

THE IMPUNITARY EXECUTIVE: ARTICLE II AFTER *TRUMP V. UNITED STATES*

*Stephen I. Vladeck**

ABSTRACT

For as much as the Supreme Court’s July 2024 ruling in Trump v. United States has been roundly criticized, much—if not most—of the criticism has focused on the majority opinion’s endorsement of presidential immunity from criminal prosecution for official acts undertaken in office. In this Article, Professor Vladeck argues that Trump’s true implications will be felt, and are already being felt, elsewhere—because the majority opinion embraces a far broader reading of the President’s indefeasible Article II authority than any prior Supreme Court decision had. Far afield of the narrow class of criminal prosecutions, Trump’s constitutional analysis will impede, among other things, Congress’s ability to impose any limits on qualifications for executive branch offices; Congress’s power to impose constraints on how the executive branch carries laws into execution; Congress’s authority to demand information and/or testimony from executive branch witnesses; and a host of other areas where, historically, the branches had been left to reach practical accommodations. The Trump immunity ruling will have massive short-term and long-term consequences, not because it allowed President Trump to escape criminal liability for his wrongful conduct during his first term, but because it empowered President Trump during his second term—and all presidents to come—to claim ever more power to act not just unilaterally, but with impunity from any interference from the other branches of government.

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* Professor of Law and Agnes Williams Sesquicentennial Professor of Federal Courts, Georgetown University Law Center. I am grateful to Ricky Coyne, Alyssa Negvesky, and Mackenzie Webb for exceptional research assistance. A version of this paper was delivered at the Drake Constitutional Law Symposium on March 29, 2025, for my participation in which I am grateful to Mark Kende.

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“[I]t is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed.”¹

I. INTRODUCTION

In every respect that matters, the Supreme Court’s July 2024 ruling in *Trump v. United States* was a massively important decision.² Writing for a 6–3 majority, Chief Justice John Roberts held that Article II of the Constitution confers immunity upon current and former presidents even from criminal prosecution for acts taken within their exclusive constitutional authority while in office.³ Although the ruling did not doom the two pending federal criminal prosecutions against then-former President Trump, it (and the Court’s earlier refusal to deny a stay in the January 6 case)⁴ had the effect of slowing those cases down enough such that the cases were still in their preliminary stages when Trump was reelected in November 2024—shortly after which they were both abandoned.⁵

Against that backdrop, it is tempting to view the significance of the Supreme Court’s intervention in the immunity case in terms of both the specific immunity-from-prosecution rule that the majority articulated and the practical effect of the ruling for the two federal prosecutions then pending against Trump. To the former, scholars like Professor Trevor Morrison have suggested that, read literally, the ruling requires immunity from prosecution not just for the President, but for many of his subordinates.⁶ To the latter, there have been numerous and repeated public claims that the Court’s ruling directly contributed to Trump’s reelection in 2024.⁷

1. *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (Rehnquist, J.).

2. 603 U.S. 593 (2024); see *infra* Part III.

3. See *Trump*, 603 U.S. at 609.

4. See *Trump v. United States*, 144 S. Ct. 1027, 1027 (2024) (mem.); Scott Bomboy, *Breaking Down the Trump Immunity Decision*, NAT’L CONST. CTR.: CONST. DAILY BLOG (July 16, 2024), <https://constitutioncenter.org/blog/breaking-down-the-trump-immunity-decision> [<https://perma.cc/D7KC-2XAX>].

5. See, e.g., Alan Feuer, Charlie Savage & Devlin Barrett, *U.S. Moves to Drop Pursuit of Trump in Criminal Cases*, N.Y. TIMES, Nov. 26, 2024, at A1.

6. See Trevor W. Morrison, Case Comment, *All the President’s Men*, N.Y.U. L. REV., Aug. 20, 2025, at 1, 1–2.

7. See, e.g., JENNY HUNTER, THE SUPREME COURT HELPED TRUMP WIN 1 (2025), <https://peoplesparityaction.org/wp-content/uploads/2025/02/The-Supreme-Court-Helped-Trump-Win.pdf> [<https://perma.cc/7QQN-9XPH>].

I am fairly skeptical of both of those claims—and, more generally, of reading the immunity-from-prosecution holding as broadly as Professor Morrison and others do.⁸ That doesn't mean the *Trump* ruling is somehow less important; rather, the central claim of this Article is that its importance principally lies elsewhere.⁹ In particular, the majority opinion in *Trump* reflects the Court's broadest articulation of both the existence and scope of what is alternatively described as either "conclusive and preclusive" or "indefeasible" executive power—in other words, constitutional authority that cannot be regulated or constrained by the other branches.¹⁰

Consider how Chief Justice Roberts described the President's relationship with the Department of Justice (DOJ) in holding that Trump was absolutely immune from those charges in the January 6 case that related to his interactions with DOJ:

The allegations [relating to DOJ] plainly implicate Trump's "conclusive and preclusive" authority. "[I]nvestigation and prosecution of crimes is a quintessentially executive function." And the Executive Branch has "exclusive authority and absolute discretion" to decide which crimes to investigate and prosecute, including with respect to allegations of election crime. The President may discuss potential investigations and prosecutions with his Attorney General and other Justice Department officials to carry out his constitutional duty to "take Care that the Laws be faithfully executed." And the Attorney General, as head of the Justice Department, acts as the President's "chief law enforcement officer" who "provides vital assistance to [him] in the performance of [his] constitutional duty to 'preserve, protect, and defend the Constitution.'"

8. Among other things, I take at least some solace from the fact that, on the same day it recognized absolute immunity from civil liability for former presidents in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the Supreme Court also rejected such complete immunity for presidential subordinates in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

9. See, e.g., Jack Goldsmith, *The Presidency After Trump* v. United States, 2024 SUP. CT. REV. 1, 2 (2025) (noting potential impact on the President's exclusive power of removal and power over investigation and prosecution).

10. Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–54 (1952) (Jackson, J., concurring) (articulating framework for evaluating presidential power in relation to Congress, including during wartime), *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631–32 (1935) (upholding statutes limiting the President's power to remove officers of independent agencies), *United States v. Nixon*, 418 U.S. 683, 707 (1974) (limiting presidential privilege by requiring compliance with judicial subpoena in criminal case), and *Clinton v. Jones*, 520 U.S. 681, 696 (1997) (rejecting immunity from civil suits for unofficial conduct before presidency), with *Trump v. United States*, 603 U.S. 593, 609 (2024) (establishing absolute immunity from criminal prosecution for acts within the President's exclusive constitutional authority).

Investigative and prosecutorial decisionmaking is “the special province of the Executive Branch,” and the Constitution vests the entirety of the executive power in the President. For that reason, Trump’s threatened removal of the Acting Attorney General likewise implicates “conclusive and preclusive” Presidential authority. As we have explained, the President’s power to remove “executive officers of the United States whom he has appointed” may not be regulated by Congress or reviewed by the courts. The President’s “management of the Executive Branch” requires him to have “unrestricted power to remove the most important of his subordinates”—such as the Attorney General—in their most important duties.”¹¹

Note how broadly the majority extrapolates from some preclusive power with respect to control of the executive branch to broad preclusive power on all things related to “management of the executive branch.”¹² This is a subtle—but huge—shift, and one that the *Trump* Court did little to defend, even though, as Justice Barrett’s partial concurrence makes clear, it was arguably unnecessary to the result.¹³ Most scholars of executive power agree that there are at least some things Congress cannot do to the President.¹⁴ For example, Congress cannot make someone else “Commander-in-Chief” of the military (although the Radical Republicans tried in 1867).¹⁵ Congress cannot wield the pardon power itself, override a presidential pardon, and so on. But these examples are not disputed; virtually everyone agrees the Constitution confers these authorities on the President alone, and so their preclusive effect is not a matter of serious debate.¹⁶

In contrast, by opening the door to such a broad, ill-defined preclusive power over all “management of the Executive Branch,”¹⁷ the majority opinion in *Trump* could easily lead to two very different, but equally important, sets of implications.

11. *Trump*, 603 U.S. at 620–21 (second and subsequent alterations in original) (internal citations omitted).

12. *See id.* at 621 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982)).

13. *See id.* at 620–21 (majority opinion); *id.* at 656–57 (Barrett, J., concurring).

14. *See Morrison*, *supra* note 6, at 5 (discussing the President’s unrestricted removal power); Goldsmith, *supra* note 9, at 6; Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 933, 937 (2007) [hereinafter Vladeck, *Separation of Powers After Hamdan*].

15. *See* Act of Mar. 2, 1867, ch. 170, § 2, 14 Stat. 485, 486–87 (granting the General of the Army the sole power to issue orders to the military, and simultaneously making the General insulated from removal).

16. *See* sources cited *supra* note 14; *Trump*, 603 U.S. at 607.

17. *Trump*, 603 U.S. at 621 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982)).

First, there is an array of statutes already on the books that impose conditions on who may hold certain executive branch offices—and for how long.¹⁸ The Secretary of Defense, for instance, must be at least seven or ten years removed, depending on rank, from active-duty military service to be eligible for the position.¹⁹ The Solicitor General must be “learned in the law.”²⁰ The FBI Director may serve for only 10 years.²¹ All of these statutes impose limits on the President’s putatively preclusive authority to manage the executive branch.²² Are they now unconstitutional? What about statutes requiring Senate confirmation for inferior officers—for whom the Constitution imposes no similar mandate?²³ Or statutes that create protections from removal for those executive branch employees in civil service (as opposed to senior executive service) positions?²⁴ More generally, what about statutes requiring executive branch officials to do specific things without being instructed to do so by the President—like make reports to Congress?²⁵ Are those also now unconstitutional (or, at least, vulnerable to constitutional challenge) after and in light of the expansive reading of preclusive power adopted by the Court in *Trump*?²⁶

Second, on a larger (but also far-less-visible) scale, historically, there were not very many judicial decisions resolving interbranch disputes because most of those disputes were resolved informally—through negotiation, accommodation, and compromise.²⁷ Instead of taking the Executive Branch to court (where it might lose), Congress would agree to drop some of its demands for information so long as the Executive Branch responded to others.²⁸ And the Executive Branch, in turn,

18. *See, e.g.*, 10 U.S.C. § 113(a) (highlighting statutory limitations on who may serve as Secretary of Defense); 28 U.S.C. § 505 (noting statutory requirement that the Solicitor General be appointed by the President with Senate confirmation and possess legal expertise); Crime Control Act of 1976, Pub. L. No. 94-503, § 203, 90 Stat. 2407, 2427 (establishing a ten-year term limit for the FBI Director, with Senate-confirmed appointment, to prevent excessive concentration of power).

19. 10 U.S.C. § 113(a)(2)(A).

20. 28 U.S.C. § 505.

21. Crime Control Act of 1976, Pub. L. No. 94-503, § 203, 90 Stat. 2407, 2427.

22. *See* sources cited *supra* note 18.

23. *See, e.g.*, 28 U.S.C. § 506 (requiring Senate confirmation for Assistant Attorneys General, despite their status as inferior officers).

24. *See, e.g.*, 5 U.S.C. § 7513 (providing cause-based removal standards and procedural safeguards for civil service employees).

25. *See, e.g.*, 5 U.S.C. § 2952 (requiring department heads to submit annual reports to Congress, independent of presidential direction).

26. *See Trump v. United States*, 603 U.S. 593, 642 (2024).

27. *See Trump v. Mazars USA, LLP*, 591 U.S. 848, 861–62 (2020).

28. *See id.*

also wary of potentially generating a bad judicial precedent in the other direction, would often agree to turn over documents or other materials, or even provide witnesses, that it believed were protected from disclosure by executive privilege, the work-product rule, or comparable concepts.²⁹

Now, though, the Executive Branch has a major constitutional arrow in its quiver; one that it can use both to exert further leverage over Congress in those backroom contexts and to defend against litigation should Congress (or private citizens) ever resort to it.³⁰ Indeed, in just over one year, we've already seen dozens of cases in which executive branch lawyers have wrapped themselves in the cloak of Chief Justice Roberts's opinion—in contexts far removed from criminal prosecutions.³¹ The upshot is that executive branch lawyers have new fodder for resisting everything from subpoenas and FOIA requests to statutes purporting to limit the President's power across a wide range of conduct.³²

It is impossible to say, with any confidence, just how widespread the ramifications will be, but it is just as impossible to conclude that there won't be any.³³ The Supreme Court's ruling in *Trump* is as significant an endorsement of preclusive executive power as anything we've ever seen from the Court,³⁴ and it will open the door, no matter who the president is, to more extravagant (and, in my view, alarming) claims of unconstrained (and unconstrainable) authority than the Founders could ever have possibly intended.³⁵ That is the significance of *Trump v. United States*, and it is potentially staggering—far more than how it might affect future criminal prosecutions of current and former presidents.

Of course, a future Court could certainly find ways to limit these effects—especially one willing to articulate seemingly “bespoke” exceptions to such a broad theory of executive power.³⁶ The critical point for present purposes is: until and unless that happens, the balance of power will shift further toward the executive

29. See *id.*; Goldsmith, *supra* note 9, at 50–51.

30. See Goldsmith, *supra* note 9, at 44–46.

31. See, e.g., Application to Stay at 2, 23, 25, *Trump v. Am. Fed'n of Gov't Emps.*, 145 S. Ct. 2635 (2025) (No. 24A1174); Application to Vacate the Injunction at 14, *Noem v. Abrego Garcia*, 145 S. Ct. 1017 (2025) (No. 24A949).

32. Application to Stay at 2, 23, 25, *Trump*, 145 S. Ct. 2635 (2025) (No. 24A1174).

33. See Goldsmith, *supra* note 9, at 2, 18, 31, 44.

34. See *supra* note 10 and accompanying text.

35. Goldsmith, *supra* note 9, at 7 (noting reliance on “constitutional underpinnings” rather than textual or originalist foundations).

36. Compare, e.g., *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025) (asserting that the independence of the Federal Reserve is not inconsistent with the unitary executive theory), with *id.* at 1421 (Kagan, J., dissenting) (criticizing the unsigned order for “creation of a bespoke Federal Reserve exception”).

and away from Congress³⁷—whether the incumbent is a Democrat or a Republican, and in contexts far removed from their (and their predecessors’) criminal liability. The result will be much more than presidents with immunity from criminal prosecution; it will be presidents with impunity from all manner of interbranch accountability³⁸—even when, unlike today, the other branches are more inclined to attempt to provide it.

II. THE DOCTRINAL ROAD TO THE *TRUMP* RULING

A. *Preclusive Power in War and Foreign Affairs*

My academic career began in the summer of 2005—in the heyday of the firestorm over the (then) extreme constitutional arguments that were being made by the Bush Administration with respect to a seemingly limitless array of war powers.³⁹ At its simplest, the argument was that the Constitution invested the President, as “Commander-in-Chief” of the military, not just with *inherent* authority to act during wartime, but with *preclusive* authority to ignore statutory limits that Congress had otherwise imposed on his powers.⁴⁰ This was the central argument, for instance, in the infamous “torture memos” prepared by the Justice Department’s Office of Legal Counsel (which argued, among other things, that the criminal prohibition on torture was unconstitutional insofar as it limited the President’s ability to subject enemy combatants to such treatment during wartime).⁴¹ It was one of the key arguments offered in defense of warrantless wiretapping conducted by the NSA (which otherwise certainly seemed to be in express violation of a statute purporting to provide the exclusive authority for certain types of surveillance).⁴² And other examples abound.⁴³

37. See *Trump v. United States*, 603 U.S. 593, 676–77 (Sotomayor, J., dissenting).

38. See *id.* at 701–02 (Jackson, J., dissenting).

39. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 636–40 (2006) (Breyer, J., concurring) (emphasizing that the President’s war powers are subject to statutory limits imposed by Congress and rejecting the notion of unilateral executive authority in areas where Congress has legislated).

40. See Vladeck, *Separation of Powers After Hamdan*, *supra* note 14, at 937.

41. See Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., to William J. Haynes II, Gen. Couns. of the Dep’t of Def. 2–3 (Mar. 14, 2003) (on file with the Drake Law Review).

42. Vladeck, *Separation of Powers After Hamdan*, *supra* note 14, at 953.

43. *Id.* at 955–56; *Hamdan*, 548 U.S. at 593; Transcript of Oral Argument at *3, *Rasul v. Bush*, 542 U.S. 466 (2004).

The Supreme Court never expressly considered that argument in any of its war-on-terrorism cases from the 2000s.⁴⁴ The closest the Court came to considering the argument was in its 2006 ruling in *Hamdan v. Rumsfeld*, where, in footnote 23, Justice John Paul Stevens wrote that, “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.”⁴⁵

To support that assertion, Justice Stevens cited Justice Robert Jackson’s famous concurring opinion in the *Steel Seizure* case—which set out a three-part taxonomy for how courts should resolve interbranch separation-of-powers disputes,⁴⁶ including those in which the President claims preclusive power to act in the face of a congressional constraint, where his power is, in Justice Jackson’s words, “at its lowest ebb.”⁴⁷ As Justice Jackson explained, “Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”⁴⁸

Justice Jackson’s point was not that the president can *never* win in this third category; it was that ruling for the president in such cases must be done with care, and with due account for the broader structural implications of “disabling” Congress from legislating in such contexts.⁴⁹ Justice Jackson knew of what he spoke; a former Solicitor General and Attorney General himself (and the lead U.S. prosecutor at the Nuremberg war crimes trial),⁵⁰ Justice Jackson was clear-eyed that there *would* be cases in which Congress could indeed be “disabled” from regulating the President.⁵¹ The key was for the Court to proceed with extreme caution lest those exceptions be allowed to swallow the rule.⁵²

The three classic examples, well familiar to Jackson, involved attempts by Congress during the Reconstruction Era to make someone other than President

44. Vladeck, *Separation of Powers After Hamdan*, *supra* note 14, at 952.

45. *Hamdan*, 548 U.S. at 593 n.23 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). I was co-counsel to the petitioner in *Hamdan*. Needless to say, the views expressed herein are not necessarily those of my co-counsel or our client.

46. *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

47. *Id.* at 637.

48. *Id.* at 638.

49. *Id.* at 637–38, 640.

50. *Solicitor General: Robert H. Jackson*, U.S. DEP’T OF JUST.: OFF. OF THE SOLIC. GEN. (Sep. 18, 2023), <https://www.justice.gov/osg/bio/robert-h-jackson> [<https://perma.cc/Z732-2T5N>].

51. *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring).

52. *Id.* at 638.

Andrew Johnson the commander-in-chief of the armed forces;⁵³ to prevent Johnson from removing Secretary of War Edwin Stanton;⁵⁴ and to defeat the effects of at least some of the countless pardons Johnson issued to former Confederates.⁵⁵ By the time *Youngstown* was decided, the consensus was that all three measures were unconstitutional—because they violated *specific* powers either explicitly mentioned in or long implied from Article II of the Constitution.⁵⁶

The same can be said for a later example—the Court’s 2015 decision in *Zivotofsky v. Kerry*, in which the majority struck down an act of Congress that purported to override the executive branch’s longstanding determination that Jerusalem was *not* part of Israel.⁵⁷ What is especially telling about *Zivotofsky* is one of the dissenting opinions—written by Chief Justice Roberts.⁵⁸ Not only did Roberts object to the Court siding with the President in a dispute falling into Jackson’s “lowest ebb” category,⁵⁹ he also stressed:

Today’s decision is a first: Never before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President’s power reaches “its lowest ebb” when he contravenes the express will of Congress, “for what is at stake is the equilibrium established by our constitutional system.”⁶⁰

To understand how things could change so quickly, our focus must shift from war and foreign affairs powers to something far more mundane: bureaucratic control of the executive branch.

B. The Rise of the “Unitary” Executive

In 1866, the U.S. Supreme Court handed down its landmark decision in *Ex parte Milligan*, which barred the federal government from trying civilians in ad hoc military tribunals when civilian courts were available.⁶¹ Writing for the majority, Justice David Davis spent several pages explaining the dangers of an unchecked executive.⁶² The United States, he said, “has no right to expect that it

53. See *supra* note 15 and accompanying text.

54. See Tenure of Office Act, ch. 154, § 1, 14 Stat. 430, 430 (1867).

55. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 144 (1872).

56. See, e.g., *Myers v. United States*, 272 U.S. 52, 176 (1926).

57. 576 U.S. 1, 32 (2015).

58. *Id.* at 61 (Roberts, J., dissenting).

59. *Id.*

60. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring)).

61. 71 U.S. (4 Wall.) 2, 127 (1866).

62. *Id.* at 124–30.

will always have wise and humane rulers, sincerely attached to the principles of the Constitution.”⁶³ Instead, “[w]icked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln[.]”⁶⁴ That is why the United States has a written constitution, he concluded, and independent judges to enforce it—even, as in the case of *Milligan*’s repudiation of Civil War-era military prosecutions of civilians, against President Abraham Lincoln himself.⁶⁵

Yet the executive branch has fared quite well in the courts in the years since Davis made his dire warning about unchecked presidential power—especially over the last 15 years.⁶⁶ As plenty of scholars have flagged, there has long been a deep tension between two competing theories of executive power. One theory locates power in the person of the President.⁶⁷ Another theory finds it in the executive branch writ large, which is administered by the President but created, structured, and funded by Congress, and features an expertise-driven bureaucracy with authority over functions that are generally considered to be nonpartisan—from tax collection to food, aviation, and highway safety to funding for academic research.⁶⁸ Indeed, the tug of war between these two camps has itself historically served as a check on presidential prerogatives.⁶⁹ Presidential whims were often moderated by what might be called the “internal separation of powers,” which was nevertheless always subject, at the end of the day, to at least some presidential control.⁷⁰

Some degree of tension between these two competing visions is inevitable. But what is new is not only presidents more willing to push the envelope than any

63. *Id.* at 125.

64. *Id.*

65. *Id.*

66. See Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 147–53 (2022).

67. See, e.g., *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 213–15 (2020) (holding that the President alone controls all subordinate officers’ exercise of executive power).

68. See, e.g., *id.* at 262–73 (Kagan, J., dissenting) (noting that Congress has long structured executive agencies to perform expert, nonpartisan functions while limiting direct presidential control). For an especially trenchant discussion of this tension, see STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, *PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE* 59–61 (2022).

69. See Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 392 (2019).

70. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316–17 (2006) (discussing the internal separation of powers that occurs within agencies, which are generally subject to some control or oversight from the President).

of their predecessors,⁷¹ but also a Supreme Court willing to put its own thumb on the scale. Unlike what was true throughout the twentieth century, when the Court simply helped to maintain an equilibrium between the Oval Office and the administrative state,⁷² more recently, the Court has intervened in support of the office of the President—precedents for which, in many ways, the *Trump* immunity ruling reflected the apotheosis.⁷³

Indeed, while the federal bureaucracy was accreting independent administrative authority delegated by Congress, conservatives in the 1970s and 1980s were embracing a rival interpretation of the constitutional separation of powers known as the “unitary executive theory.”⁷⁴ This theory found fertile ground up and down Pennsylvania Avenue, particularly as Republican presidents were in office for 20 of the 24 years between 1969 and 1993,⁷⁵ and it had powerful advocates in Justices William Rehnquist and Antonin Scalia, two executive-branch lawyers appointed to the Supreme Court by Republican presidents during this time.⁷⁶ The Constitution provides, “The executive Power shall be vested in a President of the United States[.]”⁷⁷ As Scalia once put it, “this does not mean *some* of the executive power, but *all* of the executive power.”⁷⁸ In other words, the executive power, whatever that includes, lies with the president—and the president alone.⁷⁹

According to this line of thinking, any independence within the executive-branch bureaucracy is constitutionally forbidden, regardless of its value.⁸⁰ Presidents, therefore, exercise unimpeded control over the administrative state and can dismiss whomever they please, whenever they please, for whatever reason they

71. See Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 730 (2005) (describing how presidents from both parties have been pushing for more executive power during the second half of the twentieth century).

72. See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629–30 (1935).

73. See *Trump v. United States*, 603 U.S. 593, 642 (2024).

74. Yoo, Calabresi & Colangelo, *supra* note 71, at 691 (referencing CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 133 (1991)).

75. See *id.* at 659–710.

76. See *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/4R-RS-NZ7Q>].

77. U.S. CONST. art. II, § 1, cl. 1.

78. *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

79. See *id.* at 714–15.

80. See *id.* at 710.

please.⁸¹ This theory was trotted out to resist some of Congress's most aggressive post-Watergate reforms, many of which were intended to strengthen the bureaucracy at the expense of presidential power—particularly in the areas of war powers and foreign affairs, where the arguments for executive primacy are the strongest.⁸²

Scalia wrote those pithy words about executive power at the end of his second term on the Supreme Court, in 1988, in a solo dissent from the Supreme Court's ruling in *Morrison v. Olson*.⁸³ That decision (in which the majority opinion, it should be noted, was written by Rehnquist) upheld the independent-counsel provisions of the 1978 Ethics in Government Act, which empowered a special division of the D.C. federal appeals court, upon application by the U.S. Attorney General, to appoint an independent counsel to investigate senior government officials whom, the reasoning went, the President's handpicked Attorney General might be unwilling or unable to investigate.⁸⁴ Crucially, the Act protected the independent counsel from being fired except for "good cause."⁸⁵ In Scalia's view, this last part was the true offense, for if the President could not fire a lawyer vested with the power to enforce the laws of the United States, then he did not, in fact, have the executive power.⁸⁶

One of *Morrison*'s most important holdings was that Congress could protect "inferior" executive-branch officers—in this case, the independent counsel—from being dismissed by the president without cause.⁸⁷ "Principal" officers, including cabinet officials and ambassadors, have no such protection, or independence: these officers are appointed by the president and may be subject to removal at will.⁸⁸

81. *See id.* at 708–09.

82. *See Watergate-Era Reforms 50 Years Later*, HARVARD L. TODAY (June 8, 2022), <https://hls.harvard.edu/today/watergate-era-reforms-50-years-later/> [<https://perma.cc/3NKD-KSJZ>]; *Zivotofsky v. Kerry*, 576 U.S. 1, 34 (2015) ("[T]he President ha[s] primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations.") (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004)).

83. *See supra* note 78 and accompanying text.

84. *See Morrison*, 487 U.S. at 660; Ethics in Government Act of 1978, Pub. L. No. 95–521, §§ 601–604, 92 Stat. 1824, 1867–75 (codified as amended at 28 U.S.C. §§ 591–599).

85. *Morrison*, 487 U.S. at 686 (quoting 28 U.S.C. § 596(a)(1)).

86. *See id.* at 706, 715, 723 (Scalia, J., dissenting).

87. *Id.* at 693 (majority opinion) ("We do not think that [the for-cause removal] limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.").

88. *Id.* at 690.

Morrison remains on the books today, but barely. Its wrongness has become an article of faith among contemporary conservatives, and as the Supreme Court has turned further to the right, the Justices' efforts to gut it have accelerated.⁸⁹ In 2010, for instance, Chief Justice Roberts, writing for a 5–4 majority, effectively neutered the Public Company Accounting Oversight Board (PCAOB), which was created in the aftermath of the Enron and WorldCom accounting scandals to oversee the audits of public companies.⁹⁰ A provision that protected members of the board from removal except for good cause, Roberts argued, interfered with the President's constitutional authority because, unlike in *Morrison*, these officers could be removed only by other executive officers whose removal also required good cause, meaning that the President's capacity to dismiss them was further limited.⁹¹ The Court rationalized this ruling by arguing that one level of independence is constitutional but two, as in the case of the PCAOB, is not.⁹² But that argument seemed as much to provide a fig leaf for distinguishing *Morrison* as it did to persuade.

But the brakes have truly come off since 2018—when Justice Brett Kavanaugh was appointed to succeed Justice Anthony Kennedy.⁹³ Justice Kavanaugh provided the fifth and decisive vote in the June 2020 ruling in *Seila Law LLC v. Consumer Financial Protection Bureau*, which held that officers are not protected from removal without cause if they are the singular head of an independent agency, versus one of a number of commissioners in charge of an agency.⁹⁴ In the abstract, the argument sounds plausible enough: the President should be able to hire and fire agency heads at will.⁹⁵ But in the *Humphrey's Executor* decision in 1935, the Supreme Court unanimously held that Congress could, in certain circumstances, create “independent” agencies within the executive branch—where the independence was created by insulating the agency heads from direct political control.⁹⁶ *Seila Law* narrowed *Humphrey's Executor* in a way that may be capable of description, but not necessarily persuasion—holding that Congress can create independent agencies governed by multi-member boards

89. See, e.g., *Donziger v. United States*, 143 S. Ct. 868, 870 (2023) (Gorsuch, J., dissenting from the denial of certiorari) (“[T]he notion that the Constitution allows one branch to install non-officer employees in another branch would come as a surprise to many.”).

90. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 485–86 (2010).

91. *Id.* at 495–96.

92. See *id.* at 501 (“We deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure. And though it may be criticized as ‘elementary arithmetical logic,’ two layers are not the same as one.” (internal citation omitted)).

93. *Supreme Court Nominations (1789-Present)*, *supra* note 76.

94. See 591 U.S. 197, 201, 205 (2020).

95. See *id.* at 205.

96. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

(like the Federal Trade Commission in *Humphrey's Executor*), but that “single-director” agency heads must generally be directly accountable to the President.⁹⁷ The Court has, since the *Trump* immunity decision, suggested that *Humphrey's Executor* itself may soon be on the chopping block.⁹⁸

At the end of her first term on the Court in 2021,⁹⁹ Justice Amy Coney Barrett cast the decisive vote in *United States v. Arthrex, Inc.*, which handed proponents of executive power an even more significant victory by dramatically narrowing the circumstances in which executive officers are considered “inferior” and are thus insulated from direct presidential control even under the pre-2010 precedents.¹⁰⁰ At issue in *Arthrex* were the 200 or so patent judges within the U.S. Patent and Trademark Office who hear challenges to the validity of patents granted by the federal government.¹⁰¹ With Justice Clarence Thomas joining the three Democratic appointees in dissent, the 5–4 majority held that even these minor executive-branch adjudicators are in fact “principal” officers under the Constitution because their decisions are not supervised by an executive-branch officer.¹⁰² In one fell swoop, the Court significantly winnowed the ranks of bureaucrats protected from presidential removal by whatever was left of *Morrison* and substantially increased the President’s direct control over administrative patent judges within the executive branch—a class of officials whose independence is central to their job.¹⁰³

And yet, for everything that can be written and said about this slew of decisions, they were all confined to the specific context of the President’s ability to remove senior officers of the executive branch.¹⁰⁴ The unitary executive theory may have emerged with a flourish in removal cases, but neither *Free Enterprise*

97. *Seila Law*, 591 U.S. at 204–05; see also *Collins v. Yellen*, 594 U.S. 220, 256 (2021) (extending *Seila Law* to apply to most single-director-headed agencies).

98. See, e.g., *Trump v. Wilcox*, 145 S. Ct. 1415, 1417–19 (2025) (Kagan, J., dissenting from the grant of the application for stay); see also *Trump v. Boyle*, 145 S. Ct. 2653, 2654–55 (2025) (Kavanaugh, J., concurring in the grant of the application for stay) (noting that he would have granted certiorari before judgment to resolve whether to overrule *Humphrey's Executor*); *id.* at 2655 (Kagan, J., dissenting from the grant of the application for stay) (“By allowing the President to remove Commissioners for no reason other than their party affiliation, the majority has negated Congress’s choice of agency bipartisanship and independence. In doing so, the majority has also all but overturned *Humphrey's Executor* . . .”).

99. *Supreme Court Nominations (1789-Present)*, *supra* note 76.

100. See 594 U.S. 1, 4, 23 (2021).

101. *Id.* at 8.

102. See *id.* at 23 (majority opinion); *id.* at 44–45 (Thomas, J., dissenting).

103. See *id.* But see *Wiener v. United States*, 357 U.S. 349, 356 (1958) (inferring a “for cause” removal requirement in the statute governing the President’s removal of members of the War Claims Commission because they exercise “adjudicatory” functions).

104. See, e.g., *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 204 (2020).

Fund nor *Seila Law* nor *Arthrex* established any broader proposition about Article II ensuring the President's ability to control every feature of the executive branch—especially its responsiveness (or lack thereof) to external accountability measures.¹⁰⁵

C. Privileges and Immunities Before Trump

In that context, the Court's jurisprudence presented more of a mixed bag. In *United States v. Nixon*, a unanimous Court¹⁰⁶ quite profoundly rejected President Nixon's argument that Article II invested him with an absolute privilege against the disclosure of sensitive internal executive branch communications—recognizing only a “qualified” executive privilege¹⁰⁷ (and holding that it was overcome in that case, specifically, by the prosecution's need for potentially inculpatory evidence in a criminal case).¹⁰⁸

And although a 5–4 majority in *Nixon v. Fitzgerald* recognized that former presidents were entitled to absolute immunity from damages liability in suits arising out of acts within the “outer perimeter” of their official duties—that immunity certainly at least appeared to be limited to civil suits for damages.¹⁰⁹ In 1997, the Court unanimously rejected President Clinton's effort to extend that immunity to cover *all* civil suits against the President while he's in office.¹¹⁰ Indeed, it is arguably an open question today whether the federal courts have the authority to issue prospective relief against the President.¹¹¹

In 2020, the Supreme Court, in a pair of rulings, rejected attempts by then-President Trump to quash subpoenas for his financial records—one from Congress and one from the Manhattan District Attorney.¹¹² Although both decisions somewhat narrowed the subpoenas that had been issued, only Justice Thomas

105. *See id.* at 204–05; *Arthrex, Inc.*, 594 U.S. at 23; *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484, 486–87 (2010).

106. Then-Justice Rehnquist did not participate. *See* 418 U.S. 683, 716 (1974).

107. *Id.* at 705–06.

108. *Id.* at 713–14.

109. 457 U.S. 731, 755–57 (1982).

110. *Clinton v. Jones*, 520 U.S. 681, 696 (1997).

111. *See* Steve Vladeck, *Do Federal Courts Lack the Power to Directly Enjoin the President?*, JUST SECURITY (Aug. 14, 2017), <https://www.justsecurity.org/44201/federal-courts-lack-power-enjoin-president/> [<https://perma.cc/5QBT-XUCN>].

112. *See Trump v. Mazars USA, LLP*, 591 U.S. 848, 853, 871 (2020) (Congress); *Trump v. Vance*, 591 U.S. 786, 791–92, 810 (2020) (Manhattan DA).

endorsed the view that Article II somehow insulated the President from complying with the subpoenas at all.¹¹³

Against that backdrop, when the Trump immunity case reached the D.C. Circuit, a unanimous and ideologically diverse panel viewed the matter as remarkably straightforward.¹¹⁴ The Supreme Court had never suggested that Article II conferred immunity from criminal liability for official acts, and so that should be the end of the matter.¹¹⁵ The problem for the panel's decision, though, was viewing the relevant precedents as the two *Nixon* cases and *Clinton*—and not the more recent cases about the unitary executive.¹¹⁶ It was the latter theory that ended up doing most of the work when the case reached the Supreme Court.¹¹⁷

III. *TRUMP* AND ITS IMPLICATIONS

A. *The Majority vs. Justice Barrett*

A fair amount has already been written, much of it critical, about Chief Justice Roberts's majority opinion in *Trump*.¹¹⁸ Of course, the central point of disagreement between the majority and the dissent was over the existence of the immunity from criminal prosecution that the majority recognized.¹¹⁹

But just as (if not more) important was the majority's threshold conclusion—that Trump's conversations with Department of Justice officials, which were central to the indictment's obstruction charge, implicated the President's "exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials."¹²⁰ As Professor Jack Goldsmith has explained, "[t]hese were the most far-reaching rulings in the decision, and some of the most far-reaching pronouncements about presidential power in the Court's history."¹²¹

113. See *Mazars USA, LLP*, 591 U.S. at 872 (Thomas, J., dissenting); *Vance*, 591 U.S. at 815 (Thomas, J., dissenting).

114. See *United States v. Trump*, 91 F.4th 1173, 1208 (D.C. Cir.) (per curiam), *vacated and remanded*, 603 U.S. 593 (2024).

115. See *id.*

116. See *id.* at 1188.

117. See *Trump*, 603 U.S. at 659–86 (Sotomayor, J., dissenting).

118. See, e.g., Richard Lempert, *Trump v. United States: Explaining the Outrage*, BROOKINGS (July 12, 2024), <https://www.brookings.edu/articles/trump-v-united-states-explaining-the-outrage/> [<https://perma.cc/M74G-KCR2>].

119. For more on how the focus of the arguments shifted between the D.C. Circuit and the Supreme Court, see Goldsmith, *supra* note 9, at 8–15.

120. *Trump*, 603 U.S. at 621.

121. Goldsmith, *supra* note 9, at 17.

Critically, instead of framing the question as whether Article II could be viewed as creating the type of privilege recognized in *United States v. Nixon*, or the immunity recognized in *Nixon v. Fitzgerald*, the majority considered whether the underlying criminal statutes required courts to consider conduct that fell within the President's "preclusive" power.¹²² Immunity thus flowed from the preclusiveness of the President's authority—not a more generalized Article II concept.¹²³ Such an approach in *United States v. Nixon* would have led to executive privilege being absolute or nonexistent, rather than the qualified privilege that the Court actually recognized.¹²⁴

Although the lead dissent had plenty to critique in this move (and in the rest of the majority's analysis), what is perhaps even more revealing for present purposes is the daylight between the majority opinion and Justice Barrett's separate opinion concurring in part.¹²⁵ In particular, although Justice Barrett agreed with the bulk of the majority opinion, she specifically did not join in Part III-C¹²⁶—where the majority held that Article II requires more than just dismissal of criminal indictments arising out of official acts; it also bars any proceeding in which the criminality of those acts might even be examined by a court.¹²⁷ In other words, the Article II protection the Court identified in *Trump* was not just against indictments for official acts; it almost appeared to extend to subjecting the President's official acts to the specter of judicial second-guessing in general.¹²⁸

Justice Barrett's concurrence highlighted this ambiguity—and tried to argue against it. As she wrote,

Consistent with our separation of powers precedent, I agree with the Court that the supervision and removal of appointed, high ranking Justice Department officials falls within the President's core executive power. I do not understand the Court to hold that all exercises of the Take Care power fall within the core executive power. I agree with the dissent that the Constitution does not justify such an expansive view.¹²⁹

In other words, by shifting the frame from an Article II immunity-specific principle to the President's preclusive powers more generally, the majority blurred the line between which Article II protections were simply a barrier to criminal

122. See *Trump*, 603 U.S. at 619–21.

123. See *id.*

124. See 418 U.S. 683, 707 (1974).

125. See *Trump*, 603 U.S. at 650–53 (Barrett, J., concurring in part).

126. *Id.* at 650–51.

127. See *id.* at 630–32 (majority opinion).

128. See *id.*

129. *Id.* at 651 n.1 (Barrett, J., concurring in part) (internal citations omitted).

prosecution, and which protections reflected the type of “conclusive and preclusive” power that would presumably render unconstitutional other attempts to hold presidents accountable.¹³⁰ Although Justice Barrett tried to downplay the difference between the majority’s approach and hers, she again parted company on precisely this point:

Properly conceived, the President’s constitutional protection from prosecution is narrow. The Court leaves open the possibility that the Constitution forbids prosecuting the President for *any* official conduct, instructing the lower courts to address that question in the first instance. I would have answered it now. Though I agree that a President cannot be held criminally liable for conduct within his “conclusive and preclusive” authority and closely related acts, the Constitution does not vest every exercise of executive power in the President’s sole discretion. Congress has concurrent authority over many Government functions, and it may sometimes use that authority to regulate the President’s official conduct, including by criminal statute. Article II poses no barrier to prosecution in such cases.¹³¹

The real daylight between Barrett and the majority was over the breadth of the implications of the Court’s decision.¹³² But Justice Barrett was the sixth vote in support of the judgment in *Trump*.¹³³ If anything, her concurrence drives home just how broadly the majority opinion can be read to speak at least for the other five Republican appointees—and the precedent it may well set with respect to preclusive presidential power.¹³⁴ In one of the more astute and comprehensive discussions of the decision, Professor Goldsmith suggests that it “opens up a bevy of possible new implications about the scope of presidential power, both vertically within the executive branch and with respect to law enforcement in the world.”¹³⁵ Indeed, the ruling not only opens the door to greater presidential power in general, but to more *indefeasible* presidential power—meaning the ability on the President’s part to defy or ignore efforts to constrain how those powers are exercised.¹³⁶

130. *See id.*

131. *Id.* at 651–52 (internal citations and footnote omitted).

132. *See id.*

133. *Id.* at 650.

134. *See* Goldsmith, *supra* note 9, at 24–25.

135. *Id.* at 25.

136. *See id.* at 31.

B. The First Year After Trump

Perhaps the best evidence of *Trump*'s significance beyond the specific context of immunity from criminal prosecution is how widely it was cited (and relied upon) in the first year after it was handed down.¹³⁷ Westlaw, for example, identifies 83 different judicial opinions citing the Supreme Court's ruling as of October 12, 2025. Although one of those is the New York state trial court distinguishing the ruling with respect to whether Trump could be held criminally liable for state offenses committed before he was President,¹³⁸ the other 82 citations all involve questions of executive power writ large—and not immunity from criminal prosecution. Even the lone citation of *Trump* to date from the Supreme Court—a spiteful reference to the ruling, found in Justice Sonia Sotomayor's dissent in the birthright citizenship case—was about the broader power it conferred, not the immunity from prosecution it conveyed.¹³⁹

It's not just that courts are citing to *Trump*'s treatment of executive power; it is that the executive branch is deploying that argument in all manner of contexts, including, but not limited to, judicial proceedings.¹⁴⁰ One of the most frequent places for invocation of the ruling has been in emergency applications to the Supreme Court.¹⁴¹ Of the 20 applications President Trump filed in his six months in office, five specifically invoked the *Trump* immunity ruling—even though none of the disputes had anything to do with efforts to criminally prosecute a current or former president.¹⁴²

Although the majority has not yet expressly embraced the reasoning in *Trump* in support of its grants of relief in any of these cases, that may simply be because many of the grants of relief have been unexplained¹⁴³—or because the

137. See, e.g., *Dellinger v. Bessent*, No. 25-5028, 2025 WL 559669, at *13 (D.C. Cir. Feb. 15, 2025) (Katsas, J., dissenting); *Leopold v. Fed. Bureau of Investigation*, No. 22-1921 (BAH), 2025 WL 445183, at *10 (D.D.C. Feb. 10, 2025).

138. See *People v. Trump*, 224 N.Y.S.3d 832, 848–64 (Sup. Ct. 2024).

139. See *Trump v. CASA, Inc.*, 606 U.S. 831, 894 (2025) (Sotomayor, J., dissenting).

140. See, e.g., *Application to Vacate the Injunction at 14*, *Noem v. Abrego Garcia*, 145 S. Ct. 1017 (2025) (No. 24A949).

141. See, e.g., *id.* at *11.

142. See *id.* at 14; *Application to Stay at 11*, *Trump v. Boyle*, 145 S. Ct. 2653 (2025) (No. 25A11); *Application to Stay at 23*, *Trump v. Am. Fed'n of Gov't Emps.*, 145 S. Ct. 2635 (2025) (No. 24A1174); *Application to Stay at 12–13*, *Trump v. Wilcox*, 145 S. Ct. 1415 (2025) (No. 24A966); *Application to Vacate the Order at 1–2*, *Bessent v. Dellinger*, 145 S. Ct. 1326 (2025) (No. 24A790).

143. See Steve Vladeck, *The Case for Not Writing*, ONE FIRST (July 17, 2025) [hereinafter Vladeck, *The Case for Not Writing*], <https://www.stevevladeck.com/p/bonus-167-the-case-for-not-writing> [https://perma.cc/2D9M-FMPB].

Court is putting off, at least for now, the ultimate merits questions raised in many of these cases.¹⁴⁴

Whatever the reasons for how the Supreme Court has avoided *Trump*-related arguments in *Trump*-based emergency applications thus far, it will only be able to hold off for so long.¹⁴⁵ The President and his lawyers seem intent upon making every plausible argument available to them for why an array of statutes purporting to limit the Executive Branch's power or otherwise requiring various measures of accountability are unconstitutional in light of the Supreme Court's decision on presidential immunity.¹⁴⁶ Those arguments will have to be addressed by the Supreme Court eventually.¹⁴⁷

C. The Longer-Term Implications

Until that happens—and especially if the Court endorses those arguments—I see three different, but related, sets of long-term implications when it comes to the separation of powers.

First, and least visibly, it stands to reason that the indefeasible power recognized in *Trump* will be routinely invoked by Executive Branch lawyers in efforts to forestall or completely ward off various forms of oversight—especially informal oversight from congressional committees and individual members.¹⁴⁸ Now, as opposed to what was true before *Trump*, the Executive Branch can point to a recent precedent that at least appears to support an especially robust view of the scope of the President's preclusive powers—a precedent that will necessarily give the Executive Branch more leverage at the bargaining table.¹⁴⁹ If nothing else, *Trump* will surely change the internal calculus about how much the Executive Branch should cooperate with reasonable requests for information from overseers—and how much it should dig in its heels and fight.¹⁵⁰

144. See Steve Vladeck, *The Appeasement Thesis*, ONE FIRST (July 10, 2025) [hereinafter Vladeck, *The Appeasement Thesis*], <https://www.stevevladeck.com/p/bonus-165-the-appeasement-thesis> [https://perma.cc/X8T7-CNXN].

145. See Vladeck, *The Case for Not Writing*, *supra* note 143.

146. See, e.g., sources cited *supra* note 142.

147. See Vladeck, *The Appeasement Thesis*, *supra* note 144.

148. See *id.*

149. See Steve Vladeck, *The Broader Article II Implications of the Trump Immunity Ruling*, ONE FIRST (July 22, 2024) [hereinafter Vladeck, *Broader Article II Implications*], <https://www.stevevladeck.com/p/91-the-broader-article-ii-implications> [https://perma.cc/E4N7-LSEE].

150. See *id.*

Second, and related, the *Trump* ruling will almost certainly create more incentive for the Executive Branch to resist more formal oversight efforts, including subpoenas, whether from state or local prosecutors or congressional committees.¹⁵¹ Even if the 2020 decisions in *Mazars* and *Vance* stand for the proposition that such subpoenas aren't an unconstitutional intrusion into Article II per se, *Trump* will give fodder to the Executive Branch to resist subpoenas that seek information that may fall within the scope of the preclusive power the Court identified—for the same reasons why evidence implicating that power was, in the majority's view, inadmissible in a criminal case.¹⁵² The upshot of both of these first two implications will be to tilt the scales, fairly significantly, toward the federal Executive Branch in both horizontal accountability disputes with Congress and vertical accountability disputes with state and local governments.¹⁵³

Third, *Trump* will turbocharge constitutional objections to long-standing statutes on the ground that they intrude into the very preclusive executive power that the majority recognized in its ruling.¹⁵⁴ We've already seen those arguments with respect to statutory limits on the President's ability to remove government officers without cause.¹⁵⁵ But there are hundreds of other statutes that might now be challenged because they dare to limit, in any way, how the President controls the Executive Branch—from limiting the power to remove ordinary employees who are not federal officers, to imposing conditions on who can hold an office, to requiring particular Executive Branch officials to make information public (even if the President doesn't want them to), and so on.¹⁵⁶ The critical point is not that these statutes will necessarily be invalidated after and in light of *Trump*; rather, it is that they have become vulnerable to constitutional challenge to a degree that was not true as late as the last day of June 2024.¹⁵⁷

The upshot of all of these developments will be—and already has been—a fundamental shift in both real and perceived power, away from Congress and toward the Executive Branch. And although this conclusion may not seem especially concerning at a moment in which Congress seems almost entirely

151. Vladeck, *The Appeasement Thesis*, *supra* note 144.

152. *See* *Trump v. United States*, 603 U.S. 593, 642 (2024); *Trump v. Mazars USA, LLP*, 591 U.S. 848, 869–71 (2020); *Trump v. Vance*, 591 U.S. 786, 810 (2020).

153. *See* Vladeck, *Broader Article II Implications*, *supra* note 149.

154. *See id.*

155. *See, e.g.*, Application to Stay at 11, *Trump v. Boyle*, 145 S. Ct. 2653 (2025) (No. 25A11); Application to Stay at 12–13, *Trump v. Wilcox*, 145 S. Ct. 1415 (2025) (No. 24A966); Application to Vacate the Order at 1–2, *Bessent v. Dellinger*, 145 S. Ct. 1326 (2025) (No. 24A790).

156. *See* Vladeck, *Broader Article II Implications*, *supra* note 149.

157. *See id.*

uninterested in asserting its institutional prerogative vis-à-vis the Executive Branch, that too may (and hopefully will) pass. If and when Congress seeks to enforce existing statutes and oversight authorities, it will find itself in a very different (and far weaker) position on the relative separation of powers than it did before the *Trump* ruling—without any regard to the prospects for future criminal prosecutions of U.S. presidents.¹⁵⁸

IV. CONCLUSION: THE IMPUNITARY EXECUTIVE

There are any number of respects in which, long before President Trump came to office (either the first time or the second), the Supreme Court had made it more difficult to hold the Executive Branch accountable.¹⁵⁹ Indeed, the last time I had the privilege of presenting at this symposium, my Article for this law review sought to document the myriad ways in which procedural doctrines, some of which were brand new, had gotten in the way of efforts to adjudicate the merits of many of the federal government's post-September 11 policies.¹⁶⁰ The result has been to impose an array of barriers to judicial accountability for Executive Branch misconduct, even in the civil litigation space.¹⁶¹

Read narrowly, the Supreme Court's ruling in *Trump* adds but a small piece to that puzzle—closing the door on criminal prosecutions of current or former presidents for official acts.¹⁶² If that were all it did, and all it said, we might bemoan it as the latest in a long line of cases swimming in the same direction—a modest addition to, rather than a seismic shift in, our constitutional doctrines. But *Trump*'s significance comes from placing the full ruling within a broader context.¹⁶³ For the reasons articulated above, the decision will make it much harder for a Congress that wants to conduct rigorous oversight of the Executive Branch to do so.¹⁶⁴ It will make it much harder for anyone to judicially enforce statutes limiting the Executive Branch in the face of claims that those statutes are unconstitutional.¹⁶⁵ And it already has become virtually impossible for litigants to obtain damages for lawless behavior by the federal Executive Branch.¹⁶⁶ The result is that meaningful

158. See Goldsmith, *supra* note 9, at 18.

159. See *supra* Part II.

160. See generally Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035 (2016) (discussing post-9/11 counterterrorism policies and proposing reforms).

161. See *id.*

162. See *Trump v. United States*, 603 U.S. 593, 614 (2024).

163. See Vladeck, *Broader Article II Implications*, *supra* note 149.

164. See *supra* Part III.C.

165. See *supra* Part III.C.

166. See Morrison, *supra* note 6, at 28–29.

Executive Branch accountability has been reduced to two vectors: the ballot box (which opens only every four years) and suits for injunctive relief that have not (yet) been subject to the same array of procedural constraints as backward-facing suits for damages.¹⁶⁷

As previewed above, it will be in that context that the true implications of the *Trump* ruling will be tested—and where the Supreme Court will be forced to clarify just how far it meant to go, in the context of foreclosing much of the January 6 prosecution of then-former President Trump, in expanding the preclusive powers of all presidents.¹⁶⁸ The early returns, at least, have enabled a remarkable amount of arguably unlawful behavior by Trump. But, as noted above, those same rulings have largely managed to avoid any type of conclusive answers on the merits.¹⁶⁹

Chief Justice Roberts’s majority opinion in *Trump* repeatedly cites the formulation of preclusive executive power in Justice Jackson’s *Youngstown* concurrence, but all but ignores Justice Jackson’s repeated cautions and concerns about reading that power expansively.¹⁷⁰ One need not look to history books to understand the very real risks, both in the short and long term, of giving the President too much power at the expense of the other branches of government; the daily headlines will suffice.¹⁷¹

We may, then, be left mostly to hope that the Court comes to its senses—and that, the next time it is faced with a claim by the President that he has preclusive power, it considers how Justice Jackson ended his celebrated concurrence:

The essence of our free Government is “leave to live by no man’s leave, underneath the law”—to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. . . . With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the

167. *See id.* at 29.

168. *See Trump v. United States*, 603 U.S. 593, 679–80 (2024) (Sotomayor, J., dissenting).

169. *See supra* Part III.B.

170. *See Trump*, 603 U.S. at 605–609, 638, 641; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

171. *See e.g.*, David Klepper & Konstantin Toropin, *Trump’s Use of the National Guard Sets Up a Legal Clash Testing Presidential Power*, AP NEWS (Oct. 6, 2025, at 20:19 CDT), <https://apnews.com/article/trump-national-guard-legal-clash-presidential-power-1ed22e89bcdebc8d3e5bd9238373dc45> [<https://perma.cc/B4FN-L49W>]; Elissa Steedman, *The Key Areas Where Trump Has Been Accused of Presidential Overreach*, ABC NEWS (Feb. 20, 2025), <https://www.abc.net.au/news/2025-02-21/trump-presidential-overreach-accusations/104914186> [<https://perma.cc/RSQ5-AH8X>].

Executive be under the law, and that the law be made by parliamentary deliberations.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.¹⁷²

172. *Youngstown*, 343 U.S. at 654–55 (Jackson, J., concurring).