
The Accidental Defender of the Constitution

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A Review of:

Defender in Chief: Donald Trump's Fight for Presidential Power, by John Yoo
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Other Views:

- Julian E. Zelizer, *The Many Varieties of Donald Trump*, N.Y. TIMES, (Aug. 5, 2020), <https://www.nytimes.com/2020/08/05/books/review/gerald-f-seib-we-should-have-seen-it-coming-john-yoo-stuart-stevens.html>.
- Louis Fisher, *Defender in Chief: Donald Trump's Fight for Presidential Power*, LEGBRANCH.ORG, (Aug. 12, 2020), <https://www.legbranch.org/defender-in-chief-donald-trumps-fight-for-presidential-power/>.
- Gene Healy, *Book Review: John Yoo: The Man Who Would Make the President King*, CATO, (Sept. 24, 2020), <https://www.cato.org/publications/commentary/book-review-john-yoo-man-who-would-make-president-king>.
- Jane Chong, *Donald Trump, Constitutional Grift, and John Yoo*, WASH. MONTHLY, (Sept. 11, 2020), <https://washingtonmonthly.com/2020/09/11/donald-trump-constitutional-grift-and-john-yoo/>.
- Matt Ford, *John Yoo's Twisted Path to Trumpism*, THE NEW REPUBLIC, (July 22, 2020), <https://newrepublic.com/article/158589/john-yoo-twisted-path-trumpism>.

Decades from now, when historians assess Donald Trump's presidency with sobriety and dispassion, the ironies are apt to stand out most. Donald Trump is the populist who lost the popular vote, owing his ascendancy to the Electoral College, an institution designed to temper popular excesses and which Trump himself, while pondering a presidential bid in 2012, rebuked as "a disaster for democracy." Trump has been condemned as the Constitution's scourge by progressives for whom the Constitution is mostly a nuisance to evolve beyond, framed by white racists in a time before Wokeness. Trump is the president who upheld the rule of law by firing the FBI director. He submitted to investigation by a special counsel whom he reviled but who nevertheless cleared him. Trump was impeached anyway by Democrats who were pushed into the exercise by partisans. But Democratic partisanship proved so devoid of appeal outside the activist Left that impeachment, though it happened just a few months earlier, rated nary a mention in the Democratic National Convention.

Is it any wonder that these four years have aged most of us tenfold?

We're not through with the ironies, though. For present purposes, here is the most striking one: Through all of this, President Trump's most compelling defender may be John Yoo, a brilliant conservative thinker who appeared to have both feet firmly planted in Camp Never Trump when the president took office in 2017.

John Yoo is the Emanuel Heller Professor of Law at the University of California's Berkeley Law School, where it is not easy to be a conservative academic, but anti-Trumpers are welcome. Professor Yoo is a nonpareil scholar of the presidency—in particular, of executive power as conceived in the Constitution and practiced through more than two centuries. He is a prolific author, his grasp of his core concentration immeasurably enhanced by service as a high-ranking Justice Department official. He played a pivotal role in national security policy development in the post-9/11 era, when President George W. Bush grappled with the vexing challenges of international jihadism, often with ferocious partisan opposition in Congress.

It is fair to say that *Defender in Chief: Donald Trump's Fight for Presidential Power* is a book Yoo never thought he'd write. Fair because he says so himself, right up front: "If friends had told me on January 21, 2017, that I would write a book on Donald Trump as a defender of the Constitution, I would have questioned their sanity."

But write one he has, and it is stellar.

Impeachment is not the only reason that Donald Trump has had to fight for the right to wield the presidential power he won in 2016. He has had to fight for it against an opposition party that has labored to cast doubt on his legitimacy; against a judiciary teeming with progressive activists who have portrayed him as sui generis and thus without entitlement to the comity and presumption of regularity accorded to other presidents; and

against the sprawling administrative state, including executive branch agencies he nominally controls.

Yoo's thesis is that, by waging these battles, Trump has safeguarded the presidency as the Framers envisioned it when they crafted our founding law. Two things must be borne in mind about that.

The first is that this is not Trump's conscious objective. Even the most ardent Trump supporters acknowledge that their man, a non-lawyer, is no expert on the Constitution, let alone on the Framers' conception of executive power. As Yoo recounts, Trump could only guess at the number of articles in the document (it is seven, not the eleven or twelve he estimated). It is not unheard of for the president to mangle fundamental principles in the stray tweet or ad-lib. The euphemism customarily attached to him is that he is "transactional"; he does not look at politics, let alone the constitutional framework in which politics plays out, in ideological or theoretical terms.

Yoo is quite right that, contrary to his political opposition's dire predictions and studied outrage, Trump has turned out to be a staunch defender of the Constitution. His excrescences—some necessary disruptions of Washington's way of doing business, some the inevitable fallout of unsavory character traits—have "broken political norms." Yet, Yoo stresses, Trump "did not seek to break constitutional understandings." Instead, "[h]e has returned to the Framers' original vision of the presidency as an office of unity, vigor, and independence." In so doing, Trump "may have done the nation his greatest service" by "securing the benefits of an energetic executive for his successors."

Perhaps so. This, however, is an accident of the Framers' design. Trump's opponents have sought to undermine him in abusive and novel ways. He has taken refuge in the Constitution because its authors fashioned it as the antidote to such antics. Its system of divided powers and competing checks is based on the assumptions that governmental officials will exceed their authority at the expense of other officials, and that the aggrieved must be empowered to defend themselves. Trump's concrete experience bears out those prescient assumptions. He did not start out with a purpose to vindicate our founding law. He inexorably gravitated to it as he sought to vindicate *himself*.

The second thing to bear in mind flows from the first: *Defender in Chief* is at least as much about the *presidency* as it is about the *president*. To be sure, the canvas is sketched by President Trump's peculiar struggles. His November 2016 triumph was secured through a state-driven majority in the Electoral College despite his being thumped in the popular vote. There have been revolts from within and without—from the executive policy bureaucracy as well as the law enforcement and intelligence apparatus; from a special counsel insulated from Justice Department supervision; and from the judiciary. And Trump is just the fourth president in American history to face a serious congressional impeachment investigation, and only the third to be formally impeached.

Yoo recounts these episodes in faithful detail, but they mainly serve as his jumping-off points. Their importance lies not in how the Trump presidency has been shaped by its crises, but in how those crises have tested the executive authority established by the delegates to the 1787 convention in Philadelphia.

That is not to say *Defender in Chief* shies away from analysis of the Trump policy menu. Indeed, among the book's valuable insights is Yoo's explication of a coherent "Trump Doctrine" on foreign relations—a detectable shift away from America as the selfless (and increasingly debt-plagued) guarantor of global stability, and toward an America unapologetically pursuing her own interests, impatient with free-riding allies and remote conflicts. Still, the book's focus is the Constitution's framework rather than president's preferences. The author thus finds himself in deep disagreement with some Trump initiatives while nonetheless defending the chief executive's prerogative to press them.

The fact that one can oppose a policy while vindicating the executive's discretion to adopt that policy is a testament to the Framers' genius in designing a governing system for a free people. One needn't agree, for example, with Trump's skepticism about NATO, his "trade wars," or his immigration restrictionism to grasp the imperative of having policy made by a unitary, democratically accountable president, rather than by anonymous but willful bureaucrats. In preserving the prerogatives of the presidency, Trump has preserved the Constitution's balance of powers. In light of the Framers' understanding that the separation of powers is the primary bulwark against tyranny, Trump's defense of presidential power is a defense of liberty itself.

In Yoo's telling, the president's battle for the Constitution has played out on three stages. The first was his two-part fight to stave off impeachment: The drawn-out, Obama administration-authorized FBI probe that eventually became the investigation overseen by Special Counsel Robert Mueller, followed by the partisan Ukraine kerfuffle. Secondly, Trump has faced down opposition by entrenched national-security and foreign-service bureaucrats—collectively known as the "interagency"—who chafe at traditional executive leadership in foreign affairs and war. Third was the gladiatorial arena into which Congress devolved over judicial appointments, especially those of Neil Gorsuch and Brett Kavanaugh to the Supreme Court. These and lower court appointments, Yoo surmises, could restore the original understanding of the Constitution to its proper place as the foundation for deciding questions of governmental power and individual liberty.

Again, Yoo's frame of reference is executive power. The underlying facts of Trump's brouhahas are pertinent, but Yoo is doing constitutional law more than history. My own book, *Ball of Collusion* (which Professor Yoo graciously mentions), digs into the history and focuses on the dangers of an incumbent administration's exploitation of counterintelligence spying powers against its political opposition. Yoo, by contrast, homes in on the threat the Trump-Russia investigation posed to the separation of powers. Consequently, he focuses on Trump's vindication of the chief executive's right to fire such subordinates as FBI Director James Comey and Special Counsel Mueller—the president actually dismissed the former and claimed authority to dismiss the latter—even as he applauds Trump for allowing Mueller to complete his investigation.

The sordid details of the story can obscure the central importance of the president's right to fire subordinates. The Constitution's chief concern is liberty. One way it protects

liberty is by vesting in the president *all* executive power, and that protection will be undermined if we tolerate encroachments on that vesting. The flipside of this is that it is only *executive* power that is vested in the president; he does not make the laws he executes, but Congress does. Yoo fondly recalls the late, great Justice Antonin Scalia's observation that "every tinhorn dictator" has a beautiful bill of rights, but it's the separation of powers that protects liberty.

As students of Machiavelli, Locke, Montesquieu, and Blackstone, the Framers were convinced that the combination of legislative and executive authority in one set of hands was the very definition of tyranny. To permit Congress to strip away a president's control of the executive branch by limiting his capacity to fire subordinates—officers who do not exercise their own power but only power delegated to them by the president—would indulge what Alexander Hamilton saw as the gravest threat to the separation of powers: The "legislature's propensity to intrude upon the rights and to absorb the powers of the other departments." That would be particularly egregious as applied to matters touching on law enforcement. As Yoo explains, Article II of the Constitution vests the executive power in the president without qualification. At the time of the founding, the enforcement of law was unquestionably a core executive power. Were there any doubt, Article II goes on to enumerate the president's duty to "take Care that the Laws be faithfully executed."

Equally tending toward tyranny would be the exercise of law enforcement power absent political accountability. A century of progressive governance has ingrained in federal law enforcement an ethos of independence now metastasized into arrogance. Its self-image is that of a fourth branch of government: the rule of law personified, untouchable by grimy politics.

For administrative state enthusiasts, it is a quaint formality that the police power is assigned to the executive branch. In effect, they reject the premise that the Justice Department and its premier investigative component, the FBI, are answerable to the president, which is the only thing that makes them, like him, accountable to voters who bear the brunt of law enforcement policy. Moreover, those who would free DOJ and the FBI from the president's control ignore that a big chunk of what the bureau does—namely, counterintelligence—is not actually a law enforcement function to vindicate the rule of law, but rather a domestic security mission that supports the president's core constitutional duty to protect the nation. Instead, they see the Attorney General as the public's lawyer, not the president's, and the FBI as guided solely by "the law"—an abstraction with little meaning but what is supplied by partisan politics.

This bureaucratic ideal provides a mirage of stability at the expense of the liberty derived from the separation of powers. Yoo discusses progressive scholars who see Article II's vesting of executive power in the president as essentially titular. The chief executive is a single person whose title is president, but beyond that, the president is granted very few, narrow enumerated powers: to take care that the laws be executed, to issue pardons, and to be the commander-in-chief. The executive is essentially bereft of inherent authority, functioning as the junior partner in a power-sharing arrangement with Congress, which holds a reservoir of "necessary and proper" power to determine the means of exercising

federal authority. Such a vision of executive power, along with the idea that *executive* power is distinct from *administrative* power, would render the Constitution, as Yoo puts it, "a loose system of checks and balances that gives Congress room to create new institutional designs to govern the administrative state and limit the growth of the presidency."

Yoo persuasively contends that the original meaning of executive power is best illustrated by then-Treasury Secretary and executive visionary Alexander Hamilton in his defense of President Washington's 1793 Neutrality Proclamation, which kept the United States out of Europe's burgeoning war. The Vesting Clause states a general grant of executive power in its historical abundance. The subsequently enumerated powers (including the Take Care Clause) "specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant." Thus, "the Executive Power of the Nation is vested in the President; subject only to the exceptions and qualifications" expressed elsewhere in the Constitution. These exceptions are to be narrowly construed. Consequently, in the case of President Trump, the president may not appoint top executive officers without Senate consent because the Constitution says so; however, as the Supreme Court held in *Myers v. United States* (1926), the president may fire such officials at will, because the Constitution is silent on dismissal—the chief executive's authority is presumed, and there is no implied requirement of Senate approval.

The Constitution, in sum, commands an energetic, unitary executive, who participates in the separation of powers to uphold liberty, and who is responsible for the actions of subordinates—whom he must be able to dismiss at will. The last point is important because most executive branch officials are not elected, but appointed by the president; to maintain accountability to the people, the president must be able to dismiss these subordinates for any reason, and the voters must be the ones to determine the appropriateness of those reasons in the next presidential election. This is the framework that President Trump preserved by firing Director Comey, reining in an FBI that flouted limitations on its awesome law enforcement and counterintelligence powers and waded without sufficient predication into the republic's electoral politics. Similarly, Trump defended the framework by maintaining—despite congressional, administrative, and media caterwauling—his authority to dismiss the special counsel, although he wisely (or, more accurately, through the prudent intercession of White House staffers and informal advisers) refrained from exercising that prerogative. By not only allowing Mueller to complete his investigation but also cooperating with it—for example, by waiving executive privilege and making the White House Counsel available for extensive prosecutor interviews—the president avoided a suicidal political misstep. He ended up being convincingly cleared of conspiring with the Kremlin.

In considering Trump's conduct of foreign relations, Yoo persists in the leitmotif of robust presidential power: the Constitution's design of an executive with "advantages of unity, speed, and decision, specifically so that it could protect the national security and pursue our interests abroad."

Some changes wrought by President Trump have been

“earth-shattering.” Under the Obama administration, American fortification of the liberal international order had evolved into American decline in favor of multilateral governance arrangements. In prioritizing American sovereignty, Trump is determined to reverse the decline and skeptical about global governance. In his view, international organizations and their aspirational but practically unenforceable agreements promote bureaucratic sprawl, but not security and liberty. Furthermore, the progressive piety that enlightened engagement with rogue regimes would evolve them into responsible actors has proved delusional. The rogues cheat, provoke, and pose increasing threats to a United States tied down by herculean efforts to uphold outdated or ill-conceived international commitments.

It is hyperbole to claim, as Trump critics do, that his response is isolationism. There has, however, been a retrenchment in furtherance of an “America First” national security strategy. The primary focus is on protection of the homeland, with an emphasis on border security and enforcement of the immigration laws. There is more focus on great power competition, and diminished interest in collective efforts to combat jihadism, transnational crime, and climate change. Rather than striving for global stability, Trump expects reciprocity—fair (rather than free) trade and allies who pony up for the privilege of the American security umbrella they enjoy. The president seeks to strengthen American military might, cyber and space capabilities, and prowess in the technological, energy, and manufacturing sectors. The more removed a foreign concern or conflict is from American interests, the more apt it is to be addressed only by quiet diplomacy, with no commitment to act. Rivals are alternatively courted and threatened; allies are goaded to do more for themselves.

Thus, the withdrawal from the Iran nuclear deal, the Trans-Pacific Partnership, and the Paris Accord on climate change. A trade war with China, and tariffs used to pressure even friends. Moscow stung by the U.S. abrogation of a Reagan-era treaty on nuclear arms and provision of lethal weapons to Ukraine; but Moscow simultaneously cajoled by entreaties for better relations—potentially including a new nuclear arms pact. Missile strikes, without congressional authorization, against the atrocious Assad regime in Syria, even as American forces are gradually withdrawn from the region. A dizzying switch from the threat of war with the “little rocket man” in North Korea to an unlikely Trump-Kim Jong-un bromance, the ultimate utility or foolishness of which remains to be seen. A strong backing of Israel, including moving the U.S. embassy to Jerusalem (which administrations of both parties have long promised, but which only Trump was willing to do against the “interagency” conventional wisdom); this has led, not to the catastrophe predicted by experts, but to dramatically improved relations between Israel and Sunni Islamic states—the better to contain Iran.

As Yoo demonstrates, Trump has been able to carry out his doctrine, and thus deliver on campaign promises, because the Framers conceived of the executive power as including foreign affairs supremacy. That is, the executive power is subject to the significant congressional checks spelled out in the Constitution, but only those checks. For example, the president cannot make treaties without Senate approval, but he does not need Senate input to abrogate them.

As with law enforcement, the Constitution’s silence in the domain of foreign relations implies exclusive executive authority because that is a traditional executive function. This does not lead to an imperial presidency. Congress retains powers of the purse and over legislation, and thus the ability to kill presidential initiatives that need funding and statutory authorization. Lawmakers can conduct aggressive oversight. And, as we’ve recently seen, Congress may impeach the president over alleged misconduct in foreign relations. But these checks are essentially political, not legal. In fact, to the extent there have been legal controversies over Trump’s border security policies and limitations on foreign ingress into the United States (the so-called travel ban and refugee restrictions), these have been muted because Congress—recognizing the imperative of decisive executive action in crisis conditions—has endowed the presidency with sweeping statutory authority.

Yoo makes three further related points about the relationship between Congress and the president in the realm of foreign affairs. First, Yoo rehearses his contention that the Constitution’s vesting in Congress of the power to *declare* war is not the power to *initiate* war, which largely rests with the president. (This topic was central to Yoo’s excellent 2006 book, *The Powers of War and Peace*). Second, Yoo develops a deft separation of powers theory based on whether the Framers placed an authority in Article I or Article II. For example, the treaty power, located in Article II, is essentially executive but with an ancillary legislative function (the Senate’s “Advice and Consent” role); whereas the power to enact law, located in Article I, is essentially legislative but with an ancillary executive function (the president’s veto power, which can be overridden by a congressional supermajority).

Third, Yoo gives careful consideration to the Trump impeachment. House Democrats accused the president of abusing his powers by enmeshing a reluctant foreign government in American electoral politics and, as a pressure point, delaying the transfer of congressionally appropriated defense assistance that Ukraine needs to defend its border from Russian aggression. One need not endorse the president’s actions, nor adopt Trump’s description of his performance as “perfect,” to appreciate that his dealings with Ukraine fell short of impeachable offenses. The Framers made impeachment and removal extraordinarily difficult to carry out because they were to be reserved for egregious executive wrongs that provoke dire crises. Less than a year out from a presidential election, under circumstances where Trump did finally provide the defense aid to Ukraine, impeachment was overkill. The episode caused no harm to our security and, if the public were upset about it, it could vote Trump out of office.

It was vital, Yoo argues, for Trump to defend the presidency by fighting his impeachment. Doing so reaffirmed the unitary executive, as opposed to the vaunted policy community, as the organ of democratically accountable foreign policy in a free republic. In addition, by prevailing, Trump safeguarded the Constitution’s design of the presidency against congressional partisans all too willing to convert impeachment into a tool of quotidian political combat.

The president’s many judicial appointments may be his most enduring legacy and therefore, from Yoo’s perspective, his most consequential defense of the Constitution. With the indefatigable assistance of Majority Leader Mitch McConnell

in the Republican-controlled Senate (exploiting the decision of Democrats, under former Majority Leader Harry Reid, to do away with the filibuster in most judicial confirmations), Trump has filled vacancies on the bench at a record-making pace.

As Yoo points out, the enterprise has not been as transformative as it may appear at first blush. The majority of Trump's judges have filled slots previously held by appointees of other Republican presidents. Trump would have to be reelected to shift the ideological orientation of several important appellate tribunals. Still, Trump has made his mark by stressing, more than any of his predecessors, the imperative of a more conservative, originalist judiciary to preserve our constitutional order. He has been uniquely transparent about relying on the expertise of the Federalist Society and the Heritage Foundation in identifying worthy, young nominees who can reasonably be expected to serve for decades. Trump likely would not have been elected but for the untimely death of Justice Scalia, which placed in sharp relief for the electorate the very different visions of the judiciary held by the competing parties. Voters animated by democratic self-determination were alarmed at the types of judges Hillary Clinton would undoubtedly have appointed. That was Trump's opening.

The president has not only appointed originalist judges, he has fought for them. Many presidents would have abandoned the pitched battle over then-Judge Kavanaugh's nomination to replace Justice Anthony Kennedy. Democrats turned the affair into an appalling brawl, taking character assassination to an unprecedented level—which, after the Robert Bork and Clarence Thomas nomination fights, is saying something. So deep-seated is the hostility to Kavanaugh that, though unable to derail his nomination, leading Democrats have vowed to explore impeaching him. Beyond that, with the objective of overcoming the Trump/McConnell confirmation conveyor belt, Democrats are openly resorting to their FDR playbook: threatening to expand the High Court and pack it with liberal Democrats when they are in power. This is such a radical strategy for politicizing court decisions that even Roosevelt, at the height of his powers following an overwhelming 1936 election victory that left him with supermajorities in both houses of Congress, had to back down after proposing it.

Trump's duels with his opponents over judges, then, have upheld the Constitution in crucial ways. By facing down impeachment threats and court-packing schemes, Trump has reinforced judicial independence, which, as Yoo points out, stabilizes democracy and secures minority rights. Further, the president has vindicated separation of powers principles by ensuring that the Senate could not exploit its advice and consent authority to, in effect, usurp the chief executive's power to appoint judges. Finally, by putting a premium on the installation of judges who will uphold the Constitution's protection of individual liberty against government overreach, Trump has defended the Framers' design and the core rights of Americans to life, liberty, and security.

Has all of this been in the president's self-interest? Without a doubt. Donald Trump did not come to power as a crusader for the Constitution. He is self-driven and without reverence for the norms of his office. Politically, he is motivated to disrupt Washington's established order, to revitalize American sovereignty, and to recalibrate America's interactions with the world in a way

that elevates America's interests. He made no secret of this, and it is what his core supporters elected him to do.

As John Yoo demonstrates in this scintillating study, that is the way liberty is vindicated in our governing system. Without the Constitution, President Trump could not have pursued his agenda. Without defending the Constitution, the Trump presidency could not have survived.

