RECALIBRATING POWER: THE IMPORTANCE OF CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER IN THE WAKE OF TRUMP V. UNITED STATES

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INTRODUCTION

Imagine a chilling scenario. Several decades from now, a recently re-elected President of the United States decides that their defeated political rival is too much of a threat to their power. Coming off a contentious election, the President narrowly won the Electoral College. Control of Congress is split between the two major parties. The President's party holds a two-seat majority in the Senate, and the other party narrowly won control of the House of Representatives by a few seats. Due to the embittered political environment and narrow margins in both chambers, few members of Congress are willing to break ranks with their respective parties. Further, the President is concerned that their recently defeated political rival will challenge them at every turn and make it more difficult to accomplish their agenda. To stop their political rival from stymying their power, the President decides to order a special unit of the military to assassinate their political rival.[1]

This hypothetical may seem extreme; however, the dissent in *Trump v. United States* contemplates a similarly alarming scenario, among others, in the context of presidential immunity from criminal liability arising from a President's official acts.[2] Justice Sotomayor writes:

> The President of the United States is the most powerful person in the country, and possibly the world. 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

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[1] This hypothetical illustrates the alarming possibility that a President could be immune from criminal prosecution for acts that could be considered within their official and exclusive powers as President. *See* Trump v. United States, 603 U.S. 593, 606 (2024). Further, it presents the difficulties Congress faces when trying to hold a President accountable during periods of hyper-partisanship. *See* Caroline Fredrickson & Alan Neff, *When Impeachment Fails*, BRENNAN CTR. FOR JUST. (Nov. 30, 2021), https://www.brennancenter.org/our-work/analysis-opinion/when-impeachment-fails [https://perma.cc/FWE9-G3FS].

[2] *Trump*, 603 U.S. at 685 (Sotomayor, J., dissenting).

> onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.[3]

The majority dismisses these hypotheticals as "fear mongering" and "extreme."[4] Instead, the majority is concerned with what it believes is the more likely prospect of the executive branch cannibalizing itself by giving each successive administration free rein in prosecuting its predecessors and also being unable to "boldly and fearlessly carry out [their] duties for fear that [they] may be next."[5] The majority's concern may be well-founded and more likely to occur. But are the hypotheticals of a President using their powers to conduct otherwise blatantly unlawful activity truly unlikely?

The new framework of presidential immunity in *Trump v. United States* leaves many questions as to what the boundaries of presidential power are and how a President who abuses their power to engage in egregious misconduct or unlawful acts can be held accountable. Fortunately, the United States has not yet confronted the various hypotheticals that Justice Sotomayor's dissent presents in *Trump v. United States*.[6] However, the American people are now left with the increasing possibility of confronting a President who uses their power to commit unlawful ends in an era where the power of the presidency has already grown substantially.[7]

The Presidency has become the centerpiece of American culture.[8] Seemingly non-stop media coverage of the President blankets the airwaves and social media feeds.[9] Meanwhile, Congress is viewed negatively by most Americans,[10] and it has ceded substantial power to the executive branch.[11] Moreover, Congress has largely abandoned the objective of protecting its institutional power to achieve partisan political ends.[12] In the meantime, the Presidency has amassed significant power—particularly over the past 100

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[3] *Id.*
[4] *Id.* at 640.
[5] *Id.*
[6] *Id.* at 657–86 (Sotomayor, J., dissenting).
[7] *See* William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 506 (2008).
[8] JOSEPH A. PIKA, JOHN ANTHONY MALTESE & ANDREW RUDALEVIGE, THE POLITICS OF THE PRESIDENCY 1 (9th ed. 2017).
[9] *Id.*
[10] *Congress and the Public*, GALLUP, https://news.gallup.com/poll/1600/congress-public.aspx [https://perma.cc/FLB8-P3EX] (last visited Oct. 13, 2025).
[11] *See* Edward G. Carmines & Matthew Fowler, *The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 IND. J. GLOB. LEGAL STUD. 369, 370 (2017) (discussing how increased polarization has decreased Congress' capability and productivity and has contributed to the expansion of executive power).
[12] William G. Howell, *Political Checks on a Politicized Presidency: A Response to Neal Katyal's "Internal Separation of Powers,"* 116 YALE L.J. Pocket Part 111 (2006) (referencing Neal K. Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006)), https://yalelawjournal.org/essay/political-checks-on-a-politicized-presidency-a-response-to-neal-katyala8217s-a8220internal-separation-of-powersa8221 [https://perma.cc/N6P9-QSDW].

years[13]—and the checks on such power outside of the electoral process have eroded, particularly in the wake of *Trump v. United States*.[14] The erosion of checks on presidential power has left the United States in a bind as to how to deal with a President who egregiously abuses their power.[15] This Note argues that in the wake of *Trump v. United States*, Congress must assert its prime position as a major check on presidential power by reforming constitutional and legal mechanisms that are designed to hold the President accountable.

Part I of this Note will detail the design of the Presidency, the constitutional checks on presidential power, the expansion of that power, and Congress' response to the expansion. Further, Part I will conclude by discussing the cases that developed the presidential immunity doctrine. Part II of this Note will analyze the creation and erosion of the checks on presidential power. Part III will offer three proposed solutions for Congress to enact to help address the difficulty of holding a President accountable for misconduct or unlawful acts: (1) defining unofficial and official presidential acts; (2) reviving key provisions of the Independent Counsel Act; and (3) reforming impeachment trials in the Senate.

I. BACKGROUND

To understand how the Office of the President has amassed significant power over the course of nearly two and a half centuries, it is imperative to review how the Framers of the Constitution viewed the Presidency and designed checks on its power. Moreover, reviewing more recent exercises of presidential power and checks on that power is necessary to grasp the growing problem of the President becoming increasingly insulated from accountability outside of the electoral process,[16] particularly in the wake of the landmark Supreme Court case *Trump v. United States*.

A. The Design of the Presidency at the Constitutional Convention

Delegates from the various states met in Philadelphia in 1787 to organize the Constitutional Convention.[17] The delegates met because they were troubled by a primary weakness of the Articles of Confederation: the lack of

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[13] Thomas E. Cronin, *A Resurgent Congress and the Imperial Presidency*, 95 POL. SCI. Q. 209, 211–12 (1980).

[14] *See* Trump v. United States, 603 U.S. 593, 606 (2024) (holding that a president is entitled to at least presumptive immunity for their official acts).

[15] *See id.* at 690 (Jackson, J., dissenting) (questioning how this new "Presidential accountability" will work).

[16] *See* discussion *infra* Part II.

[17] *Constitutional Convention and Ratification, 1787-1789*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1784-1800/convention-and-ratification [https://perma.cc/5FFN-QRKE] (last visited Feb. 15, 2025).

a strong federal government, which could not effectively "raise funds, regulate trade, or conduct domestic or foreign policy without the voluntary agreement of the states."[18] Under the Articles of Confederation, state governments reigned supreme, as they did not delegate much power to the national government.[19] Eventually, the delegates at the Convention decided the power imbalance between the federal and state governments was untenable and chose to replace the Articles of Confederation with the Constitution of the United States.[20]

Many of the delegates believed that creating an executive branch tasked with the role of executing the laws passed by Congress would be integral to the success of the new federal government they were designing.[21] The Articles of Confederation did not establish an independent executive branch.[22] Instead, the Articles allowed Congress to appoint leaders to head permanent departments; however, these department heads were merely appendages of the legislature and did not have power outside of what Congress granted them.[23]

The delegates disagreed over how much power should be given to the executive, whether the executive should be appointed or elected, and whether there should be a singular or plural executive.[24] In fact, during a debate regarding whether the executive should be one person, the delegate George Mason said, "We are not indeed constituting a British Government, but a more dangerous monarchy, an elective one . . . [d]o gentlemen mean to pave the way to hereditary Monarchy?"[25] Earlier in the same debate, James Wilson, who was a proponent of a single executive, stated, "All know that a single magistrate is not a King."[26] He later went on to explain that each of the 13 states, which agreed on very little, had a single magistrate at the head of their governments.[27]

In late July of 1787, after rounds of debate, the delegates tentatively agreed that the legislature should appoint a single executive to serve one

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[18] *Identifying Defects in the Constitution*, LIBR. OF CONG., https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/to-form-a-more-perfect-union/identifying-defects-in-the-constitution [https://perma.cc/8R2N-KFB7] (last visited Feb. 15, 2025).
[19] *See id.*
[20] *The Constitution: How Did it Happen?*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/constitution/how-did-it-happen [https://perma.cc/EHP7-EHEN] (last visited Feb. 15, 2025) (discussing that by mid-June of 1787, the delegates at the Constitutional Convention had decided to completely redesign the government of the United States).
[21] Cronin*, supra* note 13.
[22] PIKA, MALTESE & RUDALEVIGE, *supra* note 8, at 5.
[23] *Id.* (noting that the permanent departments included treasury, foreign affairs, and war).
[24] *Id.* at 7.
[25] *Madison Debates, June 4, 1787*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., https://avalon.law.yale.edu/18th_century/debates_604.asp [https://perma.cc/RFC9-WC46] (last visited Oct. 13, 2025).
[26] *Id.*
[27] *Id.*

unrenewable, seven-year term.[28] This plan was then presented to a five-member Committee of Detail, which was tasked with the duty of taking the resolution from the general body of delegates at the convention and turning it into a draft for the Constitution.[29]

The Committee of Detail decided to call the executive the "President" and followed the general body's initial wishes of giving the President relatively little power.[30] The draft they submitted entailed a singular executive called the President, who was appointed by Congress for one unrenewable, seven-year term, subject to impeachment, and granted a qualified veto.[31] Further, the draft gave the President the power to appoint executive officers, grant pardons, and receive ambassadors from foreign nations.[32]

The Committee of Detail presented its draft to the general body of delegates at the convention, and the issue of the executive was debated further until the convention sent it to the Committee on Postponed Matters.[33] This committee would construct the Electoral College to thread the needle between balancing power between the more populous and less populous states—the topic which caused the most controversy during the Constitutional Convention.[34] The Electoral College would allow the President to be selected independently from the legislature, unless none of the candidates received a majority of the Electoral College votes, in which case Congress would select the President from among the five candidates who received the most votes.[35] Further, the Electoral College was designed to serve as a bulwark against populism, ensuring that the passions of the people could not directly control who would become the President; instead, a body of electors chosen by the states would select the President.[36]

In addition to the creation of the Electoral College, the Committee on Postponed Matters also shortened the President's term from seven years to four, allowed the President to be re-elected for an unlimited number of terms, and granted the President some powers that the Senate had previously delegated.[37] In essence, the Committee on Postponed Matters primarily

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[28] PIKA, MALTESE & RUDALEVIGE, *supra* note 8, at 8.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 8–9.
[33] *Id.* at 9.
[34] *Id.* at 10.
[35] *Id.* 10–11. The Committee on Postponed Matters originally proposed that in the event that no candidate received a majority in the Electoral College, the Senate would choose from among the five candidates who had received the most votes. However, the Constitutional Convention later changed this provision so that the House of Representatives, with each state delegation receiving one vote each, would determine the winner of the presidential election.
[36] Rachel Reed, *The Framers of the Constitution Didn't Want You to Choose the President*, HARV. L. TODAY (Sep. 16, 2024), https://hls.harvard.edu/today/the-framers-of-the-constitution-didnt-want-you-to-choose-the-president/ [https://perma.cc/BU4R-KPQV].
[37] PIKA, MALTESE & RUDALEVIGE, *supra* note 8, at 11.

conceived the executive power articulated in the Constitution.[38] The draft they presented included the presidential power of nominating Supreme Court justices, ambassadors, and all other officers, subject to the advice and consent of the Senate.[39] Moreover, the committee's draft also gave the President the power to make treaties with foreign nations, subject to ratification by the Senate via a two-thirds vote in favor.[40]

The general body at the convention made minor changes to the language of the draft that the Committee on Postponed Matters created regarding the executive.[41] Finally, on September 8, 1787, the delegates created a five-member Committee of Style, which was chaired by Gouverneur Morris, to write the final draft of the Constitution.[42] This committee created the much-debated Vesting Clause of Article II.[43]

The Vesting Clause of Article II reads, "The executive Power shall be vested in a President of the United States."[44] Contrast that language to that of Article I of the Constitution, which limits the legislative powers to those "herein granted."[45] The debate over the differences of Article I and Article II's vesting language began shortly after the ratification of the Constitution. Alexander Hamilton argued that the language of Article II indicates that the President has authority not specifically delineated by the Constitution.[46] In contrast, James Madison disputed that expansive reading of Article II's Vesting Clause and instead believed its language was simply designed to settle the dispute as to whether the executive branch should be headed by a singular individual or multiple individuals.[47]

The various debates, committees, and drafts relating to executive power signify the progression from a weak executive, subservient to the legislature, to an independent executive with relatively more power—but power that is to be kept in check by the legislature.[48] Chief among the advocates for a strong and independent executive was Gouverneur Morris.[49]

Morris believed that the legislature had the potential to become the most tyrannical of the branches of government, stating that liberty was in "greater

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* (discussing how the general body allowed the House of Representatives to choose the president if no candidate received a majority of the votes in the Electoral College).
[42] *Id.*
[43] *Id.*
[44] U.S. CONST. art. II, § 1, cl. 1.
[45] U.S. CONST. art. I, § 1.
[46] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 230 (7th ed. 2024).
[47] *Id.*
[48] *See id.* (describing early debates regarding presidential power).
[49] Donald L. Robinson, *Gouverneur Morris and the Design of the American Presidency*, 17 PRESIDENTIAL STUD. Q. 319, 323–24 (1987).

danger from legislative usurpation than from any other source."[50] He believed that the President could function as a counterweight to legislative corruption and shield the public from the interests of the powerful elites in society, but he believed that would only be possible if the President were independent from the legislature.[51] Moreover, Morris initially opposed the notion of subjecting the President to impeachment by the legislature, as he wanted the President to be absolutely immune from removal;[52] however, he was eventually convinced by his counterparts at the Constitutional Convention that impeachment was an appropriate check on the executive.[53] Nevertheless, he insisted that impeachment be kept as narrow as possible and that there be no limit on how many terms the President could be elected.[54]

Overall, the advocates of a stronger and independent executive, like Morris, won the day;[55] however, there were plenty of delegates from the Constitutional Convention who believed the executive branch they were creating was a grave risk to the fledgling republic they were building.[56] For example, George Mason feared that the President would "be directed by minions and favorites—or he will become a tool to the Senate. . ." and "may be induced to join in any dangerous or oppressive measures; to shelter themselves, and prevent an enquiry into their own misconduct in office."[57] To counteract the concerns some of the delegates had regarding presidential power, the Framers provided Congress with the ability to check the power of the President.[58] The next subsection will discuss some of the primary congressional checks on presidential power delineated and inferred by the Constitution.

B. Constitutionally Delineated and Inferred Congressional Checks on Presidential Power

The delegates had two primary concerns while conceptualizing and drafting the Constitution: (1) creating a stronger federal government than the one the Articles of Confederation prescribed and (2) avoiding the prospect of

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[50] *Id.* at 323.
[51] *Id.* at 324.
[52] *Id.* at 319, 325.
[53] *Id.* at 319.
[54] *Id.* at 325–26.
[55] *Id.* at 326–27.
[56] *See The Debate Over the President and the Executive Branch*, UNIV. OF WIS.-MADISON: CTR. FOR THE STUDY OF THE AM. CONST., https://csac.history.wisc.edu/document-collections/constitutional-debates/executive-branch/ [https://perma.cc/L4EC-BUXX] (last visited Oct. 13, 2025).
[57] THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 43–46 (John P. Kaminski, Gaspare J. Saladino & Richard Leffler eds., 1988) (excerpt) https://csac.history.wisc.edu/wp-content/uploads/sites/281/2024/04/DC3-04-01-01_Masons-Objections_Fall-1787.pdf [https://perma.cc/NWW7-WVC7].
[58] *See, e.g.*, U.S. CONST. art. II, § 4.

creating a tyrannical government.[59] These concerns were particularly prominent in the creation of the Presidency because there were competing views and concerns about how the executive branch would be designed and how much power the newly created office would be granted.[60] To temper the President's power, the Constitution delineates and infers checks on presidential power, such as impeachment, Senate confirmation of appointments, and legislative oversight.[61]

First, a primary check on presidential power is impeachment.[62] The Constitution provides that the President is subject to impeachment, conviction, and removal from office for "Treason, Bribery, or other high Crimes and Misdemeanors."[63] Hamilton exclaimed that the nature of the offenses contemplated in the impeachment clauses are "those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."[64] He adds, "They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injustices done immediately to the society itself."[65]

Article I, Section 2 grants the House of Representatives the sole power of impeachment.[66] Article I, Section 3 provides, in part, that the Senate shall have the sole power of trying all impeachments, and that no person shall be convicted without the concurrence of two-thirds of the members of the Senate present.[67] Further, Article I, Section 3 of the Constitution also states that:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.[68]

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[59] *See generally The Debate Over the President and the Executive Branch, supra* note 56 (discussing the various concerns regarding executive power between the Antifederalists and Federalists).
[60] *See supra* Section I.A.
[61] *See* U.S. CONST. art. II, § 4; U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. I, § 8, cl. 18 (inferring the power of oversight via the Necessary and Proper Clause). *See generally* McGrain v. Daugherty, 273 U.S. 135 (1927) (establishing that Congress has the "power of inquiry").
[62] *See* U.S. CONST. art. II, § 4.
[63] *Id.*
[64] THE FEDERALIST NO. 65 (Alexander Hamilton).
[65] *Id.*
[66] U.S. CONST. art. I, § 2, cl. 5.
[67] U.S. CONST. art. I, § 3, cl. 6.
[68] *Id*. § 3, cl. 7.

Since the ratification of the Constitution, three Presidents have been impeached by the House of Representatives, but none have been convicted or removed from office by the Senate.[69]

Next, there is a check on the President's power to make treaties and nominate ambassadors, public ministers, Supreme Court justices, and other officers of the United States by subjecting a treaty and nominee proposed by the president to the "Advice and Consent of the Senate."[70] The Advice and Consent Clause requires: 1) that treaties be ratified by two-thirds of the senators present to become effective, and 2) that each presidential nomination receive a majority of the Senate to vote in favor to become confirmed.[71] In addition, Congress may, pursuant to statute, appoint inferior officers as it sees proper.[72]

Finally, the Necessary and Proper Clause gives Congress the ability to conduct oversight of the executive branch.[73] Although the Constitution does not specifically state that Congress has the power to conduct oversight of the executive branch, the Supreme Court has inferred that the "power of inquiry"—and its coordinate process to enforce it—is an "essential and appropriate auxiliary to the legislative function."[74] Further, state legislatures across the nation employed the power of inquiry prior to the framing and ratification of the Constitution, and Congress used this inferred power early in its history.[75] The next subsection will provide background information regarding how the presidency gained significant power since the Founding Era, particularly during the twentieth century.

C. The Rise of Presidential Power

The United States entered the twentieth century as an ascending world power through the rapid rise of its industrial might and military capability.[76] The economic, technological, and political changes that occurred in the United States during the twentieth century coincided with an executive branch that grew to become the focal point of American politics and policymaking, often at the expense of congressional power.[77]

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[69] *See Donald J. Trump*, LIBR. OF CONG., https://guides.loc.gov/federal-impeachment/donald-trump [https://perma.cc/9DEJ-DWEP] (last visited Feb. 15, 2025).
[70] U.S. CONST. art. II, § 2, cl. 2.
[71] *Id.*
[72] *Id.*
[73] *See* McGrain v. Daugherty, 273 U.S. 135, 173–74 (1927).
[74] *Id.* at 174.
[75] *Id.*
[76] *See How Did the United States Become a Global Power?,* COUNCIL ON FOREIGN RELS. (Feb. 14, 2023), https://education.cfr.org/learn/reading/how-did-united-states-become-global-power [https://perma.cc/UL2X-GVHU].
[77] *See* PIKA, MALTESE & RUDALEVIGE, *supra* note 8, at 1–2.

The Presidency of Theodore Roosevelt marked a break from many of his former predecessors, as he used the power of the office to intervene in global conflicts and relished independence from Congress.[78] He also espoused a theory of presidential power—coined the stewardship theory—that the president can do anything that is not expressly forbidden by the Constitution or laws passed by Congress.[79] This theory was not followed by all the subsequent office holders of the Presidency; in fact, Theodore Roosevelt's hand-picked successor, William Howard Taft, was more conservative in his approach to exercising presidential power.[80] Nevertheless, Presidents such as Franklin Roosevelt, Harry Truman, and Richard Nixon, among others, shaped the modern Presidency by pressing the boundaries of how presidential power could be exercised and perceived by the public.[81]

Since the Great Depression, Congress has passed hundreds of laws that grant the President extraordinary powers.[82] In response to the economic hardships of the Great Depression, Franklin Roosevelt spearheaded massive policy reforms under the New Deal,[83] and Congress readily recognized him as "commander in chief in the war against the depression."[84] President Franklin Roosevelt also spearheaded the passage of the Cash-and-Carry and Lend-Lease programs to aid France and Great Britain during the beginning of World War II, despite strong opposition from the public and Congress.[85]

President Truman invoked his powers as the nation's Chief Executive and Commander in Chief to seize the steel mills during a labor dispute that threatened to cripple the United States' capacity to produce steel during the Korean War.[86] The Supreme Court rebuked Truman's exercise of presidential power in this manner by holding in *Youngstown Sheet & Tube Company v. Sawyer* that the Constitution does not afford the President the power to seize private property to prevent labor disputes from stopping steel production.[87] The Court reasoned that the framework of the Constitution refutes the idea

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[78] Louis W. Koenig, *Reassessing the "Imperial Presidency"* 34 PROCS. OF THE ACAD. OF POL. SCI. 31, 36 (1981).
[79] PIKA, MALTESE & RUDALEVIGE, *supra* note 8, at 14.
[80] Koenig*, supra* note 78, at 33.
[81] Cronin, *supra* note 13, at 211 (referencing Arthur M. Schlesinger's influential book, *The Imperial Presidency*).
[82] *Id.* at 213.
[83] *President Franklin Delano Roosevelt and the New Deal*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/franklin-delano-roosevelt-and-the-new-deal/ [https://perma.cc/ZZ4T-YCHV] (last visited Jan. 15, 2026).
[84] Richard P. Adelstein, "*The Nation as an Economic Unit": Keynes, Roosevelt, and the Managerial Ideal*, 78 J. AM. HIST. 160, 174 (1991).
[85] Mark Seidl, *The Lend-Lease Program, 1941-1945*, NAT'L ARCHIVES: FDR LIBR. & MUSEUM, https://www.fdrlibrary.org/lend-lease [https://perma.cc/9TD7-NFAP] (last visited Oct. 13, 2025).
[86] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582–83 (1952).
[87] *Id.* at 587–89 (1952).

that the President can be a lawmaker and asserted that lawmaking power is entrusted to Congress alone, in good and bad times.[88]

Justice Jackson's concurrence in *Youngstown* noted three categories that determine the power of the President.[89] First, a President's authority is at its maximum when they act in accordance with the express or implied authorization of Congress.[90] Second, when a President acts in the absence of a congressional grant of authority, they can only rely upon their own independent powers; however, there may be a "zone of twilight" where "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[91] Third, a President's power is at its "lowest ebb" when they take action that is incompatible with the expressed or implied will of Congress, for they must rely on their own constitutional powers.[92] Courts can permit exclusive presidential control in such situations only by disabling Congress from acting.[93]

Justice Frankfurter's concurrence also adds an important idea to the contours of presidential power by articulating a "gloss on 'executive Power'" which derives from a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned."[94] In other words, congressional acquiescence of presidential action creates a "gloss" on the executive power.[95]

Richard Nixon also revolutionized how presidential power could be exercised.[96] For example, during the Watergate affair, Nixon asserted broad executive privilege to shield damaging information from the courts and the public.[97] Further, he impounded—the refusal of a President to spend funds that have been appropriated by Congress—$18 billion worth of funds appropriated by Congress, which was an amount far above any previous President.[98] Congress was perturbed by Nixon's use of impoundments because it believed it was tantamount to an item veto, and it prevented congressionally appropriated funds from being used for their intended purposes.[99] In response to the arguable misuses of presidential power during

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[88] *Id.* at 589 (1952).
[89] *Id.* at 635–38 (Jackson, J., concurring).
[90] *Id.* at 635–37.
[91] *Id.* at 637.
[92] *Id.* at 637–38.
[93] *Id.* (Jackson, J., concurring).
[94] *Id.* at 610–11 (Frankfurter, J., concurring).
[95] *See id.*
[96] Cronin*, supra* note 13, at 212.
[97] *Id.* at 214–15.
[98] *Id.* at 215.
[99] *Id.* at 216.

the Nixon administration, Congress responded by enacting legislation designed to temper presidential power in the 1970s.[100]

D. Congressional Response to Expanded Presidential Power

Congress enacted reforms such as the 1973 War Powers Resolution and the 1978 Foreign Intelligence Surveillance Act to try to curtail the expansive exercises of presidential power that occurred during the Vietnam War and Nixon's Presidency.[101] In addition, Congress passed the Ethics in Government Act of 1978 in response to the Watergate scandal.[102] Title VI of the Act was a response to President Nixon's firing of Special Prosecutor Archibald Cox,[103] who was investigating Watergate malfeasance in the Nixon administration in 1973.[104] Title VI's provisions attempted to insulate special prosecutors from the executive branch to avoid similar situations where a President fires the person investigating them.[105] The provisions were reauthorized by Congress several times before being renamed as the Independent Counsel Reauthorization Act in 1987.[106]

Under the statute, the Attorney General could apply to the Special Division—a division of the United States Court of Appeals[107]—if, having conducted a preliminary investigation into whether a high-ranking government official had violated the law, they determined further investigation was warranted.[108] The Special Division could then appoint an independent counsel to investigate the high-ranking government official.[109] The independent counsel was separate and independent from the Department of Justice, and the Attorney General could only remove them for good cause, incapacity, or physical or mental disability.[110] Further, the removal of an independent counsel was subject to congressional oversight and judicial review.[111]

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[100] Julian E. Zelizer, *The Conservative Embrace of Presidential Power*, 88 B.U. L. REV. 499, 499–500 (2008).
[101] *Id.*
[102] John R. Martin, *Morrison v. Olson and Executive Power*, 4 TEX. REV. L. & POL. 511, 514 (2000).
[103] *Id.*
[104] Evan Andrews, *What Was the Saturday Night Massacre?*, HIST. (May 28, 2025), https://www.history.com/news/what-was-the-saturday-night-massacre [https://perma.cc/G2AX-6XFN].
[105] Martin, *supra* note 102, at 514.
[106] Julian A. Cook, III, *Prosecuting Executive Branch Wrongdoing*, 54 U. MICH. J.L. REFORM 401, 410 (2021).
[107] Martin, *supra* note 102, at 514 (citing 28 U.S.C. § 49); 28 U.S.C. § 593(b)(1).
[108] Martin, s*upra* note 102, at 514 (citing 28 U.S.C. § 592(a)(1), (c)(1)); 28 U.S.C. § 592(g) (giving Congress the ability to request that the Attorney general apply for the appointment of an independent counsel).
[109] Martin, s*upra* note 102, at 515 (citing 28 U.S.C. § 593(b)(1)).
[110] *Id.* (citing 28 U.S.C. §§ 594(i) & 596(a)(1)).
[111] 28 U.S.C. § 596(a)(2)–(3).

The independent counsel had access to all the methods that are traditionally made available to Department of Justice prosecutors, such as grand juries, civil and criminal trials, appeals, etc.[112] They could also access Department of Justice resources and had to comply with Department of Justice policies, "except to the extent to do so would be inconsistent with the purposes" of the statute.[113]

In 1999, Congress decided to let the Independent Counsel Act lapse.[114] After independent counsel investigations into the Reagan, George H.W. Bush, and Clinton administrations, concerns regarding cost, prosecutorial discretion, and investigation duration helped bring about the end of the statute.[115]

The Special Counsel Regulations replaced the Independent Counsel Act and are still in effect today.[116] The Attorney General is empowered under the Special Counsel Regulations to appoint a special counsel to conduct an investigation when matters are brought to the Attorney General that could warrant the consideration of one.[117] The special counsel is required to comply with all Department of Justice practices, policies, and regulations.[118] One of the primary differences between the Special Counsel Regulations and the Independent Counsel Act is that, under the Special Counsel Regulations, the Attorney General may remove the special counsel "for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies,"[119] and removal is not subject to review.[120] Overall, the Special Counsel Regulations provide the Attorney General with more extensive control over the actions of the special counsel than the Independent Counsel Act afforded them.[121]

Even though Congress acted to curtail the expansion of presidential power during the post-Nixon years, new ways of "thinking about the constitutional foundations of presidential authority and how it might be sustained in the face of a hostile and resurgent Congress" began to develop almost immediately.[122] Theories such as the unitary executive theory, which is predicated on the subordination of executive power to the will of the President, would begin to circulate through legal circles and into presidential

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[112] Cook, *supra* note 106, at 409 (citing 28 U.S.C. § 594(a), (d)).
[113] *Id.* at 411–12 (citing 28 U.S.C. § 594(f)(1)).
[114] *Id.* at 412.
[115] *Id.*
[116] *Id.*
[117] 28 C.F.R. § 600.1 (2025).
[118] *Id.* § 600.7.
[119] *Id.* § 600.7(d).
[120] *See* Cook, *supra* note 106, at n.91.
[121] *Id.* at 414.
[122] Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2099 (2009).

administrations in the decades following President Nixon's resignation.[123] Further, Presidents Ronald Reagan through Donald Trump would continue to press the bounds of presidential power by taking unilateral executive actions.[124] The next subsection of this Note will discuss the presidential immunity doctrine that began to form during this period.

E. Presidential Immunity

Another significant development that occurred after the Nixon Presidency is the development of the presidential immunity doctrine.[125] To date, three major cases have developed and outlined the presidential immunity doctrine: *Nixon v. Fitzgerald*, *Clinton v. Jones*, and *Trump v. United States*.[126]

1. Nixon v. Fitzgerald

In *Nixon v. Fitzgerald*, the Supreme Court addressed whether a President is entitled to immunity from civil liability.[127] The respondent, A. Ernest Fitzgerald, lost his job as a management analyst with the Department of the Air Force in January 1970.[128] The Air Force claimed that he was dismissed as part of an action taken to "promote economy and efficiency in the Armed Forces."[129]

In November of 1968, approximately a year prior to his dismissal, Fitzgerald received national attention due to his appearance before a congressional subcommittee.[130] During his appearance before the subcommittee, Fitzgerald testified that cost overruns on a transport plane in production could cost approximately $2 billion and that technical difficulties had occurred during the development of the plane.[131] This testimony

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[123] *Id.*
[124] Ronald L. Feinman, *The Expansion of Presidential Power Since 1973*, HIST. NEWS NETWORK (May 26, 2019), https://www.historynewsnetwork.org/article/the-expansion-of-presidential-power-since-1973 [https://perma.cc/N4DL-XYUC].
[125] *See generally* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (establishing absolute immunity for a President from civil damages liability for all acts taken within the "outer perimeter" of their official responsibilities); Clinton v. Jones, 520 U.S. 681 (1997) (holding that immunity does not shield a President from civil litigation arising from unofficial conduct, particularly for acts that occurred before taking office); Trump v. United States, 603 U.S. 593 (2024) (addressing criminal immunity of the President for the first time, recognizing absolute immunity for a President's core official acts, presumptive immunity for other official acts, and no immunity for unofficial acts).
[126] *See Fitzgerald*, 457 U.S. 731; *Jones*, 520 U.S. 681; *Trump*, 603 U.S. 593.
[127] *See Fitzgerald*, 457 U.S. at 733, 748.
[128] *Id.*
[129] *Id.* at 734.
[130] *Id.*
[131] *Id.*

allegedly embarrassed his superiors at the Department of Defense and may have contributed to his dismissal.[132]

Several years later, President Nixon took personal responsibility for Fitzgerald's dismissal during a news conference; however, the White House later retracted Nixon's statement taking responsibility the day after it was made.[133] Eventually, Fitzgerald brought a civil claim against Nixon for unlawfully firing him.[134]

Nixon claimed that the President of the United States is shielded by absolute immunity from civil damages liability.[135] Fitzgerald argued that the President was only entitled to qualified immunity.[136] The Court sided with Nixon and held that Nixon, as a former President, was entitled to absolute immunity from civil liability arising from his official acts as President.[137] The Court reasoned that this immunity was a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."[138] The Court also emphasized the importance of the Presidency and the duties that come along with it, stating that "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government."[139]

In addition, the Court offered several alternative protections against presidential misconduct: impeachment, subjection to press scrutiny, a President's desire for reelection, a President's need to maintain their prestige, and a President's concern for their historical stature.[140] These alternative remedies were articulated by the Court to quell concern that their holding was placing the President above the law.[141] The development of presidential immunity from civil liability would bring about a novel argument by President Bill Clinton in the decade following *Nixon v. Fitzgerald*.[142]

2. Clinton v. Jones

Paula Jones was a state employee of Arkansas in 1991 while Bill Clinton was the Governor of Arkansas.[143] Paula Jones commenced a civil action

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[132] *Id.*
[133] *Id.* at 737
[134] *Id.* at 739.
[135] *Id.* at 748.
[136] *Id.* at 750.
[137] *Id.* at 749.
[138] *Id.*
[139] *Id.* at 751.
[140] *Id.* at 757–58.
[141] *Id.* at 758.
[142] *See generally* Clinton v. Jones, 520 U.S. 681, 692 (1997) (discussing President Clinton's argument that the Constitution affords the President temporary immunity from civil litigation arising out of events that occurred before taking office).
[143] *Id.* at 684.

against President Clinton and Danny Ferguson, a former police officer, on May 6, 1994.[144] The allegations described an event that occurred during a conference held at a hotel in Little Rock, Arkansas, while Jones was a state employee.[145] Jones alleged that Governor Clinton made sexual advances that she rejected when they were in a hotel room together during the conference.[146] Jones also claimed that her superiors dealt with her in a hostile manner and changed her duties as punishment for rejecting Governor Clinton's advances.[147]

Clinton argued that the Constitution affords the President temporary immunity from civil litigation arising from events that occurred before taking office, except in the most exceptional cases.[148] In addition, Clinton argued that the Presidency is "a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties"[149] and that the separation of powers doctrine limits the federal judiciary in its ability to interfere with the executive branch.[150]

The Court rejected Clinton's arguments and held that the doctrine of separation of powers does not require that federal courts stay all private civil actions against the President until he leaves office.[151] The Court also held that the rationale for holding Presidents immune from civil liability for their official acts is inapplicable to their private, unofficial conduct, particularly those that occurred before they took office.[152] They reasoned that only three sitting Presidents had ever been subjected to suits for their private conduct; thus, it would be unlikely that the President would be engulfed in such litigation.[153] Further, the Court reasserted the rule first surmised in *Fitzgerald* that "the sphere of protected action must be related closely to the immunity's justifying purposes."[154] The next major case regarding the presidential immunity doctrine would come nearly three decades later and addressed whether a former President enjoys immunity from alleged criminal actions they engaged in while they were in office.[155]

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[144] *Id.*
[145] *Id.* at 685.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 692.
[149] *Id.*
[150] *Id.* at 697.
[151] *Id.* at 706.
[152] *Id.* at 692–93.
[153] *Id.* at 692.
[154] *Id.* at 694 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 755 (1982)).
[155] *See generally* Trump v. United States, 603 U.S. 593 (2024) (considering the scope of a President's immunity from criminal prosecution).

3. Trump v. United States

The most recent Supreme Court case regarding presidential immunity, *Trump v. United States*, relates to criminal charges that were filed against President Donald Trump for his conduct after losing the 2020 presidential election.[156] The Supreme Court granted certiorari to address the issue of whether a former President enjoys presidential immunity from criminal prosecution for alleged conduct that involves official acts during their time in office.[157]

The indictment against Trump alleges that when he was President he, among other things, (1) "made public statements about the administration of the federal election;"[158] (2) communicated with officials at the Department of Justice about investigating alleged election fraud and about choosing leadership in the Department;[159] (3) communicated with state officials about their role in the administration of the 2020 federal election and the exercise of their official duties in respect to that role;[160] (4) communicated with Vice President Pence and with members of Congress about their duties regarding their certification of the election results;[161] and (5) "authorized or directed others to organize contingent slates of electors in furtherance of his attempts to convince the Vice President to exercise his official authority in a manner" he advocated for.[162] Trump argued that all the alleged conduct in the indictment fell within the core of his official duties as President of the United States and that the President has absolute immunity from criminal prosecution for actions performed within the outer perimeter of his official presidential responsibilities.[163]

The Court held that under the nation's constitutional structure of separated powers, a President is at least entitled to presumptive immunity for their official acts while in office.[164] Presumptive immunity may be rebutted by a prosecutor; however, a prosecution cannot interfere with a President's executive functions.[165] A President is also entitled to absolute immunity for the exercise of their exclusive constitutional powers.[166] These conclusions were made to protect a President's ability to vigorously carry out their powers

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[156] *See id.*
[157] *Id.* at 605.
[158] *Id.* at 603 (quoting Motion To Dismiss Indictment Based on Presidential Immunity at 9, United States v. Trump, 704 F.Supp.3d 196 (D.D.C. 2023) (No. 1:23-cr-00257)).
[159] *Id.* at 603–04.
[160] *Id.* at 604.
[161] *Id.*
[162] *Id.* at 603–04.
[163] *Id.* at 604 *(*quoting Motion To Dismiss Indictment Based on Presidential Immunity at 9, United States v. Trump, 704 F.Supp.3d 196 (D.D.C. 2023) (No. 1:23-cr-00257)).
[164] *Id.* at 614.
[165] *Id.* at 598.
[166] *Id.* at 606.

under the Constitution, to prevent intrusion of the President's authority and functionality, and to protect the President's decision-making process from the distortions that lingering prosecutions could cause.[167] In addition, the Court indicates that a jury cannot consider evidence concerning the President's official acts to prove things such as knowledge or notice of the falsity of their claims because admitting such evidence would "eviscerate" the immunity they prescribed.[168]

There are three acts that the Court specifically recognizes as being within the scope of the President's exclusive authority and thus cannot be subject to further judicial examination:[169] the President's power to grant pardons,[170] to remove United States executive officers whom they appointed,[171] and to recognize foreign countries.[172] This is not an exhaustive list of all the official acts that receive absolute immunity, but such acts are beyond the authority of Congress to criminalize and courts to examine.[173]

Looking to the conduct alleged by the indictment against Trump, the Court makes several determinations as to whether they fall within the official or unofficial acts categories, and, if determined to be an official act, whether they receive presumptive immunity or absolute immunity.[174] First, the allegations relating to Trump's threats to fire the Acting Attorney General are determined as official acts and are absolutely immune from prosecution because the President has the authority to remove executive officers they appointed.[175] Second, interactions that Trump had with Vice President Pence regarding the certification of the election were determined to be official acts that are at least presumptively immune from prosecution.[176] Third, the Court did not decide as to whether Trump's communications with state officials and private parties—primarily to pressure state officials to accept alternative slates of electors in the 2020 election's battleground states—were official or unofficial conduct, and they remanded the issue back to the District Court.[177]

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[167] *Id.* at 595.
[168] *Id.* at 630–31.
[169] *Id.* at 608.
[170] *Id.*
[171] *Id.* at 608–09.
[172] *Id.* at 609.
[173] *Id.*
[174] *Id.* at 619–30.
[175] *Id.* at 621.
[176] *Id.* at 623.
[177] *Id.* at 628. The District Court was never able to address whether the alleged conduct were official or unofficial acts on remand because the case was dismissed without prejudice on November 25, 2024, after federal prosecutors filed a motion to dismiss shortly after Donald Trump was re-elected as the 47th President of the United States. *See* NPR WASHINGTON DESK, *Judge Grants Dismissal of Jan. 6 Case Against Trump*, NPR (Nov. 25, 2024, at 17:03 ET), https://www.npr.org/2024/11/25/nx-s1-5205376/jan-6-trump-case [https://perma.cc/N6XJ-G8DS].

Finally, the Court analyzed whether Trump's public comments regarding the administration of the election were official or unofficial conduct.[178] The Court stated that "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities"[179] and indicated that a fact-specific, objective analysis of the "'content, form, and context'" is necessary to conclude whether public statements made by a President are official or unofficial acts.[180] Overall, Trump's public statements included in the indictment were remanded to the District Court to determine whether they were official or unofficial conduct.[181]

The development and expansion of the presidential immunity doctrine over the past several decades significantly insulates presidents from most forms of civil and criminal liability, particularly for actions they engage in while they are in office. This doctrine has arisen in the context of a Presidency that continues to amass more power while Congress' power wanes.[182] The next section of this Note will analyze this concerning trend.

II. ANALYSIS: THE EROSION OF CHECKS ON PRESIDENTIAL POWER LEAVES THE UNITED STATES VULNERABLE TO CONSTITUTIONAL CRISES

Over the past century, presidential power has expanded,[183] and Congress has abdicated its checks on presidential power.[184] Further, the presidential immunity doctrine delineated in *Trump v. United States* has left the United States with potentially significant vulnerabilities if a President decides to push the bounds of their power to commit acts that would otherwise be considered unlawful.[185] To avert potentially calamitous constitutional crises in the future, Congress must assert itself as a check on presidential power by reforming constitutional and legal mechanisms that are designed to hold Presidents accountable, as Congress is the prime branch of government[186] to ensure that the United States maintains its Republic and does not descend into authoritarianism.

A. Gouverneur Morris and the Vigorous and Independent Executive

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[178] *Trump*, 603 U.S. at 628–30.
[179] *Id.* at 598.
[180] *Id.* at 629 (citing Snyder v. Phelps, 562 U.S. 443, 453 (2011)).
[181] *Id.* at 630.
[182] *See infra* Section II.C.
[183] *See infra* Section II.C.
[184] *See infra* Section II.C.
[185] *See infra* Section II.D.
[186] *See infra* Part III.

One of the perceived flaws with the Articles of Confederation was that it did not create an independent executive branch.[187] To remedy this perceived issue, the Framers decided to create an executive branch led by one person who would be independent from the legislature.[188] Further, they designed a system where the electors of the Electoral College would choose the President, not the legislature.[189] Nevertheless, even though the Presidency that arose out of the Constitutional Convention was more independent and powerful than many of the delegates had originally conceived,[190] even the most forceful and persuasive advocates for an independent and vigorous executive at the Convention recognized the importance of ensuring that presidential power is checked by Congress.[191]

Arguably, Gouverneur Morris shaped the formation of the executive branch more than anyone at the Constitutional Convention.[192] His views on executive power were influenced by the government that the State of New York had created, which featured a strong and independent governor, who was popularly elected and served for a term of three years.[193] In addition, New York made the governor commander in chief of the armed forces and gave him a qualified veto over legislation.[194] The structure and power of the Governor of New York would become a model for Article II of the Constitution of the United States, even though it differed from the executive branches prevalent in the other states at the time.[195]

Morris and James Wilson were the primary proponents at the Constitutional Convention of a vigorous executive, who would act and be chosen independently of the legislature.[196] Morris believed that it would be impossible for a President to be independent and vigorous if he were selected by the legislature.[197] Moreover, he believed that such an arrangement would be an opportunity for corruption to fester, as had been the case during periods of time in England prior to the formation of the United States.[198] The best way to avoid the possibility of such corruption from occurring, according to Morris, was to ensure that the executive was completely independent from

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[187] PIKA, MALTESE & RUDALEVIGE, *supra* note 8, at 5–6; *see The Debate Over the President and the Executive Branch*, *supra* note 56.
[188] *See* PIKA, MALTESE & RUDALEVIGE, *supra* note 8, at 10.
[189] *See* U.S. CONST. art. II, § 1, cl. 3.
[190] *See* PIKA, MALTESE & RUDALEVIGE, *supra* note 8, at 7.
[191] Robinson, s*upra* note 49, at 319.
[192] *Id.* at 322.
[193] *Id.* at 321.
[194] *Id.*
[195] *Id.* at 320–21.
[196] *Id.* at 323.
[197] *Id.*
[198] *Id.* (providing reference to Robert Walpole and the Whigs' domination of English Parliament and the cabinet, which they used to create patronage positions for their agents).

the legislature and to give it exclusive control over judicial, diplomatic, and administrative appointments.[199]

Morris deeply distrusted legislatures and the members that composed them, believing that they "pandered to the worst instincts of the electorate."[200] His conception of the President as being a "great protector of the masses" and general guardian of the nation was not only foreign to many of his contemporaries at the Constitutional Convention, but it has also proved to be prescient when taking into consideration the perceived roles and duties of the modern presidency.[201]

Morris's conceptions of the executive branch and its power won the debate on the topic at the Constitutional Convention, as a singular executive, elected by the Electors of the Electoral College, clothed with many of the powers the governor of New York had at the time—plus more—was what the delegates agreed to create.[202] Moreover, as the chair of the Committee of Style at the Constitutional Convention,[203] Morris produced the ambiguous and arguably expansive language of the Vesting Clause in Article II.[204] This contribution may be the most controversial and relevant of Morris's many contributions at the convention because proponents and opponents of the unitary executive theory continue to debate whether the Clause gives the President sole and plenary power to control the executive power derived from the Constitution.[205]

Of particular importance, Morris was eventually convinced by some of his colleagues at the Constitutional Convention that the President should be subject to impeachment by the legislature.[206] This fact should not be overlooked because it denotes that even Morris, the most ardent and influential proponent of a vigorous and independent President at the Constitutional Convention, believed that the President should be "amendable to justice" via checks from Congress, a political body of which he was deeply

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[199] *Id.*
[200] *Id.*
[201] *Id.* at 324; *see President's Role*, NAT'L ARCHIVES: GEORGE W. BUSH PRESIDENTIAL LIBR., https://www.georgewbushlibrary.gov/research/topic-guides/presidents-role [https://perma.cc/2QF3-6262] (last visited Feb. 16, 2025).
[202] *See* U.S. CONST. art. II.
[203] PIKA, MALTESE & RUDALEVIGE, *supra* note 8, at 11.
[204] *Id.*
[205] *See William Treanor, Academic Highlight: The Framer's Intent: Gouverneur Morris, the Committee of Style and the Creation of the Federalist Constitution,* SCOTUSBLOG (Aug. 5, 2019), https://www.scotusblog.com/2019/08/the-framers-intent-gouverneur-morris-the-committee-of-style-and-the-creation-of-the-federalist-constitution/ [https://perma.cc/9B8F-SF4L]. *See generally* Dani Heba, The Unitary Executive Theory: Benefits and Dangers (May 20, 2023) (B.A. thesis, City University of New York) (on file with CUNY Academic Works) (discussing various views, interpretations, and applications of the unitary executive theory).
[206] Robinson, *supra* note 49, at 319. Benjamin Franklin, George Mason, James Madison, James Wilson, Eldridge Gerry, and Edmund Randloph were among the group that convinced Morris to support subjecting the president to impeachment. *Id.*

skeptical.[207] Morris's eventual recognition of the necessity of impeachment as a check on presidential power underscores that even the most forceful advocate of an independent and powerful presidency at the Constitutional Convention understood the importance of congressional checks on presidential power.[208]

B. Congressional Checks on Presidential Power

Of the many innovations from the Constitutional Convention, checks on the power of the various branches of the federal government may be the most vital to ensuring that the government of the United States does not descend into tyranny. The Framers were particularly concerned about the nascent Republic they were forming reverting back into a monarchy or being dominated by demagogues.[209] To address these concerns, they created checks on presidential power.[210] This section of the analysis will discuss the Framers' skepticism of populism; it will then analyze three of the primary constitutional checks Congress can assert against the President of the United States: impeachment, the Senate's advice and consent power, and oversight.

1. The Framers' Skepticism of Populism

A belief that permeated the Constitutional Convention in 1787 was that the state governments at the time were too responsive to public opinion.[211] One of the reasons the Framers believed over-responsiveness to public opinion was problematic is that they feared the rise of demagogues in the United States.[212] A demagogue is defined as a politician who gains power by appealing to prejudice, distrust, fear, and the vilification of others.[213] Alexander Hamilton wrote in Federalist No. 1 that "those men who have overturned the liberties of republics the greatest number have begun their career, by paying an obsequious court to the people, commencing

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[207] *Id.*
[208] *See supra* Section II.A.
[209] *Madison* Debates, YALE L. SCH.: LILLIAN GOLDMAN L. LIBR., https://avalon.law.yale.edu/18th_century/debates_604.asp [https://perma.cc/KRT7-ACFP] (last visited Feb. 15, 2025*)* (providing James Madison's notes from the debates held on June 4, 1787, regarding the adoption of the Federal Constitution); Eli Merritt, *Civics 101: Keep Demagogues Out of Democracy*, VAND. UNIV.: THE VAND. PROJECT ON UNITY & AM. DEMOCRACY (Apr. 7, 2021, at 00:02 ET), https://www.vanderbilt.edu/unity/2021/04/07/civics-101-keep-demagogues-out-of-democracy/ [https://perma.cc/KQ5A-D2P9].
[210] *See generally* THE FEDERALIST NO. 1 (Alexander Hamilton) (noting that the Constitution must include institutional safeguards to check ambition and prevent tyranny).
[211] Reed, *supra* note 36.
[212] Merritt, *supra* note 209.
[213] *Id.*

Demagogues and ending tyrants."[214] One of the primary innovations that the Framers created to buffer the Presidency from populist sentiment sweeping a demagogue into power was the Electoral College.[215]

The Electoral College was originally designed to have a group of electors selected by the states choose the President.[216] The Framers did not intend for the people to vote directly for the President.[217] Instead, the electors, who were envisioned to be politically experienced and vigilant guards against tyranny, would act as a type of filtration against populist sentiment and shield the presidency from demagogues supported by the people.[218] In essence, the design of the Electoral College signified two things: (1) the distrust the Framers had of allowing the voters to directly choose the President, and (2) their efforts to ensure that there were systems in place to check against the consolidation of political power sanctioned by the people.[219]

Today, states still choose the mode of selecting electors;[220] however, the voters of the individual states cast their ballots during presidential elections for electors that represent the candidate of their choosing.[221] The preferred electors are often bound to cast their electoral votes in favor of the candidate who won the popular vote in their respective states or districts.[222] Thus, the Electoral College hardly acts as a filtration system against populist sentiment; rather, it functions as a formality that often sanctions the will of the majority.[223] Of course, voters can act as a check on presidential power and corruption by not supporting Presidents or candidates that engage in such behavior.[224] However, many of the Framers were skeptical of a system that primarily relied on the people as the primary check on presidential power because they believed that demagogues would inflame the passions of the

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[214] THE FEDERALIST NO. 1 (Alexander Hamilton).
[215] *See* Merritt, *supra* note 209; *also see* Reed, *supra* note 36.
[216] *See* Reed, *supra* note 36.
[217] *Id.*
[218] Merritt, *supra* note 209.
[219] *See* Reed, *supra* note 36; *see* Merritt, *supra* note 209.
[220] U.S. CONST. art. II, § 1, cl. 2.
[221] *What Is the Electoral College?*, NAT'L ARCHIVES (May 19, 2025), https://www.archives.gov/electoral-college/about [https://perma.cc/27CT-K43E].
[222] *About the Electors*, NAT'L ARCHIVES (Nov. 7, 2024), https://www.archives.gov/electoral-college/electors#restrictions [https://perma.cc/N8NP-NVCR] ("There is no Constitutional provision or Federal law that requires electors to vote according to the results of the popular vote in their States. Some States, however, require electors to cast their votes according to the popular vote. These pledges fall into two categories—electors bound by State law and those bound by pledges to political parties."). Maine and Nebraska are the only states that appoint individual electors based on the candidate that wins the popular vote in each district; the rest of the states have a winner-take-all system. *Distribution of Electoral Votes*, NAT'L ARCHIVES (Nov. 4, 2024), https://www.archives.gov/electoral-college/allocation [https://perma.cc/2EHU-7AKX].
[223] Merritt, *supra* note 209.
[224] *See* THE FEDERALIST NO. 51 (James Maidson).

people and use their support as a vehicle to gain power.[225] Therefore, the Framers also provided institutional checks within the Constitution, such as impeachment.[226]

2. Impeachment as a Primary Check on Presidential Power

The author of Federalist No. 51 asserted the importance of having a government that is able to control itself: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and the next place oblige it to control itself."[227] The impeachment process is a primary check that ensures that Congress can counter the misuse of power by the president.[228]

The impeachment of a president comprises several processes. First, the House of Representatives, which has the sole power of impeachment under the Constitution, begins the process by bringing articles of impeachment against the President.[229] Next, the House votes whether to adopt the article(s) by a simple majority vote of the members present.[230] If a simple majority of the House members present vote in favor of the article(s), then the matter will move to the Senate for an impeachment trial.[231] The Chief Justice of the United States Supreme Court presides over the impeachment trial of a President, and the Senate has the sole power of trying the impeachment.[232] For a President to be removed from office, they must be convicted by two-thirds of the members of the Senate present.[233]

Impeachment is inherently a political tool.[234] The key phrase many politicians, scholars, and citizens debated and discussed during the impeachment proceedings of President Clinton and President Trump is found in Article II, Section 4, which states that the president "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." [235]

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[225] *See generally* THE FEDERALIST NO. 1 (Alexander Hamilton) (stating "those men who have overturned republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants").
[226] U.S. CONST. art. II, § 4.
[227] THE FEDERALIST NO. 51 (James Madison).
[228] THE FEDERALIST NO. 65 (Alexander Hamilton).
[229] U.S. CONST. art. I, § 2, cl. 5; *How Federal Impeachment Works*, USAGOV (Nov. 13, 2025), https://www.usa.gov/impeachment [https://perma.cc/9F5H-DRM5] (offering an overview of the impeachment process).
[230] *How Federal Impeachment Works*, *supra*, note 229.
[231] *Id.*
[232] *See About Impeachment*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment.htm [https://perma.cc/S63Y-RQVU] (last visited Oct. 13, 2025); *see* U.S. CONST. art. I, § 3, cl. 6.
[233] *See About Impeachment*, *supra* note 232; *see* U.S. CONST. art. I, § 3, cl. 6.
[234] THE FEDERALIST NO. 65 (Alexander Hamilton).
[235] U.S. CONST. art. II, § 4.

Many argue that the phrase "high Crimes and Misdemeanors" should be interpreted narrowly to only include serious violations of established law, particularly criminal law.[236] However, this narrow interpretation of the phrase "high Crimes and Misdemeanors" is problematic, as it constrains Congress from exercising its vital role of impeaching and then removing a President for misconduct that falls short of a serious crime under established criminal law, even if the President's conduct still grossly abuses the powers of the presidency.[237]

Moreover, tethering the phrase "high Crimes and Misdemeanors" solely to serious violations of established criminal law restrains the ability of Congress to impeach and then remove Presidents for many forms of misconduct that "proceed from the misconduct of public men, or in other words, from the abuse or violation of some public trust."[238] For example, a President may use the powers of their office to order federal law enforcement to conduct surveillance of political rivals and then exploit the information obtained from the surveillance to their political advantage. The President in this hypothetical would arguably be exercising an official act, and such an act could be considered within the President's "conclusive and preclusive" constitutional authority, which would make them immune from criminal prosecution.[239] Nevertheless, this type of activity should still be considered impeachable and could be the basis for the removal of a President from office, as it is an abuse of presidential power that corrupts the capabilities of the federal government and violates the public trust.[240]

Conversely, narrow interpretations of the phrase "high Crimes and Misdemeanors" theoretically prevent Congress from devising cunning schemes to oust a president they disagree with on a mere policy basis.[241] Further, the refusal to add "maladministration" as a basis for impeachment to the text of the Constitution may also denote that the phrase should be interpreted narrowly.[242] However, narrow constructions of "high Crimes and Misdemeanors" that only account for serious violations of established

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[236] Tom Ginsburg, Aziz Huq & David Landau, *The Comparative Constitutional Law of Presidential Impeachment*, 88 U. CHI. L. REV. 81, 89–90 (2021) (indicating that President Trump's legal team argued that the House's articles of impeachment in 2020 were insufficient in part because impeachment was only appropriate if the President violated "established law" and "criminal law").

[237] *See id.* at 90 (asserting that the narrow interpretation of "high Crimes and Misdemeanors" may be problematic).

[238] THE FEDERALIST NO. 65 (Alexander Hamilton).

[239] Trump v. United States, 603 U.S. 593, 609 (2024) (referencing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)).

[240] *See generally* THE FEDERALIST NO. 65 (Alexander Hamilton) (explaining that impeachable offenses include abuses of public trust and political misconduct injuring society itself).

[241] *See* Ginsburg, Huq & Landau, *supra* note 236, 90, 112–13 (discussing the prevalence of a narrow interpretation of the phrase "high Crimes and Misdemeanors," which has thus far prevented or deterred the occurrence of impeachments—and removals—of Presidents based solely on political grounds).

[242] *Id.* at 110.

criminal law are problematic because they generally limit the capability of Congress to hold a President accountable for misuses of their power and illustrate the erosion of a key congressional check on presidential power—impeachment.[243] Therefore, recognizing the latitude that Congress has under the Constitution to initiate and then conduct an impeachment proceeding of a President is integral to ensuring it functions as a legitimate check on presidential power. The next subsection of this analysis will analyze the Senate's latitude to control impeachment trials.

3. The Senate has the Power to Change the Procedure of Impeachment Trials

Article I, Section 3, Clause 6 of the United States Constitution gives the Senate the sole power to try impeachments.[244] In the United States Supreme Court case *Nixon v. United States*, a federal judge who was impeached, convicted, and removed from office sought a declaratory judgment that his impeachment was void because the Senate decided to appoint a special committee to receive evidence and hear testimony instead of holding a trial in front of the full Senate.[245] Instead of holding a trial in front of the full Senate, the Senate tasked the committee with reporting its findings to the full Senate so that it could decide whether to convict and remove the federal judge.[246]

The Supreme Court held that the constitutionality of the Senate impeachment proceeding was a nonjusticiable political question because the text of Article II, Section 3, Clause 6 provides a textually demonstrable basis to give the Senate discretion as to how to conduct impeachment proceedings and to determine what rules dictate how the proceedings are conducted.[247] Therefore, regardless of whether the proceeding revolves around a federal judge or a President, *Nixon* demonstrates that the Senate has considerable latitude to control how it conducts impeachment proceedings due to its textually derived authority under the Constitution.[248] Procedural reforms to the impeachment trial of a president are proposed later in this Note.[249]

4. Advice and Consent of the Senate and Congressional Oversight

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[243] *See id.* at 90 (discussing the problems inherent in interpreting "high Crimes and Misdemeanors" narrowly to encompass only criminal offenses).
[244] U.S. CONST. art. I, § 3, cl. 6.
[245] Nixon v. United States, 506 U.S. 224, 228 (1993).
[246] *Id.* at 227–28.
[247] *See id.* at 236–38.
[248] *See id.* at 239 (White, J., concurring).
[249] *See infra* Section III C.

The Framers intended for the Senate to serve as a check on presidential power by allowing it to have some influence over who the president can appoint to their administration via the Advice and Consent Clause found in Article II, Section 2.[250] Hamilton indicated that a President who is given complete discretion as to who to appoint to their administration without any input from an independent body, such as the Senate, "would be governed much more by his private inclinations and interests."[251] As such, the modern trend of avoiding Senate confirmation by holding temporary or acting executive officers is problematic because it avoids a constitutional requirement that was designed to temper the private interests of the President.[252]

In addition, Congress has also conducted oversight of the executive branch through its powers under the Necessary and Proper Clause since the beginning of the Republic.[253] This inferred constitutional power, sometimes referred to as the "power of inquiry," and its coordinate power to enforce,[254] are essential functions of the legislative branch to oversee the executive branch's implementation of public policy,[255] to keep presidential power in check, and to ensure Presidents are held accountable for misconduct.[256] Like the previously mentioned "advice and consent" power of the Senate, modern Presidents have also tried thwarting congressional oversight by failing to comply with subpoenas and generally attempting to stonewall congressional investigations.[257] Presidents faced with the specter of congressional oversight often assert that their office has powers and prerogatives that cannot be intruded on by congressional oversight.[258] Presidents also chalk up congressional oversight as a partisan tactic to try to delay the implementation of their agenda, especially when either the House of Representatives or the

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[250] *See* U.S. CONST. art. II, § 2, cl. 2.
[251] THE FEDERALIST NO. 76 (Alexander Hamilton).
[252] *See* David M. Driesen, *Donald Trump and the Collapse of Checks and Balances*, 77 SMU L. REV. F. 199, 201 (2024).
[253] McGrain v. Daugherty, 273 U.S. 135, 173–75 (1927).
[254] *Id.*
[255] TODD GARVEY, MARK J. OLESZEK & BEN WILHELM, CONG. RSCH. SERV., IF10015, CONGRESSIONAL OVERSIGHT AND INVESTIGATION 1–4 (2024), https://www.congress.gov/crs-product/IF10015 [https://perma.cc/XA8A-HC7G].
[256] *See* Matthew Levendusky & Tobias Barrington Wolff, *U.S. President vs. Congressional Investigators: How the Battle of the Branches Could Play Out*, PENN TODAY, https://penntoday.upenn.edu/news/trump-congress-subpoenas-oversight-battle [https://perma.cc/C3XP-S3L5] (last visited Oct. 13, 2025).
[257] *Donald Trump's Obstruction of Congressional Oversight*, AM. OVERSIGHT (July 31, 2020), https://americanoversight.org/investigation/donald-trumps-obstruction-of-congressional-oversight/ [https://perma.cc/W8XT-J3AU]. Levendusky & Wolff, supra note 256.
[258] Levendusky & Wolff, *supra* note 256.

Senate is controlled by the opposing party.[259] Nevertheless, Congress still has the responsibility of ensuring that the President is not abusing their power.[260]

Overall, the Framers designed a system of intragovernmental checks and balances to ensure that the country would not descend into tyranny at the hands of a demagogue who gained the power of the presidency through populist sentiment or by other means.[261] In particular, the Framers ensured that Congress would be able to check a President's power by instituting the integral checks of impeachment and the Senate's advice and consent for presidential appointments.[262] Further, the Constitution also infers that Congress has the power to conduct oversight of the President and the executive branch.[263] These important congressional checks on presidential power have been tested over the past century as presidential power has expanded considerably.[264] The next section of the analysis will discuss the expansion of presidential power since the early twentieth century and congressional actions that attempted to recalibrate the rise of such power.

C. The Presidency Expands Its Power in the Twentieth Century and Supplants Congress as the Dominant Political Branch in American Government

Presidential power expanded considerably in the twentieth century and continues to do so today.[265] Starting with President Theodore Roosevelt in 1901, Presidents began to assert what they believed to be the inferred or expressed powers of their office to set the policy agenda for the nation and address crises as well as changes in society.[266] During this same period, Congress gradually began to lose its primacy as the central political branch in American government and was supplanted by presidential leadership in traditional areas of congressional prerogative, such as policy setting.[267] This shift of power began as a collaboration between Congress and the President to enhance government efficiency and accountability; however, this collaborative venture between the two political branches of the federal

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[259] *E.g.*, Caitlin Oprysko, *'Witch Hunt Garbage': Trump Blasts News of Pelosi's Impeachment Inquiry*, POLITICO (Sep. 24, 2019, at 18:49 ET), https://www.politico.com/news/2019/09/24/trump-reaction-impeachment-inquiry-000033 [https://perma.cc/JD4S-TJEG].
[260] *See* Levendusky & Wolff, *supra* note 256.
[261] *See* Merritt, *supra* note 209.
[262] *See* U.S. CONST. art. II, § 4; *see* U.S. CONST art. II, § 2, cl. 2.
[263] *See* McGrain v. Daugherty, 273 U.S. 135, 173–74 (1927)
[264] *See infra* Section II.C.
[265] *See* Donald R. Wolfensberger, *The Return of the Imperial Presidency?*, 26 WILSON Q., 36, 36–41 (2002).
[266] PIKA, MALTESE & RUDALEVIGE, *supra* note 8, at 1–2.
[267] *See* Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2145–73 (2024).

government eventually gave way to a presidency that was inclined to take unilateral action more often.[268]

President Franklin Roosevelt spearheaded the New Deal policy agenda to combat the devastating social and economic effects the Great Depression thrust on the nation.[269] Congress largely allowed Franklin Roosevelt to take the lead on setting the New Deal policy agenda during this time and even viewed him as "commander in chief in the war against the depression."[270] This change of the President being the focal point and director of the national policy agenda was fueled by Franklin Roosevelt's use of the radio as a means of communication to reach and persuade a massive audience of Americans.[271]

The phenomenon of the President setting the national policy agenda by using modern technology continued throughout the remainder of Franklin Roosevelt's time in office and continues today.[272] It also demonstrates the structural advantage the presidency has over Congress of creating a consistent and coherent policy agenda that can be communicated to Americans and the world,[273] as it is significantly easier for a unitary figure such as the President to form and direct a policy agenda relative to Congress, which is a diverse body of 535 people with differing beliefs, goals, and interests.[274] Today, this advantage is seemingly exacerbated in an era dominated by the need to quickly respond to rapidly developing events and emergencies happening all over the world.[275] In essence, it appears that the presidency is more equipped than Congress to have the rapid reflex necessary to address the quickly developing and demanding crises in the modern world due to its inherently centralized nature and ability to make decisive decisions.[276] Nevertheless, the apparent exigencies of the modern world and a President's ability to quickly communicate and adapt to rapid changes does not inherently make it inevitable that the powers of the presidency should expand, nor does it relinquish the more deliberate body of Congress of its

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[268] *Id.* at 2133.
[269] Adelstein, *supra* note 84, at 174.
[270] *Id.*
[271] *FDR's Fireside Chat on the Recovery Program*, NAT'L ARCHIVES (June 1, 2020), https://www.archives.gov/education/lessons/fdr-fireside [https://perma.cc/9G3H-34QM].
[272] *See id.*; *see also* Lauren Mannerberg, The Presidency and the Media: An Analysis of the Fundamental Role of the Traditional Press for American Democracy 7 (May 2017) (B.A. thesis, University at Albany, State University of New York) (on file with the Honors College at Scholars Archive, University at Albany) (discussing how presidents continue to "manipulate the media" through their conduct).
[273] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2339 (2001).
[274] *Id.*
[275] *See* James P. Pfiffner, *Federalist No. 70: Is the President Too Powerful?*, 71 PUB. ADMIN. REV. (SPECIAL ISSUE) S112, S116 (2011).
[276] *See id.*

constitutionally prescribed role of being the center for making important decisions in both domestic and international policy.[277]

The tension between whether the President or Congress is the appropriate body to address a crisis is illustrated in the landmark case *Youngstown Sheet & Tube Company v. Sawyer*.[278] In 1952, during the Korean War, President Truman issued an executive order and directed the Secretary of Commerce to seize and operate the nation's steel mills to avert the effects that a strike by the United Steelworkers of America threatened to have on production of critical military supplies.[279] Truman asserted his powers as Commander in Chief and Chief Executive as the basis for his actions; however, the Supreme Court refused to sanction this assertion of executive power by holding that the Constitution does not afford the President the power to seize private property to prevent labor disputes from stopping production because Truman's executive order did not carry out a congressionally passed policy in a way prescribed by Congress.[280] The Court further reasoned that it is Congress that has the exclusive constitutional authority to make laws that are necessary and proper to carry out its powers vested in the Constitution.[281] Moreover, the Court asserted that "[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[282]

The majority opinion, written by Justice Hugo Black, is a clear rebuke of the use of presidential power that exceeds the limits the Constitution places on the President;[283] it also indicates that the President should not intrude on the lawmaking function granted to Congress by the Constitution.[284] However, the famous tripartite test articulated by Justice Jackson in his concurrence,[285] and the so called "gloss on 'executive Power'" that Justice Frankfurter describes in his concurrence,[286] function as frameworks for the use of presidential power in ways that are not expressed by the Constitution or permitted by federal statute, particularly when Congress acquiesces to such actions taken by a President.[287] Thus, both Jackson and Frankfurter's concurrences in *Youngstown* illustrate that it is imperative for Congress to be assertive and clear with its lawmaking powers if it wants to shield against the expansion of presidential powers into areas traditionally under its purview.

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[277] *See* U.S. CONST. art. I, § 8, cl. 18 (giving Congress the power to make laws which are necessary and proper to carry out the powers enumerated in the Constitution); *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588–89 (1952).
[278] *Youngstown*, 343 U.S. at 579.
[279] *Id.* at 583–84.
[280] *Id.* at 588–89.
[281] *Id.* at 588.
[282] *Id.* at 589.
[283] *Id.* at 588–89.
[284] *Id.*
[285] *Id.* at 637 (Jackson, J., concurring).
[286] *Id.* at 610–11 (Frankfurter, J., concurring).
[287] *Id.* at 637 (Jackson, J., concurring); *id.* at 610–11 (Frankfurter, J., concurring).

D. The Importance of the Key Features of the Independent Counsel Act

President Nixon pushed the bounds of how presidential power could be exercised both at home and abroad.[288] In response, Congress passed legislation such as the Ethics in Government Act of 1978.[289] Title VI of the Ethics in Government Act was an important development in providing checks against a President engaging in misconduct, as it was designed, in part, to insulate special prosecutors from being fired by a President for investigating malfeasance in their administration.[290] The special counsel provisions of the Ethics and Government Act were renamed the Independent Counsel Reauthorization Act ("the Act") in 1987 and contained several key features that were designed to curtail a President's ability to engage in misconduct without at least facing some form of intragovernmental pressure.[291] As such, these key features should serve as roadmaps for Congress to reform the currently operational Special Counsel Regulations.

First, the Act provided that the Attorney General had to apply to the Special Division for the appointment of an independent counsel.[292] Second, if the Special Division believed the appointment was warranted, they could then appoint an independent counsel to investigate the high-ranking government official in question.[293] The structure of these preconditions for the appointment of an independent counsel is intriguing because it dispersed them between a high-ranking executive branch officer, the Attorney General, and the judiciary.[294] In addition, the Act also allowed Congress to request that the Attorney General apply for the appointment of an independent counsel.[295] Dispersing the decision-making process as to the appointment of an independent counsel was important because it helped minimize the possibility that the independent counsel would be used purely for partisan purposes, built redundancy in the system, and dispersed power between the three branches of the federal government.[296]

Third, the Act made the independent counsel separate and independent from the Department of Justice.[297] Fourth, the Act provided that the Attorney General could only remove an independent counsel for good cause,

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[288] *See* Cronin, *supra* note 13, at 212.
[289] Martin, *supra* note 102, at 514.
[290] *Id.*
[291] Cook, *supra* note 106, at 408–10.
[292] Martin, *supra* note 102, at 514; *see* 28 U.S.C. § 592(a)(1), (c)(1).
[293] Martin, *supra* note 102, at 514–15.
[294] *Id.*
[295] 28 U.S.C. § 592(g).
[296] Martin, *supra* note 102, at 521–22.
[297] *Id.* (citing 28 U.S.C. § 594(i)).

incapacity, or physical or mental disability.[298] Fifth, the removal of an independent counsel was subject to congressional oversight and judicial review.[299] These key features were integral because they protected the independent counsel from being fired by a President simply for investigating their administration, which occurred during the Watergate scandal when President Nixon fired Special Prosecutor Archibald Cox.[300] These features also provided a fairly narrow basis for the Attorney General to remove the independent counsel, which gave the independent counsel room to operate, and allowed Congress and the federal judiciary a check on the power of the executive branch to remove the independent counsel.[301]

Sixth, the Act allowed the independent counsel to access Department of Justice resources and ensured that they comply with Department of Justice policies "except to the extent to do so would be inconsistent with the purposes" of the Act.[302] Seventh, the Act allowed the independent counsel access to all methods that are traditionally made available to prosecutors at the Department of Justice, such as grand juries, civil and criminal trials, appeals, etc.[303]

Providing an independent counsel with the resources of the Department of Justice gave them the capability to conduct substantive and thorough investigations of high-ranking officials, such as the President.[304] Further, requiring the independent counsel to follow Department of Justice policies while ensuring that those policies did not constrain the purposes of the Act provided an appropriate balance to protect the subject(s) of an independent counsel investigation from having their rights infringed upon while maintaining the office's independence.

Access to grand juries, civil and criminal trials, and appeals, among other forums, was an integral feature of ensuring that the independent counsel had the ability to prosecute the most high-ranking government officials.[305] However, criminal indictment and prosecution of a sitting President was taken off the table for special and independent counsels via an Office of Legal Counsel (OLC) memorandum written in 1973.[306] The 1973 OLC

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[298] *Id.* (citing 28 U.S.C. § 596(a)(1)).
[299] 28 U.S.C. § 596(a)(2)–(3).
[300] *See* Andrews, *supra* note 104.
[301] *See* Cook, *supra* note 106, at 409–411.
[302] *Id.* at 411–12 (citing 28 U.S.C. § 594(f)(1)).
[303] *Id.* at 409 (citing 28 U.S.C. §§ 594(a) & 594(d)).
[304] *See id.*
[305] *See id.*
[306] *See* Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Just., on Amenability of the President, Vice President and Other Civ. Officers to Fed. Crim. Prosecution While in Off. (Sep. 24, 1973) https://www.justice.gov/d9/pages/attachments/2022/09/02/la_19730924_amenability_of_the_president_vice_president_and_other_civil_officers_to_federal_criminal_prosecution_while_in_office_0.pdf [https://perma.cc/P5SN-KV7F].

memorandum indicates that the President is immune from criminal prosecution while in office because subjecting a sitting president to criminal indictment and prosecution would directly "interfere with the President's unique official duties, most of which cannot be performed by anyone else."[307]

E. The Special Counsel Regulations Weakened the Key Features of the Independent Counsel

Congress let the Independent Counsel Act lapse in 1999.[308] The Special Counsel Regulations replaced the Independent Counsel Act and are still in effect today.[309] The Special Counsel Regulations weakened an important check on presidential power by significantly depleting the protections independent counsels (now called special counsels) used to enjoy.[310] As such, special counsels are particularly more vulnerable to executive branch control and interference in their investigations for several reasons.

First, the Attorney General no longer needs to make a request to a court to appoint a special counsel, as they now have complete control as to whether one is warranted or not (given that they are not recused from the matter at hand).[311] Further, the Regulations do not provide Congress a basis to request the appointment of a special counsel, whereas the Independent Counsel Act did.[312] These changes remove the dispersion of power between the executive, legislative, and judicial branches by eliminating the involvement of the Special Division (a division of the United States Court of Appeals[313]) and Congress in the process of appointment.[314]

Next, a special counsel is also required to follow all the Department of Justice practices, policies, and regulations, without any of the exceptions that were applicable in the old Independent Counsel Act.[315] This slight change theoretically makes it easier for the executive branch to control the special counsel and all but eliminates their independence from the Department of Justice.[316]

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[307] *Id.* at 28.
[308] Cook, *supra* note 106, at 412.
[309] *See* 28 C.F.R. § 600.1-10 (2025).
[310] Cook, *supra* note 106, at 414.
[311] *See* 28 C.F.R. § 600.1 (2025).
[312] *Compare* 28 C.F.R. 600.1 (2025) (containing the appointment process for a special counsel under the Special Counsel Regulations), *with* 28 U.S.C. § 592(g) (containing the process for Congress to request that the Attorney General apply to the Special Division to appoint an independent counsel).
[313] Martin, *supra* note 102, at 514.
[314] *See* Cook, *supra* note 106, at 412.
[315] *Compare* 28 C.F.R. § 600.7(a) (2025) (requiring a special counsel "comply with the rules, regulations, procedures, practices and policies of the Department of Justice"), *with* 28 U.S.C. § 594(f)(1) (requiring that an independent counsel comply with written or other established policies of the Department of Justice "except that to do so would be inconsistent with the purposes of this chapter").
[316] *See* 28 C.F.R. § 600.7 (2025).

Finally, the Special Counsel Regulations allow the Attorney General to remove a special counsel "for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies."[317] Contrast this with the grounds for removal under the Independent Counsel Act, which states that the Attorney General can only remove an independent counsel for "good cause, physical or mental disability…or any other condition that substantially impairs the performance of such independent counsel's duties."[318] The change provides the Attorney General with more grounds to terminate a special counsel.[319] As such, it may also expand the possibility that a President orders the Attorney General to fire a special counsel who is investigating them or their administration.

The scenario of a President firing a special counsel investigating their administration almost arose during the first Trump administration when Trump reportedly ordered the firing of Special Counsel Robert Mueller.[320] Trump and his allies argued that as President, he had the power to direct federal prosecutions and fire Department of Justice officials.[321] Critics of this point of view argued that the President does not control federal prosecutors because prosecutors are afforded prosecutorial discretion in the American legal system.[322] Regardless of which side of the argument is correct, the likelihood that a President will fire a special counsel investigating their administration is significantly higher now that the protections and independence afforded to them are weaker than they were during the independent counsel era.[323] Moreover, this is an example of a check on presidential power eroding due to Congress giving Presidents the leeway to test the bounds of their already expansive power.[324] The next section of the analysis will discuss how the Supreme Court has diminished the checks on a President facing civil or criminal liability for misconduct they engaged in while in office.

F. The Presidential Immunity Doctrine Erodes Checks on Presidential Power

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[317] 28 C.F.R. § 600.7(d) (2025).
[318] 28 U.S.C. § 596(a)(1).
[319] *Compare* 28 C.F.R. § 600.7(d) (2025) (providing the grounds for removal of a special counsel under the Special Counsel Regulations), *with* 28 U.S.C. § 596(a)(1) (providing the grounds for removal of an independent counsel).
[320] Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 3 (2018).
[321] *Id.* at 3–4.
[322] *Id.* at 4.
[323] *See* 28 C.F.R. § 600.1-10 (2025).
[324] *See* Cook, *supra* note 106, at 440.

Since the beginning of the twentieth century, checks on presidential power have eroded as presidential power has expanded and congressional power has dwindled.[325] More recently, the Supreme Court of the United States has eroded a check on presidential power—the possibility of a President being held civilly or criminally liable for their misconduct—by creating and then substantially expanding the doctrine of presidential immunity.[326]

The first case where the immunity doctrine took shape is *Nixon v. Fitzgerald*.[327] The Court in *Nixon v. Fitzgerald* held that President Nixon, as a former President, was entitled to absolute immunity from civil liability arising from his official acts while in office.[328] The Court reasoned that a President's unique office requires that they not be diverted from their important duties by being preoccupied with private civil lawsuits.[329]

There is no doubt that the President holds an office which is unlike any other. It is also reasonable to argue that the President should not be subjected to meritless civil suits regarding their official acts as President. However, the blanket immunity the Court provides in *Nixon v. Fitzgerald* is unnecessary, as the judiciary has the mechanisms necessary to dispose of meritless cases without the need for the President to expend considerable resources and time away from their official duties.[330]

In addition, the Court also raises several alternative forms of protection other than the possibility of civil liability that could guard against a President engaging in misconduct, including impeachment, presidential subjection to press scrutiny, a President's desire for reelection, a President's need to maintain their prestige, and a President's concern for their historical stature.[331] Nevertheless, many of these alternative forms of protection are hardly adequate, and they do not provide redress to a party that is injured by a President's misconduct while engaging in an official act.[332] Further, the adequacy of many of the alternative remedies asserted by the Court are

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[325] PIKA, MALTESE & RUDALEVIGE, *supra* note 8, at 1–4 (reviewing the historical growth of presidential power).

[326] *See generally* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (establishing absolute immunity for a President from civil damages liability for all acts taken within the "outer perimeter" of their official responsibilities); Clinton v. Jones, 520 U.S. 681 (1997) (holding that immunity does not shield a President from civil litigation arising from unofficial conduct, particularly for acts that occurred before taking office); Trump v. United States, 603 U.S. 593 (2024) (addressing criminal immunity of the President for the first time, recognizing absolute immunity for a President's core official acts, presumptive immunity for other official acts, and no immunity for unofficial acts).

[327] *Fitzgerald*, 457 U.S. at 749.

[328] *Id.* at 749.

[329] *Id.* at 749–51.

[330] *See id.* (White, J., dissenting) ("There is no reason to think that, in the future, the protection afforded by summary judgment procedures would not be adequate to protect the President, as they currently protect other executive officers from unfounded litigation."); *accord* FED. R. CIV. P. 56.

[331] *Fitzgerald*, 457 U.S. at 757–58.

[332] *See, e.g.*, *id.* at 797 (White, J., dissenting) ("Such a rule [of absolute immunity] will, however, leave Mr. Fitzgerald without an adequate remedy for the harms that he may have suffered. More importantly, it will leave future plaintiffs without a remedy, regardless of the substantiality of their claims.").

inadequate because they are dependent on the personal integrity, perceptiveness, and internal priorities of the occupant of the presidency, which vary greatly from President to President.[333] Further, a remedy such as the President's desire for reelection would be moot if they were confined by term limits or were not seeking a second term.[334]

The only asserted alternative mentioned in *Nixon v. Fitzgerald* of considerable merit is impeachment,[335] but even that has inherent weaknesses, as it does not provide individual redress to injured parties. Further, it has also been demonstrated by the nation's four impeachments to date that such an endeavor is difficult to fully exercise to finality, as all four impeachments have led to acquittals.[336] Nevertheless, the possibility of impeachment hanging over a President is a real deterrent that is substantially more likely to restrain misconduct compared to the other alternative protections asserted by the Court in *Nixon v. Fitzgerald*.[337]

In *Clinton v. Jones*, the Supreme Court held that the doctrine of separation of powers does not require that the court stay all private civil actions against a President until they leave office.[338] The Court also clarified that the rationale for holding Presidents immune from civil liability for their official acts is inapplicable to a President's private, unofficial conduct, particularly in the case of conduct that occurred before the President took office.[339] As such, *Clinton v. Jones* featured the Court refining the scope of the presidential immunity doctrine, and it presented an opportunity for them to differentiate between official and unofficial or private types of conduct.[340] The next case to directly address presidential immunity*, Trump v. United States*, would not follow the same pattern of constraining the presidential immunity doctrine and pertained to criminal immunity instead of civil.[341]

Trump v. United States is the first time the Supreme Court addressed the issue of whether a former President enjoys presidential immunity from criminal prosecution for conduct that allegedly involved official acts while

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[333] *See* Marshall, *supra* note 7, at 506 ("[V]iews on presidential power tend to be more variable than views on other constitutional issues because they intuitively relate to who is in power in a way that views on other controversial constitutional issues.").
[334] *See* Anthony Fowler, *Democracy Reform Primer Series: Term Limits*, THE UNIV. OF CHI.: CTR. FOR EFFECTIVE GOV'T (Jan. 25, 2024), https://effectivegov.uchicago.edu/primers/term-limits [https://perma.cc/YS6A-6JVR] ("[[T]erm limits] reduce the incentives of elected officials to work hard and please the voters.").
[335] *See Fitzgerald*, 457 U.S. at 757.
[336] *See How Federal Impeachment Works*, USA.GOV (Nov. 13, 2025), https://www.usa.gov/impeachment [https://perma.cc/9F5H-DRM5].
[337] *See Fitzgerald*, 457 U.S. at 757 (noting "the constitutional remedy of impeachment" before listing other deterrents).
[338] Clinton v. Jones, 520 U.S. 681, 706 (1997).
[339] *Id.* at 692–93.
[340] *Id.* at 693.
[341] *See generally* Trump v. United States, 603 U.S. 593 (2024) (considering whether the President has immunity from criminal prosecution).

in office.[342] The Court held that a former President is entitled to at least presumptive immunity from criminal prosecution for their acts which fall within the outer perimeter of their official responsibility.[343] Further, the Court indicated that a president's immunity from criminal prosecution is absolute as to conduct that falls within their core constitutional powers.[344] Presidential conduct that falls within the outer perimeter of their official responsibilities may be rebutted by a prosecutor; however, the prosecution cannot intrude on the authority or functions of the executive branch.[345] Moreover, the Court also prevents a jury from considering evidence concerning the President's official acts to prove things such as knowledge or notice of the falsity of their claims, as admitting such evidence would essentially defeat the immunity they prescribed.[346]

Overall, the Court substantially expands the doctrine of presidential immunity in *Trump v. United States* to at least give a former President presumptive immunity from criminal prosecution for their official acts that fall within the outer perimeter of their responsibilities.[347] Further, conduct that falls within the President's exclusive constitutional powers—such as granting pardons, removing executive officers that they appointed, and recognizing foreign countries—is given absolute immunity from criminal prosecution.[348]

The overarching effect of *Trump v. United States* is that Presidents are now significantly more insulated from the threat of criminal prosecution once they leave office, especially if they use their official powers as President to engage in acts that would otherwise be considered unlawful.[349] In essence, this significantly weakens the check of potential criminal prosecution for unlawful activity that existed beforehand. Further, it makes it exceedingly more difficult for prosecutors charging a former President to prove that the President engaged in illegal conduct while in office because the majority in *Trump v. United States* hamstrings a prosecution's ability to use evidence pertaining to a President's official acts that could help a jury piece together integral elements, such as knowledge, of a crime.[350] The Federal Rules of Evidence are equipped to ensure that a former President standing trial is not

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[342] *Id.* at 605.
[343] *Id.* at 614.
[344] *Id.* at 606.
[345] *Id.* at 598.
[346] *Id.* at 630–31.
[347] *Id.* at 614.
[348] *Id.* at 608–09.
[349] *See id.* at 685 (Sotomayor, J., dissenting) ("When [the President] uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution.").
[350] *See id.* 630–31 (discussing the rule that prosecution cannot use evidence of a president's official acts to prove knowledge, falsity, etc.).

unfairly prejudiced without unnecessarily hamstringing the prosecution's ability to present critical evidence at trial.[351]

As previously mentioned, the majority is concerned with the prospect of the executive branch cannibalizing itself by giving free rein to each successive administration to prosecute its predecessors and simultaneously preventing them from effectively carrying out the duties of the presidency for fear of being prosecuted next.[352] This concern is well-founded, as the effectiveness of the executive branch should be a primary concern for anyone who values the functionality of our federal government; it also underscores a similar goal that Framers such as Morris and Wilson had, which is to ensure that the president is independent and vigorous in enforcing the law.[353] Nevertheless, the breadth of the immunity to criminal prosecution the Court bestows upon former, current, and future Presidents insulates them from being held accountable for unlawful conduct they engage in while in office if such conduct is considered part of an official act;[354] it also heightens the equally important concern that a President could use the power of their office to engage in activities that would otherwise be considered unlawful.[355]

In addition, the opinion strikes at the check of criminal prosecution placed on a President by the Constitution.[356] Specifically, the so-called Impeachment Judgment Clause infers the availability of the criminal process as a backstop by indicating that a President (or another federal official) impeached and convicted by the Senate "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[357] This inference is bolstered by the fact that the Framers did provide a narrow immunity for legislators in Article I, Section 6, Clause 1 of the Constitution (referred to as the Speech or Debate Clause); thus, showing that the Framers clearly knew how to provide immunity.[358]

In sum, the executive branch that arose out of the Constitutional Convention was designed to be independent from the legislature and vigorous in its execution of the laws.[359] Nevertheless, the delegates were far from unified in their visions for the newly created presidency, as many feared that executive power could devolve into a monarchy or be captured by a

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[351] *Id.* at 656. (Barrett, J., concurring); *e.g.*, FED. R. EVID. 403.
[352] *Trump,* 603 U.S. at 640.
[353] *See* Robinson, *supra* note 49, at 323*; Trump*, 603 U.S. at 610 (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).
[354] *Trump*, 603 U.S. at 606.
[355] *Id.* at 684–85 (Sotomayor, J., dissenting) (arguing that the majority's reasoning would render a President "immune" even for acts such as ordering assassinations, staging a coup, or taking bribes).
[356] *Id.* at 657 (Sotomayor, J., dissenting).
[357] *Id.* at 661 (Sotomayor, J., dissenting) (citing U.S. CONST. art. I, § 6, cl. 1).
[358] *Id.* at 660–61 (Sotomayor, J., dissenting) ("[T]he Framers clearly knew how to provide for immunity from prosecution. They did provide a narrow immunity for legislators in the Speech and Debate Clause . . . . They did not extend the same immunity to Presidents.").
[359] Robinson, *supra* note 49, at 327.

demagogue.[360] To temper those concerns, the Framers included in the Constitution checks on presidential power, such as impeachment and the advice and consent role of the Senate.[361] Later, the "power of inquiry," inferred from the text of the Constitution, was used by Congress to conduct oversight of the executive branch, and special and independent counsels were created to investigate high-ranking executive officials.[362]

As time marches forward, the presidency continues to become more powerful and influential while Congress' power diminishes.[363] This power imbalance has been exacerbated by the erosion of the checks on presidential power, particularly in the wake of *Trump v. United States*, which provided extensive immunity from criminal prosecution to Presidents.[364] The next section of this Note will propose solutions that Congress can enact to ensure that it can assert its prime position as an institution that checks expanding presidential power.

III. RESOLUTION

This section proposes three actions that Congress can take to ensure that Presidents are held accountable for misconduct or illegal acts they engage in while in office. First, Congress should define which presidential acts are considered unofficial or official. Second, Congress should revive key provisions of the Independent Counsel Act to replace the Special Counsel Regulations. Third, Congress should reform the impeachment process to mitigate the destructive effects that partisan politics has on the assertion of its institutional power.

A. Legislation to Define Unofficial and Official Acts

Trump v. United States specified three types of official acts that fall within the President's exclusive authority (also referred to as conclusive and preclusive authority), which are afforded absolute immunity: granting pardons, removing executive officials they appointed, and recognizing foreign governments.[365] The Supreme Court stated that:

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[360] *See The Debate Over the President and the Executive Branch*, *supra* note 56; Merritt, *supra* note 209.
[361] *See* U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cl. 6; *id.* art. II, § 2, cl. 2.
[362] McGrain v. Daugherty, 273 U.S. 135, 173–74 (1927) (case establishing that Congress has the "power of inquiry").
[363] Cronin, *supra* note 13, at 211–12.
[364] *See generally* Trump v. United States, 603 U.S. 593 (2024) (addressing criminal immunity of the President for the first time, recognizing absolute immunity for a President's core official acts, presumptive immunity for other official acts, and no immunity for unofficial acts).
[365] *Id.* at 608–09.

> 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.[366]

Therefore, it is integral that Congress does not attempt to interfere with the acts which the Court has already determined are within a President's exclusive powers, if it wants to ensure that a statute differentiating unofficial and official acts is not overturned.

The Court also articulates that President Trump's interactions with Vice President Pence regarding the certification of the 2020 election are official acts that are at least presumptively immune from criminal prosecution.[367] It also alludes to the possibility that "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities."[368] Again, legislation that Congress passes on the matter should follow the contours of the presidential immunity doctrine articulated in *Trump v. United States*.

To differentiate and clarify unofficial and official acts via federal statute, it is vital to clearly define what an unofficial and official presidential act is. A recommended definition of an "Unofficial Act of the President of the United States" is as follows:

> (a) Any conduct, communication, or decision made by the President of the United States which is not undertaken pursuant to, or substantially connected with, the discharge of their express powers, duties, or responsibilities provided in Article II of the Constitution, or expressly authorized by federal statute, code, or regulation; or
>
> (b) Any conduct, communication, or decision made by the President of the United States that is made for personal or financial interests and has no reasonably identifiable connection to the lawful operation of the federal government; and
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> (c) Conduct that is not considered an Official Act of the President of the United States pursuant to Article II powers, responsibilities, or duties; federal statute; or prior federal court precedent.

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[366] *Id.* at 609.
[367] *Id.* at 623.
[368] *Id.* at 598.

> An "Official Act of the President of the United States" may be defined as:
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> (a) The lawful removal of an official of the executive branch appointed by the President of the United States; or
> (b) The exercise of the President of the United States' power to grant Reprieves and Pardons for Offenses against the United States, except for Cases of Impeachment, pursuant to Article II, Section 2, Clause 1; or
> (c) The lawful recognition of a foreign nation; or
> (d) Conduct, communications, or decisions made by the President of the United States which are pursuant to, or substantially connected with, the discharge of their express powers, duties, or responsibilities provided in Article II of the Constitution; or
> (e) Any lawful act not otherwise specified which serves as a necessary and reasonable exercise of the powers expressly vested in the President of the United States under the Constitution, or which is expressly authorized by federal statute, code, or regulation.

The foregoing definitions provide a baseline for Congress to capture the types of acts that are unofficial or official types of conduct. Conduct that falls within the definition of an official act should be afforded at least presumptive immunity.[369] Official acts under sections (a)–(d) should be afforded absolute immunity, as they comprise actions given absolute immunity by the Supreme Court in *Trump v. United States*, or they concern the express powers, duties, or responsibilities of the president pursuant to Article II.[370] Acts under section (e) should afford a president presumptive immunity. Any conduct captured by the definition of an unofficial act by the President of the United States should not be afforded criminal immunity.

There is a possibility that legislation Congress passes to define unofficial and official presidential acts would be considered a violation of the separation of powers. It is fairly likely that the Supreme Court and the President would argue that Congress defining which presidential acts are official or unofficial would constrain the presidency and be tantamount to Congress interpreting the Constitution. Therefore, the definitions provided previously could also be used as a basis for an amendment to the Constitution if the Supreme Court overrules legislation regarding the matter.

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[369] *See id.* at 614.
[370] *See id.* at 608–09; U.S. CONST. art. II.

B. Reviving Key Provisions of the Independent Counsel Act

This section proposes several key provisions of the Independent Counsel Act that Congress should use as a basis for replacing the Special Counsel Regulations. First, a special counsel may only be appointed by a federal court, upon application of the Attorney General, and Congress should have the ability to request that the Attorney General apply for the appointment of a special counsel.[371] Next, the Attorney General may only remove a special counsel for good cause or incapacity.[372] Further, the Attorney General must immediately inform the Chair and Ranking Minority Member of the House and Senate Judiciary Committees upon removal of a special counsel, and the removal must be subject to judicial review, which may allow the special counsel to be reinstated, among other types of appropriate relief.[373] Finally, a special counsel, upon completion of their investigation or the termination of their duties, must submit a report detailing their investigation directly to the Chair and Ranking Members of the House and Senate Judiciary Committees.

These proposed reforms would ensure that a special counsel's investigation is appropriately protected from interference by the President, other executive branch officials, or political bias. The reforms would also allow Congress and the federal judiciary to conduct oversight and judicial review, respectively, over the process, which serves the purpose of bolstering the principles of checks and balances. Moreover, the reforms would also serve the functions of ensuring that the public obtains detailed and accurate information about the investigation, and that Congress has access to the findings of the investigation so that they can use it as a basis for impeachment, if appropriate.

C. Reforming Impeachment Trials in the Senate

To date, three Presidents have been impeached by the House of Representatives, and there have been four separate times where a President has been acquitted of the articles of impeachment brought against them.[374] The failure of the two impeachment proceedings of President Trump and the impeachment of President Clinton illustrates that Congress has largely abandoned the objective of protecting its institutional power and integrity to achieve partisan political ends.[375] For example, in the two impeachments and

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[371] *See* 28 U.S.C. § 592(a), (g).
[372] *See id.* § 596(a)(1).
[373] *See id.* § 596(a)(2)–(3).
[374] *See* Fredrickson & Neff, *supra* note 1.
[375] *See id.*; Howell, *supra* note 12.

subsequent impeachment trials of President Trump, Republicans who broke ranks with the President faced severe political backlash from the President, their party, and Republican voters.[376] This comes as no surprise, as the forces of polarization, partisanship, and a fractured media that reinforces confirmation bias have ravaged not just the effectiveness of impeachment as a proceeding but the functionality of Congress generally.[377]

Therefore, the Senate should amend the rules for impeachment trials to ensure that senators can vote via secret ballot when they cast their vote to convict or acquit a President. *Nixon v. United States* affirms that the Senate has the sole power of trying impeachment and can dictate how the chamber carries out the impeachment trial of a federal official.[378] Article I, Section 5 of the Constitution also gives the House of Representatives and the Senate the liberty to determine whether a proceeding requires secrecy.[379]

The downside to this proposed reform would be that it would diminish the transparency of the proceedings. Further, upon a vote of one-fifth of the senators present, the votes of the impeachment proceeding could be made public.[380] Nevertheless, in situations where a President has been impeached for significant misconduct, there is a possibility that a secret vote would be preferred by most members of the Senate so that they could prioritize their institutional duties as opposed to deferring to partisan considerations. Overall, allowing senators to vote to convict and remove an impeached President via secret ballot would weaken partisan considerations, fortify the potency of the impeachment process, and strengthen the institutional power of Congress because senators that are concerned about the partisan ramifications of voting to remove a President of their own party would not have to publicly share their vote, unless the requisite votes were mustered up to make the voting record public.

IV. CONCLUSION

Since the twentieth century, Congress has diminished in power relative to the President, and Presidents have pressed the envelope as to how they exercise their power. In addition, checks on presidential power have eroded over the past century. Now, as the Supreme Court has significantly extended the presidential immunity doctrine to cover criminal conduct for some

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[376] *See* Devan Cole, *These GOP Lawmakers Are Facing Backlash from State Parties for Not Backing Trump*, CNN (Feb. 15, 2021, at 21:22 ET), https://www.cnn.com/2021/02/15/politics/republicans-facing-censure-trump-impeachment/index.html [https://perma.cc/3MDX-JL2T].

[377] *See* Fredrickson & Neff, *supra* note 1 ("Working in tandem, these same forces—polarization, partisanship, and media configured to reinforce bias—which have weakened impeachment as a tool to check an out-of-control president.").

[378] *See* Nixon v. United States, 506 U.S. 224, 236–38 (1993); U.S. CONST. art. I, § 3, cl. 6.

[379] U.S. CONST. art. I, § 5.

[380] *Id.*

official acts a President engages in, Congress must assert itself as the prime institution to check the misuse of presidential power by passing legislation that defines what presidential acts are considered unofficial or official, reviving key provisions of the Independent Counsel Act, and reforming the impeachment process. Doing so will recalibrate the balance of power in the federal government, fortify checks to hold a President engaging in misconduct accountable, and protect the United States from descending into tyranny perpetrated by a President.