

The Court's embrace of the divine right of presidents

In the *Trump v. United States* oral arguments, the conservative justices sought what Justice Gorsuch called “a rule for the ages”—one that doesn’t impair the sovereign grandeur of presidential power.

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Century illustration

The Supreme Court had never before made me think of the late, great religion scholar Jonathan Z. Smith. But last Thursday, listening to the oral arguments in Donald Trump’s petition to have his indictments relating to January 6 quashed on the grounds of absolute presidential immunity, I remembered Professor Smith saying, through his habitual grin and his halo of smoke-yellowed hair, “there is no

such thing as a non-divine king.” We were having a class discussion of the theory of “sacred kingship” in James George Frazer’s *The Golden Bough*, and I was deeply skeptical. Even those shadowy suit-wearing monarchs in northern Europe are avatars of divinity? That’s just a toned-down version of the wacky superstitions we’d been reading about, in which the king has healing powers and ensures the fertility of the land?

But I repent: the Supreme Court has convinced me that divine kingship is alive and well in the heart of our own world.

The claim being entertained—which appears likely to be at least partially affirmed—is that presidents enjoy total immunity from criminal prosecution for “official” actions taken while in office. On one hand, this is simply the Court continuing to serve as just another partisan venue, whose conservative majority seems poised to help Trump defer any trial until after the election. But beyond the immediate exigencies of party politics, the Court embraced a striking rhetoric of presidential inviolability that goes beyond mere deference to the office of the president. It wraps the person of the president in a monarchical dignity previously unknown in our republican and Enlightenment constitutional order.

When the facts are bad for your case, the old lawyer’s saw goes, you argue the law. Justices Alito, Gorsuch, and Kavanaugh scuttled like crabs from a hungry jellyfish at every mention of the facts in the special counsel’s indictment of Donald Trump for attempting to overturn the 2020 election. Again and again they insisted that they were thinking not about this case but about “a rule for the ages,” as Gorsuch put it. (Someone should inform Justice Gorsuch of how many prior rules the Court has overturned with his vote.) And whatever this rule might be, they consistently implied, it could not impair in any way the sovereign grandeur of presidential power.

Trump’s lawyer warned that anything short of total immunity would tend “to dampen the ardor of that president to do what our constitutional structure demands of him or her, which is bold and fearless action in the face of controversy.” He specifically affirmed that a former president could be immune from prosecution for having a rival killed or ordering a military coup so long as it were done as an “official” act.

The three liberal justices seemed to think this sounded bad. But Justice Kavanaugh was much more concerned that investigations would “hamper” presidents. The

question of whether Donald Trump is immune from prosecution for a scheme intended to substitute fraudulent electors for the legitimate ones has, in his thinking, “huge implications” for “the future of the presidency” and indeed “the future of the country.” The health and vitality not just of the institution or office of the presidency but of the president himself was repeatedly connected to the health and vitality of the body politic. A president sapped of boldness and vigor—as expressed, for example, in what among non-presidents would be an obvious case of murder or conspiracy—implies a nation weak and helpless against the dissolving forces of history and nature.

It was a stupefying reversal of everything a naive newcomer might imagine our constitution is for. A Court that has reliably and progressively chipped away at every procedural protection for ordinary citizens in their interactions with police and prosecutors expressed exquisite concern for the harried and diminished president, beset on all sides by petty bureaucrats ready to take him down a peg or settle political scores. Alito and his colleagues dismissed the idea of a former president facing a prosecutor, let alone a jury of his theoretical peers, with the contemptuous disbelief one imagines at the thought of a 16th-century peasant sitting in judgment over his king. They treated as borderline absurd the expectation that a president would conform to the laws of the United States, let alone be held accountable for failing to do so. It was as if our legal system were designed not to protect citizens from the power of the state but vice versa.

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And while the absurdity of the argument reflects the intellectual and legal corruption of the Trump years, in which one man’s personality and actions have come to reshape an entire political party and every institution connected to it, it didn’t begin there. The government’s lawyer was himself hampered by a string of precedents that put many exercises of presidential power beyond legal review—and the president himself beyond the reach of civil litigation for official acts and beyond criminal indictment while in office. He was obliged to defend the legality of President Kennedy’s support for a coup in Cuba and President Obama’s assassination of American citizen Anwar al-Awlaki. The Court’s conservatives were simply taking the obvious—if drastic—next step by saying that a president can therefore order coups and assassinations on American soil, aimed at the functioning of the American

government.

The office of the presidency has been escaping the bounds of law at least since the Manhattan Project vested it with impenetrable secrecy and world-altering power. That we had created a behemoth at the heart of our political order was, at best, a necessary embarrassment to legal and political thinkers. But the slender reed on which the legitimacy of this office rested was the person of the president himself: while vested with enormous power, he was merely a man, subject to the law. Inside the godlike machine was a mere citizen, who must emerge after a term in office and join the common run of humanity.

It seems that we are about to lose this last conceptual firewall between a republican presidency and an elected monarchy. The Court's liberals vainly pointed out that the framers of the Constitution knew about immunity clauses and chose not to write one for the president. This does not matter to the Court's supposedly "textualist" and "originalist" majority. Something they called the "structure" of our political order requires that presidents stand above and outside it. By the end of the argument, it would not have been more surprising if Justice Alito had warned that the rains might fail and the crops wither if a president were subjected to the laws of the republic.

For a hundred years or more, scholars of religion have speculated that our modern world is "disenchanted," often with a note of lamentation for a lost age of mystery and grandeur. If Thursday's arguments are any indication, we are not nearly disenchanted enough. Even here, in a nation that pioneered the very idea of citizen self-government in which no person is above the law, our most powerful legal minds seem tempted to hand it all back to mystification and humbug.

Humanity was a long time in gaining equality with its rulers. It won't be easy to win back.