PLSC 471: American Constitutional Law

Midterm Examination "Key"

In italics are each of the questions from the Fall 2025 PLSC 471 midterm exam. Below each question is an example of a strong essay answer to that question. Note: **This is for reference only**; the "answers" given here are of course not the only possible strong answer, and it is entirely possible to craft an answer that receives a high score but that looks very different from these examples.

1. Alexander Hamilton called the judiciary the "least dangerous branch." In recent years, however, legal scholars on both the left and the right have expressed concern over the rise of an "imperial judiciary." In your essay, assess these competing claims. What is the scope of judicial power vis-a-vis the other branches? In what ways is that power restrained, or "checked", by those other branches? What kind of restrictions do the courts place upon themselves, and why? In answering this question, draw upon both cases pertaining to the judiciary itself, but also those involving the other branches in which judicial power is implicated.

Alexander Hamilton famously argued in Federalist No. 78 that the judiciary would be the "least dangerous branch" because it possessed neither the sword nor the purse. Yet modern critics on both left and right suggest that the Supreme Court has become increasingly assertive, and sometimes even "imperial." Evaluating these competing claims requires examining the constitutional foundations of judicial power, the internal and external constraints on that power, and the Court's interactions with the other branches.

The modern Court's powers stem from *Marbury v. Madison* (1803), in which Chief Justice Marshall established judicial review and claimed for the Court the authority to "say what the law is." This principle allows the Court to invalidate acts of Congress and the executive. Landmark political-structure cases such as *Powell v. McCormack* (1969) and *U.S. Term Limits v. Thornton* (1995) show the Court limiting legislative discretion when it conflicts with constitutional text or structure. In separation-of-powers cases such as *Humphrey's Executor*, *U.S. v. Nixon*, and *Clinton v. Jones*, the Court has also imposed binding limits on presidents. This is the heart of the "imperial judiciary" critique: that the Court exercises broad, countermajoritarian power against the other branches.

But despite its broad power, the judiciary is also significantly constrained. Presidents appoint and Senates confirm justices, shaping the Court's ideological direction. Congress may change the Court's size and structure (an implicit limit familiar from Court-packing debates). Congress also possesses extensive Article III authority to regulate federal jurisdiction and the appellate docket. Moreover, the Court's lack of enforcement power provides another limit. In *Nixon v. U.S.* (1993), the Court avoided intervening in the Senate's impeachment procedures, a domain where judicial decrees would be unenforceable.

The Court has also developed doctrines that narrow its own role, including those relating to standing (*Flast v. Cohen* (1968)), other matters of justicability (e.g., mootness and ripeness), and the political question doctrine (*Baker v. Carr* (1962)), all of which help to preserve the Court's institutional legitimacy and perceived neutrality, but at the cost of curbing its power.

In sum, the judiciary is neither as weak as Hamilton predicted nor as unbounded as critics claim. The power of judicial review enables the Court to shape national policy, but its powers remain dependent on the other branches for its membership, jurisdiction, and the enforcement of its rulings, as well as on its own self-restraint for legitimacy. The "imperial judiciary" critique captures the reality that the Court has become a major policymaker, but that growth has occurred alongside – and is often a product of – structural incentives, political polarization, and legally grounded doctrines rather than pure judicial aggrandizement.

2. Some members of our illustrious Court are fond of pointing out that the federal government is one of enumerated powers. Assess this claim, as it relates to the powers of the U.S. Congress. Specifically, discuss the extent to which the specifics of Article I limit the power of Congress, both explicitly and as against the ability of Congress to act in the absence of such enumerated grants of power.

The Constitution establishes Congress as a legislature of enumerated powers, but the scope of those powers has been the subject of sustained debate. A full assessment must examine enumerated, implied, inherent, and amendment-enforcing powers.

Article I, §8 lists explicit powers: taxation, spending, regulating commerce, declaring war, etc. Literalist and originalist scholars emphasize these as limits. Yet textual grants such as the Necessary and Proper Clause (NP) and the Commerce Clause are written broadly. In *McCulloch v. Maryland* (1819), Chief Justice Marshall held that the NP Clause allows Congress to choose any means "plainly adapted" to a constitutional end. This interpretation substantially broadened Congress's legislative capacity. *McCulloch* also explicitly recognizes implied powers essential to carrying enumerated powers into effect. Over the 20th century, cases such as South Carolina v. Katzenbach (1966) expanded implied powers in tandem with Congress's enforcement authority under the Reconstruction Amendments.

At times the Court has also recognized inherent authority linked to national sovereignty. For example, in *Curtiss-Wright Export Co.* (1936), the Court recognized broad federal foreign-affairs powers, which loosened the strictures of Article I when acting internationally. In addition, after the Civil War, the 13th-15th Amendments added new grants of congressional authority. the *Katzenbach* case demonstrated the breadth of these powers, ruling that Congress may use any rational means to enforce voting-rights protections, even overriding traditional state prerogatives.

But while Congress has substantial legislative powers, significant limits do exist. Some are textual; for example, Congress may not add to qualifications for office (*Powell*; *U.S. Term Limits v. Thornton*). Likewise, Congress' power to investigate is broad, but must relate to a legitimate legislative purpose (*Watkins*; *Barenblatt*). And Congress cannot delegate power in ways inconsistent with constitutional structure (as recognized in some executive-power cases, including *Curtiss-Wright*).

In sum, while formally Congress has only enumerated powers, functionally, its powers – implied, inherent, and amendment-enforcing – are quite broad, and go well beyond those spelled out in Articles I-III. The specifics of Article I do not truly confine Congress to narrow powers; rather, they anchor a system in which Congress was intended to be the dominant domestic policymaker, with its limits being largely structural (separation of powers and federalism) or rights-based (e.g., the Bill of Rights).

3. Write an essay supporting or refuting (i.e., no waffling) the following statement: "Congressional power is more constrained by the president than presidential power is constrained by the Congress."

Historically and doctrinally, presidential power is more constrained by Congress than congressional power is constrained by the presidency. Support for this statement begins with the Constitution itself: Article II is brief and often vague, while Article I is detailed and assigns Congress the central tools of governance: lawmaking, funding, impeachment, war powers, and institutional control over the federal bureaucracy. The consequence of this is that the Court has frequently struck down presidential actions taken without explicit or implicit statutory authorization. In *Humphrey's Executor* (1935), the Court ruled that Congress may impose limits on the president's removal power in independent agencies. Later, in *Youngstown Sheet & Tube v. Sawyer* (1952), the Court held that, absent Congressional authorization, President Truman lacked the authority to seize steel mills during the Korean War; Justice Jackson's concurring opinion notes explicitly that the president's power is "at it's lowest ebb" in the face of Congressional resistance. And in *U.S. v. Nixon* (1974) executive privilege had to yield to the demands of criminal process. In each of these cases, the clear lesson was that the president cannot act contrary to or without statutory authority.

Conversely, the President's checks on Congress are more limited. While the president can veto, this check itself has a limitation: with sufficient majorities, Congress can override such a veto. In addition, Congressional powers over its own institutions and procedures are robust; *Powell v. McCormick* and *U.S. Term Limits v. Thornton* reflect the fact that Congress's structural authorities are grounded directly in constitutional text and not subject to presidential revision. Congress also controls appropriations, oversight, investigations (*Watkins*; *Barenblatt*), and impeachment. These mechanisms allow Congress to politically or legally restrain the executive, but not the reverse.

An important exception is in the area of foreign affairs, where presidential power is much more substantial (e.g., *Curtiss-Wright*). Outside of that issue, however, the presidency often functions within a framework built by Congress: delegations, statutory authorizations, and budget priorities are all set by Congress. Even strong claims of inherent or emergency authority – such as Truman's argument during the Korean conflict – have been rejected by the Court.

In summary, the institutional design of the Constitution, reinforced by Supreme Court precedent, consistently places more meaningful limits on presidential power than on congressional power. Congress can override vetoes, set policy by statute, control funding, regulate executive structure, and impeach. The president, by contrast, cannot unilaterally block congressional action, cannot ignore statutes, and must often justify authority through congressional delegation. Thus,

congressional power is not more constrained by the president; in practice, the reverse is true.

4. The year is 2045, and you are the chief political advisor to GOP President Noelle Bush. At the insistence of freshman Representative Kimberly Daschle (D-SD), the House Ethics Committee has begun investigating whether this President Bush has used "sneak" (the "crack" of the '40s) in the White House, and has subpoenaed both you and your boss to testify before the committee. In private, President Bush admits to you that she has, in fact, been hitting the pipe in the Oval Office. Answer the following questions, in essay format: (a) When called to testify, what are your options? That is, what sorts of questions can and can't you refuse to answer, and why? (b) With respect to her testimony, what approach would you recommend that the president take under these circumstances, and why?

I begin by noting that Congress's investigatory power is broad but not unlimited. Under *Watkins v. U.S.* and *Barenblatt v. U.S.*, witnesses may refuse questions not tied to a legitimate legislative purpose or questions that are overly vague, overly broad, or infringe fundamental constitutional rights.

(a) As the president's advisor, I have three possible bases on which I may refuse to answer. The first is *executive privelege*. Although *U.S. v. Nixon* (1974) rejected an absolute privilege, that case recognizes a qualified privilege for confidential presidential communications. I may thus invoke privilege for conversations directly with President Bush – especially discussions in the Oval Office related to her admission. Second, if truthful answers might expose me to criminal liability (e.g., knowledge of drug use, failure to report illegal conduct), I can invoke the Fifth Amendment. Third, if Congressional questions are unrelated to legitimate legislative purposes – for example, if the questions are designed purely to embarrass me, or the president – then *Watkins v. U.S.*. allows me to refuse to answer those as well. However, questions about drug use may relate to ethics rules, internal discipline, or potential legislation concerning executive misconduct, so it is likely that Congress could assert a legitimate legislative purpose for such questions, depending on the specifics.

(b) For President Bush, it's useful to start by noting existing case law. In *Nixon v. U.S.* (1974) the president was compelled to provide evidence in support of a criminal proceeding. *Clinton v. Jones* (1997) was similar, in that the president was found to be subject to judicial process for private actions. *Nixon v. Fitzgerald* (1982) found absolute immunity from civil liability for official acts, but not from testimony. And most recently, *Trump v. Thompson* (2022) held that privilege claims are generally weaker when Congress asserts a legitimate institutional interest.

Accordingly, I would advise the president to invoke executive privilege narrowly, not categorically. A blanket refusal would echo Nixon's failed approach and would likely be legally indefensible. A narrower assertion would be both constitutionally and politically easier to swallow for Congress and the public. Second, I would suggest the president decline to answer questions related to private, non-official conduct. Following *Clinton v. Jones*, private conduct is not insulated, but Congress's oversight authority extends only to matters connected to legislation or ethics enforcement. Drug use may not bear directly on official duties unless Congress can articulate such a connection. Finally, avoid perjury at all costs; full honesty, or a carefully framed refusal to com-

ment on specific matters, is essential.

5. Writing three years after leaving the White House, President Harry Truman argued that "the President...must always act in a national emergency...[He] must be able to act at all times to meet any sudden threat to the nation's security." With reference to the cases and issues discussed in class, evaluate the status of President Truman's assertion. When and under what historical circumstances has the Court approved of such a broad construction of presidential emergency power, and when has it been less willing to do so? Most important, what are the reasons for both the extent and limits of Presidential emergency power?

While President Truman argued that the president must always be able to act in national emergencies, history shows that the Supreme Court has sometimes embraced broad emergency authority, but at times has also imposed significant limits on that authority. The president's broad emergency powers extend back to *In re Neagle* (1890), which recognized the executive's inherent authority to protect federal officials even absent explicit congressional authorization. In the area of foreign affairs, it is implied by *U.S. v. Curtiss-Wright* (1936), which urged strong deference to the president in that area under the doctrine of inherent presidential power. Perhaps most infamously, in *Korematsu v. United States* (1944) the Court upheld Japanese American internment during World War II; there, the Court deferred heavily to the executive's claim of wartime necessity. And much more recently, *Trump v. Hawaii* (2018) upheld President Trump's travel ban on individuals from certain (mostly majority-Muslim) countries, again deferring to executive claims of national-security necessity. All of these cases suggest that emergencies (or presidential claims of emergency-like threats) justify broad executive discretion.

On the other hand, cases such as *Youngstown Sheet & Tube Co. v. Sawyer* (1952) and *U.S. v. Nixon* (1974) outline limits on presidential emergency powers. In the former, the Court rejected Truman's claim of inherent emergency authority. Justice Jackson's concurrence created the canonical tripartite framework limiting presidential power absent congressional authorization. In the latter, the Court affirmed that even in a crisis, executive privilege must yield to the rule of law and judicial process. These and other cases show that matters of imminent national concern do not grant carte blanche to the president in responding to emergencies.

The cases described also limn the contours of when presidential emergency power will be greater or less. As a general matter, presidential power increases during wartime, in matters of foreign relations or immigration, when national fear or external threats dominate politics, and/or where Congress has delegated broad statutory authority to the executive. Such powers are less in domestic economic crises, when the judicial process is obstructed, when the president's actions lead to rights violations that are clear and unrelated to foreign threats, and/or when the exercise of presidential power contradicts explicit congressional statute.

In sum, Truman's assertion captures only part of the constitutional reality. The Court recognizes that presidents need flexibility in emergencies – especially in matters of war and foreign affairs – but it firmly rejects unilateral executive authority where Congress has spoken or where individual liberties suffer unjustified infringement. Presidential emergency power is robust, but not limitless.