

**ARTICLES**

**THE IMPLICATIONS OF *TRUMP V. UNITED STATES*  
FOR THE EXERCISE OF FOREIGN AFFAIRS AND  
WAR POWERS**

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ABSTRACT

*The unique format of this Festschrift has afforded us the opportunity to consider the possible impact and consequences of the U.S. Supreme Court's recent presidential immunity decision in *Trump v. United States* upon the exercise of the President's powers in the particular areas of diplomacy and war. In the view of some observers, the decision represents a striking (and unprecedented) extension of presidential immunity and, perhaps more consequentially, poses a serious constraint on the ability of the judiciary to constrain future presidential abuses of power in the field of foreign relations. For that reason, it is worth careful analysis and interpretation. The issues it raises are among the subjects of the seminar that we teach together at Georgetown Law, aptly titled "Constitutional Aspects of Foreign Affairs."*

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I. BACKGROUND

In an historic decision handed down in July 2024,<sup>1</sup> the U.S. Supreme Court held that under the constitutional structure of separated powers, a former President is entitled to absolute immunity from criminal prosecution for actions taken within the scope of the President’s “conclusive and preclusive constitutional authority”—the so-called “core” powers—and is further entitled to at least presumptive immunity from prosecution for all official acts.<sup>2</sup>

In the Court’s view, “[t]he nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President’s exercise of his core constitutional powers, this immunity must be absolute.”<sup>3</sup> While noting that there is no immunity for “unofficial” acts,<sup>4</sup> the Court provided no clear guidance on how to distinguish the one from the other, or from a President’s “core constitutional powers.”

The proceeding in question arose out of a federal grand jury indictment charging that, after losing the 2020 election but before leaving office, then-President Donald J. Trump conspired to overturn the result by knowingly and intentionally spreading false claims of election fraud in order to obstruct the collection, counting, and certification of the election results. The district court denied his motion to dismiss, holding that former Presidents do not possess immunity for such federal criminal acts,<sup>5</sup> and the D.C. Circuit affirmed.<sup>6</sup> Given the preliminary nature of the relevant motion to dismiss, neither the district nor appellate

1. *Trump v. United States*, 603 U.S. 593 (2024).

2. *Id.* at 614. The precise question addressed by the Court was “[w]hether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.” *Id.* at 605. As the majority opinion expressly noted, “[t]his case is the first criminal prosecution in our Nation’s history of a former President for actions taken during his Presidency.” *Id.*

3. *Id.* at 606, 614.

4. *Id.* at 615 (“As for a President’s unofficial acts, there is no immunity. The principles we set out in *Clinton v. Jones* [520 U.S. 681 (1997)] confirm as much”).

5. *United States v. Trump*, 704 F.Supp.3d 196 (D.D.C. 2023).

6. *United States v. Trump*, 91 F.4th 1173, 1208 (D.C. Cir. 2024) (having “balanced former President Trump’s asserted interests in executive immunity against the vital public interests that favor allowing this prosecution to proceed . . . [w]e conclude that ‘[c]oncerns of public policy, especially as illuminated by our history and the structure of our government, compel the rejection of his claim of immunity in this case. . . . We also have considered his contention that he is entitled to categorical immunity from criminal liability for any assertedly ‘official’ action that he took as President—a contention that is unsupported by precedent, history or the text and structure of the Constitution.”).

court was required to decide whether the indicted conduct did in fact involve official acts.

The U.S. Supreme Court vacated and remanded. Writing for the majority,<sup>7</sup> the Chief Justice noted that while no domestic court has yet determined exactly how to distinguish between the official and unofficial acts of a President, presidential immunity “extends to the outer perimeter of the President’s official responsibilities, covering actions so long as they are not manifestly or palpably beyond his authority[,]”<sup>8</sup> and that, in determining what qualifies as official conduct, “courts may not inquire into the President’s motives.”<sup>9</sup> An action is not unofficial, the opinion added, “merely because it allegedly violates a generally applicable law.”<sup>10</sup> The Court remanded the case for the lower courts to determine “whether and to what extent Trump’s alleged conduct is entitled to immunity.”<sup>11</sup>

The Chief Justice was careful to state that the President “enjoys no immunity for his unofficial acts, and that not everything the President does is official. The President is not above the law.”<sup>12</sup> At the same time, the Chief Justice observed,

Congress may not criminalize the President’s conduct in carrying out the responsibilities of the Executive Branch under the Constitution. And the system of separated powers designed by

7. The majority opinion was joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh. Justice Barrett joined in part; Justices Thomas and Barrett concurred in part. Justice Sotomayor filed a dissenting opinion (in which Justices Kagan and Jackson joined); Justice Jackson also filed a dissenting opinion.

8. *Trump v. United States*, 603 U.S. 593, 618. *Presumptive* immunity from criminal prosecution exists for a President’s acts within the “outer perimeter” of his official responsibilities “so long as they are ‘not manifestly or palpably beyond [his] authority.’” *Id.* at 595–96 (citing *Blossingame v. Trump*, 87 F.4th 1, 13 (D.C. Cir. 2023)).

9. *Id.* at 618. In consequence, there is presumptive immunity for any “official act” regardless of the motive or intent behind it and whether it is unlawful or even criminal. Justice Sotomayor stated in her dissent, however, that “[w]hether described as presumptive or absolute, under the majority’s rule, a President’s use of any official power for any purpose, even the most corrupt, is immune from prosecution. That is just as bad as it sounds, and it is baseless.” *Id.* at 659 (Sotomayor, J., dissenting).

10. *Id.* at 619. That sentence can plausibly be read to reflect an understanding that, by acting “officially,” a President may permissibly—even constitutionally—commit unlawful acts and even violate a criminal prohibition.

11. *Id.* at 637.

12. *Id.* at 642. The Chief Justice thus implicitly rejected former President Nixon’s famous assertion, made during an interview with David Frost in 1977, that “when the President does it . . . that means that it is not illegal.” Interview by David Frost with Richard Nixon (May 19, 1977) (transcript on file with Teaching American History).

the Framers has always demanded an energetic, independent Executive. The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts. That immunity applies equally to all occupants of the Oval Office, regardless of politics, policy, or party.<sup>13</sup>

While the opinion did not say so explicitly, it seems clear that the rule as stated would apply to sitting as well as former Presidents.

From one perspective, the statement quoted above makes good sense. If the U.S. Constitution clearly obligates (or merely empowers) the President to perform certain functions or to carry out certain duties, then it cannot be within the legitimate authority of the Congress to criminalize the performance of those functions or duties—at least when the acts are done within the scope of the relevant provisions. Although the Court did not articulate its reasoning on this point, the *justification* must surely be that the President would be doing no more than exercising his responsibilities under the “Take Care” clause of the Constitution.<sup>14</sup>

Moreover, even the threat of criminal prosecution might well inhibit a President from taking prompt and decisive action in exigent circumstances—if necessary, to the furthest reach of her powers.<sup>15</sup> The underlying premise would be that, to the extent that such activities exceed the legitimate limits of those powers (or violate a criminal law), the appropriate remedy must be political (through impeachment or at the ballot box) rather than judicial.<sup>16</sup> As a practical matter, however, such remedies may

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13. *Trump*, 603 U.S. at 642. The Court did not explicitly determine whether “knowingly and intentionally spreading false claims of election fraud” in violation (criminal or otherwise) of “generally applicable law” could properly be considered an “official act,” or might be considered to fall within the President’s “core constitutional powers.” Neither did it define the scope of those “core powers” with any precision. It did say, however, that core powers include “commanding the Armed Forces, granting reprieves and pardons, appointing public ministers and foreign relations such as “making treaties, appointing ambassadors, recognizing foreign governments, meeting foreign leaders, overseeing international diplomacy and intelligence gathering . . . terrorism, trade and immigration.” *Id.* at 607. The prosecution of federal offenses has also been described as a core presidential power. *See Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting). It is difficult to imagine, however, that actions in violation of federal criminal law could properly be considered an exercise of “core” presidential powers.

14. U.S. CONST. art. II, § 3 (requiring the President to “take Care that the Laws be faithfully executed . . .”).

15. At the same time, it is not at all clear how the acts alleged (spreading false claims of election fraud in order to obstruct the collection, counting, and certification of election results) might satisfy that standard.

16. Since the case against former President Trump had been brought after he had left office, impeachment was not an option.

not always be available—for instance, when the President’s actions enjoy majority support in the Congress or (more obviously) when the President is no longer in office.

The Court did not specifically determine whether the charges of “knowingly and intentionally spreading false claims of election fraud in order to obstruct the collection, counting, and certification of the election results” were in fact “official acts” or implicated “core constitutional powers.”<sup>17</sup> However, following the Court’s decision, the federal charges against then-former President Trump were dismissed,<sup>18</sup> so those questions remain unresolved, at least for the moment.

Still, the essential accusation against President Trump—that he sought to overturn a national election—strikes at the very heart of the U.S. democratic system. It would seem implausible to justify the acts in question as “official,” much less within a President’s “core” constitutional powers. Accordingly, the issues presented by the Court’s decision are worthy of careful and continued consideration.<sup>19</sup>

## II. IMPLICATIONS FOR THE PRESIDENT’S FOREIGN AFFAIRS AUTHORITY

Although the specific charges against President Trump arose in a domestic context, the Court’s analysis was not explicitly limited to domestic situations. Indeed, both its conclusion and underlying rationale clearly have broad—and potentially very troublesome—implications in the context of foreign affairs, where the President’s constitutional authority is even more extensive, more informed by policy, and less constrained by statute than it is in a purely domestic context.

While the Congress holds express constitutional authority to regulate public and private dealings with other nations through its war and foreign commerce powers,<sup>20</sup> the President has a substantial degree of authority to act independently in the foreign affairs context.<sup>21</sup> The Court itself has long recognized that the conduct of the nation’s foreign relations is unquestionably within the scope of the President’s “core powers”<sup>22</sup> and it

17. Presumably, few would argue that it could be “constitutional” to violate the Constitution.

18. See *United States v. Trump*, 757 F.Supp.3d 82 (D.D.C. 2024).

19. Several thoughtful analyses have already been provided. See *generally*, Laura Dickinson, *Protecting the U.S. National Security State from a Rogue President*, 16 HARV. NAT’L SEC. J. 1 (2025); Philippe Sands, *How Far Does Trump’s Immunity Go?*, ATLANTIC (Oct. 6, 2025), [https://www.theatlantic.com/ideas/archive/2025/10/trump-presidential-immunity/684413/?utm\\_source=flipboard&utm\\_content=topic/internationallaw](https://www.theatlantic.com/ideas/archive/2025/10/trump-presidential-immunity/684413/?utm_source=flipboard&utm_content=topic/internationallaw).

20. U.S. CONST. art. I, § 8, cl. 3, 11.

21. See U.S. CONST. art. II, § 2, cl. 2.

22. See, e.g., *United States v. Belmont*, 301 U.S. 324, 331 (1937); *United States v. Pink*, 315 U.S. 203, 229 (1942); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). See

has, on many occasions, emphasized the breadth of presidential authority in the field of foreign affairs and national security.<sup>23</sup> Consequently, the approach it has taken in the *Trump* decision may well turn out to be even more consequential in the foreign affairs area than it is in the purely domestic context.

Over time, of course, the Court's decisions have offered differing views about when and to what extent the constitutional principle of "separation of powers" applies to the executive's actions in the foreign affairs realm. It has been clear, however, that under the Constitution, the President holds the "executive power" of the federal government, and with respect to the nation's foreign relations, that power is even more extensive than it is in purely domestic contexts.<sup>24</sup> The concern is that in stating explicitly that a President may not be prosecuted for exercising "his core constitutional powers," the decision may well prove to have encouraged future occupants of the Oval Office to disregard legal constraints on the conduct of foreign policy.

For instance, the President's constitutional authority to nominate and receive ambassadors<sup>25</sup> has been interpreted broadly to embrace decisions about whether and when to recognize foreign states or governments, when and how to maintain diplomatic relations with other nations, whether to engage in alliances and confrontations, etc.<sup>26</sup> While the Senate must, of course, give advice and consent to ambassadorial nominees, the exercise of the broader "recognition" authority falls squarely within the President's exclusive discretion; it is not shared with the Congress and cannot be second-guessed by the judiciary.<sup>27</sup> Yet the recognition power provides the underlying constitutional basis for a substantial portion of the foreign relations functions of the U.S. government.<sup>28</sup> Similarly, while the authority to

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generally *Zivotofsky v. Clinton*, 566 U.S. 189 (2012); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

23. See, e.g., *Clinton*, 566 U.S. at 189.

24. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); cf. *Dames & Moore v. Regan*, 453 U.S. 654, 675 (1981) (noting that in nullifying attachments and ordering assets transfer of the assets the President acted pursuant to specific congressional authorization); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1962) (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society"). Indeed, the Supreme Court has said clearly that the President is "exclusively responsible for the conduct of foreign affairs." *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950).

25. U.S. CONST. art. II, § 2, cl. 2, 3.

26. See, e.g., *Zivotofsky v. Kerry*, 576 U.S. 1, 17 (2015).

27. *Id.*

28. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) ("Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss

enter into treaties with other nations is shared with the Senate, the responsibility for negotiating treaties (and other international agreements), as well as for the conduct of most aspects of the nation's day-to-day foreign relations, falls to the President and those who report to her.<sup>29</sup>

As a result, determining the “outer perimeter of the President’s official responsibilities” with respect to the conduct of the nation’s foreign affairs is inherently challenging, to say the least. If the *Trump* opinion means that *any* executive decisions that are (or can logically be justified as being) grounded in the President’s exclusive (core) foreign affairs authority cannot be challenged unless they are “manifestly or palpably beyond” that authority,<sup>30</sup> then the door has been opened wide to a substantial risk of potentially unconstitutional and illegal conduct effectively beyond the reach of judicial review or sanction.<sup>31</sup>

### III. EXPLORING HYPOTHETICAL DILEMMAS POSED BY THE DECISION

Identifying historical instances of clearly criminal conduct by sitting Presidents in the field of foreign affairs has proved challenging. It is not very difficult, however, to conjure up some imaginary (if not entirely unrealistic) situations in which a President—whether motivated by selfish interest, evil intent, basic ignorance, a lack of proper counsel, or even a simple disregard for the law—might well want to take (or to direct) actions that deliberately disregard or are arguably unlawful under existing domestic or international law (or both), but

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on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations’” (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)). Similar points can be made with respect to the constitutional allocation of authority to declare war, raise and support Armies, to provide and maintain a Navy, etc.

29. See *Zivotofsky v. Kerry*, 576 U.S. 1, 20 (2015).

30. *Trump*, 603 U.S. at 618 (citing *Blassingame v. Trump*, 87 F.4th 1, 13 (D.C. Cir. 2023)).

31. As Justice Sotomayor noted in her dissent,

[T]he long-term consequences of [the Court’s] decision are stark. The Court effectively creates a law-free zone around the President, upsetting the status quo that has existed since the Founding. . . . When he uses his official powers in any way, under the majority’s reasoning, he now will be insulated from criminal prosecution. Orders the Navy’s Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.

*Trump*, 603 U.S. at 684–85. In contrast, some commentators contend that the decision does not in fact reflect a significant change in the Court’s interpretation but rather follows prior precedents both on official immunity and executive authority. See for example Robert Delahunty & John Yoo, *The Presidential Immunity Decision*, 2024 HARV. J.L. & PUB. POL’Y: PER CURIAM 34 (2024); see also Philip Bobbitt, *A Prudential Way Forward in Trump v. United States*, JUST SEC. (July 29, 2024), <https://www.justsecurity.org/98205/prudential-trump-v-united-states/>.

which could persuasively be described as falling within the scope of what may be his “core” constitutional authority over foreign affairs. If the President is entirely insulated from the constraints of criminal law (domestic or international), can self-interest and “political” considerations be effective safeguards?

Consider, for instance, the following (admittedly outrageous) hypotheticals in the foreign affairs realm, which may describe acts of questionable constitutional propriety (if not clearly illegal or even criminal conduct), but which are nonetheless plausible for a second-term President unconcerned with re-election.

- (1) Claiming that the vital foreign policy interests of the country require it, the President instructs members of the cabinet to order U.S. government personnel (civilian and military) to commit certain acts abroad that unquestionably violate the internationally accepted prohibitions against genocide, crimes against humanity, torture, or grave violations of the laws of war, despite having been clearly advised that such orders contravene both domestic and international law and that the individuals committing such acts would be prosecutable.<sup>32</sup>
- (2) A self-interested foreign dictator has taken power in another country and proposes to renegotiate the boundary with her neighbor so that her private company can exploit certain valuable natural resources that (as a result of the redrawn lines) would fall on “her side” of the border. In exchange for a promised share of the resulting profits (to be deposited in a foreign bank account), the President secretly agrees to instruct the U.S. embassy to pressure the neighboring country to accept the proposed agreement, including by threatening to withhold congressionally approved foreign assistance.<sup>33</sup>

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32. The United States is party to the 1948 UN Convention on the Crime and Punishment of Genocide and has implemented its provisions in U.S. law through 18 U.S.C. § 1091. It is also party to the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, implemented at 18 U.S.C. §§ 1340–1340B. For a discussion, see U.S. DEPT. OF STATE, INITIAL REPORT TO THE UN COMMITTEE AGAINST TORTURE (1999), [https://1997-2001.state.gov/global/human\\_rights/torture\\_articles.html](https://1997-2001.state.gov/global/human_rights/torture_articles.html). The use of armed force against unarmed civilians for law enforcement purposes might raise similar issues.

33. The bribery of public officials—including the President—is criminalized by 18 U.S.C. § 201. The offense includes both offering, giving, or promising, and receiving, accepting, or agreeing to accept anything of value. Article II, section 4 of the U.S. Constitution provides that the President (as well as the Vice President and all civil Officers of the United States) “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high

- (3) In retaliation for a foreign government’s criticism of his stated policies regarding immigration and refugee protection, the President instructs the U.S. Treasury to take certain actions specifically aimed at damaging that country’s economy by profoundly disrupting the functions of its central bank, depleting its financial reserves, and effectively devaluing its currency. However, it is instructed to do so only after the President has been able to adjust his personal portfolio in order to insulate his assets and indeed to profit from the resulting financial turmoil.
- (4) The President orders the summary (presumptively illegal) deportation of a political opponent to a violent and dangerous country, claiming after the fact that it had been an “administrative error,” although internal White House communications clearly demonstrate otherwise. Rejecting a judicial determination that the deportation had been illegal and that the government must “facilitate” the individual’s return, the President nonetheless determines that the court’s ruling requires only that she not raise barriers to her opponent’s return, rather than any positive action such as demanding it.
- (5) Against the unanimous advice of the cabinet, the Senate Foreign Relations Committee, and foreign policy experts both inside and outside the government—but in exchange for the promise of a large donation by the leader of a foreign government to his favorite personal recreational activity—the President agrees to veto a UN Security Council resolution condemning that government’s manifestly illegal armed incursion into a neighboring country.
- (6) Acting purely out of personal spite but claiming that the foreign policy interests of the United States require it, the President imposes harsh political and economic sanctions on a designated foreign country whose leader has recently criticized a U.S. action. Those sanctions impinge severely on the otherwise lawful rights of U.S. persons to have any dealings with that country. For instance, they prohibit U.S. persons from traveling to that country, forbid U.S. banks

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Crimes and Misdemeanors.” U.S. CONST. art. II, § 4. President Trump contended that the latter superseded the former, so that a sitting President is immune from criminal prosecution with respect to any “high crime or misdemeanor” for which he or she might be impeached. The Chief Justice’s opinion rejected that argument, noting that “[t]ransforming that political process [of impeachment] into a necessary step in the enforcement of criminal law finds little support in the text of the Constitution or the structure of our Government.” *Trump*, 603 U.S. at 634.

from engaging in any financial transactions in that country's currency, order the media not to report on developments in that country, and instruct U.S. officials to revoke the visas of—and summarily expel—all individuals who are citizens of that country.

- (7) The President invokes the powers afforded under the International Emergency Economic Powers Act (IEEPA)<sup>34</sup> to enforce steep tariffs on imports of certain goods from a foreign country. In the days following, however, credible investigations reveal that (i) there was no factual basis for the determination of an “emergency” within the meaning of the statute, (ii) the President was aware of that fact, and (iii) her personal investments as well as those of several senior White House staff members involved in the decision vastly outperformed the stock market as it reacted to the tariffs. SEC investigations into their trading activity reveal that they had clearly acted on the basis of insider information about when the tariffs would go into effect. However, invoking her “foreign affairs” authority, the President has directed the SEC not to investigate any members of the White House staff or her cabinet under threat of summarily firing anyone who objects.

Assume, for the sake of argument, that each of these (one would have thought outlandish) hypotheticals involves actions that (i) fall within the “outer perimeter of the President’s official responsibilities” given the President’s “conclusive and preclusive constitutional authority” over foreign affairs, so that (ii) they are presumptively “official”—perhaps even “core”—acts, but that (iii) they are motivated (in whole or in part) by “personal” (as opposed to “official”) interests. Some, but surely not all, would violate criminal law.

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34. Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701–1710). On April 2, 2025, President Trump declared a national emergency and announced imposition of a ten percent tariff on most imports to the United States and additional duties on certain trading partners. See *President Donald J. Trump Declares National Emergency to Increase our Competitive Edge, Protect our Sovereignty, and Strengthen our National and Economic Security*, WHITE HOUSE (Apr. 2, 2025), <https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-declares-national-emergency-to-increase-our-competitive-edge-protect-our-sovereignty-and-strengthen-our-national-and-economic-security>. For a recent decision describing the power to impose tariffs as a “core” Congressional power, see *V.O.S. Selections, Inc. v. Trump*, 149 F.4th 1312, 1332 (Fed. Cir. 2025).

Given the Court's explicit instructions that (i) courts may not inquire into the President's motives<sup>35</sup> and (ii) a particular presidential action is not unofficial "merely because it allegedly violates a generally applicable law,"<sup>36</sup> one must ask whether the *Trump* decision is to be understood to say that, even where the acts in question would be illegal (and possibly unconstitutional), the President would be (at least presumptively, and possibly absolutely) immune from challenge in domestic courts, including prosecution in the case of criminal acts.<sup>37</sup> That, even for clearly unconstitutional acts, the only paths to accountability would be through impeachment or rejection at the ballot box?<sup>38</sup>

One need not contemplate such extreme hypotheticals to understand the potential implications of the Court's decision or to have genuine concerns about the possible consequences of the Court's decision in less dire situations.

Broadly speaking, in the foreign affairs arena, the United States has long embraced the ideal of a rules-based order; in other words, that members of the international community should embrace and respect international law and legal principles in their relations with each other because doing so is in everyone's interest and promotes economic development, respect for human rights and equal treatment, the cause of freedom, etc.<sup>39</sup> Indeed, the United States has accepted various obligations regarding its conduct of

35. *Trump*, 603 U.S. at 618 (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982)).

"In dividing official from unofficial conduct, courts may not inquire into the President's motives. Such an inquiry would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect. Indeed, '[i]t would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government' if '[i]n exercising the functions of his office,' the President was 'under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry.'"

36. *Id.* at 619.

37. Whether such immunity would apply to international as well as domestic prosecution is another question, which we do not address here.

38. A related question—with which we also do not deal—is whether, under the Court's approach, presidential immunity could also shield the individual government officials who give effect to the President's instructions.

39. Some commentators distinguish between international law and a "rules-based order." See John Dugard, *The Choice Before Us: International Law or A 'Rules-Based International Order'?*, 36 LEIDEN J. INT'L L., 2023, at 223, 232 (2023). The latter is typically thought to be broader than the former, in that it includes not just rules but social, economic and political goals (e.g., human rights); Julinda Beqiraj et al., *The Rules-Based International Order: Catalyst or Hurdle for International Law?*, BRIT. INST. OF COMPAR. AND INT'L L. (Mar. 31, 2024), <https://www.biicl.org/publications/the-rules-based-international-order-catalyst-or-hurdle-for-international-law>. For present purposes, we do not rely on that distinction.

foreign relations (including on the use of force), the violation of which might entail criminal liability.<sup>40</sup>

Is the Court's opinion properly understood to say that, if the act in question is in fact done within the presumptive scope (or "outer perimeter") of the President's constitutional authority over the conduct of the nation's foreign affairs, then as a matter of domestic law it cannot be criminal—or at least cannot be prosecuted? If so, that would seem to entail immunity for a truly vast—possibly all-encompassing—range of presidential actions in the realm of foreign policy and relations.

Would it not then also be unconstitutional for the United States to become party to any agreement, arrangement, treaty or convention that would potentially expose a president to such criminal liability under international law? Consider, for instance, the international instruments criminalizing such acts as "official" torture, crimes against humanity, war crimes, or certain other significant human rights violations—acts that can only be done by individuals acting in an official capacity.<sup>41</sup> In such situations, should the Court's decision in *Trump* regarding constitutionally-based presidential immunity also apply to insulate lower-level officials engaged in carrying out the presidential directives?

#### IV. WHAT DID THE COURT ACTUALLY INTEND?

Did the Court actually mean to say that there can be no prosecutorial remedy at all for an alleged criminal violation by a President in office? That the only remedy is political (i.e., impeachment or rejection by the electorate)? Perhaps, although it seems unlikely since the Court was addressing the question in the context of a "former President." In any event, deferring entirely to the political system not only undermines the role of criminal law in national governance and more broadly the essential functions of law in the conduct of the nation's foreign affairs, it would also fail to check the President's power when the incumbent's political party is in control of both houses of the legislature.

Was the Court perhaps concerned mostly about the possible ramifications of permitting the winner in a hotly contested presidential election to pursue (prosecute) their defeated predecessor for alleged crimes committed before he or she lost the election—in effect by creating a statute-of-limitations on presidential crime?<sup>42</sup> Again, despite an

40. Consider, for example, international conventions prohibiting torture and genocide, the use of certain types of weapons, the commission of war crimes, etc.

41. The Court's opinion does not address whether subordinates carrying out a President's illegal or unconstitutional directives would benefit from the immunity that the Court had identified.

42. *Cf. Trump v. United States*, 603 U.S. 593, 642 (citing 35 Writings of George Washington 226–227 (John C. Fitzpatrick, ed., 1932)) (comparing the Chief Justice's reference to George

increasingly heated political context driven by divisive issues and a sharply divided electorate, that seems highly improbable, although adopting a very broad definition of “official acts” might well produce that very result.

Might the Court simply have been trying to insulate the judiciary from what it considers to be fundamentally dangerous political questions? Or to signal, more generally, that political disagreements require political solutions since criminalizing political choices can easily pose a fundamental danger to a democratic polity? Or did the Court apply a formal (if rather simplistic) separation-of-powers analysis without contemplating its possible consequences?<sup>43</sup> Is it fair, in any event, to understand the practical consequences of the Court’s decision as likely to encourage, rather than discourage, illegal conduct by a President-in-office? Or at least to cloak such conduct in official raiment? These seem to us particularly consequential issues worthy of careful analysis.

#### V. IMPORTANT QUESTIONS IN THE WAKE OF *TRUMP*

While the *Trump* case arose in a purely domestic context, we have been contemplating the international law and foreign affairs implications of its (in our view stunning) conclusion that former Presidents are (i) absolutely immune from criminal prosecution for actions taken in the exercise of their “core constitutional powers” and (ii) presumptively immune from prosecution for all their “official” acts.<sup>44</sup> Given the apparent breadth of those propositions, and the fact that unlike a sitting President, former occupants of the Oval Office are no longer subject to the political sanction of impeachment, it seems like an extraordinary (and questionable) approach to accountability and—more broadly—the rule of law.

We have pondered how to understand the reach of the Court’s conclusions and how, if at all, they might be relevant to the broader

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Washington’s comment that maintaining “a Government of as much vigour as is consistent with the perfect security of Liberty is indispensable” since a government “too feeble to withstand the enterprises of faction” could lead to the “frightful despotism” of “alternate domination of one faction over another, sharpened by the spirit of revenge”).

43. By way of example, see Shalev Gad Roisman, *Trump v. United States and the Separation of Powers*, 173 U. PA. L. REV. ONLINE 33 (2025), [https://scholarship.law.upenn.edu/penn\\_law\\_review\\_online/vol173/iss1/2/](https://scholarship.law.upenn.edu/penn_law_review_online/vol173/iss1/2/).

44. “We conclude that under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President’s exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity. At the current stage of proceedings in this case, however, we need not and do not decide whether that immunity must be absolute, or instead whether a presumptive immunity is sufficient.” *Trump*, 603 U.S. at 607 (2024). Neither did it address the question whether (or how) that immunity might be waived. Cf. *Carroll v. Trump*, 151 F.4th 50 (2d Cir. 2025).

questions we address in our seminar on the “Constitutional Aspects of Foreign Affairs.” Our seminar deals with the President’s constitutional authority over foreign affairs, particularly with diplomatic and war powers, including issues of congressional oversight, justiciability, and judicial review. The breadth of that authority—the reach of those powers—is extensive. Needless to say, we had never thought that the President’s exercise of those powers would be considered to be entirely insulated from the possibility of criminal prosecution, if the actions in question warranted such. Neither, we suppose, had the U.S. Supreme Court.

In that sense, the Court’s decision is without precedent. That is not to say, however, that it is necessarily wrong but only that, because it has the potential to be enormously consequential and because the Court’s reasoning seems less than rigorous, it is worthy of careful analysis from the constitutional perspective.

One dimension of the issue concerns the use of force at the international level. The Constitution, of course, explicitly assigns to Congress the power “to declare War.”<sup>45</sup> In consequence, it unquestionably gives the legislature the exclusive power formally to initiate hostilities. We distinguish that authority from the President’s unilateral “use of force” powers as commander-in-chief.<sup>46</sup> There is boundless scholarship touching on the tension between the two, with no definitive resolution.<sup>47</sup> The distinction has also been analyzed in a number of opinions of the Office of Legal Counsel of the Department of Justice.<sup>48</sup>

Whether Article I § 8 of the Constitution limits the presidential ability to use military force in armed combat without a formal declaration of war or other affirmative congressional approval has long been debated.<sup>49</sup>

45. U.S. CONST. art. I, § 8 (giving Congress *inter alia* the power to “provide for the common Defence,” to “raise and support Armies,” to “provide and maintain a Navy,” and to “make Rules for the Government and Regulation of the land and naval Forces”).

46. See U.S. CONST. art. II, § 2, cl. 1 (identifying The President as the Commander-in-Chief of the Army and Navy) and art. II, § 3, cl. 1 (charging The President with “tak[ing] Care that the Laws [are] faithfully executed . . .”).

47. See generally Rebecca Ingber, *The Insidious War Powers Status Quo*, 133 YALE L.J. 747 (2024); Harold H. Koh, *THE NATIONAL SECURITY CONSTITUTION IN THE 21<sup>ST</sup> CENTURY* (2024); William Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORN. L. REV. 695, 698 (1997); LOUIS FISHER, *PRESIDENTIAL WAR POWERS* (1995).

48. See, e.g., U.S. DEP’T OF JUST., *OVERVIEW OF THE WAR POWERS RESOLUTION* (Oct. 30, 1984). <https://www.justice.gov/olc/opinion/overview-war-powers-resolution>.

49. See generally Saikrishna Bangalore Prakash, *Deciphering the Commander in Chief Clause*, 131 YALE L.J. 1 (2023); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941 (2008); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

There are more than a few examples to suggest that Presidents may order the use of force in the absence of a formal congressional declaration.<sup>50</sup> Such an order, standing alone, would be unlikely to constitute a criminal act.

It is entirely possible, however, to contemplate a situation in which a unilateral presidential decision to use force (to initiate or conduct hostilities with another nation) or to use a particular kind of force (or perhaps to authorize the use of certain types of weapons) in a particular situation might plausibly be said not only to contravene the “take care” clause but also to give rise to allegations of criminal violations.<sup>51</sup> What if, for example, the President were to issue an order that clearly violated the law of war or international humanitarian law (say, use of armed force against noncombatants or civilians, or deployment of prohibited weapons)? Or that constituted “aggression” as defined by international criminal law?<sup>52</sup>

Most commentators agree that the Constitution grants to the President substantial—perhaps nearly complete—authority over the conduct of the nation’s foreign affairs.<sup>53</sup> The Supreme Court itself has referred to the Executive as the “sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>54</sup>

In our seminar on *Constitutional Aspects of Foreign Affairs*, we therefore pay particular attention to the allocation of powers at the federal level.<sup>55</sup> The *Youngstown* decision is the source of the classic treatment of that issue, dealing principally with the respective powers of the executive

50. See, e.g., U.S. Dep’t of Just., Off. L. Couns., *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, (Feb. 12, 1980), <https://www.justice.gov/olc/opinion/presidential-power-use-armed-forces-abroad-without-statutory-authorization>.

51. If, for instance, a President were to order an attack on another State that was clearly not justified by self-defense, or as retaliation for that State’s use of force against the United States, or in accordance with a UN authorization.

52. See Rome Statute of the International Criminal Court art. 8 bis, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The question is hypothetical, of course, since the United States is not a party to that instrument.

53. See H. Jefferson Powell, *The President’s Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 576 (1998).

54. See *Curtiss-Wright v. United States*, 299 U.S. 304, 319 (1936) (quoting 10 Annals of Cong. 613, Mar. 7, 1800); see also *Zivotofsky v. United States*, 576 U.S. 1, 19 (2015) (quoting *United States v. Belmont*, 301 U.S. 324, 330 (1937)).

55. We also deal with the division between the federal and state levels, but that question does not seem implicated by the *Trump* decision.

and legislative branches.<sup>56</sup> A related set of cases holds that those powers may not be delegated; that is, the Legislature must legislate and only legislate, and similarly the Executive must “faithfully execute” and only “execute.”<sup>57</sup> The decisions implement this principle by prohibiting delegation of power between the branches.<sup>58</sup> In the words of one court, “core governmental power must be exercised by the Department on which it is conferred and must not be delegated to others in a manner that frustrates the constitutional design.”<sup>59</sup>

Notably, the allocation and separation of powers doctrine by itself tells us nothing about the susceptibility and subordination of these powers to the rest of the Constitution, such as the Bill of Rights and comparable provisions in the body of the document. The notion of “core” powers (broadly understood as synonymous with “exclusive,” “preclusive,” “conclusive” powers) is generally used in the *Youngstown* sense of being beyond congressional encroachment.<sup>60</sup> To our understanding, it has never before been used to mean that the President has

56. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.”)

See also Justice Jackson’s concurrence in *Youngstown*, 343 U.S. at 634–655.

57. For example, the Court itself has observed that the Constitution “allows the President to execute the laws, not make them.” *Medellin v. Texas*, 552 U.S. 491, 532 (2008), while Congress “may not transfer to another branch ‘powers which are strictly and exclusively legislative.’” *Gundy v. United States*, 588 U.S. 128, 135 (2019); see also *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,” U.S. Const., Art. I, § 1, and we long have insisted that “the integrity and maintenance of the system of government ordained by the Constitution” mandate that Congress generally cannot delegate its legislative power to another Branch.”

58. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1950); see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329 (1936), rejecting a claim of unlawful delegation of legislative power and finding “sufficient warrant for the broad discretion vested in the President which are said to evidence the unconstitutionality of the Joint Resolution” in question. While “non-delegation” is obligatory, there may be sharing if “intelligible principles” are observed. *Federal Communications Commission v. Consumers’ Research*, 606 U.S. 656, 763 (2025).

59. See *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004).

60. *Youngstown*, 343 U.S. at 640–55 (Jackson, J., concurring); *Trump v. United States*, 603 U.S. 593, 607 (2024).

absolute immunity from criminal prosecution or, more broadly, from judicial process or jurisdiction.<sup>61</sup>

Indeed, would such an interpretation not be a palpable violation of (or at least inconsistent with) the separation of powers principle, effectively precluding the courts from carrying out their duty to faithfully execute the judicial power? If so, the *Trump* decision marks a consequential—one might even say radical—shift in the balance between the branches of the federal government.

## VI. OTHER IMPLICATIONS OF THE DECISION

The Constitution does more than merely establish the structure of the federal government and define the powers of the three coordinate branches; it also limits them, embeds them in a web of procedures, substantive definitions, and most vitally the constraints of the Bill of Rights.<sup>62</sup> The Chief Justice’s opinion acknowledged as much, noting the necessity to consider the “profound consequences for the separation of powers and for the future of our Republic.”<sup>63</sup>

At the same time, the Court’s decision presents a question which we had not previously contemplated: can the Constitution properly be read to empower (or permit) a President to commit a crime, directly or indirectly? It would seem so. Under the Court’s analysis, if the acts in question were determined to fall within the scope of the President’s “conclusive and preclusive constitutional authority”—his so-called “core” powers—then they can neither be criminalized nor prosecuted.

Congress cannot act on, and courts cannot examine, the President’s actions on subjects within his “conclusive and preclusive” constitutional authority. It follows that an Act of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize the President’s actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions. We thus conclude that the President is absolutely immune from

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61. *United States v. Nixon*, 418 U.S. 683, 707 (1974) (holding that neither separation of powers nor requirement of confidential communications alone can support an unqualified presidential immunity from judicial process).

62. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 440–42 (1998) (striking down the line-item veto as violative of the separation of powers as enshrined in the Presentment Clause).

63. *Trump*, 603 U.S. at 641.

criminal prosecution for conduct within his exclusive sphere of constitutional authority.<sup>64</sup>

In other words, the Constitution may well preclude prosecution of a President for *all* official acts within her authority, not just those involving her “core” authorities.<sup>65</sup>

At the same time, the Court claimed not to say that the President is free to break the law or violate the Constitution. The majority opinion stated that “[t]he President, charged with enforcing federal criminal laws, is not above them,”<sup>66</sup> that the President is not a king, and (implicitly) that—contrary to former President Nixon’s assertion—it is not true that “when the President does it, that means that it is not illegal.”<sup>67</sup> So how are these approaches to be reconciled? How might the Court’s approach actually play out in a given situation?

Once an indictment was brought, the President would presumptively challenge it. He would bear the burden of proving the scope of his immunity, that the charges of the indictment clearly fall within the scope of such immunity (i.e., were “official” and not “private” acts), and, if not within “core powers,” that the acts were sufficiently “official” so as to be at least presumptively immune. We offer two plausible contexts in which such questions might actually arise.

#### A. *Commander-in-Chief and War Powers*

The President’s powers as commander-in-chief are assuredly the most far-reaching. It makes sense, therefore, to start with *Reid v. Covert*,<sup>68</sup> a case decided by the Supreme Court in 1957. Clarice Covert, a U.S. citizen, murdered her husband, then a soldier in the U.S. military, while they were stationed in the United Kingdom.<sup>69</sup> Under the applicable “status of forces” agreement (SOFA) with the United Kingdom, the U.S. military was allowed

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64. *Id.* at 609.

65. In Justice Barrett’s view, “[t]he Constitution does not insulate Presidents from criminal liability for official acts. But any statute regulating the exercise of executive power is subject to a constitutional challenge. . . . Thus, a President facing prosecution may challenge the constitutionality of a criminal statute as applied to official acts alleged in the indictment. If that challenge fails, however, he must stand trial.” *Id.* at 656–57 (Barrett, J., concurring).

66. *Id.* at 614.

67. See Interview by David Frost with Richard Nixon (May 19, 1977) (transcript on file with Teaching American History).

68. *Reid v. Covert*, 354 U.S. 1 (1957).

69. The relevant facts are set out in Justice Black’s opinion. See *id.* at 3–5.

to exercise jurisdiction, including over the dependents of members of the military. Accordingly Mrs. Covert—even though a civilian—was tried by court martial under the congressionally-enacted Code of Military Justice and was convicted of murder.<sup>70</sup> The Supreme Court threw out the conviction, however, declaring that because she was not a member of the military, Mrs. Covert was constitutionally entitled to a trial in a U.S. civilian court with all the protections of the U.S. Constitution, including grand jury indictment and other protections not available in a court martial.<sup>71</sup>

To bring the facts within the broad purview of the *Trump* decision, assume that Mrs. Covert's case had arisen under an agreement with another nation adopted solely on the independent powers of the President as commander-in-chief, which had created a commission with its own rules of procedure.<sup>72</sup> Also assume that, like the military tribunal, the commission had proceeded to convict Mrs. Covert and sentence her to death. In such a situation, and in light of the Court's *Trump* decision, might one imagine that Mrs. Covert would *not* be entitled to

70. *Id.*

71. As Justice Black's opinion for the Court stated,

We reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.

*Id.* at 5–6 (footnotes omitted), 18–19.

72. In *Quirin*, German citizens apprehended in the United States were tried on charges of sabotage, espionage and violations of the law of war, convicted and sentenced to death by a Military Commission appointed by the President and operating under rules prescribed by the President under his Commander-in-Chief powers, which *inter alia* denied them access to the courts. *Id.* at 21. The Supreme Court rejected their habeas corpus petition, holding that the Commission had been lawfully constituted, that the petitioners had been tried and convicted as enemy aliens for offenses which the President was authorized to order be tried by military commission, that his Order convening the Commission was lawful and the Commission had been lawfully constituted, and that the petitioners were held in lawful custody. “We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury. *Id.* at 45. Accordingly, it denied their habeas corpus request.

(or afforded) the Due Process protections of the Fifth Amendment and the others noted by the Court in *Reid v. Covert*.<sup>73</sup>

One could imagine two different scenarios, in both of which the President's actions might well survive judicial review unscathed. First, however unlikely it might be, Congress could attempt to enact a law declaring that the President (and those following presidential instructions) would be guilty of a degree of homicide if anyone were executed by such a non-reviewable executive tribunal. Alternatively, the family members of the condemned could seek to press charges under 18 U.S.C. § 1117 for conspiracy to commit murder, in addition to civil damages. Yet those facts would surely fall within the ambit of Justice Barrett's "closely related conduct,"<sup>74</sup> since they implicate either a "core function" of the executive or an area of shared presidential and congressional authority.<sup>75</sup> Under the Court's approach in *Trump*, the President (and those carrying out presidential instructions) would presumptively be immune.

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73. Justice Black's opinion focused on rights under the Fifth and Sixth Amendments but must be read more broadly.

While it has been suggested that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shalt nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments. Moreover, in view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right."

*Reid*, 354 U.S. at 8–9 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*379).

74. In her concurrence, Justice Barrett stated that, in her view, "the Constitution prohibits Congress from criminalizing a President's exercise of core Article II powers and closely related conduct." *Trump v. United States*, 603 U.S. 589, 657 (2024) (Barrett, J., concurring). While cautioning that "[p]roperly conceived, the President's constitutional protection from prosecution is narrow," *id.*, she would assess "the validity of criminal charges predicated on most official acts—*i.e.*, those falling outside of the President's core executive power—in two steps; first, determining "whether the relevant criminal statute reaches the President's official conduct" and, if so, "the prosecution may proceed only if applying it in the circumstances poses no 'dange[r] of intrusion on the authority and functions of the Executive Branch,'" the test adopted in the majority opinion. *Id.* at 605.

75. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.").

Granted, commander-in-chief cases are not without particular difficulty. Consider *Al-Aulaqi v. Panetta*, in which the courts rejected Mr. Aulaqi's efforts to hold federal officials personally liable for their roles in drone strikes abroad that targeted and killed his son—a U.S. citizen and alleged terrorist in Yemen.<sup>76</sup> The courts rejected the application of the Due Process Clause to the killing of a terrorist in a theater of war.<sup>77</sup> Alternatively, imagine efforts to enjoin the D-Day invasion in a court of law. Actually, you need not use much imagination; during the Vietnam War there were in fact a number of efforts in the courts to challenge the conduct of hostilities, many of which were brought by draftees not wishing to participate, including requests for injunctions seeking to halt the war.<sup>78</sup> They did not succeed.

Such cases have often turned on the political question doctrine, which has its foundation in *Baker v. Carr*.<sup>79</sup> In that decision, Justice Brennan made clear that the justiciability of foreign affairs and national security cases—where the actions in question are grounded in core powers clearly committed to the executive—is not necessarily blocked by the doctrine.<sup>80</sup> Even when core powers are involved, judicial review is not precluded if there are “judicially discoverable and manageable standards.”<sup>81</sup> To imagine a homicide law directed towards the President in this situation would be surely be a bridge too far.

### B. *Foreign Affairs, Commerce, and National Security*

Situations involving executive decisions to use force at the international level, while perhaps the most consequential, are today not the most common. By contrast, executive branch regulation of transnational economic and commercial activities has become pervasive, and while supported (and to some extent constrained) by legislation, this area also functions largely under presidential direction. As a result, these cases increasingly present questions about the scope of executive power in the foreign affairs context, and they have begun to find their way into the courts (although they infrequently reach the Supreme Court).

One specific set of issues about which our seminar students have written involves the work of the Committee for Foreign Investment in the

76. *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014).

77. For an analysis, see Austin Tarullo, *Shock & Awe: Lethal Autonomous Weapons Systems and the Erosion of Military Accountability*, 2024 BOS. COLL. INTELL. PROP. & TECH. F. 1, 8–9 (2024).

78. *Cf. Massachusetts v. Laird*, 451 F. 2d 26 (1st Cir. 1971).

79. *Baker v. Carr*, 369 U.S. 186 (1962).

80. *Id.* at 201, 211–12 (“An unbroken line of our precedents sustains the federal courts’ jurisdiction of the subject matter of federal constitutional claims of this nature.”).

81. *Id.* at 217.

United States (“CFIUS”). An interagency (executive branch) body created by statute and managed by the U.S. Department of the Treasury, CFIUS has the power to regulate, prevent, or terminate foreign investments that pose a risk to U.S. national security.<sup>82</sup> Although its work is largely technical, its connection to national security clearly brings it within the scope of the President’s “conclusive and preclusive constitutional authority”—the so-called “core” powers—and for that reason, under the Supreme Court’s approach in *Trump*, it would likely be entitled at least to presumptive immunity.

Consider that proposition, however, in light of the *Ralls* decision in the D.C. Circuit.<sup>83</sup> Ralls, a company owned by two Chinese (People’s Republic of China) nationals, had invested in wind turbines in Oregon, apparently near a military base. Following certain procedures, CFIUS recommended, and the President issued, an order terminating the investment, depriving Ralls of property valued at USD six million.<sup>84</sup> While Ralls had met with U.S. Treasury officials to express its concerns and was able to submit documents, it was denied the right to review (unclassified) evidence supporting the Order.

Ralls challenged the Committee’s decision in court, seeking to invalidate the Order and to enjoin its enforcement, claiming *inter alia* that in adopting it CFIUS had exceeded its statutory authority, acted arbitrarily and capriciously, and deprived Ralls of its constitutionally protected property interests in violation of the Due Process Clause of the Fifth Amendment.<sup>85</sup>

The Court of Appeals agreed, holding that Ralls had indeed been deprived of due process, particularly the right to notice and the right to cross-examine Treasury.<sup>86</sup> While national security was unquestionably at issue, the court said, the political question doctrine did not displace Ralls’ due process rights.<sup>87</sup> Moreover, it found that Ralls’ property interests were protected against discriminatory treatment and that the President’s order “deprived [the corporation] of its constitutionally protected property interests without due process of law.”<sup>88</sup>

82. CFIUS was established under § 721 of the Defense Production Act of 1950 as amended. It operates under E.O. 11858 and various regulations issued by the Department of the Treasury. For background information, see U.S. Dep’t of the Treasury, *The Committee on Foreign Investment in the United States (CFIUS)*, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> (last visited Sept. 30, 2025).

83. *Ralls Corp. v. Comm. on Foreign Investments*, 758 F.3d 296 (D.C. Cir. 2014).

84. *Id.* at 320.

85. *Id.* at 302.

86. *Id.* at 319–21.

87. *Id.* at 313–314.

88. *Id.* at 319.

The *Ralls* proceeding was of course civil, not criminal, but one could readily imagine variations of its facts that would bring it within the underlying rationale of the *Trump* analysis. The breadth of executive branch authority in the field of international commercial, financial, and economic activity clearly creates the possibility of presidential orders directing unlawful acts or official acts taken for unlawful motives or purposes.

Consider also *United States v. Caltex Inc.*,<sup>89</sup> in which the U.S. Supreme Court rejected a claim against the government for the U.S. military's destruction of Caltex's refineries in Corregidor during World War II. The Court found that the loss in question had been the result of wartime actions conducted to keep the refineries out of the hands of the invading Japanese forces and was thus not a compensable "taking."<sup>90</sup> The "terse language of the Fifth Amendment," it said, "is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign."<sup>91</sup>

While the Court's decision in *Caltex* is presumptively understood as narrowly addressing the unique exigencies of wartime,<sup>92</sup> it is tempting to ponder whether (and if so, how) it might apply to hypothetical (if regrettably realistic) situations in which the government, acting on presidential instructions, might invoke similar authority to confiscate or destroy private property in order (it alleges) to manage what it considers to be "exigent" or even "war-like" circumstances—for instance to preclude illegal immigration or the influx of fentanyl or other drugs across the borders with Mexico or Canada. Might the courts as currently constituted find the President immune or the government excused from paying compensation in such circumstances? What if the claimants could establish a discriminatory component or political motive for such actions?

89. *United States v. Caltex Inc.*, 344 U.S. 149 (1952). Courts also tend not to allow the political question doctrine to block expropriation claims. *See, e.g.*, *Temistocles Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), *cert. granted and judgment vacated, sub nom* *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985) (U.S. Army occupied land in Honduras). That proceeding involved a client of one of the authors.

90. *Caltex*, 758 F.3d at 155 ("The 'requisition' involved in this case was no more than an order to evacuate the premises which were slated for demolition. The 'deliberation' behind the order was no more than a design to prevent the enemy from realizing any strategic value from an area which he was soon to capture.").

91. *Caltex*, 344 U.S. at 155–56. Justices Douglas and Black dissented on the basis that the government's action did constitute a Fifth Amendment taking. *Id.* at 156 (Douglas, J., dissenting).

92. *See, e.g.*, *Temistocles Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1530 n. 129 (D.C. Cir. 1984), *cert. granted and vacated, sub nom*, *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985) (U.S. Army occupied land in Honduras). That proceeding involved a client of one of the authors.

VII. CONCLUSION

We acknowledge that questions about the immunity of a sitting or former President from civil or criminal liability for exercising her authority under domestic U.S. law involve different considerations from those presented under international law. As a matter of customary international law, heads of state and government have traditionally been recognized as immune from the civil and criminal jurisdiction of foreign states.<sup>93</sup> As recently as 2002, the International Court of Justice reaffirmed that sitting heads of state and government (together with foreign ministers) enjoy immunity from the jurisdiction of foreign states in both civil and criminal matters.<sup>94</sup> That principle reflects not only the doctrine of the sovereign equality and independence of states in international law but also the practical and functional difficulties that the prospect of foreign prosecutions would inevitably pose to the conduct of foreign relations.

By distinction, there appears to be a growing trend in the global community that heads of state and government—along with other senior officials—should not be permitted to evade *international* responsibility for their involvement in the commission of internationally recognized crimes such as genocide, crimes against humanity, torture, and (more recently) aggression.<sup>95</sup> Under the Rome Statute which established the International Criminal Court, for example, the “official capacity” of a defendant provides no defense.<sup>96</sup> Of course, permitting international tribunals to hold the most senior government officials criminally responsible for the most serious violations of international law presents a

93. While the immunities of diplomatic and consular officials are addressed by widely ratified multilateral conventions, no such agreement yet exists with respect to the immunities of heads of state and government. Accordingly, the issue is generally addressed on the basis of customary international law.

94. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), Judgment, 2002 I.C.J. 121, 20–21 (Feb. 14). Immunity from the jurisdiction of international tribunals is of course a different question.

95. See generally Philippa Webb and Daisy Peterson, “The ‘Loaded Weapon’ of Presidential Immunity: An International Law Perspective on *Trump v. United States*”, EJIL: TALK! (Jan. 20, 2025), <https://www.ejiltalk.org/the-loaded-weapon-of-presidential-immunity-an-international-law-perspective-on-trump-v-united-state>; Chimene Keitner, *Criminal Law Beyond Borders*, 2024 U. ILL. L. REV. ONLINE 73, <https://illinoislawreview.org/wp-content/uploads/2024/12/Keitner.pdf>.

96. Rome Statute, *supra* note 52, Article 27 (“Irrelevance of official capacity”) provides:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

different set of issues than providing for such possibilities within the leaders' own legal systems, as does allowing victims to pursue civil remedies for alleged harms in their own judicial systems.<sup>97</sup> As a practical matter, of course, the international mechanisms are likely to come into play only when the relevant domestic systems do not permit such recourse or have otherwise failed to hold those officials accountable.

One might contend that the U.S. Supreme Court's decision in *Trump* is premised on a particularly narrow conception of the judiciary's role (and especially the role of the Supreme Court itself) in addressing the most politically sensitive questions. There may well be agreement that, in the U.S. constitutional system, how a President carries out her constitutional duties is, in the most fundamental sense, a political rather than legal question.<sup>98</sup> Such an assumption may well be justified when the legislature has the will and the opportunity to exercise appropriate political control. However, when that is not the case—for example, when the President's political party controls both houses of the legislature—then the onus necessarily falls on the judiciary. Where judicial constraints are insufficient or lacking, a substantial risk of systemic failure arises.

To summarize, the Supreme Court's decision in *Trump v. United States* appears to have significant—and troublesome—implications in the specific area of foreign affairs law, which are deserving of the most careful attention and analysis. We do not purport to have examined all of the issues, or even any in great depth. However, we trust the foregoing discussion will provide a basis for pondering the ultimate purport and consequences of *Trump*, which may well be revealed over the coming months.<sup>99</sup>

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97. See *R v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte* [2000] 1 AC 61; see also *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 75 (2d Cir. 2008) (holding that the Kingdom of Saudi Arabia, four members of its royal family, a Saudi banker, and the Saudi High Commission for Relief to Bosnia and Herzegovina (“SHC”) were immune from civil suit brought by affected U.S. citizens).

98. One can certainly read the Court's opinion in that light.

99. Cf. Oona A. Hathaway, *For the Rest of the World, the U.S. President Has Always Been Above the Law: Americans Will Know What a Lack of Accountability Means*, FOREIGN AFFS. (July 16, 2024), <https://www.foreignaffairs.com/united-states/rest-world-us-president-has-always-been-above-law>; see also Keith E. Whittington, *Presidential Immunity*, CATO SUP. CT. REV. 2023-2024 283, 317 (2024) (“If Presidents begin to behave in a more criminal fashion, then Sotomayor will have been vindicated in thinking that the threat of criminal prosecution was doing some real work in deterring presidential misconduct. If politicized lawfare becomes a routine feature of our domestic politics, then we may be thankful that Roberts saw what was coming and constructed some constitutional barriers to Presidents becoming victims of at least some forms of “politics by other means.”).