

FOREWORD

The President Did Better Than This President at the Supreme Court

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The Cato Institute's Robert A. Levy Center for Constitutional Studies is pleased to publish this 24th volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the Term just ended plus a look at the Term ahead. We are the first such journal to be released, and the only one that approaches its task from a classical liberal, Madisonian perspective. We release this volume each year at Cato's annual Constitution Day symposium.

This Term featured several blockbuster cases that captured the public's attention. But all too often, the media boiled down Supreme Court decisions into a single bottom line: who won? And when the winner or loser is as high-profile and controversial as the President of the United States, most people will form their opinions of a decision based only on that same question: who won? The reality, of course, is that Supreme Court decisions are complex, and the Justices decide cases based not on *who* the parties are, but on *what* the parties are trying to do.

Observers who think that the Justices simply rule for or against Donald Trump based on party or ideology would likely be confused at his mixed win-loss record this year. Here is one way to think about it: Trump's biggest win this Term was in a case about *the* President's power of removal. That case was not about a power newly claimed by Trump; rather, it was about a power that had been asserted by Presidents stretching back centuries over this country's history. And that case built on Supreme Court decisions under prior Presidents, all

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of which had laid the historical groundwork for the Court's decision. So while the case was unmistakably a win for the *office* of President, it was not unique to the *current* President, and its effects will be felt just as much under future Presidents of both parties.

On the other hand, in two cases where President Trump asserted a novel and unprecedented power, he lost both times. The Court invalidated perhaps Trump's two most high-profile actions from the first year of his second term: a massive tariff scheme and the dramatic limitation of birthright citizenship. In both cases, Trump's actions were not grounded in tradition but a *break* from tradition. When the Court has confronted the novel, expansive theories of power unique to *this* President, it has reacted with skepticism. In this Foreword, I'll summarize the different outcomes in the removal and birthright cases, demonstrating why one claim of presidential power had a strong historical foundation while the other did not.

Slaughter: A Win for The President

Over the course of the twentieth century, "independent" federal agencies accumulated vast executive power, including the power to investigate, adjudicate, and impose severe financial penalties for regulatory violations. Yet courts still treated these agencies as if they were mere "judicial or legislative aids" from a bygone era. On that basis, officials within these agencies were insulated from presidential removal for over 90 years.

This Term, that ended. The Supreme Court held in *Trump v. Slaughter*¹ that the Federal Trade Commission's for-cause removal provision is contrary to the separation of powers enshrined in the Constitution. As the Court explained, the Constitution creates a hierarchy below the elected President within the Executive Branch. And both constitutional structure and history show that to remain accountable to the President, those officers directly below the President must be removable by him.

In his majority opinion for the Court, Chief Justice John Roberts recounted the key historical moments that led to this decision. The Framers of the Constitution knew that "almost every State had but a nominal Governor, who could act only with his council's consent."²

¹ 146 S. Ct. 2283 (2026).

² *Id.* at 2293.

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And the Framers “chose to depart from this model, for they had seen its flaws up close.”³ The Framers opted for a system in which all executive power would be vested in one President. And although the President would be aided by many officers, those officers “were to serve as envoys of the President, not his equals.”⁴

But the Framers did include an important limit on the President’s power to appoint the highest-ranking officials in the federal government: He could only do so with the “advice and consent of the Senate.”⁵ This provision was included to provide a check against presidential cronyism and nepotism. And this senatorial consent requirement means that when an officer is fired or resigns, the President is not guaranteed to appoint his preferred replacement.

But beyond this practical downside to firing high-ranking officials, can Congress create other obstacles to their removal? That is the question Congress debated in 1789 when the first three Cabinet positions were established. And as Roberts recounts, a contingent led by James Madison “contended that removal was part of ‘the Executive power’ vested in the President, which ‘the Legislature has no right to diminish or modify.’”⁶ This group “emerged victorious” when the statutes establishing the first cabinet secretaries included “a new clause that assumed ‘the power of removal to be in the President.’”⁷

The majority opinion and the dissenting opinion by Justice Sonia Sotomayor disagree on the historical relevance of a few federal commissions from the nineteenth century, whose rules of composition and removal are open to debate. But all sides acknowledge that the independent agencies we know today did not become ubiquitous until the twentieth century, when the Supreme Court blessed them in its *Humphrey’s Executor* opinion.⁸ Notably, Roberts strongly suggests that the outcome in *Humphrey’s Executor* was motivated more by the Supreme Court’s opposition to the New Deal in 1935 than by neutral constitutional principles. After years of narrowing that decision,

³ *Id.*

⁴ *Id.* at 2294.

⁵ U.S. CONST. art. II, § 2, cl. 2.

⁶ *Slaughter*, 146 S. Ct. at 2296.

⁷ *Id.*

⁸ *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

the majority opinion makes clear that “[i]f anything more is left of *Humphrey’s*, we overrule it.”⁹

The Court’s decision means that any agency that exercises executive power must be controlled by the Chief Executive. As a result, the commissioners of so-called “independent agencies” can now be fired at will by the President for policy disagreements.

Nonetheless, three important limitations still exist that limit the President’s ability to influence such agencies. First, as with all top-level positions, the President must obtain Senate consent before filling a vacancy with a new appointment. Second, unlike most Senate-confirmed positions, the commissioners of the (formerly) independent agencies are exempt from the Vacancies Act, meaning the President cannot temporarily bypass Senate confirmation by unilaterally filling these positions with acting officers.¹⁰ And third, for the time being, “partisan balance” limitations remain in effect. That typically means no more than three of a commission’s five seats may be filled by someone of the President’s party. The practical result, for now, is that most commissions will likely be filled by three members of the current President’s party with two unfilled vacancies.

The decision brings the formerly “independent” agencies in line with the other departments of the Executive Branch: subject to the President’s supervision and accountable to his policy priorities. But this decision also means that the President can no longer hide behind the veil of tenure protection to avoid responsibility for the actions of these agencies. For better or for worse, Presidents will now fully own the decisions of the Federal Trade Commission, Securities and Exchange Commission, Federal Communications Commission, and similar agencies. In a democracy where presidential elections are the means by which the people direct the Executive Branch, that is as it should be.

Still, as Justice Neil Gorsuch notes in his concurrence, these agencies will continue to wield tremendous power and discretion. It is certainly possible that Congress would not have given them so much discretion had Congress known they would eventually become subject to presidential control.¹¹ Now the ball is in Congress’s court.

⁹ *Slaughter*, 146 S. Ct. at 2302.

¹⁰ 5 U.S.C. § 3349c.

¹¹ *Slaughter*, 146 S. Ct. at 2315 (Gorsuch, J., concurring).

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If this decision leads Congress to reevaluate the authority possessed by these agencies, that will be another welcome benefit. If an agency has too much power to be subject to direct presidential control, it had too much power to begin with.

Slaughter is unquestionably a win for the power of both this President and future Presidents to guide and control the authorities wielded by the formerly independent agencies. But *how much* power that is does not need to remain a constant. How the executive agencies are controlled and *how much* power those agencies retain are two entirely separate questions, and the Court's decision addressed only the former.

Barbara: A Loss for This President

Near the end of this past Term, the Supreme Court struck down President Trump's executive order purporting to limit birthright citizenship.¹² That order would have denied citizenship to children born on US soil if their parents were in the United States only temporarily or illegally. But the Court held that the Fourteenth Amendment guarantees citizenship to such children, as it does for nearly all children born on US soil. The Court's opinion by Chief Justice Roberts correctly interprets the original meaning of the Fourteenth Amendment and ensures that nearly universal birthright citizenship will continue as the law of the land, just as it has since the English common law.

The Fourteenth Amendment commands, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."¹³ The key debate in this case hinged on the meaning of the middle portion of that sentence: "subject to the jurisdiction thereof." Looking at history, the Court found that this phrase had a clear meaning: jurisdiction is about being subject to a nation's laws.

"Before the Revolution, the American colonists—like all in the British Empire—were considered subjects of the sovereign."¹⁴ And this relationship between the King and his subjects came with both responsibilities and benefits. "The King, Blackstone explained, owes

¹² *Trump v. Barbara*, 146 S. Ct. 2438 (2026).

¹³ U.S. CONST. amend. XIV.

¹⁴ *Barbara*, 146 S. Ct. at 2445.

those ‘born within the dominions’ a duty of ‘protection.’ . . . And ‘in return for that protection,’ those ‘born within the dominions’ owe the King a ‘duty’ of ‘allegiance.’”¹⁵ This reciprocal relationship extended to everyone born on soil controlled by the King. “A foreign mother could enter the British Isles, give birth, and leave with her child the very next day, and that child would remain a British subject. Why? Because the child owed an implied allegiance to the sovereign who protected him at his birth.”¹⁶

Of course, America has no king, but many aspects of English common law were adopted by analogy after independence. “This view crossed the Atlantic with the colonists—and was adopted with little fanfare after the Revolution, as ‘subject[s]’ of the sovereign became ‘citizens’ of the States. And the same logic applied to children born in the states: if they were born subject to the laws of the state, they were also born citizens of the state.”¹⁷

As Chief Justice Roberts lays out, the logic of this rule also explains its exceptions. Ambassadors and diplomats from another country have long been held to have “diplomatic immunity,” meaning they are not subject to all the laws of the country they temporarily inhabit. So, children born to ambassadors and diplomats were not “subject” to the country of their birth and thus not born citizens. In America, the same logic led states to conclude that those born on Indian tribes were also not automatically citizens of the state because they, too, were not fully subject to state law.¹⁸

These were the only two recognized exceptions to birthright citizenship until the Supreme Court’s “odious decision of *Dred Scott v. Sandford*” in 1857, which held that the rule of birthright citizenship “excluded all those descended from slaves.”¹⁹ After the Civil War, the Reconstruction Congress sought to both overrule *Dred Scott* and prevent any future diminishment of the rule of birthright citizenship. First, in 1866, the Civil Rights Act declared that “all persons born in the United States and not subject to any foreign power, excluding

¹⁵ *Id.*

¹⁶ *Id.* at 2445–46.

¹⁷ *Id.* at 2446.

¹⁸ *See id.*

¹⁹ *Id.* at 2447 (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)).

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Indians not taxed, are hereby . . . citizens of the United States.”²⁰ Then, to avoid all doubt and remove the power of future Congresses to revoke this rule, the Fourteenth Amendment guaranteed that all persons born in the United States and “subject to the jurisdiction thereof” are citizens.

As Chief Justice Roberts sums up, the meaning and purpose of this language is made clear by the history leading up to it. “Any child who was born ‘under the protection of’ the United States—that is, any child for whom no extraterritorial fiction applied—was made a citizen, for he owed a natural ‘allegiance’ (and thus ‘obedience’) to the Nation.”²¹ In practice, that means the Fourteenth Amendment guaranteed citizenship to all born in the United States, except those born to diplomats or within Indian tribes. Immigrants, even those here illegally or only for a short time, are subject to US law and thus bound to both its restrictions and its benefits. The default rule of birthright citizenship, therefore, applies to them.

In the government’s view, the Fourteenth Amendment’s meaning of “jurisdiction” would exclude the children of parents who are temporarily or illegally in the country. But as the majority opinion put it, “there is scant evidence for this dramatically revisionist view.”²² To prove its case, the government would have had to show that “[a]t some point before the ratification of the Fourteenth Amendment, . . . it became ‘deeply rooted’ in this country that [d]omicile is the key concept that creates allegiance.”²³ But history does not support such a change in the common law. Instead, right up to the Fourteenth Amendment’s enactment in 1868, legal sources “defined ‘allegiance by birth’ just as the British did—as ‘the tie or duty’ owed by one who is ‘born within the dominions and under the protection of a particular sovereign.’”²⁴

The Court’s decision is a reaffirmation of a rule that had been nearly undisputed for over a century, since the Supreme Court’s decision in *United States v. Wong Kim Ark* (1898).²⁵ As the Court

²⁰ See *id.* at 2448.

²¹ *Id.* at 2449.

²² *Id.* at 2453.

²³ *Id.*

²⁴ *Id.* at 2454.

²⁵ 169 U.S. 649 (1898).

explained, the holding “in *Wong Kim Ark* was simple: the Citizenship Clause incorporated the common law and granted citizenship to nearly all children born in the United States.”²⁶ It is the government’s view that would have massively upended American law, injecting tremendous uncertainty into our process for citizenship. But because the Supreme Court ruled on constitutional grounds, it is now certain that no future President or Congress can alter this rule. Those born on American soil are American citizens, subject to our laws and guaranteed our protection.

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As these two cases illustrate, it is overly simplistic to boil down this Court into a “pro-Trump” or “anti-Trump” Court. Nor is it even a uniformly “pro-President” or “anti-President” Court. Rather, the outcomes depend on whether a particular exercise of presidential power can lay a strong claim to authority grounded in constitutional or statutory text and history. When Trump has asserted powers claimed by a long line of Presidents before him and supported by Framing-era history, he has been relatively successful. But when he has attempted to create unprecedented sea changes in the balance of powers, the Court has rightly blocked him. Going forward, commentators and the press would be wise to add some nuance to their coverage of these cases, and to educate the public about the differences between powers consistently claimed by *the* President and the novel powers newly claimed by *this* President.

²⁶ *Barbara*, 146 S. Ct. at 2453.