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The Roberts Court & Executive Power

Jeffrey Rosen*

I am delighted to be here at Pepperdine where I know that all of my questions about the mystery of the Roberts Court will be answered. Dean Kmiec, in his kind introduction, said this is a Court of nine ruled by one. And in cases involving executive power, this pattern holds. The views of Justice Kennedy on executive power in the domestic and foreign spheres are indeed defining the direction of the Roberts Court.

Broadly, we have four more conservative Justices who seem inclined to defer to the executive branch not only in foreign affairs, but also in contested interpretations of domestic statutes. Consider, for example, the *Massachusetts v. EPA*¹ case, construing the EPA's power to regulate global warming,² and the *Gonzales v. Oregon*³ case in which the Attorney General, John Ashcroft, attempted to construe a federal law to prohibit doctors from prescribing drugs to cause death in compliance with the Oregon "Death with Dignity" law.⁴

In these foreign and domestic cases, there were four more liberal Justices who were more skeptical of executive power, and they were sometimes joined by Justice Kennedy who provided the important fifth votes.⁵ What is the source of Justice Kennedy's vision of executive power, and how can his vision be distinguished from those of his more conservative and liberal colleagues?

The answer may have something to do with the formative intellectual and professional experiences of the Justices in question. For the four conservatives, those formative experiences were shaped by what is now called the theory of the unitary executive. It was, after all, in the post-

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1. 127 S. Ct. 1438 (2007).

2. *Id.* at 1459.

3. 546 U.S. 243 (2006).

4. *Id.* at 248-49.

5. *Id.* at 247; *see also Massachusetts v. EPA*, 127 S. Ct. at 1444.

Watergate era that Justice Scalia, the head of the Office of Legal Counsel,⁶ and Vice President Cheney, then President Ford's Chief of Staff,⁷ became suspicious of the excesses of what they perceived as congressional oversight.⁸ They thought the presidential prerogatives were being usurped and they became committed to defending the president's control over domestic agencies against congressional assault.⁹ In the mid-1970s, Scalia, Cheney, and other young conservatives were alarmed by the War Powers Resolution and other laws that the post-Watergate Congress had passed to constrain the President.¹⁰ They were particularly distressed when Congress voted to cut off funding for South Vietnam in 1975, which they felt undermined President Ford's foreign policy.¹¹ When Cheney went on to serve as a Republican congressman from Wyoming in the 1980s, the Iran-Contra scandal reinforced his determination to defend executive power.¹² In the minority report to the Iran-Contra hearings, Cheney and his aide David Addington argued that most of what President Reagan did during the scandal was legal.¹³

During the Reagan administration, a group of younger conservatives, which included Chief Justice Roberts and Justice Alito, at the Office of Legal Counsel ("OLC") and the White House Counsel's Office, asserted a theory of the unitary executive which said that the President had to have the power to fire any executive officer.¹⁴ Under the leadership of Ted Olson and Charles Cooper, with the help of deputies like Alito, the OLC vigorously asserted the constitutional powers of the unitary executive.¹⁵

6. The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Jan. 22, 2008).

7. Biography of Vice President Richard B. Cheney, <http://www.whitehouse.gov/vicepresident/vpbio.html> (last visited Jan. 22, 2008).

8. See, e.g., JAMES B. STAAB, *THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA* 11-12 (2006) (quoting Justice Scalia in 1976: "While I question neither the legitimacy nor the desirability of the congressional oversight function, . . . it should, in my view, be subordinate to the function of legislating. You might ask yourselves when you read the daily newspapers how many of the congressional activities which are reported pertain to the difficult and politically risky process of hammering out specific and detailed legislative proposals, and how many consist of much more scintillating inquiries into alleged executive malfeasance or inefficiency . . .")

9. See *id.* at 9-13.

10. See Scott Shane, *Recent Flexing of Presidential Powers Had Personal Roots in Ford White House*, N.Y. TIMES, Dec. 30, 2006, at A13, available at <http://www.nytimes.com/2006/12/30/washington/30roots.html>.

11. See Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, THE NEW YORKER, July 3, 2006, available at http://www.newyorker.com/archive/2006/07/03/060703fa_fact1.

12. See *id.*; see also Shane, *supra* note 10.

13. See Shane, *supra* note 10.

14. See Jeffrey Rosen, *Power of One*, THE NEW REPUBLIC, July 24, 2006, at 8.

15. See *id.*

Steven Calabresi, an assistant to Attorney General Ed Meese, was the first to defend the idea of the “unitary executive” in a law review article in 1992.¹⁶ The initial goal of the unitary executive theory was to assert the President’s complete control over the executive branch in the face of assaults by a Democratic Congress—in particular the Independent Counsel Act, which unitary executive theorists considered unconstitutional.¹⁷ In 1988, the American Enterprise Institute held a conference on “The Fettered Presidency,”¹⁸ which was later published as a book that began: “The office of the president of the United States has been significantly weakened in recent years and . . . Congress is largely, but not entirely, responsible.”¹⁹ That same year, the Supreme Court rejected the Reagan administration’s claim that the Independent Counsel Act was unconstitutional—by a decisive 7-1 vote.²⁰ The decision was written by William Rehnquist, who as a law clerk in the 1950s had objected to the centralizing excesses of President Roosevelt.²¹ The only dissenter was Scalia, a former head of the OLC under President Ford.²² The debate highlighted a generational divide: conservatives who came of age during the New Deal era and its immediate aftermath viewed the presidency as a harmful institution, while those who came of age in the 1970s and 1980s viewed it as preferable to an overreaching Congress.²³

Born in 1936, Justice Kennedy straddled this generational divide.²⁴ As a young lawyer, he made his name lobbying and practicing private law in Sacramento,²⁵ rather than practicing public law in Washington. His worldview was not centrally shaped by the reaction to Watergate. And most important, he has a more skeptical vision of executive power, and a more romantic vision of the judiciary’s duty to check executive excesses in order to preserve longstanding liberties.

16. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1153 (1992).

17. See Rosen, *supra* note 14, at 8.

18. See *id.* at 9.

19. Robert H. Bork, *Foreword to THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* ix (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989).

20. See *id.* at 9 (referring to *Morrison v. Olson*, 487 U.S. 654, 659 (1988)).

21. See Rosen, *supra* note 14, at 9.

22. See *id.*

23. See *id.*

24. See Oyez: Anthony M. Kennedy, U.S. Supreme Court Justice, http://www.oyez.org/justices/anthony_kennedy/.

25. See *id.*

These generational and intellectual divisions came to a head in the *Hamdan v. Rumsfeld* case, decided in 2006.²⁶ Although the Bush Administration lost, one could trace in the Justices' opinions the evolution of conservative thought on executive power over the past few decades. Concurring with the majority, Justice Kennedy wrote that the Administration's use of military tribunals in the war on terrorism "is not a case . . . where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government . . . has . . . set limits on the President's authority."²⁷ Justice Thomas, joined by Justices Scalia and Alito, filed a passionate dissent, calling the idea that Congress could second-guess the President's authority as Commander-in-Chief "antithetical to our constitutional structure."²⁸

The generational divide was telling: Kennedy represents an older wave of conservatives who never served in the executive branch and who associate the presidency with the liberal nationalizing excesses of the New Deal and the Great Society. By contrast, the unitary executive proponents—Thomas, Scalia, Alito, and possibly Chief Justice John Roberts (who recused himself from this Supreme Court case because he had ruled against Hamdan while on the D.C. Circuit)²⁹—all served in the Ford or Reagan Administrations.³⁰ And during that time, these Justices came to see a strong presidency as the only way to defend conservative ideals from the encroachments of a Democratic Congress, liberal courts, and obstreperous bureaucrats.

In his majority opinion in *Hamdan*, Justice Stevens explicitly rejected the Bush Administration's most extreme view of executive unilateralism. Citing Justice Robert Jackson's famous opinion striking down President Truman's effort to seize the steel mills in 1952, Justice Stevens declared, "Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."³¹

Justice Stevens' vision of executive power was centrally shaped after World War II when, as a law clerk to Justice Wiley Rutledge, he wrote or

26. *Hamden v. Rumsfeld*, 126 S. Ct. 2749 (2006).

27. *Id.* at 2799 (Kennedy, J., concurring).

28. *Id.* at 2823 (Thomas, J., dissenting, joined by Scalia & Alito, JJ.).

29. *See id.* at 2758-59 (majority opinion). *See also* *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 10 (D.D.C. 2006).

30. The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/bigographiescurrent.pdf> (last visited Jan 17, 2008).

31. *Hamdan*, 126 S. Ct. at 2774 n.23 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

studied important dissents in which Justice Rutledge had questioned the haste with which the Court endorsed procedurally dubious war crimes trials.³² In particular, Stevens worked with Rutledge on his dissent from a 1948 opinion upholding the right of the Attorney General to deport German nationals he considered Nazis without any review by federal courts.³³ Stevens cited Rutledge's dissent when he wrote a landmark majority opinion in the 2004 *Rasul* case, which allowed foreign nationals held at Guantanamo Bay to challenge their detentions in United States courts.³⁴

Stevens was also influenced by Rutledge's dissenting opinion in the *Yamashita* case in 1946, where the Court upheld the power of a military commission to try and execute a Japanese general in the Philippines in violation of the Geneva Conventions.³⁵ Emphasizing the dangers of denying anyone within American jurisdiction a fair trial, Stevens once again cited Rutledge's dissent in Stevens' landmark opinion in the *Hamdan* case, which Kennedy joined.³⁶

Stevens continued to court Justice Kennedy in the deliberations about whether to hear the most recent cases involving challenges to the Military Commissions Act of 2006. Initially, both Stevens and Kennedy voted not to hear the case, believing the litigants had not exhausted their congressionally specified remedies; but in a joint statement respecting the denial of certiorari, they quoted a concurring opinion by Justice Rutledge and stressed that these people could not be made to run a gauntlet without end.³⁷ But later, Justices Kennedy and Stevens were persuaded that a gauntlet had been established and run, and they voted together to hear the case.³⁸

Kennedy's view of executive power in domestic cases is similarly committed to preserving liberty against what he perceives as executive assaults. In his majority opinion in *Gonzales v. Oregon*, after all, he objected to the idea that the Attorney General on his own could ban the use

32. See generally JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE 301-19 (2004).

33. *Ahrens v. Clark*, 335 U.S. 188, 193-210 (1948) (Rutledge, J., dissenting).

34. *Rasul v. Bush*, 542 U.S. 466, 477 (2004) (citing *Ahrens*, 335 U.S. at 209 (Rutledge, J., dissenting)).

35. See *In re Yamashita*, 327 U.S. 1, 41 (1946) (Rutledge, J., dissenting).

36. *Hamdan*, 126 S. Ct. at 2796-97 (quoting *In re Yamashita*, 327 U.S. at 44 (1946) (Rutledge, J., joined by Murphy, J., dissenting)).

37. *Boumediene v. Bush*, 127 S. Ct. 1478, 1478 (2007) (statement by Justices Stevens and Kennedy respecting denial of certiorari) (quoting *Marino v. Ragen*, 332 U.S. 561, 570 n. 12 (1947) (Rutledge, J., concurring)).

38. See *Bourmediene v. Bush*, 127 S. Ct. 3078 (2007), *granting cert.*, 476 F.3d 981 (D.C. Cir. 2007) (No. 06-1195).

of prescription drugs to cause death—a regulation Congress itself had refused to enact.³⁹ Does this mean that Kennedy is a partisan of congressional power vis-à-vis the executive? In *Hamdan*, he had suggested that the executive's position would be entitled to greater weight if it were endorsed by Congress.⁴⁰ But Kennedy is no more a congressional supremacist than an executive supremacist. He is a judicial supremacist.

It was Kennedy who, between 1994 and 2000, voted more frequently than any other Justice to strike down federal and state laws.⁴¹ In his sweeping rhetoric, insisting on not only the right, but also the duty of judges, to reject congressional or executive pronouncements that infringe on the judiciary's unique duty to say what the law is, he is the Court's most vocal defender of judicial power.

This is good news in the short run for the liberals who seem to have a fairly reliable ally in their effort to defend congressional prerogatives against executive assaults. Whether the Justices of the Roberts Court will maintain their positions on executive power when we have a new President, on the other hand, remains to be seen.

39. *Gonzales v. Oregon*, 546 U.S. 243, 270-72 (2006).

40. *Hamdan*, 126 S. Ct. at 2799-800 (Kennedy, J., concurring in part).

41. THOMAS KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* 251 (2004).