

**Testimony Submitted for the Record**  
**Senate Committee on the Judiciary**  
**“When the President Does It, that Means It's Not Illegal”: The Supreme Court's**  
**Unprecedented Immunity Decision**  
**By Debra Perlin, Policy Director, Citizens for Responsibility and Ethics in Washington**

**September 24, 2024**

Chairman Durbin, Ranking Member Graham and members of the Committee, thank you for the opportunity to submit testimony regarding the consequences of the Supreme Court's decision in *Trump v. United States* and why that decision heightens the need for Congress to immediately pass the Protecting Our Democracy Act (PODA).<sup>1</sup>

My organization, Citizens for Responsibility and Ethics in Washington (CREW), is a nonpartisan nonprofit organization dedicated to ethics, transparency and accountability. Our mission is to build a durable democracy that can tackle corruption and beat back the rising tides of authoritarianism here at home. In furtherance of this mission, CREW has for years called on Congress to pass comprehensive democracy reform legislation to start reversing America's democratic decline. Today's hearing represents a critical step towards understanding the harms caused by the Supreme Court's ahistorical and misguided decision in *Trump v. United States* and how Congress can legislate to mitigate some of those harms.

**Trump v. United States harms our democracy**

When the Supreme Court makes decisions it decides not just the case before them, but sets precedents to guide our democracy into the future. By that measure, the Supreme Court's decision in *Trump v. United States* sets our democracy on a very dangerous path.<sup>2</sup>

Since the founding of our country—a founding premised on the idea that people should not be ruled by kings but rather represented by elected officials<sup>3</sup>—the presidency has existed within our separation of powers framework. Within that framework, there has long been a recognition that the president “occupies a unique position in the constitutional scheme.”<sup>4</sup> But there have also been constraints placed on that position and a fundamental recognition that the president, and the presidency, is not above the law.

---

<sup>1</sup> H.R.5048, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/5048>.

<sup>2</sup> *Trump v. United States*, 144 S. Ct. 2312 (2024).

<sup>3</sup> Brief of Amici Curiae Scholars of the Founding Era in Support of the Respondent at 9-10, *Trump v. U.S.*, 144 S. Ct. (2024) (No. 23-939) (“The Framers came to the Philadelphia Convention of 1787 determined not to replicate the British monarchy they had defeated ... [e]ven those Federalists who endorsed a strong executive ... were careful to distinguish their vision from monarchy.”); The Federalist No. 69 (Alexander Hamilton) (“The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the President ... would stand upon no better ground than a governor of New York”).

<sup>4</sup> *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

A long line of cases dealing with presidential accountability confirms this. In *United States v. Nixon*, a unanimous Court held that the president cannot hide behind executive privilege when issued a subpoena in civil actions.<sup>5</sup> In *Clinton v. Jones*, a unanimous Supreme Court concluded that the U.S. Constitution does not give a sitting president immunity from civil litigation, thereby requiring then-President Clinton to sit for a deposition.<sup>6</sup> And in *Trump v. Vance*, a 7-2 decision, the Supreme Court held that the Constitution does not require a heightened evidentiary standard to issue a subpoena to a sitting president.<sup>7</sup>

In *Trump v. United States* however, the Supreme Court abandoned the unanimity, or near unanimity, it had shown in its prior executive accountability decisions. Putting the president above the law, the Supreme Court issued a deeply divided opinion holding that not only can former presidents never be prosecuted for core aspects of their jobs, but that they also have “presumptive immunity from prosecution for all [] official acts.”<sup>8</sup> Although the decision left open the possibility that a former president can be prosecuted for private conduct, it took an incredibly broad view of what constitutes an official act in the first place. To that end, the Court explained that an official act includes all presidential “actions so long as they are not manifestly or palpably beyond his authority.”<sup>9</sup> The decision then went on to give lower courts narrow constraints within which to determine what is private presidential conduct leaving unresolved whether former President Trump can be prosecuted for any of his conduct that led to the January 6th insurrection.

This decision “reshapes the institution of the presidency” – and not for the better. As Justice Sonia Sotomayor explained in her dissenting opinion joined by Justices Elena Kagan and Ketanji Brown Jackson, the Court’s newly discovered presidential immunity is now lying around “‘like a loaded weapon’ for any President that wishes to place his own interests...above the interests of the Nation.”<sup>10</sup> Accepting bribes in exchange for pardons or ambassadorships—immune. Using the military to assassinate a political rival—immune. Selling classified information—immune. Organizing a coup d’etat—immune.

Calling the dissent’s suggestion of these nightmare scenarios “fear mongering”, Chief Justice Roberts used his majority opinion to dismiss their likelihood.<sup>11</sup> But this misses the point. The principle of *stare decisis* requires the Supreme Court to consider all possible applications of legal principles because their decisions will guide the resolution of cases for decades in the future.<sup>12</sup> This is a point that Supreme Court justices across the ideological spectrum understand. In 2017 during oral arguments in *Hernandez v. Mesa*, a Fourth Amendment case

---

<sup>5</sup> *Nixon v. U.S.*, 506 U.S. 224, 238 (1993).

<sup>6</sup> *Clinton v. Jones*, 520 U.S. 681 (1997).

<sup>7</sup> *Trump v. Vance*, 591 U.S. 786, 810 (2020).

<sup>8</sup> *Trump v. United States*, 144 S. Ct. at 2347.

<sup>9</sup> *Id.* at 2333 (quoting *Blassingame v. Trump*, 87 F.4th 1, 13 (D.C. Cir. 2023)).

<sup>10</sup> *Id.* at 2371 (Sotomayor, J., dissenting) (quoting *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting)).

<sup>11</sup> *Id.* at 2346.

<sup>12</sup> *Understanding Stare Decisis*, American Bar Association (Dec. 16, 2002), [https://www.americanbar.org/groups/public\\_education/publications/preview\\_home/understand-stare-decisis/](https://www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decisis/) (“stare decisis holds that courts and judges should honor ‘precedent’ - or the decisions, rulings, and opinions from prior cases. Respect for precedents gives the law consistency and makes interpretations of the law more predictable”); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (“We reaffirm that ‘[i]f a precedent of this Court has direct application in a case ... the Court of Appeals should follow the case which directly controls’”) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

dealing with a cross-border shooting, Justice Stephen Breyer stressed that Court decisions must establish legal principles that can be applied to “other cases” in the future.<sup>13</sup> Justice Samuel Alito underscored that point, arguing that the Court “can’t just say that... on the particular fact here” one side wins. “We have to have a rule... that can be applied in other cases.”<sup>14</sup> With that understanding of the Court’s role, when the dissent raises the possible application of *Trump v. United States* to future scenarios it is not fear mongering. Rather, it is rightfully raising the alarm that this decision lets a future president with authoritarian tendencies—regardless of political party—clothe themselves in the language of “official acts” to place themselves beyond the reach of the law.

### **The Protecting Our Democracy Act**

When considering how Congress should respond to the Supreme Court’s decision in *Trump v. United States* it is crucial to recognize that the decision comes at a time when the powers of the presidency have been expanded and exploited by presidents of both parties for decades without meaningful attempts by Congress or the courts to reign them in.<sup>15</sup> It is time for that to change.

Since the Court’s decision, members of Congress and President Biden have come out in support of a constitutional amendment to overturn *Trump v. United States*. We support this effort, but also recognize that constitutional amendments—even popular ones—can take years. In the meantime, there are meaningful legislative steps that Congress can take to claw back the powers of the presidency to ensure that any president, including one with authoritarian tendencies, doesn’t have too much power in the first place.

Congress should start by passing the Protecting Our Democracy Act (PODA).<sup>16</sup> Originally introduced during the 117th Congress, PODA contains a raft of pro-democracy reforms intended to strengthen the guardrails of our democracy to prevent abuses of executive power and corruption in the first place by reforming emergency powers, reasserting congressional oversight and financial powers, strengthening executive branch oversight, enforcing the emoluments clauses and preventing political interference in law enforcement functions, among other reforms. Although PODA was written prior to the Court’s decision in *Trump v. United States* and would require some revisions, particularly to its legislative provisions in Title I regarding pardons and Title II ensuring presidents are not above the law, the rest of the legislation can meaningfully help limit the damage of the Court’s decision.

PODA’s reforms to emergency powers, which have received broad bipartisan support<sup>17</sup>, are particularly salient in a post-*Trump v. United States* world. Currently, if the president declares a national emergency he has at his disposal 123 special statutory powers that give

---

<sup>13</sup> Transcript of Oral Argument at 8, *Hernandez v. Mesa*, 582 U.S. 548 (2017) (No. 15-118), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2016/15-118\\_3e04.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-118_3e04.pdf).

<sup>14</sup> *Id.* at 10-11.

<sup>15</sup> Christina Pazzanese, *Reigning in growing powers of the presidency*, The Harvard Gazette (Nov. 20, 2020), <https://news.harvard.edu/gazette/story/2020/11/bob-bauer-jack-goldsmith-after-trump-reconstructing-presidency/>; Daphna Renan, *Presidential Norms and Article II*, 131 Harv. L. Rev. 2187 (2018); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. of Leg. 1 (2002).

<sup>16</sup> Protecting Our Democracy Act, H.R. 5314, 117th Cong. (2021).

<sup>17</sup> ARTICLE ONE Act, S.1912, 118th Cong. (2023); *Cosponsors: H.R.3988 - 118th Congress (2023-2024)*, Congress.gov, <https://www.congress.gov/bill/118th-congress/house-bill/3988/cosponsors> (last visited Aug. 2, 2024).

far-reaching powers including seizing Americans bank accounts,<sup>18</sup> declaring martial law,<sup>19</sup> restricting transportation and even turning off the Internet.<sup>20</sup> Although these powers were designed to respond to unexpected crises, they could easily be used and abused to engage in any number of nightmare scenarios, including deploying the military to steal an election. While this idea might seem outlandish, reporting indicates that Donald Trump considered deploying the military to overturn the 2020 election only to be stopped by his advisers.<sup>21</sup>

While PODA would not eliminate these emergency powers, it would put guardrails on them. Crucially, PODA would replace the current legal framework which permits emergency declarations to continue indefinitely with a requirement that emergency declarations expire after 30 days absent congressional assent.<sup>22</sup> This approach would allow a president to maintain the flexibility needed to respond to emergent crises while creating a meaningful check on that power in a way that honors our constitutional system of checks and balances. By doing so, it limits the possibility that a president can abuse emergency powers for their own personal anti-democratic gain.

This approach to emergency powers would limit executive power—and the potential for executive misconduct—by strengthening Congress’ legislative role as a check on executive power. Other reforms in PODA take a similar approach to rebalancing our separation of powers by strengthening Congress’ constitutional role. Title IV would strengthen Congress’ oversight role by establishing clear rules for congressional subpoena compliance and expedited enforcement procedures for non-compliance.<sup>23</sup> Title V would reassert another key congressional tool—the power of the purse—by restoring Congress’ role in funding decisions rather than ceding that completely to the executive branch.<sup>24</sup> Taken together, these reforms would reverse a long standing trend of Congress being complicit in the expansion of executive power<sup>25</sup> and limit the possibility that a president with authoritarian tendencies could manipulate the levers of government to anti-democratic ends.

## Conclusion

The Supreme Court’s decision in *Trump v. United States* is dangerous and ahistorical. We need a constitutional amendment to reverse that decision. In the meantime, Congress can and must act swiftly to limit the powers of the presidency and place guardrails against

---

<sup>18</sup> *Emergency Powers*, Brennan Center for Justice, <https://www.brennancenter.org/issues/bolster-checks-balances/executive-power/emergency-powers> (last visited Aug. 2, 2024).

<sup>19</sup> Tim Lau & Joseph Nunn, *Martial Law Explained*, Brennan Center for Justice (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/martial-law-explained>.

<sup>20</sup> Thor Benson, *The ‘Emergency Powers’ Risk of a Second Trump Presidency*, *Wired* (Mar. 13, 2024), <https://www.wired.com/story/donald-trump-emergency-powers/>.

<sup>21</sup> Nicholas Reimann, *Trump Reportedly Asked Advisors About Deploying Military To Overturn Election*, *Forbes* (Dec. 19, 2020), <https://www.forbes.com/sites/nicholasreimann/2020/12/19/trump-reportedly-asked-advisors-about-deploying-military-to-overturn-election/>.

<sup>22</sup> Protecting Our Democracy Act, H.R. 5314, 117th Cong. (2021).

<sup>23</sup> *Id.* § 403-404.

<sup>24</sup> *Id.* § 501.

<sup>25</sup> Erin Peterson, *Presidential Power Surges*, *Harvard Law Today* (July 17, 2019), <https://hls.harvard.edu/today/presidential-power-surges/>; 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. of Glob. Legal Stud.* 369 (2017).

misconduct.<sup>26</sup> The Protecting Our Democracy Act does just that. We are grateful to the sponsors of PODA, led by Senator Amy Klobuchar and Representative Adam Schiff. As this committee explores the consequences of the Court's decision, we urge you to identify opportunities to limit its damage and protect the American people. PODA is that opportunity.

---

<sup>26</sup> H.J. Res. 193, 118th Cong. (2024).