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OPINION

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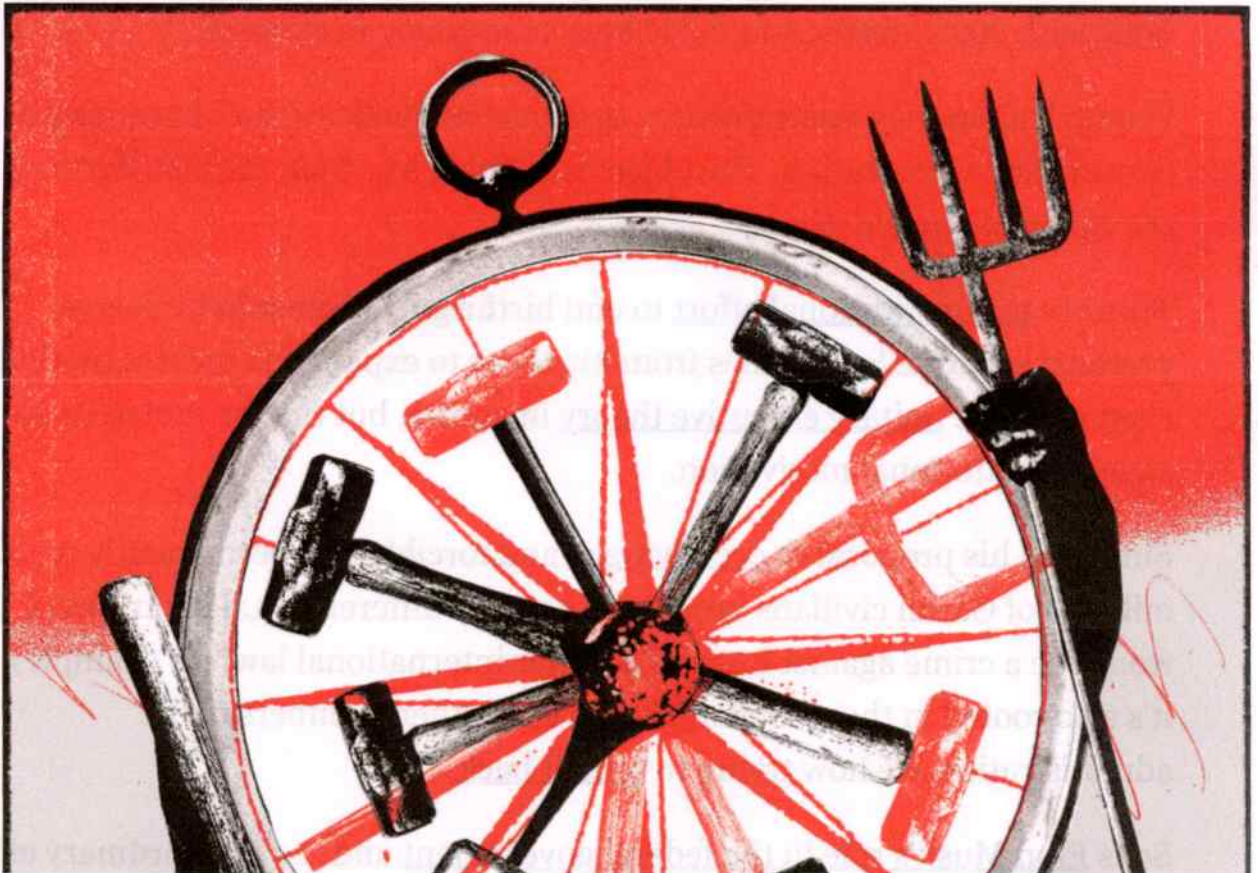




Illustration by George Douglas; source photographs by Arthur S. Aubry and DNY59/Getty Images

## The president is using every tool at his disposal to reshape the American founding



By **David French**

It is a mistake to think of the first two and a half weeks of President Trump's second term as a series of discrete and separate constitutional and legal crises. It is one crisis, with many manifestations. Think of Trump's second term as a kind of legal hydra, in which the defenders of the Constitution are facing one body with many heads, and those heads are acting in concert.

Trump isn't merely issuing orders and enacting policies; he's launching a constitutional revolution. The object is nothing less than the transformation of the American presidency.

Trump's [unconstitutional effort](#) to end birthright citizenship by decree presents separate legal issues from his effort to expand his powers beyond even what the [unitary executive theory](#) imagines, but they're rooted in the same constitutional motivation.

Similarly, his proposal to [occupy Gaza](#) and forcibly and permanently relocate millions of Gazan civilians implicates entirely different legal doctrines (it would be a crime against humanity under international law, for example), but it's also rooted in the same impulse, even if other members of the administration are now trying to [walk it back](#).

So is [Elon Musk's role in the federal government](#) and the extraordinary effort

to impound appropriated funds or [destroy executive agencies](#) established by Congress.

And so is Trump's attempt to push the [edges of his tariff authority](#) and extend congressional trade statutes far beyond their intended scope.

Even the low and spiteful character of so many people who are being hired in the administration is related to Trump's constitutional revolution. He needs people who aren't just willing but also happy to blow through moral and legal guardrails for him.

For example, Secretary of State Marco Rubio just hired a man named Darren Beattie to serve as his acting undersecretary of state for public diplomacy. Beattie has a horrific record of overt racism. On Jan. 6, 2021, he tweeted at multiple Black lawmakers and public figures, [telling them](#) to "learn their place" and "take a knee" before MAGA.

In October, [he posted on X](#), "Competent white men must be in charge if you want things to work. Unfortunately, our entire national ideology is predicated on coddling the feelings of women and minorities, and demoralizing competent white men."

If you follow the news closely, you'll know that this extensive list is woefully incomplete. I could spend months playing columnist Whac-a-Mole with any number of unconstitutional, lawless or immoral Trump initiatives.

That individual analysis will be important. Every case will turn on different aspects of American law, but we can't miss the forest for the trees. When the role of the presidency is at stake, the American founding is at stake.

**It's said that** history is written by the victors, but sometimes we need to read what the losers had to say. Most Americans are taught about the Federalist Papers — the series of essays by Alexander Hamilton, James Madison and John Jay arguing for the ratification of the Constitution.

But the Federalists weren't the only voices in the public square. They were [opposed by the anti-Federalists](#), people who believed the Constitution gave

too much power to the federal government and worried that the original Constitution didn't include a Bill of Rights.

It's wrong to say that anti-Federalists lost entirely. After all, the United States did ratify the Bill of Rights three years after it ratified the Constitution, but they lost the argument over the Constitution itself.

I don't want to rehash the entire debate, and I still stand with the Federalists (the Constitution was a vast improvement over the Articles of Confederation), but an anonymous anti-Federalist who went by the pseudonym An Old Whig has something to say to us now.

[In an essay](#) published on Nov. 1, 1787, he wrote a powerful plea for a Bill of Rights, but finished with a prescient warning about the power of the presidency:

The office of President of the United States appears to me to be clothed with such powers as are dangerous. To be the fountain of all honors in the United States, commander in chief of the army, navy and militia, with the power of making treaties and of granting pardons, and to be vested with an authority to put a negative upon all laws, unless two thirds of both houses shall persist in enacting it, and put their names down upon calling the yeas and nays for that purpose, is in reality to be a KING as much *a King as the King of Great Britain*, and a King too of the worst kind — an elective King.

An Old Whig overstates his case. Even the president's considerable powers didn't place him in the same place as Britain's monarch, much less the even more powerful king of France, but he was exactly right on his core point: The powers granted to the president in the Constitution are great enough that an unscrupulous man or woman in the Oval Office can place an extraordinary strain on the country.

By now, this observation almost seems quaint. The steady expansion of presidential powers has already placed a strain on American democracy. But where previous presidents walked Trump now runs — the era of incremental

presidential power grabs is over.

An Old Whig is also right to highlight the unique danger of an *elected* autocrat. If the president becomes too powerful, every election becomes a struggle for near-total control over the Republic. It elevates the stakes of electoral contests to an unsustainable level and creates an irresistible temptation to abandon democracy entirely.

The early American answer to An Old Whig's concerns about the presidency was a person and an institution.

The person was George Washington. The institution was Congress. Washington's role as the first president wasn't just to govern the executive branch but also to create a precedent. Washington's dignity and restraint (including his decision to step down after two terms) established more than a mere norm — they established an honor code.

While many American presidents have tested the boundaries of their powers in discrete ways, few American presidents (outside the context of the Civil War or the world wars) have comprehensively pushed the exercise of their power to its absolute limit. The honor code has largely held.

Even the most corrupt president before Trump — Richard Nixon — pushed much of his imperial presidency from behind closed doors. He knew that if his misconduct came to light, he'd pay a steep price.

Trump is different. His defiance lies in plain view. There is no dignity. There is no restraint. There is only power.

The founders knew that not every president would be George Washington, and they built in the ultimate check on presidential power: an independent branch of government that could override and even remove the president.

But just as Washington's voluntary decision to limit his own authority depended on an exercise of personal character, so does the decision to contradict, much less impeach and remove, a president of your own party. And if a scheme to overturn a presidential election that culminates in a violent

assault on the Capitol isn't misconduct severe enough to merit conviction, then what is?

Again, the contrast with Nixon is instructive. He resigned after he knew that party leaders were abandoning him. He faced the very real possibility of bipartisan impeachment and bipartisan removal. Trump does not.

**There's one last** federal check remaining: judicial review. The doctrine is so important that one can think of the founding as unfolding in three distinct phases. First, we ratified the 1787 Constitution, which established a republican form of government. Next, we ratified the Bill of Rights, to create explicit protections for individual liberty.

Finally, the Supreme Court decided [Marbury v. Madison](#) and established the principle of judicial review, the power of the Supreme Court to definitively declare the meaning of the Constitution and nullify any law or official act that contradicts it.

In theory, that last guardrail still stands. But as Jack Goldsmith and Bob Bauer argue in a [chilling new piece](#) in their newsletter, Executive Functions, Trump may not be using his executive orders to manufacture a series of test cases designed to check the limits of his power; he may instead be "seeking to effectuate radical constitutional change."

Goldsmith and Bauer argue specifically that the Trump administration may be attempting "to instill fear in the Supreme Court that the presidency is prepared to resort to outright defiance of its decisions."

Neither person is prone to hot takes or constitutional alarmism. Goldsmith is a Harvard Law School professor and a former assistant attorney general for the Office of Legal Counsel in the George W. Bush administration; Bauer served as White House counsel for Barack Obama between 2009 and 2011.

They quote one of Trump's most influential advisers, Russell Vought, as arguing that the right "needs to throw off the precedents and legal paradigms that have wrongly developed over the last 200 years and to study carefully the words of the Constitution and how the founders would have responded in

modern situations to the encroachments of other branches.”

In addition, the executive orders themselves are too poorly drafted to serve as effective vehicles for test cases. They attack the Constitution not with a scalpel but with a sledgehammer. Goldsmith and Bauer note that the executive orders are not being drafted and implemented according to regular order, and they ask: “Where are administration lawyers?”

Goldsmith and Bauer are careful to hedge their analysis. It’s speculation, yes, but it’s informed speculation buttressed by evidence. And Vought [is not alone](#).

**As we watch** unprecedented events unfold, it’s important to shift our political paradigm. I’ve been concerned for a long time that Trump and his MAGA movement have fully internalized the morality of the ends justifying the means.

That’s certainly still an element of Trumpism. It’s a universal temptation in politics and an almost omnipresent element of populism, but now I’m beginning to wonder whether the means are the ends. In other words, he’s not breaking the constitutional structure to achieve concrete policy goals; breaking the constitutional structure *is* the policy goal.

In his 2019 book, “The Conservative Sensibility,” [George Will writes](#), “The proper question for conservatives is: What do you seek to conserve? The proper answer is concise but deceptively simple: We seek to conserve the American founding.”

I hope that the argument in this newsletter is wrong — that we’re not witnessing an attack on the American founding as much as a shotgun blast of populist incompetence. I hope that Trump will do what he did for most of his first term and yield to a Supreme Court that rejected his legal arguments more than those of any other modern president.

But hope is not a strategy. When a president’s close allies declare their intention to “throw off” precedents and legal paradigms — 200 years of them — and when the president’s conduct is completely consistent with that revolutionary goal, it’s foolish to think about politics in normal terms, to

evaluate Trump's actions appointee by appointee or executive order by executive order.

There is no clear path forward. There is no four-point plan that will end this threat, but any effective response requires recognizing the magnitude of the danger, and the extent of our national peril is plain — if Americans care to see it.

## Some other things I did

On Sunday, I wrote about the nomination of Kash Patel as F.B.I. director. He's morally and professionally unfit, but it's worse than that — he's a vital cog in Trump's anti-constitutional machine:

There's a problem with simply listing Patel's scandals and crackpot ideas: They actually understate the scale of the threat Patel presents to American law enforcement and American justice. He's no ordinary public official. He would be occupying what is by design one of the most powerful offices in the United States government, and he won't be working alone.

In fact, the things that repel and worry so many Americans about Patel are the very things that attract so many millions of Republicans to Trump. Members of Trump's movement would read my list above and applaud each entry. That's what makes Patel a hero to the MAGA movement, and that's what will help him fit seamlessly into the culture of the Trump White House.

Republican senators should see this moment for what it is — an opportunity to demonstrate the courage necessary to uphold their constitutional role:

Republican senators are heirs to a constitutional tradition that tells them they must exercise their own judgment. They should check the power of the president, especially a president of their own party.

There is no case for Kash Patel. It would be bad enough if he



were merely obsequious and subservient, passively compliant to Trump's demands. But Patel is aggressively subservient. He seeks to pursue Trump's enemies.

Every Republican senator who votes for Patel is abdicating his or her constitutional responsibility. And for what? To please a lame-duck bully? To protect their right flank in a primary? It took immense courage to create our constitutional republic, and now immense cowardice is placing our system of justice under threat.

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