

IDEAS

This Is the Presidency John Roberts Has Built

The country is witnessing the creation of an all-powerful institution, and one man is responsible.

By Peter M. Shane

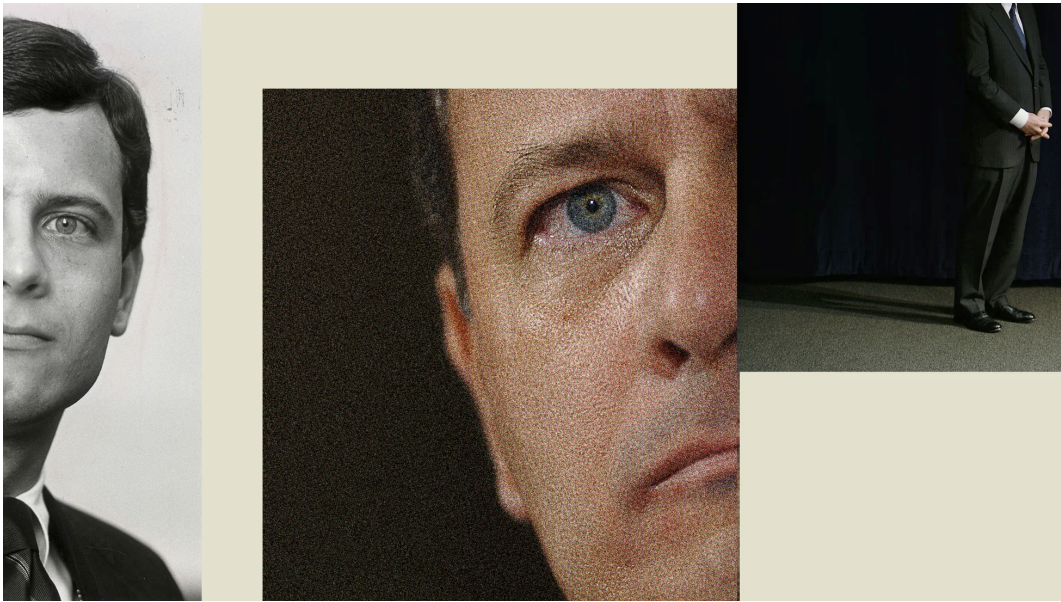


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NO ONE ON the Supreme Court has gone further to enable Donald Trump's extreme exercise of presidential power than the chief justice of the United States, John Roberts. Associate justices have also written some important opinions shaping executive power, and the Court has issued ever more important unsigned orders, but the most transformative opinions—the opinions that directly legitimize Trump's unprecedented uses of power—are Roberts's handiwork. This is not happenstance. Under Supreme Court practice, the most senior justice in the majority—which is always the chief justice when he so votes—determines who will write the main opinion. Roberts reserved these milestones for himself.

And what milestones they have been. Roberts upheld the first Trump administration's "Muslim ban" on the grounds that the president's national-security role precludes courts from taking account of the bigotry undergirding an immigration order. He remanded a lower court's enforcement of a congressional subpoena for Trump's financial information, writing that "without limits on its subpoena powers," Congress could exert "imperious" control over the executive branch and "aggrandize itself at the President's expense." He has come close to giving the president an untrammelled right to fire any officer in the executive branch at will. And he took the lead in inventing a presidential immunity from criminal prosecution that could exempt the president from accountability for even the most corrupt exercises of his official functions.

Going beyond the precise holdings in these cases, Roberts's superfluous rhetoric about the presidency has cast the chief executive in all-but-monarchical terms. The upshot is a view of the Constitution that, in operation, comes uncomfortably close to vindicating Trump's: "I have an Article II, where I have the right to do whatever I want as president." Trump's confidence is surely bolstered also by the Roberts Court's unsigned per curiam opinions blocking even temporary relief from his sweeping actions. In May, the Court held that Trump orders removing two federal officials at key independent agencies could remain in place while the issue of their legality makes its way through the judiciary. In June, it allowed the administration to proceed with so-called third-country deportations—that is, deporting undocumented noncitizens summarily to countries to which they had no prior connection, but where they might well face torture. On July 8, the Court effectively allowed Trump to proceed with a massive restructuring of the federal executive branch, notwithstanding that the power over executive-branch organization belongs to Congress, not the president. On July 14, the conservative majority allowed the sabotaging of the Department of Education to proceed. Trump's use of executive power is not a distortion of the Roberts Court's theory of the presidency; it *is* the Court's theory of the presidency, come to life.

Adam Serwer: Why Trump thanked John Roberts

What America is witnessing is a remaking of the American presidency into something closer to a dictatorship. Trump is enacting this change and taking advantage of its possibilities, but he is not the inventor of its claim to constitutional legitimacy. That project is the work of John Roberts.

RONALD REAGAN won the presidency in 1980 while Roberts was clerking for then–Associate Justice William H. Rehnquist, who represented, at the time, the far right on the Burger Court. Following his clerkship year, Roberts joined the Reagan administration as a special assistant to the attorney general, and then in short order was recruited in 1982 to join Reagan’s White House staff as an associate counsel to the president. That same year, the Federalist Society was founded, and those two entities together—the Reagan administration and the Federalist Society—accelerated the mainstreaming of what until then had been a marginal view of presidential authority under the Constitution: “unitary-executive theory.” The core idea of the unitary executive was that the president, as the single head of the executive branch, was entitled to direct how all discretionary authorities of that branch would be exercised. On every question, the president would be, as George W. Bush later said, “the decider.”

In practical terms, debates over unitary-executive theory have centered on how far the president can go in firing people: Can he fire anyone at will, or may Congress protect at least some officials from discharge unless the president can show good cause for dismissal? Good cause is most often specified in the law as “inefficiency, malfeasance, or neglect.” At-will removal power would allow a president to purge the government of any resistance to his agenda. Roberts has all but made at-will removal the president’s constitutionally guaranteed prerogative, and his rhetoric goes further yet. His opinions taken together create a dangerously authoritarian and largely ahistorical narrative about the constitutional presidency.

In Roberts’s story, the president “alone composes a branch of government” and holds the “entirety” of executive power. All of the federal civil service—the thousands of administrative officers who wield executive power—do so on the president’s behalf. What gives this system “legitimacy and accountability” is that “We, the People” get to vote for president. The thousands of subordinate officers involved in administering the federal government are accountable to “We, the People” only because they are tied to the president through “a clear and effective chain of command.” The point of absolute-removal power is precisely to enable the president to keep his underlings in line. The powers of removal and supervision, Roberts writes, are “conclusive and preclusive.” That is to say, at least in Roberts’s narrative, Congress may not regulate the president’s supervisory powers by statute, and courts may not examine their exercise.

The alternative to this narrative—the understanding of the constitutional presidency that, at least in broad strokes, had represented conventional wisdom until the advent of the Roberts Court—is an account of executive power woven into a system of checks and balances. Article II vests executive power in a president, to be sure. It assigns the president a number of exclusive roles, such as the negotiation of treaties and serving as commander in chief of the Army and Navy. But Article II also envisions a branch that includes “executive departments.” These departments have

“duties,” most of which are to be set forth in statutes. Fulfilling statutory duties is the job of the agencies, which, in doing their work, act not on behalf of the president, but on behalf of Congress. The president’s role in this scheme is one of supervision, not command. He is charged to “take care that the laws be faithfully executed.” The Constitution underscores the president’s supervisory position by providing that he may “require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices.” This is not at all a one-person branch of government, and its design is not the prerogative of the president, but of Congress.

Aziz Huq: The Court’s liberals are trying to tell Americans something

In 1980 and perhaps even now, unitary-executive theory would seem an odd position for conservatives and libertarians—the Federalist Society base—to adopt. But by then a strong presidency seemed the best and perhaps only route for yanking the American government in a much more conservative direction. During the 1960s and ’70s, Congress, prodded on by a host of different social movements, enacted a panoply of statutory authorities that enabled ambitious liberal presidents to advance significant progressive policies. A president intent on rolling back that agenda would find doing so difficult. There exists no general statutory authority for shrinking government, and deregulation on a rule-by-rule basis is slow going and often legally vulnerable. Conservatives found their solution in Article II of the Constitution, which, if creatively reinterpreted, might give the president more authority to unilaterally undermine the regulatory state.

Over the next two decades, the conservative legal movement further developed its arguments for the unitary executive, the Federalist Society grew and became a powerful credentialing institution for the right, and Roberts’s career soared, culminating in 2005 with his appointment as chief justice.

Roberts has not approached his work timidly. In the two decades of his tenure thus far, his opinions on executive power have created what might be called a proto-authoritarian canon, lending constitutional legitimacy to a kind of presidency that brooks no dissent, treats Congress as a subordinate institution, and need answer to no one except possibly to the Supreme Court itself.

It is hard to overstate how much is wrong in Roberts’s narrative of the presidency. It muddles constitutional text. It flouts constitutional history. It is willfully ignorant of the risks of authoritarianism in a polarized, populist age. Its very premise—that the Constitution creates a one-person branch of government—is provably untrue by just reading the Constitution, which, again, refers to “executive departments.” The president’s constitutional role does not require at-will removal power, except in the cases of those few officials who directly assist the president in fulfilling specific Article II roles. For all others—the overwhelming majority of government officers and

employees—the president needs only the power to discharge persons who have failed to faithfully execute the law, thus providing “good cause” for their removal. The conditions under which the president may fire such officials is a matter for Congress to decide.

The idea that vesting the president with “the executive power” means “all” of the executive power is likewise not in the Article II text, which does not contain the word *all*. Where the word *all* does appear is in the Constitution’s vesting in Congress the power to “make all laws which shall be necessary and proper” for executing its role and all others in the government. Far from signaling a wide swath of “conclusive and preclusive” executive authority, the text suggests a sweeping legislative power to prescribe how executive power is to be exercised.

The Roberts Court narrative fares no better on history than on text. The Court claims to be originalist and to be implementing a vision of the presidency that matches that of the Framers. The best that can be said about its opinions in this respect is that they have launched a scholarly renaissance among constitutional historians whose work demonstrates that the Court has the history wrong. One characteristic of several of the Court’s most executive-indulgent opinions is the inclusion of blazingly incorrect statements of history.

Arguably the strangest of the Court’s departures from history appears in *Seila Law v. Consumer Financial Protection Bureau*, in which Roberts wrote, “The Framers made the President the most democratic and politically accountable official in Government.” That statement, unfortunately, captures the precise opposite of the Framers’ plan. Under the original Constitution, the president was the least electorally accountable official. House members were elected by voters. Senators would be chosen by state legislatures. The president would be chosen by presidential electors, and those temporary officials would be chosen in a manner to be determined by the legislature of each state.

Acknowledging the relative insulation of the original presidency from electoral politics underscores that the Roberts narrative of administrative “legitimacy and accountability” is also wrong. What would legitimize executive power in the Framers’ scheme would not be electoral accountability, but the quality of government, the character of officeholders, and the fidelity of officeholders to the law.

Read: The Supreme Court won’t explain itself

Seila Law is not an isolated example of ignoring or inventing history. Roberts’s presidential-immunity opinion has not a word to say about either the Richard Nixon pardon or Bill Clinton’s nonprosecution deal during his last weeks in office—incidents obviously relevant to understanding how earlier presidents assessed the scope of immunity. Likewise, the per curiam opinion keeping in place for now

Trump's unlawful firings of two independent administrators purports not to threaten the independence of the Federal Reserve Board of Governors. "The Federal Reserve," the Court says, is not the same as other independent agencies; it is instead "a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States." The problem with that assurance is that there is virtually no resemblance between the 19th-century Banks of the United States, on one hand, and the Federal Reserve Board of Governors, on the other. If the president is constitutionally entitled to fire members of the National Labor Relations Board, there is no obvious principled reason he cannot also fire members of the Fed.

The Court has presumably shown concern for the Fed's independence because giving presidents direct control over the monetary supply would predictably lead to greater inflation, which would be bad for investors. Decision makers serving at a president's pleasure may be driven less by long-term price and employment trends—their assignment from Congress—and more by the president's short-term political concerns. But in one way or another, Congress has similarly determined for a host of other major agencies, such as the Federal Trade Commission and the Federal Communications Commission, that the quality of their decision making will be best served if directed by a bipartisan group of experts, any of whom may express policy disagreement with the president without fear of reprisal. Under the system of checks and balances that the Constitution was intended to enable, administrative agencies thus shoulder accountability to the Congress that created them and the courts that review them, not just to a president who believes, "I hold all the levers, and have all the cards."

THE NATION IS NOW just six months into the experiment of what happens when a knows-no-bounds president takes office under a Court committed to a unitary executive. The results are alarming. As a matter of principle, anyone concerned with preserving robust constitutional checks and balances should be disturbed by a president's overweening unilateralism, regardless of that president's policy agenda. In Trump's case, however, the threat to democracy is at its zenith because unitary-executive theory is being pushed to enable an authoritarian agenda on every front. Trump seems to believe he is effectively the unitary head not just of government, but of the nation. He appears determined to squelch any resistance within the government—and to force submission to his program by the media, universities, the legal profession, and apparently even entire cities. Roberts's assurance that elections render the unitary president "directly accountable to the people" for so blatant an antidemocratic program appears meaningless against the backdrop of Trump's authoritarian tactics.

The Roberts Court so far has been mostly generous to the administration, handing it a set of technically narrow procedural wins that, for the moment at least, have blocked relief in the lower courts. When the Court must finally resolve the controversies concerning birthright citizenship, the capricious withholding of government grants,

the unauthorized dismantling of government agencies, or the use of extortionate tactics to secure the submissiveness of independent institutions, John Roberts will likely again write opinions for a majority. Ideally, he will be open to rethinking his extreme version of what the presidency represents and what the chief executive may do without meaningful legal accountability. But given the path he has taken so far, optimism seems naive.

**Sources: Harry Naltchayan / The Washington Post / Getty; Chip Somodevilla / Getty / Tom Williams / Roll Call / Getty*

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