.

Carrie Severino:
Yes, that's -- that is the effect. But actually, that's part of the intent of the Constitutional design, that the president isn't given just a broad authority. The Congress certainly knows how to give that flexibility and some of this delegation to administrative agencies is how they deal with it. If they think there is going to be an issue that's going to need some tweaking, they can make a broader language within limits. But that's not how our Constitution sets it up. It doesn't have an escape clause for if the law turns out it's not working as intended or if the law turns out that people don't like it as well as they

thought or there's just speed bumps, as you said. It simply isn't the Constitutional system.

19:31:12

John Donovan:

Adam Cox, would you like to spend as well?

Adam Cox:

Yeah. I agree completely. And that's exactly why Congress in the 1930s started to give more power to the president and that's why the Supreme Court in an unbroken string of precedents over the last 80-odd years has supported that vision of the Constitution. Congress passes statutes that say things like, "Clean up the air to protect public health," or "Regulate communications in the public interest." That's the standard given, and it confers tremendous policy-making authority which makes for a more flexible, responsive policy-making process, a more democratic one.

John Donovan:

That was a great question both in a --

Michael McConnell:

--and I have not complained about any delegations by Congress. We're not saying that it's illegal for the president to exercise powers that actually have been delegated by Congress. It's the ones that they haven't delegated that are the problem.

John Donovan:

Sir, right in the center there. Mic's coming from your right-hand side.

19:32:05

Male Speaker:

My name is Mark -- is this on?

John Donovan:

You're good, yeah.

Male Speaker:

This whole debate is as old as the republic. Jefferson was the one, along with Madison, who was fearful of monarchy and the whole idea of maintaining republican government. When Jefferson becomes President of the United States, and we buy the Louisiana Purchase.

John Donovan:

I'm going to give you 15 more seconds to land it.

Male Speaker:

So does anyone want to talk about the legality of the bond issue that was issued to buy the Louisiana Purchase.

John Donovan:

I'm going to respectfully pass on the question because there's too much homework for the audience to do. It's not a bad question at all, but I just think in terms of the time we have. But thank you for asking it. A few rows back in the striped shirt.

Female Speaker:

My name is Ann. Really, my question is for the moderator. I feel like at this moment we would all benefit by a third choice instead of "Yes," "No," that the third choice could be that, yes, the president -- the last two presidents have usurped power, but that the system isn't serving us.

19:33:16

And I would really love to see that as a third choice instead of "Don't know," which is where I started.

John Donovan:

All right. Duly noted. Thank you. That wasn't a question.

[laughter]

Down in the front in the blue shirt, and then I'm going to go to the back corner. I do see you up there.

Male Speaker:

Yeah. My name's Jack. And if the people for the motion would address the like implied consent of Congress, for example, against ISIS, there was no formal declaration of war, but Congress has sort of showed its approval by funding the air war against ISIS. So if you could comment on that, please.

John Donovan:

That's a great question, actually. Let's take that to Mike McConnell.

Michael McConnell:

The administration has taken the interesting position that the war against ISIS is authorized by the AUMF, the authorization for use of military force that George Bush was given by Congress to fight al-Qaeda on the theory that ISIS, even though it's a competitor and in some ways an enemy of ISIS is in fact an offshoot of ISIS.

19:34:21

You know, President Obama, after asking Congress to repeal the AUMF, has now used it not only to fight an entirely new organization but to move from Iraq into Syria. I didn't mention this as an example because I don't think it's entirely clear-cut. There is in fact an AUMF out there. Eric made the argument that you can stretch the language to include it. President Obama is apparently rather uncertain as to whether he has this authority or not, but he hasn't been willing to go to Congress and have an honest debate about whether we should be engaged in it.

John Donovan:

Mike, I think -- I think the questioner's point was that if Congress continues to fund the operations, that that's a tacit at going along.

Michael McConnell:

The Supreme Court has consistently said that appropriations are not a substitute for authorization of the actions.

John Donovan:

Opposing side want to respond to that?

19:35:12

Eric Posner:

Well, the questioner makes a good point, that the way the world really works as opposed to the way the founders were sort of hoping it would work in the 18th century is that frequently there's collaboration between the president and Congress, which has been formally reduced into statutes, but nonetheless, reflects the joint judgment and beliefs of both branches. So whatever you think of that from a legal perspective would be very hard to call that usurpation of Congress' authority.

John Donovan:

I want to remind you that we are in the question and answer section of this Intelligence Squared US debate. I'm John Donovan, your moderator. We have four debaters, two teams of two, arguing it out over there motion: "The president has usurped the Constitutional power of Congress." We are doing questions and answers, and there was a question right there. I think you're in the last row. Yep.

Male Speaker:

Hey, I'm Pat. So it's a question for both sides, clarifying question, but mainly for the against. In your opening remarks sort of a pillar was that you argued that the president has not usurped power of Congress, but Congress has abdicated the power.

19:36:13

So my question is --

Male Speaker:

Is that even legal --

Male Speaker:

So maybe not. But is it illegal for the question to abdicate their power. And furthermore, if its, should that come through legislation, or should that come through a Constitutional amendment?

John Donovan:

Adam, you look ready.

Adam Cox:

So as Eric said, we didn't use the word "abdication," and for good reason, because, well, legally, the Supreme Court has, since the 1930s, sustained the notion that it's lawful for Congress to delegate important policy-making power to the president for just the reasons we stated, Congress lacks -- as a deliberative body, lacks the capacity, doesn't have the time to answer all these questions itself, and it also lacks the expertise to do so. And that means as a social matter as well as a legal matter, it's a good thing that Congress has the authority to delegate this power to the president.

John Donovan:

Well, Carrie Severino, let's have you take a crack at the same question, but I want to maybe slightly rephrase it. Has Congress unwisely let power slip through its fingers over the last century?

Carrie Severino:

I think I definitely agree with that. I mean, our system is broken in many ways.

19:37:16

The idea was to have these checks and balances that were supposed to work against each other so that the institutional interests of Congress would be working against the institutional interests of the president. And they would each be kind of policing those boundaries. And that is supposed to help us maintain the system. It doesn't allow tyranny to take over, right? I hope I'm not sort of veering into Tyrannophobia. But our challenge is --

John Donovan:

Are you having headaches and nausea or --

[laughter]

Carrie Severino:

But our challenge is that now -- and maybe even in some ways it's the political parties have become too -- too committed perhaps to defending their own party rather than defending their own institutions. So you'll have, in cases of both Bush and Obama, I think, their partisan interests of the members of Congress will defend their own president's party rather than actually standing up for those boundaries. We used to have people -- I mean, Senator Robert Byrd was known as a real institutionalist who stood for the interests of the Senate, not just the interests of his own party.

19:38:14

And unfortunately, there aren't that many people like that anymore. So it's important for us to remember what those boundaries are, and, you know, help to remind the government. We need to have people policing these boundaries--

John Donovan:

Okay. Down in the front row here. The mic's coming down from your right-hand side. Could you stand up?

Female Speaker:

Yes.

John Donovan:

Thanks.

Female Speaker:

My question is, is there any way, when we think that the president has overstepped the power in order to be able to prevent it? In other words, you have said that the only -- that I understand, the only people that can stop the president from overstepping his power is the Supreme Court. And on the other hand, can't Congress stop him from also oversurfing his power?

John Donovan:

And is the point of your question that his power really can't be overstepped if there's always somebody there to check it?

Female Speaker:

Yes.

John Donovan:

Okay. That's an interesting way to put it. Let's take that first to your side, and I'll bring it to the other side. Mike McConnell.

19:39:07

Michael McConnell:

See, I think the way our system works is that we have institutional checks. The courts are an institutional check. Congress is an institutional check. Ultimately though, it is going to be the public that is the only real check. And as long as our members of Congress and our judges do not believe that the American people care about checks and balances, then they are not going to be very motivated to do this. And I think that the public has a very real role, not a direct role, but a powerful real role in motivating our political system to care again about the way in which our government is structured.

[applause]

John Donvan:

Eric Posner.

Eric Posner:

Well, I'm glad to hear Michael quoting from my book again or paraphrasing perhaps.

[laughter]

One of the arguments in the book is that it is, in fact, the public --

Michael McConnell:

Love the book.

[laughter]

Eric Posner:

-- pardon -- the public -- yes, good -- the public and the press and the party system to some extent, they're all of these institutions that have arisen which control the president, that make sure that the president doesn't go too far.

19:40:17

And then there are -- of course, there still are real institutional constraints. Obama did not get everything he wanted from Congress. Bush did not get everything he wanted from Congress. No president has gotten everything that they want from Congress. Bush, Obama, previous presidents have frequently found themselves thwarted by the courts, not necessarily the Supreme Court, it could be a lower court as well. So the -- there are a great many constraints on how the president can behave.

Michael McConnell:

But may I just say why -- the only thing I disagree with Eric's book about, I mean, much that -- a lot of it is really very good analysis. But Eric believes that law no longer constrains the executive and should no longer constrain it. But the "unbound executive" means that the executive is not bound by law, still bound by a lot of things, culture and politics and so forth -- I think that law is a very important part of the constraints on the executive.

19:41:13

John Donovan:

We have the horse's mouth here. Is that in any way what your book says?

Eric Posner:

That's not -- it's the -- the argument of the book is that the traditional system of separation of powers as it existed in the 18th century has lost the force that the founders wanted.

John Donovan:

Okay, you know how I want to get that out? We're going to do what we call our "volley round." It's how we conclude our round. And what we do is we have one question that I put to all sides. All four debaters get to answer it. And they only get 30 seconds to answer it. And then the time switches to the other side. And when that time runs out, I ring a bell. So they get to talk until the bell goes. And I want the question to be this point that actually came up in the opening statements and that Eric Posner recently made -- just now made, is that we're in a different world now in terms of the president's relationship to Congress under the Constitution, that the needs of the 18th century, the century in which the document was drawn up, are different from the needs today, and, therefore, that actually not only explains but to some degree justifies the changes that have taken place, the shift in power, the strengthening of the executive.

19:42:19

So the question to you, Mike McConnell -- I'll go first to you, Mike McConnell. Then I'm going to come to you, Adam, or -- Mike, you were asking if you could have a little 30-second time to think about this, or are you good to go?

Michael McConnell:

I haven't heard the question yet.

John Donovan:

Oh, okay.

[laughter]

The question is -- the question basically, "Is Eric right, are we in a different world?" All right? The question is, "Is Eric right, that we are in a different world where the needs of the 18th century have been -- have somewhat been outdated by recent developments in terms of how the Constitution should apply?" Your 30 seconds starts now.

Michael McConnell:

Well, of course we're in a different world, but we're in a world where it is as important as ever to make sure that our -- the elements of our government operate according to the limits. It is so tempting -- you just look around the world at the Putins and the Chavezes and the Berlusconi in Italy.

19:43:14

We have seen so many countries taken down the road of executive unilateralism, and it is not a good thing. Yes, the world has changed, and it's given --

John Donovan:

Eric Posner, it's your floor.

[laughter]

I like that you obeyed the rules.

[laughter]

That was very clean. Thank you.

Eric Posner:

18th century, population three million, homogenous population, people lived and worked on farms, small towns and states could do all the law and all the administration that was necessary. Today, population 300 million, global economy, global defense needs, the states can no longer handle this administratively. You need a national government to do this, and you need a strong leader of the national government to run the government.

John Donovan:

Carrie Severino.

Carrie Severino:

I think we still have a government of the people by the people for the people.

19:44:07

The government still should have its powers limited by those given to it by the people in the Constitution. And so, well, yes, things have changed. Those limits are still necessary. And you know, maybe if the government does a few -- some fewer things and doesn't invade so many aspects of American life, they would actually have time to achieve all of it. But I think our constitutional limits certainly are still there. And even if we don't need it anymore, the question still stands. Did he usurp the powers of the Constitution? Yes.

John Donovan:
Adam Cox.

Adam Cox:
The question is, "What are those limits?" And there are two views on the table. One is the view that we should adopt the limits that we had in the 18th century, with all the facts that Eric said. The other is that we should have the limits that the Supreme Court has endorsed over the last century, acknowledge the realities of today. And all of the examples that we've talked about have all been examples, really of democratic responsiveness by the president to what the public wanted. That's what Carrie started with -- the idea that we should listen to the people. And that supports our position.

John Donovan:
Perfect timing. And that concludes Round 2 of this Intelligence Squared U.S. debate --

[applause]

-- where our motion is The President Has Usurped the Constitutional Power of Congress.

19:45:18

And as we move on to Round 3, remember how you voted the first time. Immediately after you hear closing statements, we're going to have you vote a second time. And again, it's going to be the difference between the first and the second votes in percentage point terms. The numbers that have gone up the most in percentage points will be declared our winner. Onto Round 3. Round 3 will be closing statements by each debater in turn. They will be two minutes each. They will do these statements seated. Speaking first in support of the motion, Carrie Severino, chief counsel and foreign policy -- I'm sorry. I'm going to re-do that, because you're not foreign policy. The motion is this: The President Has Usurped the Constitutional Power of Congress. Making her closing statement in support of the motion, Carrie Severino, chief counsel and policy director of the Judicial Crisis Network.

Carrie Severino:
Thanks. Have you ever wondered why we go through all this trouble of having elections every two years for our Congress and four years for the president?

19:46:12

It really would be a lot more efficient, I'm sure, to just give all the power to one person. They can make the laws. They can execute the laws, et cetera. But the reason our framers chose not to do it that way is because they had experienced what happens when you have all that power concentrated in a single government. Their belief was that it leads to tyranny. And that's why they created the Constitution, with its separate checks and balances, because they thought that was the best way to preserve our liberty. When we're talking about these constitutional powers, it's those same powers that applied Washington, applied for Lincoln, applied for Nixon, Bush, and Obama, and they're the ones that are going to apply to Hillary Clinton and Donald Trump. Hillary Clinton has already said she is going to take President Obama's executive orders for immigration and go even further with them. Donald Trump said essentially the same thing. He's going to use executive orders too, except he said he's going to use them much better and they're going to serve much better purpose than what he's done. So, I don't know -- they're going to be gilded or something.

19:47:04

[laughter]

But the problem is, President Obama did promise to restore the constitutional balance between Congress and the president, but he didn't. He was tempted by the power of the office, by the expediency, or just -- in his mind -- by the greater good. I think there's a lot of people here who do think, "Well, maybe this isn't working. Okay. That may be true. Maybe we do need to amend our Constitution. Maybe we need to change it to -- in some ways." But even if we think this, you don't have to show that our country has devolved into tyranny to acknowledge, confirm the proposition of this debate, because I think it's clear from what we talked about -- the recess appointments we haven't even had a chance to discuss. I don't think they rebutted anything I've said on that -- and the appropriations the president has clearly overstepped his bounds, including re-writing the law, the authorization of war without Congress, et cetera. Because the president has done so repeatedly -- he has usurped the powers of Congress -- I ask you to vote yes in favor of the proposition.

John Donovan:

Thank you, Carrie Severino.

[applause]

And that's the motion: The President Has Usurped the Constitutional Powers of Congress. And here to make his closing statement against the motion, Adam Cox, professor at New York University School of Law.

19:48:10

Adam Cox:

So, when I was a brand new lawyer, fresh out of law school, I interviewed for a job in the Department of Justice, in a little unit that spent its time investigating municipal police departments. And the year of my interview was 2000, right in the middle of the George W. Bush/Al Gore presidential race. And in the interview, I recall vividly asking the lawyer what would happen to the work the unit did if Bush won the election rather than Al Gore. And he was a little bit annoyed. But the reason I asked him was exactly the reason why Eric and I are here tonight, arguing against the proposition. It was because I knew that each presidential administration comes with a mandate from the people and a set of priorities that might be different than the last presidential administration. And that's a crucial point, right? That's what gives an administration the power to pivot, to focus on issues that are socially important in the moment. That's why the Justice Department today has recently been able to reinvigorate its investigations of local police departments after the events of Ferguson and Baltimore and elsewhere.

19:49:18

That's democracy, it's not tyranny, and that's why you should vote against the proposition.

John Donovan:

Thank you, Adam Cox. And, again, the proposition is, "The President Has Usurped the Constitutional Power of Congress." Here making his closing statement in support of the motion, Michael McConnell, director of the Constitutional Law Center at Stanford Law School.

Michael McConnell:

I've long told my students in constitutional law that when thinking about issues of constitutional power they should think not about presidents or leaders that they admire and trust, but ones that they disagree with, ones that they don't trust. And they always just thought I was some kind of fuddy-duddy. We're at a different moment. And suddenly I see light coming into their eyes and a newly dawning recognition that maybe these constitutional limits are there for a reason, maybe, as, well, Benjamin Franklin said a few blocks down the road, maybe enlightened statesmen will not always be at the helm.

19:50:23

We've not been talking about speedbumps. We've not been talking about congressional delegations that Adam wants to talk about. We've been talking about very important changes not over 200 years but over the last eight, 12, 16 years. We're talking about presidents who have spent money that wasn't appropriated. We've talked about

presidents going to war without even asking Congress for authorization. We're talking about presidents blatantly deciding not to enforce our laws when that very president knew and said beforehand that that would not be an appropriate use of the office. We've been talking about national security violations that even -- that Eric Posner in his book at least says are entirely illegal.

19:51:15

This will go on unless the American public is willing to stand up and say, "This is a problem." Join President Obama as candidate, saying, "This is a serious problem. The presidents have usurped authority that has properly been vested by our Constitution in Congress." Thank you.

[applause]

John Donovan:

Thank you, Michael McConnell. The motion, again, "The President Has Usurped the Constitutional Power of Congress." And here making his closing statement against the motion, Eric Posner, professor at the University of Chicago Law School.

Eric Posner:

You might not have noticed, but while people were speaking I went onto my iPhone. And I went to rightdiagnosis.com to check out, "What's the cure for Tyrannophobia?"

[laughter]

And the answer is, "statistics." And so I thought I would give you a few statistics here.

19:52:06

And the idea here is to show you that things aren't really bad, especially when we focus on the current president. So as has been mentioned, presidents use executive orders. They do this because Congress has told them to regulate in various ways and take other action. But an executive order is just an order to his subordinates to do those things. Well, what is the record like? Reagan, before the 16-year period Michael told us about, issued 381 executive orders over two terms. Clinton issued 364. Bush issued 291. Obama issued 242 through seven and a third years, pretty much in line with his predecessors, maybe a little less. Another example, signing statements, during the Bush administration controversy erupted because George Bush would issue these statements when he signed bills saying that while he's signing this bill there are certain provisions that he would not enforce because they were in conflict with his constitutional powers. So I looked up the numbers for that as well. Now, Reagan issued 250 signing statements, Clinton, 381, Bush, himself, 161.

19:53:14

What about Obama? Through 2014, 30. And then finally the scary topic of recess appointments, the president appoints something like 1,200 to 1,400 people per year in the executive branch. He's allowed to make appointments when Congress is in recess, Reagan, 232, Clinton, 139, Bush, 171, Obama through six years, 32. Vote against the motion.

John Donovan:

Thank you, Eric Posner. And that concludes round three of this Intelligence Squared U.S. debate where the motion is, "The President Has Usurped the Constitutional Power of Congress." And now it's time to learn which side you have found most persuasive here in Philadelphia. We want to ask you again to go to the keypads at your seat and vote a second time, same way.

19:54:08

Look at the motion, "The President Has Usurped the Constitutional power of Congress. If you agree with the motion now, push number one. If you disagree with the motion now, push number two. And if you remain or became undecided, push number three. And just like before, we'll give it about 15 seconds, and I'll ask in a minute to see if anybody needs a few seconds, if anybody needs more time. Anybody need more time? Okay. We're going to lock it out. So we'll have the results in a little under two minutes. While that's happening, there's a couple people, a few -- some people I want to think. First couple of people I want to thank are the debaters on the stage who lived up to the ideal of Intelligence Squared US and I would say as well the National Constitution Center, to bring real debate to the debate process, to bring ideas, logic, facts, persuasion, respect for the other side, and a willingness to listen to the other side, even if only to try to demolish them, but to demolish them legitimately. Legitimately. So I want to congratulate these debaters for what they did up there.

19:55:16

[applause]

We also want to thank the National Constitution Center, whom we love having as a partner, and particularly its leader, Jeffrey Rosen, who you met earlier. Thanks again, Jeffrey.

[applause]

I want to thank everybody who got up and asked a question. It takes a lot of guts. It's not easy to do. The questions that I didn't take I want to say wasn't out of disrespect in any way. I just had to make a judgment about whether it was off topic. The question for the moderator, which was an argument with the moderator, point taken, and it's actually something we think about from time to time, should we have three options, should we have four options? So we've been thinking about it. So thank you for bringing that up. I want to let you know that Intelligence Squared -- Intelligence Squared US is a nonprofit operation. We create these debates, and then we release them to the world for free.

19:56:11

They are -- they're not only heard by millions of people cumulatively through the radio broadcasts, through the live stream on Fora.TV, to our website, through our app, and through the podcast that comes through our apps. They're also used now in thousands of schools as a teaching tool. We sell tickets, and it's a delight, by the way, that they sold out here in Philadelphia on a beautiful night like this. You people are seriously interested in smart stuff, so thank you for that.

[applause]

But, you know, I forget you should say, when you're at a podium, "You people." I didn't mean that. I meant here everyone in the Philadelphia community is what I meant. But I just want to say this: That we really do depend on your support. You can go to our website and make a donation, large or small, to assist us and keep this going. We would appreciate it enormously. So this is our final spring debate, but we're going to be announcing our fall lineup come summer.

19:57:11

Those debates take place in New York and in Washington. This fall we want our debates to focus on issues that will be relevant, we hope, to the presidential election. We hope our topics will dovetail with things that people are talking about at the time of the election so that we can help you all make a more informed decision on election day. If you sign up for our e-blasts, you can keep track of where we're going with that and the topics we go to. All those folks out there obviously who are not part of our live audience, we're glad that you're joining us through mobile devices like Apple and Android. Our live stream on IQ2US.org. And again I want to remind you that this debate will be on public radio stations across the country. Well, a couple other two little things. We are working with a group called newsy.com, excellent, excellent new platform organization that turns these debates into two minutes, sort of mini debates.

19:58:06

And they actually do work. You really get a sense of what happened in the course of the debate, and even some of the meat of the arguments. And in the next week, we're going to be releasing a two-minute short version of everything that you went through tonight. So if you clapped, you can hear yourself clap for about a split second in that two minutes. But that'll be you. Finally, this is something that we're starting. We've just -- we're just watching this now. As I've said, we're very proud of the fact that we're -- we're -- we think we aspire to bring real debate to the process, to the national discourse. We have figured out that we would like to try to do our part to help improve the quality of the American presidential debates that will be coming up this election season. And to that end, we have just launched a petition with change.org. That petition calls upon Donald Trump and Hillary Clinton and the commission on presidential debates to fix the format, to give us real debates this election season, not be --

[applause]

All right.

19:59:11

Thank you. So you know where I'm going. And we think that the Oxford style debate format we've demonstrated here tonight is superior in bringing about substance as well as style. And we hope that you agree. So if you want to see better debates among our -- between our presidential candidates this fall, maybe it'll make a difference if you go to our site and -- to the change.org site -- change.org/fixthedebrates and sign the petition. And you can follow all of this using [fixthedebrates](https://twitter.com/fixthedebrates) hashtag on Twitter. So really consider that. We would really appreciate it. Okay. It's all in now. You have voted twice. You have voted to choose the winner where the motion is "The President Has Usurped the Constitutional Power of Congress." There were two votes. It's the difference between the two votes that determines who is the winner.

20:00:07

Let's look at the first vote. In the first vote on the motion, "The President Has Usurped the Constitutional Power of Congress," before the debate 29 percent of you agreed with this motion, 39 percent were against it, 32 percent were undecided, a third of you. Let's look at the second vote now. The team arguing for the motion, "The President Has Usurped the Constitutional Power of Congress," their second vote was 38 percent. That means they pulled up 9 percentage points. That becomes the number to beat. Let's look at the team against the motion, their first vote, 39 percent, their second vote, 53 percent. That means they pulled up 14 percentage points. The team arguing against the motion has been declared our winner where the motion is, "The President Has Usurped the Constitutional Power of Congress." Our congratulations to that side and to all of the debaters. Thank you from me, John Donvan, and Intelligence Squared

U.S. We'll see you next time. Thank you, everybody, very, very much. It's been a pleasure.

20:01:00

[applause]

[end of transcript]