

# [***Trump's immunity case is another reminder that all roads now lead to the Supreme Court***](https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:6BVW-V3G1-DY7V-G0PP-00000-00&context=1516831)

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**Body**

(CNN) &#8212; The Supreme Court's hearing Thursday on [*former President Donald Trump's*](https://www.cnn.com/politics/president-donald-trump-45) immunity claim will underline a historic power shift. In a closely divided era when neither party has proven able to maintain control of the White House and Congress for very long, the six GOP-appointed justices on the high court have become the most durable source of influence determining the nation's direction.

"There's an argument to be made that the Supreme Court is the central character in our national story right now because they are setting the terms by which the other branches and the states and the American people operate in a much more assertive way than perhaps they ever have," said historian Jeff Shesol, author of an authoritative account of President Franklin D. Roosevelt's confrontations with the court during the Great Depression.

Although Chief Justice John Roberts [*at his confirmation hearing famously likened the court to an impartial "umpire,*](https://www.cnn.com/2005/POLITICS/09/12/roberts.statement/)" the conservative majority has steadily steered policy on a wide range of social, racial and economic issues toward the preferences of the Republican Party, whose presidents nominated them and whose senators provided the vast majority of votes to confirm them.

In recent years, the court has produced some rulings that liberals have cheered, particularly before the majority gained a sixth vote when Amy Coney Barrett replaced the late Ruth Bader Ginsburg in 2020. And even after Barrett's ascent, the court in several cases has ruled against Trump, including by rejecting red-state litigation designed to invalidate the 2020 election results.

But throughout the 21st century, the conservative movement has won far more consequential victories at the Supreme Court than it has through legislation or executive branch decisions. Indeed, rulings by the GOP-appointed majority have delivered conservatives victories on issues that Republicans had virtually no chance to achieve through congressional or presidential actions - from retrenching federal voting rights laws and limiting federal and state gun regulation to ending the constitutional right to abortion.

The rulings by the GOP-appointed justices over roughly the past two decades have produced cumulative policy changes "way more extensive than any administration, even within unified control of government, has been able to generate," said Paul Pierson, a University of California at Berkeley political scientist and co-author of the upcoming book, "Partisan Nation: The Dangerous New Logic of American ***Politics*** in a Nationalized Era."

For Democrats, maneuvering around the Supreme Court majority has become an existential challenge, and the final weeks of each court session have become a period of unremitting stress as they await decisions on the year's key cases. This year will produce another such period of tension as the court releases opinions on polarizing cases - including on whether a former president enjoys immunity from criminal prosecution for acts taken while in office.

But however the court eventually rules on Trump's argument, its unhurried handling of the case - which vastly reduces the chances he will face a trial in his federal election subversion case before November - has again demonstrated to many observers its unrivaled influence.

Trump's relationship has been complex with the court's conservative majority - despite his instrumental role in establishing it. In probably the most significant policy case of his presidency, [*the court in 2018 upheld his ban on visitors from Muslim-majority nations*](https://www.cnn.com/2018/06/26/politics/travel-ban-supreme-court/index.html), with the five GOP-appointed justices (at that point) outvoting the four appointed by Democrats. But that same 5-4 court also struck down, on procedural grounds, [*his efforts to add a question on citizenship to the census*](https://www.cnn.com/2019/06/27/politics/census-supreme-court/index.html), and [*his attempt to end former President Barack Obama's program*](https://www.cnn.com/2020/06/18/politics/daca-immigration-supreme-court/index.html) providing legal protection to young people brought to the US illegally by their parents. In each case, Roberts joined the four Democratic-appointed justices to deny Trump.

The court has also drawn Trump's scorn by ruling against him on several cases relating to investigations: [*it allowed Manhattan prosecutors to gain access to his financial records*](https://www.cnn.com/2021/02/22/politics/supreme-court-trump-taxes-vance/index.html) and [*the bipartisan House committee that investigated the January 6, 2021, riot*](https://apnews.com/article/us-supreme-court-congress-donald-trump-30d5d01db49f0591d641d9e92d4092a8) to obtain White House records that it sought. [*The court also batted down the long-shot case*](https://www.cnn.com/2020/12/11/politics/supreme-court-texas-trump-biden/index.html) from Republican state attorneys general and members of Congress, backed by Trump, that attempted to invalidate the 2020 election results in four states that Joe Biden won.

More recently, the court delivered Trump an important victory [*when it ruled that individual states could not bar him*](https://www.cnn.com/2024/03/04/politics/trump-supreme-court-colorado-14th-amendment/index.html) from the ballot in 2024 using the 14th Amendment's prohibition against office-holding by officials who engaged in insurrection. But that case, which was decided unanimously, has not prompted anything like the controversy about the court's handling of Trump's claim of immunity.

At multiple points, the Supreme Court has made decisions that have slowed its consideration of the case - with this week's hearing falling on the term's final day for oral arguments. Scholars who defend the court say that, by its normal standards, it is actually moving at an accelerated pace. "I think if anything they've gone a little faster than normal," said Michael McConnell, director of the Constitutional Law Center at Stanford University Law School. "What some people want them to do is put them on a rocket, and it's not obvious why they should do that either."

But critics say that through its scheduling decisions, the Supreme Court has already provided Trump exactly what he most desires: extensive trial delays that diminish the chances he will face a jury before November in the 2020 election interference case from special counsel Jack Smith. Those skeptical of the Supreme Court's actions in the immunity case often liken it to the 5-4 Bush v. Gore decision, in which the five GOP-appointed justices outvoted the four nominated by Democrats to terminate the voting recount in Florida and effectively declare George W. Bush the winner in the 2000 presidential election.

"Until now this was a conservative court, but it was not a MAGA court: They had shown no appetite for bailing Trump out of his troubles, or for covering up for his abuse of power," said Michael Waldman, president and CEO of the Brennan Center for Justice at New York University School of Law and author of "The Supermajority," a 2023 book on the contemporary Supreme Court. "And I don't fault them for ruling one state cannot throw someone off the ballot under the 14th Amendment. But what they have done with the immunity case is the most egregious intervention by the Supreme Court in partisan presidential ***politics*** since Bush v. Gore at least - but really ever."

Waldman, a former White House speechwriter for Bill Clinton, points out that while the Supreme Court has already kept Trump's election subversion trial on hold for months, there's ample precedent for it moving forward quickly from this point. [*In a recent analysis*](https://www.brennancenter.org/our-work/analysis-opinion/stop-stall?fbclid=IwAR245ZArNw-qOxVAqhDH-N2RxIHqk7ZivItFmbfY5E8n7UJmvi6Rj1mJqZA_aem_AYbRL18v_153jLbQ_GOqZYvBzaOS6KPl_No5coESTuvm9ox5Yz1crhS9ohdD96usm3f7l39fkFgvaJzAE-tQDMqq&utm_campaign=PANTHEON_STRIPPED&utm_content=PANTHEON_STRIPPED&utm_id=PANTHEON_STRIPPED&utm_medium=PANTHEON_STRIPPED&utm_source=PANTHEON_STRIPPED&utm_term=PANTHEON_STRIPPED), he noted that the court has moved very rapidly after oral arguments to decide other cases setting the limits of presidential power: The court decided Bush v. Gore, for instance, just three days after it was argued. It issued its unanimous decision forcing then-President Richard Nixon to turn over Watergate-related tapes just two weeks after it heard that case; Nixon resigned two weeks after the decision. Those examples, Waldman said, suggest the Supreme Court could easily return a decision in the immunity case by mid-May, increasing the chances that Trump will face a jury before he again faces the voters.

"Once they hear the case, they don't have to sit around for two months polishing their footnotes," Waldman said. "It is disingenuous [for the justices] to pretend this isn't a case about whether voters have the right to know whether somebody tried to overthrow the Constitution before he is on the ballot again."

McConnell, though, argues that the substance of the court's likely decision will render this debate about its timing moot. He predicts the Supreme Court will rule that Trump can't be criminally prosecuted for actions that fall within his official responsibilities as president, but can for private actions beyond that orbit and will send the case back to the trial court to decide which counts in the indictment fall into which category. "It is going to take some time to sort through the indictment and figure out which parts are ok and which parts aren't," said McConnell, a former appellate court judge appointed by George W. Bush. "I think anybody who thinks the case is going to go to trial and be decided before Election Day is having a pipe dream."

Whatever, and whenever, the court decides, the immunity case has placed it in a familiar position - with a decisive role in framing the terms of the competition between the parties.

One reason for the Supreme Court's growing impact is that the GOP-appointed majority represents a rock of stable influence in a political era largely defined by instability.

Neither party has defended unified control of the White House, the House and Senate for more than four consecutive years since 1968; In the 21st century, Republicans have held unified control for just six years and Democrats for four. That's meant each party has been able to convert its priorities into legislation only through short bursts of activity punctuated by long periods of partisan stalemate. In sharp contrast, the court's conservative majority has exerted its influence year after year, without interruption. Entrenched conservative dominance of the Supreme Court has become "this kind of force field that we just take for granted," said Waldman.

Another key reason for the court's growing impact is that its conservative majority has become more cohesive. Justices appointed by Republican presidents have comprised a majority of the bench since 1970. But for most of the past half century those appointments did not produce a reliable ideological majority; several proved to be swing vote moderates (including Sandra Day O'Connor and Anthony Kennedy, both selected by Ronald Reagan) or even reliable liberals (like David Souter, chosen by George H.W. Bush.)

In modern times, though, an exhaustive machinery has developed in each party to reduce the chances that Supreme Court nominees will surprise the party that selects them. The process has become particularly institutionalized on the Republican side, with groups led by the conservative Federalist Society exerting enormous leverage over the selection process. "There is just much more intense vetting of Supreme Court justices," said Pierson.

In the period of both the earlier 5-4 GOP-appointed majority, and the 6-3 "supermajority" cemented by Barrett's confirmation, the court has sometimes rendered verdicts on policy questions that collide with the dominant opinion among Republicans.

In the 5-4 era, the court narrowly upheld Obama's Affordable Care Act, established a nationwide right to same-sex marriage, and extended civil rights protections in the workplace to gay and transgender individuals. In the 6-3 era, the court surprisingly upheld [*a ruling that Alabama violated Black voting rights*](https://www.cnn.com/2023/06/08/politics/supreme-court-alabama-voting-rights-milligan/index.html#:~:text=The%20map%20was%20invalidated%20when,Alabamians%20to%20elect%20candidates%20of) with its congressional maps and [*rejected the doctrine pushed by some conservatives*](https://www.cnn.com/2023/06/27/politics/supreme-court-election-clause-case/index.html) to provide state legislators unfettered authority to award their state's Electoral College votes, regardless of the outcome in the popular vote.

But mostly, the court in this century has delivered a succession of seismic policy victories for conservatives. During the 5-4 era, [*it issued landmark decisions severely weakening campaign finance laws (Citizens United)*](https://www.brennancenter.org/our-work/research-reports/citizens-united-explained), [*effectively ending federal preclearance of state voting procedures under the 1965 Voting Rights Act*](https://www.cnn.com/2013/06/25/politics/scotus-voting-rights/index.html) (Shelby County), and preventing Obama from requiring states to expand Medicaid under the ACA. Since the appointment of Brett Kavanaugh and Barrett, the court has virtually eliminated affirmative action in higher education, [*severely restricted the authority of states to regulate gun ownership,*](https://www.cnn.com/2022/06/23/politics/supreme-court-guns-second-amendment-new-york-bruen/index.html)[*overturned Biden's plan to offer student loan relief*](https://www.cnn.com/2023/06/30/politics/supreme-court-student-loan-forgiveness-biden/index.html#:~:text=In%20a%20stinging%20defeat%20for,borrowers%20struggling%20with%20outstanding%20debt.), and most dramatically, [*rescinded the constitutional right to abortion*](https://www.cnn.com/2022/06/24/politics/dobbs-mississippi-supreme-court-abortion-roe-wade/index.html) that had stood for 50 years. In both periods, the court [*has reliably ruled to lower the barriers between church and state*](https://www.theatlantic.com/politics/archive/2020/12/how-supreme-court-champions-religious-liberty/617284/), and to weaken the federal government's regulatory authority, particularly on [*environmental issues such as climate change*](https://www.cnn.com/2022/06/30/politics/epa-supreme-court-ruling-effect/index.html).

Cecilia Munoz, who served as the chief White House domestic policy adviser for Obama, said the addition of a sixth reliably conservative vote in Barrett has materially changed the calculation for Democratic presidents. While Obama was president, she said, the administration assumed that it would face lawsuits against virtually all of its major executive branch decisions. But the White House still believed, with a 5-4 balance, "it was not a foregone conclusion" that the court would strike down their plans, she said. With the 6-3 balance, though, "That hope has gotten thinner in recent years," she added. "You can tell by the results of the court decisions over the past several years that it is fundamentally different. Even someone like the Chief Justice [Roberts], who famously controlled that first ACA decision, doesn't have control of the court any longer."

The cohesion and ambition of the conservative majority has left Democratic presidents in what many analysts view as a stalemated situation. The filibuster has made it tougher for presidents of either party to pass their agenda through Congress; but when Obama or Biden have tried to respond by asserting executive authority to act unilaterally (as Obama did on immigration or Biden did on student loans), the court's GOP-appointed majority has routinely invalidated their actions. "The combination of the filibuster and this Republican court does come pretty close to an effective blockade" on Democratic policy-making, said Pierson.

McConnell, of the Constitutional Law Center, countered that while the conservative majority on some issues has issued rulings more sweeping than he considered necessary, overall, he believes the court is not inserting itself into national debates more intrusively than in earlier generations. "It's just that they tend to be going more to the right side of the spectrum than the left side, so suddenly people who had been cheering on the Supreme Court for flexing its muscles are now disgruntled," he said.

With Samuel Alito and Clarence Thomas, the oldest members, both in their mid-seventies, this court majority [*could continue well into the 2030s to write the rules for a society undergoing rapid demographic and social change*](https://www.cnn.com/2022/04/12/politics/ketanji-brown-jackson-supreme-court-conflict/index.html). Shesol, who also served as a White House speechwriter for Clinton, believes the long-term influence of this majority could exceed even that of the conservative Supreme Court blocs that invalidated generations of progressive federal, state and municipal legislation like the minimum wage and maximum hour laws from the turn of the 20th century until well into FDR's New Deal.

"I do think in terms of its duration and impact, it will be far greater than what the conservatives in the 1920s and 1930s were able to accomplish," Shesol said. Then, he noted, FDR had massive Democratic congressional majorities that helped him to reverse the court's anti-New Deal decisions until his lengthy hold on the White House provided him enough vacancies to reverse the court's ideological balance.

Now polarization and pervasive use of the filibuster have made it much more difficult for Democrats to legislatively reverse decisions by this conservative majority. While Republicans have little chance to pass laws through Congress undoing the signature Democratic accomplishments of the New Deal and the Great Society, Shesol said, "if you build a majority in the Supreme Court, you can tear the whole edifice down."

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