

## OPINION

# One Sentence in the Constitution Is Causing America Huge Problems

Aug. 21, 2025

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On Nov. 8, 1787, a pamphleteer who wrote under the pseudonym Cato published one of the most prescient warnings in American history.

Cato looked at the proposed Constitution and declared that it might well turn into a vehicle for tyranny.

He didn't see a Constitution of enumerated rights that sharply limited the power of the president. Instead, he saw a Constitution that granted the president such sweeping authority "that if the president is possessed of ambition, he has power and time sufficient to ruin his country."

In other words, he could see a man like Donald Trump coming, and Cato knew the Constitution could not prevent his rise.

We're not sure who Cato was; some historians believe he was George Clinton, then the governor of New York. But we know he was an antifederalist, and the antifederalists are remembered as the losers of one of the most important arguments of the American founding, the argument over the ratification of the Constitution.

In some respects, however, the antifederalists were right, and it's important that we remember their words and heed their warnings.

**Like many Americans**, I find myself in the curious position of both revering the Constitution as a world-historical document that advanced liberty and justice and recognizing that it contains a number of flaws. Many of the Constitution's flaws remain hidden when America is governed by decent men but become obvious and dangerous when it is not. Poor character creates a constitutional stress test, and it can reveal fatal defects in much the same way that a physical stress test can expose flaws in your heart.

And nowhere are those flaws more apparent than in **Article II**, the article that created the American presidency. We should consider a change.

The fundamental goal of the founding of America was to discard the British monarchy, to establish a republican form of government. We see this in Benjamin Franklin's famous response to Elizabeth Willing Powel's question: "Well, Doctor, what have we got, a republic or a monarchy?"

"A republic," Franklin replied, "if you can keep it."

Can we keep it? That's the concern that preoccupied antifederalists such as Cato. While Franklin himself said the Constitution, for all its flaws, was as "near to perfection" as we could reasonably expect, the antifederalists saw it as **inherently dangerous**. It lacked a Bill of Rights. (The antifederalists were instrumental in persuading the states to ratify the Bill of Rights after they ratified the Constitution.) It gave too much power to the central government and ruling elites. And the presidency, in the hands of a bad man, could produce despotism.

The problems with the presidency, according to Cato, began in the first words of Article II. "The construction of the first paragraph of the first section of the second article," he said, "is vague and inexplicit."

He is exactly right. It's so vague and inexplicit, in fact, that it's hard to discern what it actually means. Ambitious leaders are eager to fill the vacuum created by ambiguity.

Here is the key sentence: "The executive power shall be vested in a president of the United States of America." That sentence immediately raises two questions: What is executive power? And crucially, what are its limits?

**When Trump** entered office in his first term, he didn't have a clear theory of power. He isn't a constitutional scholar (to say the least), and initially he was surrounded by more or less traditional Republicans who were far more wedded to longstanding American constitutional traditions than he was.

This time, however, he's surrounded by a different breed of Republican — people who possess a theory of power, declare that it's found right in the text of the Constitution and then press that power to its limit and beyond.

The **best description** of Trump's theory comes from Jack Goldsmith, a law professor at Harvard, who says that it has four distinct elements:

(a) the Constitution vests all of the executive power in the president, (b) all subordinate executive branch officials are removable at will by the president, (c) the president's Article II duty to "take care that the laws be faithfully executed" entails an exclusive presidential power to decide which laws to enforce or not to enforce and (d) the president can thus direct and control all subordinate executive officials.

We see each of these elements at work in countless Trump actions and decisions in his second term, from his mass terminations of executive branch employees to defunding executive branch agencies established by Congress to refusing to enforce the law that effectively bans TikTok. Trump is turning Congress into an advisory committee. It gets to pass laws, but he decides which laws to enforce.

Taken together, these four principles turn the constitutional order upside down. I'm not a big fan of trigger warnings, but I must confess that there is a phrase that triggers me every time I see it: "coequal branches of government."

Um, no. Our nation is not supposed to have coequal branches. Congress is supposed to reign supreme. Yes, the other branches have the power to check Congress (presidents can veto legislation; courts exercise judicial review), but Congress alone possesses the power of the purse. Congress alone is supposed to possess the power to declare war. Congress can impeach and remove members of the executive and judicial branches of government, including the president and justices of the Supreme Court.

I don't know about you, but I tend to call the person who can fire me "boss."

There is a very good reason for that congressional supremacy. Congress — particularly the House of Representatives — is our most democratic, most representative branch of government. It's Congress more than the presidency (or any court) that makes our country a democracy.

But now Congress is our weakest branch of government. It's wholly defined by the president. When it's controlled by the president's party, it's entirely supine. When it's controlled by the opposition, it's defiant. But it's never truly independent. It is not exerting its own will.

**Nothing I'm saying** is original. Lots and lots and lots of people from all over the American political spectrum recognize Congress's weakness. The American people despise Congress. According to Gallup polling, it's the least-trusted governmental institution in the United States. Americans can see clearly that Congress is almost entirely partisan, and the president defines the contours of that partisanship more than anyone else.

This concern doesn't originate with Trump. If the problem were only Trump, then it could be solved when he leaves office. In reality, his presidency is the amplification and culmination of a longstanding bipartisan trend. Presidents from both parties have stretched their power — at a lesser scale than Trump — but the executive became the most powerful branch of government well before Trump became president. Arthur Schlesinger had most likely never heard of Trump when he first wrote about "the imperial presidency."

We're living in the miserable reality that our presidents have made for us. Every four years, Americans go to the polls to elect the most powerful man in the world, at the helm of the most powerful branch of government, yet most of us don't cast meaningful votes. Unless we live in one of the half-dozen or so true swing states, we don't have much of a voice in selecting our nation's true — and sometimes only — real leader.

Most solutions to this problem amount to little more than moral exhortation and public shaming. "Be better," we tell Congress. "Exert your authority." We have different admonitions for presidents. "Restrain yourself," we tell them. "Don't try to push too far."

How long must we struggle before we realize that the system itself needs to change? When the antifederalists looked at the scope of presidential power in the Constitution, from the vague and sweeping first sentence of Article II to the president's broad authority over pardons and his control over the military, they had a warning for us: A king is coming; an American king is coming to replace the British one.

As I wrote previously, the federalist answer to the antifederalist complaint came in the form of a legal principle (impeachment) and a virtuous person (George Washington).

This moment reminds me of the **Virginia ratification debate**, when George Mason and other antifederalists sounded the alarm about the president's pardon power and his sweeping authority over the armed forces.

James Madison rose in response.

"If the president be connected in any suspicious manner with any persons," he said, "and there be grounds to believe he will shelter himself; the House of Representatives can impeach him — they can remove him if found guilty."

Impeachment, Madison said, was a "great security."

It is not. It took more than 230 years for a senator to vote to convict a president of his own party. That senator was Mitt Romney in 2020, and he stood alone. After the president of the United States helped foment a violent attack on the Capitol and attempted to reverse the results of a presidential election, only seven members of his party broke ranks — far too few to convict.

And then, when the president pardoned the Jan. 6 rioters, connecting him in a "suspicious manner" with people who attempted a violent coup on his behalf, Congress did nothing.

Compounding the problem, George Washington's influence has waned.

As the most revered American of his time, he could have grasped near-absolute power and governed the nation as long as he lived. Instead, he term-limited himself. In contrast with modern politicians who can sometimes pursue the presidency with an almost maniacal zeal, Washington was the **reluctant president** and at every step was conscious that he was setting a precedent. He lived to create a legacy.

The antifederalists admired Washington, but they knew that his example would not endure. An antifederalist writing under the pseudonym An Old Whig said it well. “So far is it from its being improbable that the man who shall hereafter be in a situation to make the attempt to perpetuate his own power, should want the virtues of General Washington,” he wrote, “that it is perhaps a chance of one hundred millions to one that the next age will not furnish an example of so disinterested a use of great power.”

We are in the next age, and we are governed by a man who shuns Washington’s example and grasps for power with both hands.

**There is a constitutional answer** to this national challenge. We can — at long last — heed the warnings of the antifederalists, and we can do it simply enough, by changing the first sentence of Article II. Instead of declaring, “The executive power shall be vested in a president of the United States of America,” it should read, “A president of the United States of America shall execute laws passed by Congress.”

This simple change would have sweeping implications. It would remove the president as the chief executive of the nation and turn him or her into a steward of the laws passed through the democratic process. In this formulation, the Department of Defense and the Department of Education wouldn’t be the president’s agencies; they would be his or hers to run according to the rules and guidelines established by Congress.

No longer would the president possess a free-standing “executive power” to grant him the authority that Trump seeks, including the discretion to decide which laws to enforce and which laws to ignore.

Revising the executive vesting clause isn’t the only necessary or prudent constitutional change (the pardon power should be revisited, for example), but it would make explicit what the Constitution makes implicit: Congress is the supreme branch, and at a stroke the Constitution would no longer enable, in Cato’s formulation, an ambitious president to “ruin his country.”

This new presidency wouldn’t be powerless. The president would still command the armed forces, for example, and he or she would still nominate judges and make treaties.

Nor would this amendment permit Congress to run amok. The president would still possess the veto. Courts would still possess the right of judicial review.

But the balance of power would shift, and the populist project of maximum executive authority would come to an end, and only another amendment would make it rise again.

If history is any indication, unless the next president has Washingtonian character and foresight, then it is quite likely that he or she will imitate Trump and wield all the power that he or she can, though in service of that person's ends rather than Trump's. In fact, in the absence of congressional action, it will take a Trumpian exercise of power to simply undo all the worst excesses of his second term.

But there is another path. Our nation can look at our escalating political conflicts, at the hysteria that engulfs the country every four years as we elect a quasi-monarch, and decide that enough is enough.

This will take time. Americans are so divided that any constitutional amendment that's seen as partisan is dead on arrival. But it's also a mistake to believe that our present polarization is permanent. When this terrible political moment does end, wise men and women will need to step forward and propose the changes that will prevent the next American demagogue from grasping for power that threatens our republic.