Presidential Immunity

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It is probably not a good sign for the health of the republic that in my lifetime we have developed a body of law regarding presidential immunity from legal proceedings. For most of the nation's history, such doctrines were apparently unnecessary. Presidents might have faced many problems, but the possibility of being dragged into court was not one of them.

But times change. Presidents and former Presidents now face prosecutors and process servers, and thus we have had to contemplate the circumstances in which such individuals are amenable to judicial accountability for their alleged actions. The Department of Justice has concluded that sitting Presidents cannot be criminally prosecuted.[1] The Supreme Court has held that Presidents can be made to disgorge documents for use in criminal investigations.[2] The Court has concluded that civil suits can proceed against a sitting President for his private actions, but that former Presidents cannot be subjected to personal civil suits for their official actions while in office.[3]

It was perhaps inevitable that the Court would eventually have to decide whether a former President could be held criminally liable for his conduct while in office. Inevitable perhaps, but answering the question was never going to be easy. Bromides about how no man is above the law would not get us very far in resolving the complexities involved. Experience does not provide much guidance in assessing how opening or closing the door on prosecutions might work out.

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[1] Robert G. Dixon, Jr., Office of Legal Counsel, *Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office*, memorandum, Department of Justice (Sept. 24, 1973); Randolph D. Moss, Office of Legal Counsel, *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 22 Op. O.L.C. 222 (Oct. 16, 2000).

[2] United States v. Nixon, 418 U.S. 683 (1974).

[3] Clinton v. Jones, 520 U.S. 681 (1997); Nixon v. Fitzgerald, 457 U.S. 731 (1982).

The experience with independent counsels suggests the need for some caution about assuming that criminal investigations of high officials will be rare and uncontroversial.

It was perhaps also inevitable that when the Court was called on to resolve this issue, no one was particularly happy with the result. Chief Justice John Roberts likely hoped that a consensus could be reached on the Court that might provide a framework on how to proceed while quieting partisan critics. Perhaps we will someday learn whether such a consensus was ever a practical possibility and how the majority opinion in *Trump v. United States* came about.[4] From the published opinions we have before us, it seems unlikely that a unanimous opinion from this Court was ever in the cards for a case addressing whether former President Donald Trump can be criminally prosecuted for his actions while in office. The opinion that the Court has given us, under the nominal authorship of the Chief Justice, bears all the hallmarks of an uneasy negotiation and compromise among the Justices in the majority. It will not be surprising if the Court finds itself having to revisit these issues in the not-too-distant future, when a more fractured majority will offer competing interpretations of what this Court meant. The Court has thrown the hot potato back into the hands of the lower courts, perhaps hoping that the case will not return to the Court too soon or that the circumstances will look rather different when it does.

This article examines *Trump v. United States* in several parts. Part I reviews how this issue made its way to the Court, both politically and procedurally. Part II reviews the rationales for immunity for high government officials that have been offered in other contexts. Part III examines how the majority in *Trump v. United States* attempted to address the issue. Parts IV and V examine the concurring opinion by Justice Amy Coney Barrett and the dissenting opinion by Justice Sonia Sotomayor. Part VI considers the implications of what the Court has done and where we might go from here.

[4] A first draft at history can be found in Joan Biskupic, *Exclusive: The Inside Story of John Roberts and Trump's Immunity Win at the Supreme Court*, CNN (July 30, 2024), https://www.cnn.com/2024/07/30/politics/supreme-court-john-roberts-trump-immunity-6-3-biskupic/index.html.

I. How Did We Get Here?

President Donald Trump had a tumultuous term of office, and it became even more so as it ended. He survived an independent counsel investigation focused on how he had won the 2016 presidential election, which expanded to include questions about how he had responded to—or obstructed—the investigation itself. No sooner had he put that investigation behind him than he found himself facing only the third presidential impeachment trial in the history of the U.S. Senate. With the stalwart support of Senate Republicans, he was not convicted on impeachment charges revolving around abuse of his presidential powers. Within weeks of his acquittal, the country was consumed by the global pandemic that defined the rest of the 2020 election year.

If that were not enough, President Trump ended his first term of office calling into question the legitimacy of the election that had brought his presidency to an end. Beyond a comprehensive campaign to sow doubt about the election results, the Trump campaign embarked on a systematic and increasingly desperate and deranged effort to overturn the election results. The effort included fruitless recounts and lawsuits that produced no evidence of the massive fraud or vote stealing that the Trump campaign alleged to have corrupted the election results.

With the clock ticking on the final certification of the election victory of his rival Joe Biden, scheduled to be performed in Congress on January 6, 2021, the Trump campaign looked for a Hail Mary play that might snatch victory from the jaws of defeat. One possibility might be to persuade a state to replace a duly elected slate of presidential electors for Joe Biden with a slate pledged to vote for Donald Trump. This would have to be done before the Electoral College met to cast its ballots on December 14, 2020. Failing that, the Trump campaign hoped that Congress might be persuaded to throw out some Biden ballots and instead count some "alternative" electoral votes in favor of Trump. *In extremis*, perhaps Vice President Mike Pence might be persuaded to unilaterally throw out some Biden ballots when opening the envelopes on January 6 "in the presence of the Senate and the House of Representatives," as the Twelfth Amendment commanded.

All those efforts proved unavailing in the end, but they were not without consequence. The unprecedented effort to overturn the

apparent presidential election results by fair means or foul did significantly undermine public confidence in the integrity of American elections and made it a Republican article of faith and loyalty test that the 2020 election had been "stolen." It undoubtedly suppressed Republican voter turnout for the Georgia runoff elections for two Senate seats on January 5, 2021, likely costing the GOP control of the U.S. Senate.

More dramatically, it led to a violent assault on the Capitol Building in an effort to prevent Joe Biden from being declared the winner of the 2020 election and to prevent the peaceful transfer of power. President Trump himself headlined a "Save America March" at the White House Ellipse on the morning of January 6, 2021, promising on social media that the rally "[w]ill be wild."[5] His supporters soon began to promote the event as the "Wild Protest" in which "Patriots" will gather to "Stop the Steal" and "Fight for Trump" and "Fight for your country."[6] Tens of thousands rallied on the Ellipse, and thousands marched to the Capitol where Congress had assembled to certify the election results. Although President Trump did not manage to fulfill his apparent intent of leading the march to the Capitol "to cheer on our brave senators and congressmen and women" so that they would "take back our country," many of his supporters did make their presence known to the assembled members of Congress.[7]

Rioters broke through police lines and stormed the Capitol. As the air rang with chants of "hang Mike Pence," members of Congress fled for their lives. Meanwhile the President hunkered in the White House, glued to the television and taking in the spectacle while making no effort to restore order. Several hours later, police managed to clear the building of the rioters, and Congress finally met

[5] Carol D. Leonnig, Josh Dawsey, Peter Hermann & Jacqueline Alemany, *Trump Call Jan. 6 to "Walk Down to the Capitol" Prompted Secret Service Scramble*, Wash. Post (June 7, 2022), https://www.washingtonpost.com/politics/2022/06/07/trump-pressed-secret-service-for-plan-to-join-march-to-capitol/.

[6] U.S. Secret Service, Protective Intelligence Brief: Wild Protest (Dec. 30, 2020), https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000101135.0001/pdf/GPO-J6-DOC-CTRL0000101135.0001.pdf.

[7] Charles Cameron & Michael Gold, *Trump Acknowledges He Wanted to Go to the Capitol on Jan. 6*, N.Y. Times (Mar. 1, 2024), https://www.nytimes.com/2024/05/01/us/politics/trump-capitol-jan-6.html; Charlie Savage, *Incitement to Riot? What Trump Told His Supporters before Mob Stormed Capitol*, N.Y. Times (Jan. 12, 2021), https://www.nytimes.com/2021/01/10/us/trump-speech-riot.html.

and completed its task of ceremonially counting the electoral ballots and declaring Joe Biden to be the President-Elect.

These events led to a second impeachment and trial of Donald Trump, though by the time of the Senate trial Joe Biden had been inaugurated as President and Trump was a private citizen and former President. This time the sole article of impeachment passed by the House charged Trump with the high crime of "inciting violence against the Government of the United States."[8] Trump was once again acquitted in his unprecedented second impeachment trial.

The impeachment verdict did not put the matter to bed. The Department of Justice pursued criminal charges against hundreds of individuals who participated in the Capitol riot. A House Select Committee was appointed to investigate the events of January 6, resulting in damning public testimony and a lengthy report. Local prosecutors began to investigate potential criminal violations associated with the "Stop the Steal" campaign. On November 18, 2022, Attorney General Merrick Garland appointed Jack Smith to be a special counsel to investigate any criminal offenses Trump might have committed associated with the events of January 6 and in relation to his retention of classified documents after leaving the presidency. Ultimately, Donald Trump faced four separate criminal indictments, two in state court and two in federal court. A state indictment in New York involved his actions during the 2016 election, and a federal indictment in Florida involved his post-presidential retention of classified documents. A state indictment in Georgia focused on his campaign to overturn the 2020 election, and a second federal indictment in Washington, D.C., arose from the events of January 6. It is that last indictment which gave rise to the question heard by the Supreme Court in *Trump v. United States*.

On August 1, 2023, Donald Trump was indicted on four counts of violating federal criminal law based on his actions while he held the office of President of the United States. All four counts involved his postelection campaign. They included allegations that he used false claims to attempt to get state officials to change electoral votes, that he organized "fraudulent slates of electors" and caused them to "transmit their false certificates to the Vice President," that he attempted to use the Department of Justice to "conduct sham election

[8] H.R. Res. 24, 117th Cong., 1st Sess. (Jan. 25, 2021).

crime investigations," that he attempted to persuade the Vice President "to fraudulently alter the election results," and that he sought to persuade members of Congress to delay the certification of the electoral vote using "false claims of election fraud."[9]

Trump moved to dismiss the indictment on the grounds that the alleged actions "fell within the core of his official duties" as President and that he enjoyed "absolute immunity from criminal prosecution" for such actions.[10] The district court denied the motion to dismiss, holding that "former presidents d[id] not possess absolute federal criminal immunity for any acts committed while in office."[11] On appeal, the D.C. Circuit affirmed that ruling. The circuit court concluded that presidential actions that "violated generally applicable criminal laws" were not "properly within the scope of his lawful discretion" and thus were not entitled to immunity from prosecution.[12]

In a 6–3 decision, the Supreme Court reversed the lower courts and remanded the case back for further proceedings. The opinion of the Court was written by Chief Justice Roberts, and a concurring opinion was written by Justice Amy Coney Barrett that disagreed with parts of the Chief Justice's analysis. A dissent by Justice Sonia Sotomayor was joined by Justices Elena Kagan and Ketanji Brown Jackson. A separate solo concurrence by Justice Clarence Thomas took issue with the legality of the special counsel's appointment, and a separate solo dissent by Justice Jackson discussed the implications of immunity for criminal accountability. For purposes of this essay, I focus on the opinions by Roberts, Barrett, and Sotomayor on presidential immunity.

II. Amenability of High Officials to Judicial Proceedings

Before examining how the Justices grappled with the problem of presidential immunity to criminal prosecution, it is worth noting how the Court and the Office of Legal Counsel (OLC) have approached immunity questions in the past. Over recent decades,

[9] Trump v. United States, 144 S. Ct. 2312, 2324–25 (2024).

[10] *Id*. at 2325.

[11] *Id*.

[12] *Id*. at 2326. For a detailed critique of the framework offered by the D.C. Circuit, see Amandeep S. Grewal, *The President's Criminal Immunity*, 77 SMU L. Rev. F. 81 (2024).

the Court has constructed an elaborate body of law regarding the immunity of government officials to judicial proceedings, and the rationale for recognizing such immunity has varied depending on the context. In some ways, the problem of presidential criminal immunity is the last puzzle piece to fall into place.

One issue has not yet reached the Court, though perhaps a version of it might do so in the not-too-distant future, and that is the issue of whether a sitting President can be criminally prosecuted.[13] During the presidencies of both Richard Nixon and Bill Clinton, the Office of Legal Counsel produced opinions arguing that they could not be. The presidential immunity contemplated by the OLC turned on the burden that a criminal case would impose on the constitutional office of the presidency. "A necessity to defend a criminal trial and to attend court in connection with it . . . would interfere with the President's unique official duties, most of which cannot be performed by anyone else."[14] Moreover, to the extent that the "President is the symbolic head of the Nation . . . [t]o wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus."[15] Notably such considerations are unique to the case of a sitting President, so much so that even a sitting Vice President could not claim a similar immunity from criminal proceedings.[16]

The Clinton OLC explicitly observed that "[r]ecognizing an immunity from prosecution for a sitting President would not preclude such prosecution once the President's term is over or he is otherwise removed from office by resignation or impeachment."[17] The OLC's analysis emphasized a functionalist balancing test. The OLC opinion weighed the interests in "*immediate* prosecution and punishment" of a President and found that sitting Presidents were uniquely situated.[18]

[13] The OLC opinions effectively precluded the possibility of federal criminal prosecution of a sitting President. But they did not foreclose the possibility that a state prosecutor might seek an indictment against a sitting President, and such an event would then trigger judicial scrutiny of whether such a prosecution could proceed.

[14] Dixon, Jr., *supra* note 1, at 28.

[15] *Id*. at 30.

[16] *Id*. at 40.

[17] Moss, *supra* note 1, at 255.

[18] *Id*.

The OLC opinions on this topic were exclusively concerned with the timing of any presidential prosecution. They did not address or attempt to distinguish among different acts for which a President might be prosecuted. For purposes of a sitting President, the mere fact of indictment and prosecution created the constitutional problem, and it did not matter whether the acts being prosecuted arose from the President's private or public conduct or whether they preceded the President's term in office entirely. Prosecution for any reason triggered the concern, and such burdens on a sitting President's time and prestige would necessarily become irrelevant once the President left office. The particular presidential interests considered by the OLC could provide no basis for post-presidential immunity from criminal prosecution.

The Supreme Court itself has similarly deployed a balancing approach to developing doctrines of immunity. Like the OLC, the Court has not been overly concerned with the lack of textualist or originalist pedigree for such doctrines. In *United States v. Nixon* (also known as the Watergate Tapes case), the Court considered arguments as to whether "the independence of the Executive Branch within its own sphere . . . insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications."[19] The Court had no difficulty recognizing that "[c]ertain powers and privileges flow from the nature of enumerated powers," notwithstanding "the silence of the Constitution on this score."[20] The structuralist reasoning that the Court had made use of since at least *McCulloch v. Maryland* provided a sufficient basis for extrapolating necessary privileges from the logic of the overarching design of the Constitution and the practical realities of making such a design functional.[21] In the Watergate Tapes case, however, the Court thought that an "absolute privilege as against a subpoena essential to enforcement of criminal statutes" would "upset the constitutional balance of 'a workable government' and gravely impair the role of the courts."[22] Without a more specified presidential interest in refusing a particular subpoena and without a demonstration that the subpoena impinged on important presidential duties, the judiciary's

[19] United States v. Nixon, 418 U.S. at 706.

[20] *Id*. at 705, 705 n.16.

[21] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[22] United States v. Nixon, 418 U.S at 707.

interest in its own constitutional functions weighed more heavily in the balance.

A few years later, former President Nixon asserted a similar absolute privilege against a civil suit arising from allegedly unlawful official conduct. In *Nixon v. Fitzgerald*, the Court recognized such an immunity.[23] Here it was the nature of the acts in question rather than the timing of the judicial proceeding that did the constitutional work. In contemplating the existence of such an immunity from civil suits, the Court pointed to a long history of judicial recognition "that government officials are entitled to some form of immunity from suits for civil damages."[24] This history extended back to "English cases at common law" and drew upon "'[t]he interests of the people'" in "bold and unhesitating action" by government officials without fear of a countervailing private interest in avoiding future personal liability.[25] The "requisite inquiry," the Court indicated, "may be viewed in terms of the 'inherent' or 'structural' assumptions of our scheme of government."[26] "[O]ur constitutional heritage and structure" required courts to recognize what was "implicit in the nature of the President's office in a system structured to achieve effective government."[27] As Justice Joseph Story contended, there are "incidental powers belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it," which at least included immunity from arrest for sitting Presidents and immunity from personal civil liability for their official acts.[28]

Once again, the unique nature of the presidency came into play. In *Fitzgerald*, its unique nature justified an absolute immunity of the type that the Court had held to be enjoyed by judges and prosecutors, rather than a qualified immunity of the type enjoyed by lower executive officers. The "singular importance of the President's duties" weighed against subsequent personal accountability for his official conduct.[29] Presidential decisions are both the most

[23] *See* Nixon v. Fitzgerald, 457 U.S. 731.

[24] *Id.* at 744.

[25] *Id*. at 744–45.

[26] *Id*. at 748 n.26.

[27] *Id*. at 748.

[28] *Id*. at 749.

[29] *Id*. at 751.

controversial and the most important, "the most sensitive and far-reaching . . . entrusted to any official under our constitutional system."[30] It was well settled, the Court thought, that the judiciary "must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch," and only the weightiest of "broad public interests" could justify judicial action.[31]

Likewise, the unique nature of the presidency had implications for the scope of the President's immunity. The Court had often "held that an official's absolute immunity should extend only to acts in performance of particular functions," but the "Court also has refused to draw functional lines finer than history and reason would support."[32] Because the President's "discretionary responsibilities" were vast and sensitive, close judicial inquiries "could be highly intrusive."[33] A President acting "within the 'outer perimeter' of his official responsibility" should be immune from personally answering for such actions in court.[34]

The Court's finding of absolute immunity took civil liability for official acts off the table, but the Court thought its ruling would "not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive."[35] Presidents could still face impeachment, public scrutiny, congressional oversight, electoral pressures, and more. Such "alternative remedies" weighed in the balance in favor of presidential immunity from civil liability for official acts and insured that the President was not "above the law."[36] Notably, the Court did not in *Fitzgerald* list criminal prosecution as among those "alternative remedies," and the dissent in *Fitzgerald* thought the logic of the Court's opinion would in fact naturally extend to at least some criminal protections.[37]

In *Clinton v. Jones*, the Court refused to extend such an absolute immunity to sitting Presidents facing civil suits over their *private* actions.

[30] *Id*. at 752.
[31] *Id*. at 754.
[32] *Id*. at 755.
[33] *Id*. at 756.
[34] *Id*.
[35] *Id*. at 757.
[36] *Id*. at 758.
[37] *Id*. at 780.

In doing so, however, the Court again emphasized the importance of the distinction between official and unofficial acts in the balance of constitutional interests that justify immunity.[38] The Court's "central concern was to avoid rendering the President 'unduly cautious in the discharge of his official duties.'"[39] "Immunities are grounded in 'the nature of the function performed, not the identity of the actor who performed it.'"[40] This "functional approach" cut against President Clinton since the acts in question had nothing to do with the presidency.[41] Moreover, the Court thought that the "dominant concern" in previous immunity cases was "the diversion of the President's attention during the decisionmaking process caused by needless worry as to the possibility of damages actions stemming from any particular official decision."[42] The fact that the Clinton litigation involved "questions that relate entirely to the unofficial conduct of the individual who happens to be the President" meant that it "pose[d] no perceptible risk of misallocation of either judicial power or executive power."[43] The Court thought that civil litigation, even when it involved a sitting President, was unlikely to "impair the effective performance of his office."[44] There were "appropriate circumstances" in which the courts could burden "the time and attention of the Chief Executive," such as when the courts entertained suits to "determine whether he has acted within the law."[45] The presidential responsibility "to accomplish [his] assigned mission" must yield to the judiciary's responsibility "to decide whether his official conduct conformed to the law," but such a burden on the executive branch was intrinsic to the constitutional design in which the presidency was one of constitutionally delimited powers.[46]

The Court has repeatedly emphasized that "absolute immunity must be justified by reference to the public interest in the special functions of [an executive official's] office, not the mere fact of high station."[47]

[38] Clinton v. Jones, 520 U.S. 681.

[39] *Id*. at 693–94.

[40] *Id*. at 695.

[41] *Id*. at 694.

[42] *Id*. at 694 n.19.

[43] *Id*. at 701.

[44] *Id*. at 702.

[45] *Id*. at 703.

[46] *Id*.

[47] Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982).

Indeed, in many circumstances, the "greater power of such officials affords a greater potential for a regime of lawless conduct," and thus a greater need for judicial accountability.[48] Judicial accountability is most needed, moreover, when officers are not "subject to other checks that help to prevent abuses of authority from going unredressed."[49] Immunity for an officer should only follow from the special "responsibilities of his office" and from a demonstration that the officer "was discharging the protected function when performing the act for which liability is asserted."[50] The judiciary has a special interest in actions that are "lawless," or outside the scope of an officer's authority, and that are unlikely to be redressable by other means. But the judiciary should show restraint when a judicial process is likely to impinge on an officer's willingness and ability to vigorously perform his own public duties.

So where does that leave Trump? The particular question of whether Presidents can be held criminally liable for their official conduct was novel in *Trump v. United States*, but the Court had over several decades developed a conceptual framework for answering such questions. The framework is functional and pragmatic and hardly airtight. But it has put particular emphasis on the uniqueness of the presidency, the conduct in question, and the burdens imposed on an officer's decisionmaking, counterbalanced by the nature of the judiciary's interest in inquiring into an officer's actions.

III. The Roberts Opinion

The Court's critical holding in *Trump* is that,

> under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity.[51]

None of this disturbs, or endorses, the OLC's opinion that a sitting President is immune from prosecution as a matter of timing.

[48] Butz v. Economou, 438 U.S. 478, 506 (1978).

[49] Mitchell v. Forsyth, 472 U.S. 511, 522 (1985).

[50] *Harlow*, 457 U.S. at 813.

[51] Trump v. United States, 144 S. Ct. 2312, 2327 (2024).

The Court effectively divided presidential actions into three categories, each of which receives a different level of immunity from criminal prosecution. A sitting President engages in some conduct that is entirely personal and private, "unofficial" conduct. The President has no presumptive immunity for any criminal acts he might commit in that personal capacity. At least according to the OLC, prosecution of such acts might have to wait until the President has left office, but a former President can be held criminally liable for such conduct. A President who engages in the same criminal behavior that any other private individual is capable of performing can be held accountable in the same fashion as any other private individual. Thus, a President who shot someone on Fifth Avenue, raped a government employee, tampered with evidence in a criminal investigation, or engaged in fraud in seeking a private loan, among many other actions, can be prosecuted in an ordinary criminal court, at least after he has left office. This, at least, is uncontroversial, though determining what actions by a President are personal and "unofficial" might be difficult in practice.

Roberts did provide two cautions about distinguishing official from unofficial acts. First, courts "may not inquire into the President's motives" to determine that something was an unofficial act.[52] Second, courts may not determine that an act is unofficial "merely because it allegedly violates a generally applicable law."[53] These cautions may harken back to special counsel Robert Mueller's investigation of President Trump. The second volume of Mueller's report was dedicated to documenting the ways in which the President hindered the criminal investigation into Russian interference in the 2016 election. Such actions might well have been impeachable, but Mueller also suggested that they might amount to criminal obstruction of justice. The conduct in question centered around official acts, such as the President removing FBI Director James Comey.

Can such official acts become "unofficial" acts because they were driven by corrupt motives or fell within the scope of a catch-all phrase in an obstruction statute? Special Counsel Mueller argued that they did. Crucially, the special counsel asserted, a "preclusion of 'corrupt'

[52] *Id.* at 2333.

[53] *Id*. at 2334.

official action is not a major intrusion on Article II powers."[54] The President's Article II authority do not properly include actions "for corrupt personal purposes," and thus a congressional and judicial imposition on such actions cannot intrude on the President's constitutional authority.[55] Any danger of intrusion into legitimate executive branch actions would be minimal, Mueller posited.

By contrast, Trump's own personal legal counsel had informed Mueller that in their view, "as a matter of law and common sense, the President cannot obstruct himself or subordinates acting on his behalf by simply exercising [the President's] inherent Constitutional powers" to direct and control the administration of justice.[56] Before being appointed Attorney General, William Barr wrote to Trump's Department of Justice to elaborate on his own objections to "Mueller's 'Obstruction' Theory."[57] In Barr's view, the longstanding position of the Department of Justice is that "the President's authority over law enforcement matters is necessarily all-encompassing, and Congress may not exscind certain matters from the scope of his responsibilities."[58] Actions that are legal in themselves would become criminal if an outside body determined that the official had the wrong subjective motivations when taking the actions. Such disputes about motive and its effect on otherwise lawful actions are a proper matter for political accountability, not criminal accountability. Officials who must labor under the possibility that outside perceptions of their motives might become a sufficient basis for the imposition of criminal punishments will avoid making necessary but controversial decisions. Judges may determine whether an officer has the authority to decide a question, but once it is recognized that discretionary authority has been placed in the hands of a decisionmaker, those

[54] U.S. Dept of Just., 2 Report of the Investigation into Russian Interference in the 2016 Presidential Election 174 (2019). For a defense of Mueller's position, see Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 Calif. L. Rev. 1277 (2018).

[55] U.S. Dept of Just., *supra* note 53, at 176.

[56] Marc E. Kasowitz, CEO, Kasowitz Benson Torres, letter to Robert S. Mueller III, Special Counsel, Dept. of Just. (June 23, 2017), https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html#june-23-2017.

[57] Bill Barr, *Memorandum to Deputy Attorney General Rod Rosenstein and Assistant Attorney General Steve Engel, Re: Mueller's "Obstruction" Theory* (June 8, 2018), https://www.justsecurity.org/wp-content/uploads/2018/12/June-2018-Barr-Memo-to-DOJ-Muellers-Obstruction-Theory-1.2.pdf.

[58] *Id.* at 10.

decisions must be "non-reviewable."[59] "The prospect of review itself undermines discretion."[60]

The Roberts Court came down squarely on the side of Barr in his dispute with Mueller. It held that facially lawful official acts by the President cannot be criminalized or converted into unofficial acts as a result of second parties such as judges or juries questioning the President's motives when taking those actions.

A second category of presidential actions involves "core constitutional powers," official acts that are "within [the President's] 'conclusive and preclusive' constitutional authority."[61] These are the powers that Justice Robert Jackson described as existing at the "lowest ebb" of presidential power, those cases in which the President is relying on his "own constitutional powers minus any constitutional powers of Congress over the matter."[62] These are powers upon which Congress cannot constitutionally encroach. Similarly, "the courts have 'no power to control [the President's] discretion' when he acts pursuant to the powers invested exclusively in him by the Constitution."[63] The specific powers that fall within this "core" would depend on one's constitutional theory, but Roberts listed such examples as the President's pardoning power and power to fire federal officials. These powers are constitutionally vested in the President alone, as distinct from any other private individual or government official. No private individual is capable of taking the same actions that the President can take under these powers. If neither Congress nor the courts can encroach on those powers, then Presidents cannot be criminally prosecuted for their official actions making use of those powers.

A third category of presidential actions involves official acts outside of that core, acts that rest on a legal authority that is shared with Congress. Such acts are taken "pursuant to an express or implied authorization of Congress" or in areas where "[the President]

[59] *Id.* at 9, 13.

[60] *Id*. at 13.

[61] *Trump*, 144 S. Ct. at 2328.

[62] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[63] *Trump*, 144 S. Ct. at 2327.

and Congress may have concurrent authority."[64] Again, determining which official acts rest on concurrent authority and which rest on exclusive authority depends on the underlying theory of presidential power that one adopts. But discretionary policy decisions of all sorts, particularly in the domestic sphere, are likely to fall within this zone.

The fact that such official acts might rest on a delegated legal authority from Congress suggests that they cannot be as insulated from congressional regulation and control as those resting on the President's exclusive constitutional authority. This possibility of congressional regulation might open space for piercing the absolute immunity that the Court recognized for core powers. Even so, the Court left that question unresolved, saying that the President is entitled to at least "presumptive" immunity in this context. Why might that be so? The Court looked back to *Fitzgerald* and the rationale for immunity from personal civil liability for official acts.[65] Regardless of the source of the discretionary policy authority, the public interest requires that an officer exercise that authority with vigor and not hedge his decisionmaking so as to avoid personal risk. If the threat of personal *civil* liability creates a constitutionally unacceptable risk that an officer might shirk his public duty, a threat of personal *criminal* liability must pose an even greater one. This would seem to suggest that it is up to Congress to choose where to draw the lines on the discretionary authority it has delegated to the President. The Supreme Court may patrol those boundaries to ensure that Presidents do not overstep the limits of their authority, but Congress may not demarcate those boundaries by imposing a *criminal* penalty for presidents who traverse it. Such a draconian penalty creates an inappropriate chilling effect on the ability of the President to take care that the laws be faithfully executed within those bounds. The independence of the chief executive in performing his constitutional responsibilities will be "significantly undermined" if Congress can subject his official acts to the "scrutiny in criminal prosecutions" and cast a "pall" over his exercise of constitutional discretion.[66]

The *Trump* Court borrowed the idea of a "presumptive privilege" from the *Nixon* Court's ruling on executive privilege claims. But the

[64] *Youngstown*, 343 U.S. at 635, 637 (Jackson, J., concurring).

[65] *See Trump*, 144 S. Ct. at 2329–30.

[66] *Id.* at 2331.

Court's *Trump* opinion inexplicably elaborates, borrowing from *Fitzgerald*, that at "a minimum, the President must therefore be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'"[67] That statement marks a significant revision of both *Nixon* and *Fitzgerald*. In *Nixon*, the Court held that a presumptive privilege could be overcome with an adequate showing of the important interests in piercing the privilege. One such sufficient interest was when the allegedly privileged material was "essential to the justice of the [pending criminal] case."[68] In his opinion for the Court in *Trump*, Roberts said nothing about the balance of interests that might help justify overcoming the President's presumptive immunity from criminal prosecution. In *Fitzgerald*, the Court similarly argued that the public interest, such as the interest in an "ongoing criminal prosecution," could counterbalance "the dangers of intrusion on the authority and functions of the Executive Branch."[69] Compared with that approach, the Roberts opinion would seem to up the stakes such that there can be *no* dangers of intrusion on the executive branch. The *Trump* opinion lapses silent on any interests that might be balanced against the President's presumptive immunity. Within this outer perimeter of official presidential action, Roberts borrowed from the functionalist balancing framework of earlier separation of powers cases but downplayed the weighing of interests that those cases had always emphasized. At first blush, "presumptive" immunity appears to be all but absolute in practice.[70]

The Supreme Court remanded the *Trump* case back to the lower courts for further proceedings to determine whether the President's actions at issue are official or not, core or not, immune or not. Nonetheless, it is worth noting that the Court suggested an extremely broad understanding of what falls within the outer perimeter of the President's office for this purpose. In political science terms, a modern President serves many functions within the political system,

[67] *Id.*

[68] United States v. Nixon, 418 U.S at 713 (brackets in original).

[69] Nixon v. Fitzgerald, 457 U.S. at 754.

[70] *Cf. Trump*, 144 S. Ct. at 2361 (Sotomayor, J., dissenting) ("It is hard to imagine a criminal prosecution for a President's official acts that would pose no dangers of intrusion on Presidential authority in the majority's eyes.").

only some of which derive from his constitutional office and legal responsibilities.[71] Roberts, however, blurred the distinction between the President's legal and political functions. Thus, in Roberts's telling the President's use of the "bully pulpit" or his efforts to advance a legislative agenda simply become aspects of "Presidential power," apparently indistinguishable from the President's legal obligation to take care that the laws are faithfully executed.[72] The Court still left open the possibility that some of this behavior could be unofficial. But the Court obscured the difference between the President acting as a head of government and the President acting as a political leader in ways that might not be constitutionally justified.

Trump had made an additional argument for presidential immunity grounded in the Constitution's "Impeachment Judgment Clause." The Constitution provides that if an official is impeached and convicted, the judgment "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."[73] But "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[74] Trump argued that this provision means a President may be convicted of a crime *only* if he has previously been impeached by the House and convicted by the Senate.

The Court decisively rejected Trump's argument that the Impeachment Judgment Clause precludes criminal prosecution when the Senate does not convict in its own proceedings. On Trump's reading, a Senate conviction in an impeachment is a necessary condition to penetrating presidential immunity for acts taken in office. But the Court pointed out that Trump's theory is at odds with the text, history, and logic of the impeachment power. In doing so, the Court also correctly observed that "impeachment is a political process" and not a criminal process, and that the two kinds of proceedings should not be conflated.[75]

[71] *See, e.g.*, Clinton Rossiter, The American Presidency (1956).

[72] *Trump*, 144 S. Ct. at 2340.

[73] U.S. Const. art. I, § 3, cl. 7.

[74] *Id.*

[75] *Trump*, 144 S. Ct. at 2342. *See also* Keith E. Whittington, The Impeachment Power (2024).

IV. The Barrett Concurrence

Justice Barrett offered a concurring opinion that frames its disagreement with the Chief Justice narrowly but hints at a broader alternative to the scheme the majority opinion lays out. The majority opinion might have done well to have borrowed more of Barrett's framing.

Barrett began by suggesting that we should reconceptualize presidential immunity as two distinct propositions. First, the President (or former President) is entitled to "challenge the constitutionality of a criminal statute as applied to official acts alleged in the indictment."[76] Second, the President "can obtain interlocutory review of the trial court's ruling."[77]

Barrett's first suggestion clarifies the nature of the problem of criminalizing some presidential conduct. When applied to unofficial acts, there is no valid Article II challenge to be made, and thus prosecutions could proceed. When an indictment involves official acts, however, a sitting President would naturally be able to argue that the application of the statute to the President's official actions is unconstitutional. That would be true whether the statute in question sought to impose criminal penalties on a President who violated it or sought to impose some other form of penalty. Moreover, it would be equally true whether the statute in question specifically targeted some presidential conduct (e.g., removing a Cabinet member without Senate approval) or was cast in general terms that arguably include some presidential conduct (e.g., removing a Cabinet member to end a specific criminal investigation). If the application of the statute is delayed by the assumption that a sitting President cannot be criminally prosecuted, then the underlying constitutional issue is still the same when it is eventually applied to the former President. The overriding questions are whether Congress may declare certain presidential actions unlawful and whether the substance or means of how Congress attempts to do so unduly interfere with the constitutional prerogatives of the President. In other words, the question is not whether Presidents are immune from criminal prosecution *as such*, but instead whether particular criminal law provisions are constitutionally infirm as they might be applied to presidential actions.

[76] *Trump*, 144 S. Ct. at 2352 (Barrett, J., concurring in part).

[77] *Id*.

The latter is a familiar question within American law. To be sure, the Court might reach a correct or incorrect conclusion about that question in any given case. But the idea that Congress might encroach on presidential powers by way of a statute or that the judiciary has a responsibility in such a case to intervene and declare the law null and void as applied in that context is hardly novel or a threat to democracy or the rule of law.

The prospect of interlocutory review would address a key aspect of a privilege of immunity, which is the ability to avoid full judicial proceedings. If the process of a civil or criminal trial itself imposes an inappropriate burden on an officer who enjoys absolute immunity, then the question of whether a criminal statute can be constitutionally applied to a former officer can be resolved before the process of a trial is undertaken. The concept of immunity cannot avoid the necessity of litigation to determine whether immunity is warranted in specific circumstances. But that litigation process can be channeled through a system of interlocutory review of what is in essence a substantive constitutional issue: the scope of congressional authority. As Barrett recognized, allowing an interlocutory appeal in this context would give the former President a fast-track to resolution of the constitutional issues that other parties who suffer under unconstitutional laws do not have. But that disparity can be examined and addressed separately.

If in a future case the Court finds that a particular criminal statute is unconstitutional as applied, then the President is "immune" from further sanction and the prosecution is at an end. If the Court, by contrast, finds that the particular criminal statute is constitutionally valid as applied to particular presidential actions, then the President is not "immune" from further sanction and the prosecution can proceed. The question of presidential immunity is not a general or stand-alone question; it is ultimately a question about the constitutionality of legislative restrictions on particular presidential actions. That question is both routine and familiar within our constitutional system. There is nothing magical about Congress attempting to place its restrictions on the presidency within the federal criminal code as opposed to elsewhere within the statute books.

Barrett also seemed to take some issue with the Court's opinion over the scope of the President's authority. She would have given more guidance to the lower courts as to how they ought to analyze

the indictment at issue in this case. For example, Barrett did not think further proceedings were necessary to know that the President is not taking an official action when he participates in a scheme to organize a slate of fake electors or persuade state legislatures to set aside their presidential election results.[78]

Barrett's explicit disagreement with the majority opinion, however, came on the question of what evidence of presidential conduct may be presented to a jury in a trial regarding unprotected conduct. Because Roberts wanted to exclude any judicial inquiry into presidential motives or any judicial scrutiny of presidential decisionmaking, his opinion for the Court forbade the use of any evidence regarding protected conduct in court. If a President does "not have to answer for his conduct" on those matters, then they should not be laid bare in a courtroom.[79] Juries should not be allowed to "probe official acts for which the President is immune," and the judiciary should not risk that juries might be tainted by political passions raised by such evidence.[80]

By contrast, Barrett was more comfortable with "familiar and time-tested procedure[s]" to deal with such evidentiary problems.[81] Roberts's evidentiary carve-out may point to the fact that the presidential immunity in his framework has a more sweeping character than the two propositions that Barrett suggested. Barrett's approach of as-applied challenges to criminal statutes has no immediate implications for what evidence might be admissible at trial for unofficial acts that are within Congress's authority to regulate. Her limited recognition that executive privilege might be relevant in such cases highlights the extent to which she would prefer to treat the *Trump* case as much more routine. In practice, there might not be much difference between the evidence that Roberts and Barrett would allow into court. But Roberts clearly had a heightened concern about whether, in our hyperpolarized world, prosecutors and jurors can be trusted not to make improper use of evidence relating to presidential motives.

[78] *See id.* at 2353 n.2.

[79] *Id.* at 2340 (majority opinion).

[80] *Id.* at 2341.

[81] *Id.* at 2355 (Barrett, J., concurring in part).

V. The Sotomayor Dissent

Undoubtedly Roberts hoped that the Court would respond to the Trump litigation with the same kind of unanimity that it displayed in *United States v. Nixon* or *Clinton v. Jones*. If so, he was to be disappointed. Instead, the Court came closer to the 5–4 ruling that it issued in *Nixon v. Fitzgerald*. Of course, *Fitzgerald* was the only case that the President won and the closest in its immunity claims to *Trump*. Since we had already seen a preview of the *Trump* case in the debate surrounding the Mueller Report, a clear conservative/liberal divide on whether criminal statutes could be applied to presidential official acts might have been anticipated.

In her dissent, Sotomayor offered a sweeping rejection of presidential immunity for official acts, though she did not clearly say what, if any, limits she might recognize on the congressional authority to criminalize presidential behavior. If Barrett's framework had been adopted by the majority, it might have forced Sotomayor to grapple with that problem more directly. She might then have explained what authority Congress has to regulate how the President conducts his office and where the limits of that authority might be found. But as things stand, Sotomayor did not grapple with that problem. Instead, she focused on the question of whether there is a recognized presidential immunity from criminal prosecution. Unsurprisingly, since the issue is a novel one, she found no text or history establishing such an immunity.

More problematic, however, was that Sotomayor went further and insisted that there is a settled tradition establishing that Presidents "are answerable to the criminal law for their official acts."[82] The evidence here is thin, primarily consisting of the facts that President Gerald Ford pardoned former President Nixon and that independent counsels had investigated Presidents in the past. That is not much of a tradition, and it says little about the specific question of immunity for official acts.

Sotomayor was quick to convert the consensus that a President can be prosecuted for unofficial acts ("of course he can") into a proposition that unofficial acts are whatever acts for which Presidents can be properly prosecuted. Her concern was not that Roberts's vision of official acts included more than the President's role as head

[82] *Id*. at 2359–60 (Sotomayor, J., dissenting).

of the government. Her concern was instead that Roberts would immunize "any use of official power for any purpose."[83] In her view, Presidents are effectively above the law if they are "beyond the reach of the federal criminal laws for any abuse of official power."[84] Yet the idea that "abuse" of power can be criminalized is itself an astonishing leap. The identification of abuses of power is a quintessentially political act. It is why the Framers thought we needed elections and impeachments.[85] When officers exceed their power, they can be checked by courts who can declare such acts beyond those officers' authority. And when officers abuse their power, they should be held politically accountable. But if officers can be *imprisoned* for abuse of power, then criminal prosecutions will be the stuff of politics.

Sotomayor would downplay the dangers of the door she would open. Unlike Roberts, she had no concern about politicized prosecutions. In the civil liability context, the Court worried about how easy it would be to find potential parties who might harass controversial political officials through nettlesome litigation. In the criminal context, Sotomayor thought such worries could be put to rest. Who could imagine the possibility of "a baseless criminal prosecution?"[86] The criminal justice process, she assured us, is surrounded by many checks and balances to effectively separate out the guilty from the innocent and filter out meritless cases. The long history of the nation has demonstrated an ample "restraint" on the prosecution of former Presidents.[87] There is no reason to imagine that presidential prosecutions might become a problem in the future.

Sotomayor was also little concerned about the possibility of criminal liability affecting presidential decisionmaking. If she were President, she suggested, she would simply not commit crimes. How hard could that be? Surely Presidents have always acted under the shadow of the criminal law, and yet they have not hesitated to perform their duties.[88] Complying with the criminal law should be no

[83] *Id.* at 2361.

[84] *Id.* at 2362.

[85] *See* WHITTINGTON, *supra* note 75.

[86] *Trump*, 144 S. Ct. at 2365 (Sotomayor, J., dissenting).

[87] *Id.* at 2364.

[88] *See id.* at 2364–65.

"great burden."[89] She was "deeply troubled by the idea, inherent in the majority's opinion, that our Nation loses something valuable when the President is forced to operate within the confines of federal criminal law."[90] But Sotomayor did not grapple with the Court's reasoning in *Fitzgerald*, which contended that personal presidential liability for official conduct would have a chilling effect on the President that would skew government decisions and damage the public good. The question is not just whether the President operates within the confines of federal criminal law. It is whether Presidents will hesitate to do their duty for fear that they might accidently step over that line or be perceived by partisan political actors to have stepped over that line. Sotomayor seemed to assume that such lines are so clear that there will be no chilling effect.

At the same time, however, Sotomayor suggested that the criminal law can and does carve out a large hole in presidential powers. Any official acts driven by "corrupt motives and intent," she asserted, can be reached by the criminal law.[91] It is not properly within the President's authority to act with "corrupt purpose," and thus any actions he takes with such wrong purposes must be "unofficial" acts.[92] Ultimately, Sotomayor shared Mueller's view that the scope of the President's constitutional authority is defined, in part, by the President's subjective mental state when he takes an action. Prosecutors must be able to examine the President's motives when he takes putatively official acts, and if they find that those motives were not sufficiently public-spirited they can imprison him.

Running through Sotomayor's dissent is the belief that the threat of criminal prosecution has been a significant component of the checks and balances that have kept Presidents from abusing their powers. By recognizing a presidential immunity from criminal prosecution for official presidential acts, the majority has removed a load-bearing beam from the constitutional framework. Presidents who were previously tempted to order "Seal Team Six to assassinate a political rival" or "organize a coup" or "take a

[89] *Id*. at 2365.

[90] *Id*.

[91] *Id*. at 2361.

[92] *Id*.

bribe" will now be emboldened to do so.[93] There will be, apparently, no other means of redress to prevent, discourage, or counter such presidential conduct.

V. Kicking the Can Down the Road

It was unfortunate that the Court had to hear an argument at all raising the question of presidential immunity from criminal liability. That the Court had to address the question is not the fault of the Justices but the fault of former President Trump and the prosecutors who have pursued him. The country would be better off if the Court had not had to detail the precise contours of presidential immunity and had not incepted into the public consciousness the question of what exactly a sitting President can order Seal Team Six to do. The constitutional system functions better if some hypotheticals are not discussed beyond a seminar room, if some possibilities of how power might be exercised are so far beyond the pale that they are not even imagined, and if the boundaries of legislative and executive authority are not tested and detailed. But if high government officials insist on testing the outer bounds of their powers, law will replace norms and vague sensibilities will be reduced to fine details.

Given that the issue is now being litigated, the Court's opinion says much less than was needed. The Court invited political backlash by insufficiently explaining the logic of its own opinion and refusing to address reasonable concerns about the outer bounds of that logic. By framing the question as one of immunity rather than limits on congressional authority to interfere with Article II powers, the Court opened the door to simplistic solutions in the name of accountability. A constitutional amendment declaring that "No One Is above the Law" and stripping Presidents of immunity from criminal prosecution would be enticing, but it would fail to grapple with the real problems that could be unleashed by a Congress empowered to criminalize presidential conduct at will. The Court could have done more to inform such a public debate, but instead it chose to be oblique. Meanwhile, the Court provided only limited guidance to the lower courts on how to navigate the complexities surrounding a prosecution of a former President. The Court failed to clarify what actions a President might take that would be constitutionally

[93] *Id*. at 2371 (cleaned up).

protected from criminal prosecution. Simultaneously, the Court threw into confusion evidentiary issues associated with criminal prosecutions by indicating that some materials relating to presidential conduct are constitutionally off-limits.

The Court's analytical framework is an odd mixture of formalism and functionalism that is unlikely to be satisfying to advocates of either approach and that leaves important issues unresolved. The opinion has all the trappings of a functionalist argument and appeals to the canonical opinion of modern functionalist separation-of-powers jurisprudence in Justice Robert Jackson's concurring opinion in the *Steel Seizure Case*.[94] This in itself is neither surprising nor problematic. The Jackson opinion is the standard starting point for thinking about presidential powers problems, and functionalism undergirds all of the Court's prior opinions regarding constitutional immunity for Presidents and other government officials. Although the *Trump* dissent makes some rhetorical hay out of the Court's minimal engagement with constitutional text and original meaning, there is nothing unusual about how Roberts approached the issue of presidential immunity.

However, Roberts did make two important, unexplained, and undeveloped departures from traditional forms of analysis. First, Roberts borrowed a balancing framework but did not engage in any constitutional balancing. Recent conservative Justices have often been uncomfortable with balancing tests, not least because they often appear to be highly subjective in application. The immunity decisions have relied on balancing tests, however, and Roberts freely borrowed from their language and rationale—at least when it comes to understanding the constitutional interests of the presidency. Criminal scrutiny of presidential actions could corrupt the administration of the executive branch and unduly interfere with the decisiveness and energy of the executive. The structural design of the Constitution creates implications that courts have been willing to recognize in order to preserve the independence of the executive branch. Those structural considerations have given rise to such doctrines as executive privilege and immunity from personal civil liability for official actions.

[94] *See supra* note 62.

But the Court has also thought that there might be circumstances that would justify overcoming those presidential interests. In *Nixon* itself, the Court held that the government's interest in criminal prosecutions could outweigh an absolute executive privilege, though even here the President's interest had to be accommodated through such safeguards as *in camera* review of potentially privileged evidence. In *Trump*, however, Roberts gave no recognition of such counterbalancing constitutional interests. The unwillingness to grapple with *Nixon*'s concerns for criminal justice is particularly notable in the specific context of *Trump*. There might be reasons to think that the balance of constitutional interests is tilted even more heavily toward the President in the context of criminal prosecutions of the President himself, but Roberts did not say so. The functionalist analysis is incomplete, and one suspects that it is unstable.

At the same time, the *Trump* opinion sweeps in some more formalist considerations but without sufficient explanation to provide much guidance for future doctrine. Part of the difficulty is the breadth of the question of presidential immunity as such. In the independent counsel case, Chief Justice William Rehnquist framed the key separation of powers question as whether the statute was "impermissibly interfering with the functions of the Executive Branch."[95] On the one hand, Rehnquist posed the functionalist question of how much and what kind of "interference" might impede the President in the performance of his duties. On the other hand, he largely assumed a formalist background of what counted as among the "functions of the Executive Branch." In the context of the independent counsel statute, the executive duty in question was specific and clear. But in the context of the presidential immunity questions raised by the *Trump* case, the executive duties that might become at issue are infinite. From a formalist perspective, we need to know what the scope of presidential duties under the Constitution might be to know when criminal statutes might impermissibly interfere with those duties. Trying to answer that question at a high level of abstraction stretched the Court's opinion to the breaking point. The Court's distinction between official and unofficial acts and, further, between core and noncore official acts begs more questions than it answers.

[95] Morrison v. Olson, 487 U.S. 654, 697 (1988).

Roberts apparently preferred to avoid getting into hypotheticals in his opinion. But avoiding specifics left the door open to the kind of rhetorical reaction that the opinion received both on and off the Court. By its silence, did the Court's majority mean to say that the President is, in fact, some kind of king? That the President could, in fact, order Seal Team Six to assassinate a political rival? That the President could, in fact, initiate a self-coup? It seems likely that the majority did not think so, but the opinion simply does not provide the material for explaining why. Perhaps the various Justices in the majority were not of one mind about which specific acts might be on or off the table, and so getting into specifics would have fractured the majority. Perhaps the various members of the majority were not of one mind about their underlying understanding of the formal scope of presidential power, and so getting into specifics would have broken down an overlapping consensus on the basic questions. Such is the danger of a minimalist opinion. The opinion is so concerned with papering over differences that it says very little that is meaningful.

Things get complicated at the level of specifics. A more thoroughgoing formalist analysis might have said more about where the boundaries of presidential power might be found. A more thoroughgoing functionalist analysis might have said more about where the counter-balancing interests of Congress or the structuralist logic of the overarching constitutional system begin to "[]permissibly intrude[]" on presidential choices.[96]

If we sweep away the idea of presidential immunity entirely, as some Democrats are currently suggesting we should do in the wake of the *Trump* decision, then the consequences for presidential independence are dramatic. Let us distinguish between two kinds of statutory possibilities. One type of statute would criminalize acts that the President alone can take; the other would criminalize acts that the President could take along with ordinary citizens. The former type of statute would, of course, involve the use of presidential powers, whether those powers are rooted in the Constitution, statute, or treaty.

If we conclude that Presidents have no immunity from criminal prosecution for their official actions or that the authority of Congress

[96] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

to adopt criminal laws must always trump whatever constitutional authority a President might have, then Congress would be positioned to gut the independence of the presidency. When the Reconstruction Congress passed the Tenure of Office Act forbidding President Andrew Johnson from removing a Cabinet officer without Senate approval, could it have upped the ante by making it a criminal offense for the President to attempt to do so? Could a former President be prosecuted under a statute that specifically made it a crime to fire the Secretary of Defense or the Attorney General or the director of the FBI? Could Congress have criminalized its disputes with President George W. Bush over the scope of the President's commander-in-chief authority? Could a former President who had ordered "enhanced interrogation" of foreign terrorists or sweeping national security electronic intelligence or the detention of unlawful combatants in security facilities abroad be prosecuted under specific criminal statutes aimed at such presidential conduct? Could President Barack Obama be prosecuted under a Senator Rand Paul–inspired statute imposing criminal penalties for any president who ordered a targeted drone strike on an American citizen under any circumstances? Could Congress authorize the criminal prosecution of a President who insufficiently enforced immigration laws or pardoned sex offenders or withdrew the United States from NATO or NAFTA or exchanged a convicted Russian arms dealer for an American journalist?

If we think some meaningful line can be drawn between a President issuing an order to Seal Team Six to assassinate a domestic political rival and issuing an order to target a drone strike at an American citizen abroad who is actively engaged in terrorist operations, then simply saying there should be no such thing as presidential immunity does not help. But neither does it help to simply say that Presidents enjoy absolute immunity when exercising their core constitutional powers. Both examples involve the President acting in his role as commander-in-chief. Perhaps there is no meaningful line to be drawn. Perhaps assassinating a political rival is just an "abuse" of the commander-in-chief authority rather than an action lying outside of that authority. Perhaps we must simply depend on the good character of a sitting President to know when to order the targeted killing of an American citizen and when not. Or perhaps we must depend on the political checks-and-balances that raise the costs on Presidents making bad calls in such situations.

Or perhaps we need a theory of the proper constitutional scope of the commander-in-chief power that would allow us to distinguish between constitutionally proper and improper presidential orders to the military. Perhaps such a theory might turn on presidential motivations, as the *Trump* dissent suggests. But that seems unlikely to be adequate. If we had clear evidence that a President was concerned about improving his reelection chances or his historical reputation when ordering a military strike, would that be sufficient to move the order outside the President's constitutional authority and make him criminally liable? If a terrorist group kidnapped the President's daughter and the president authorized the release of a terrorist leader to secure the return of his daughter, would he be acting from a corrupt personal motive that would justify his criminal prosecution? If the President chose one military target over another because he once had a nice meal in a city that could have been a target or because he has friends and donors who have substantial property interests in a potential target, is he no longer operating within his proper constitutional authority? If a President working on racist assumptions ordered the detention of American citizens who shared a national heritage with a wartime adversary, could he be held criminally liable for his flawed decisionmaking? By excluding presidential motivation from the equation, the *Trump* majority wanted to take such possibilities off the table. Criminal juries should not be asking whether the President had a good enough reason to order bombs dropped on a particular target.

If the dissent's theory is inadequate for identifying the boundaries of the President's constitutional authority, we still need such a theory and the majority declines to give us one. The impeachment power is aimed at addressing acts incompatible with holding office, but those acts can be either criminal or noncriminal. The Constitution itself lists "treason" as an impeachable offense, and that presumably includes at least cases of literal treason involving a government officer committing the ordinary crime of treason. Surely the President himself could commit treason while in office, just as the President could commit murder, obstruction of justice, or various other criminal acts. But can the President commit treason while exercising his otherwise lawful powers of the presidency? Are there any orders that a President might issue as commander-in-chief that could qualify as treasonous in a criminal

sense, not just a political sense? If a President were to order an unconditional surrender to a dominant wartime adversary, there is little question that doing so would be giving aid and comfort to the enemy. But surely the President could not be charged with treason for exercising his constitutional duties as he thought necessary in the circumstances. Could a President order that a nuclear bomb be dropped on New York City so as to avoid an all-out nuclear exchange with a foreign adversary without opening himself to criminal liability? Other cases would presumably be harder. If the President ordered American troops to stand down as an invasion was launched against the United States, would such an order necessarily be protected as within the scope of his lawful powers? If the President ordered the American national security agencies to unilaterally turn over the names of all American covert foreign assets to a hostile foreign nation, could there be criminal sanctions?

Are there circumstances in which the President could purport to be acting under his authority as commander-in-chief, but would in fact be acting unlawfully and outside the scope of that authority? The question could arise not only in the context of a treason statute but in the context of other statutory crimes as well. A vast array of actions would be criminal in ordinary contexts but are regarded as lawful within a military context; but Congress and the President might disagree about the military necessity of various wartime orders. If Congress can back its judgment with criminal sanctions, the President would be deterred from faithfully exercising his constitutional responsibilities as he understands them. But perhaps objective circumstances could be identified that would put some military orders or actions outside the scope of the President's proper constitutional authority.

I think it is obvious that a President could not simply walk across the debate stage and shoot his electoral opponent in the head in the name of national security. If that is "obvious," however, it is presumably because there is no plausible national security rationale for such an action. But I could also presumably add more details to the hypothetical that would overcome that presumption and suggest that perhaps there are circumstances in which Seal Team Six could be ordered to act against a presidential candidate. In ordinary American political circumstances, we do not imagine a plausible scenario in which a major party nominee poses such a threat. That in turn implies

there are objective limits to what a President can order the military to do even in wartime. Unfortunately, we do not have anything like a consensus theory of what such a limit might be. President Obama's Department of Justice might suggest, for example, that if an American citizen were involved in the operational planning of violent attacks on the United States and could not be feasibly captured, such an individual could be a legitimate military target notwithstanding that individual's political activities. In a dystopian world in which an American political party had a military wing and sought to gain power through both electoral and terroristic means, a sitting President might well be within his constitutional authority to take lethal action against an electoral foe. Presumably President Abraham Lincoln could not have ordered the assassination of a Democratic "peace candidate" on the grounds that such a candidate posed an existential threat to the nation, but he could have ordered the assassination of Jefferson Davis had he been a contender for the Democratic Party nomination in 1864. Chief Justice Roger Taney feared that he might be detained by Union forces if he issued judicial opinions obstructing Lincoln's wartime actions. Suppose the President were to order the arrest of Supreme Court Justices. Whether the President was acting within the scope of his constitutional authority—and thus properly immune from criminal prosecution—would likely depend on what the Justices had allegedly done. If the Justices had been conspiring with foreign enemies, then their detention would be understandable. If the Justices had disagreed with the President about the scope of his constitutional prerogatives, then their detention would seem much more dubious. The bounds of presidential power may not be determined by the President's subjective motives or even by the action undertaken, but they might well depend on the public reasons for his actions. A President who detains judges because he dislikes their constitutional opinions is acting unlawfully. A President who detains judges because they are behaving criminally is not. A theory that cannot distinguish between a President acting within his constitutional authority and a President purporting to act within his constitutional authority is going to be inadequate.

The Court created more uncertainty within its expansive notion of official presidential acts and its refusal to provide more of a hint as to where those limits are to be found. Take the problem of presidential speech. Presumably Congress cannot criminalize the President's

making speeches in public. Even without a theory of presidential speech being part of the President's Article II authority, Congress would encounter some First Amendment limits to an overly broad ban on presidential speechmaking. The *Trump* Court, however, was less focused on the First Amendment than on Article II. It focused on distinguishing between the occupant of the White House speaking to the public as part of his "official responsibilities" and speaking in an "unofficial capacity."[97] When speaking "as a candidate for office or party leader," the President speaks in an "unofficial capacity."[98]

But is it the case that even when Presidents speak in their official capacity, they cannot be brought within the bounds of the criminal law? The exceptions for the First Amendment are narrow, and it would seem strange if Presidents were constitutionally criminally immune when operating within those exceptions. Shoehorning such presidential communications into an "unofficial speech" category just because of their illicit content would seem to be nothing but a legal fiction. If a President were to post child pornography on the White House website or make true threats in a televised speech from the Oval Office, such speech might functionally be within the "outer perimeter of his official responsibilit[ies]" and yet still be criminal under generally applicable law.[99] The speech would not be "otherwise lawful" conduct in Attorney General Barr's framework, but it could perhaps become lawful precisely because the President was doing it while conducting his office. A "fact specific" analysis might help us sort such situations out. But that is less because we could distinguish official from unofficial acts than because we could balance the competing constitutional interests to determine when presidential interests would have to give way to other public concerns.

Imagine that then-President Trump engaged in speech that in fact met the standards for incitement to imminent unlawful action and for being integral to illegal conduct. As a consequence, Trump would have engaged in speech that fell outside the scope of established First Amendment protections and within the scope of established and generally applicable criminal laws. The Court's *Trump* opinion provides a path to prosecuting such speech if Trump engaged in such

[97] *Trump*, 144 S. Ct. at 2340.

[98] *Id*.

[99] *Id*. at 2331.

speech in an unofficial capacity, for example by engaging in such speech as a political candidate. But what if that out is not available? The Court has characterized a wide range of presidential speech as within the "outer perimeter of his official responsibilities," but such speech could be criminal in such a sense. Is a President necessarily immune from criminal prosecution if he gives an "official" speech that incites a riot? *Contra* the dissent, the relevant question would not be whether the President's motives in delivering such speech were corrupt. *Contra* the majority, the relevant question would not be whether the President's speech was delivered in an unofficial capacity. The question is ultimately one of where the balance of constitutional and public interests is to be found. Even if we accept the majority's desire to constitutionalize the President's bully pulpit, the constitutional interest in that bully pulpit is substantially weaker than the constitutional interest in the discretionary authority vested in the commander-in-chief or chief magistrate. At the same time, the public interest in not having elected demagogues go around inciting riots or orchestrating criminal conspiracies is quite substantial.

The *Trump* Court simultaneously said too little and too much, and it would have done better to have framed the constitutional issue differently. As it stands, the Court has invited unnecessary controversy and confusion. The Court has put off until later questions that will eventually have to be answered. If the Court ever gets around to answering those questions, it seems likely that the apparently simple framework outlined in the majority opinion will have to be significantly complicated.

Justice Barrett offered a more promising path forward than Chief Justice Roberts. A criminal statute may impermissibly intrude on the President's constitutional authority, and that is true whether the criminal statute is written in general terms or specifically targets presidential actions. Former Presidents are "immune" from criminal prosecution for their actions as President to the extent that those actions are constitutionally insulated from congressional interference. But to the extent that those actions are properly subject to congressional regulation, Presidents must face the consequences of their actions. There are unavoidably hard problems involved in determining whether a particular presidential action is beyond the reach of congressional statutes, and that is no less true in the context of criminal statutes than in the context of other federal legislation.

The majority could have reserved for a later case the question of where exactly the outer bounds of presidential power might be in any particular circumstance, but it nonetheless could have been clearer about the relevant questions to be asked if Congress is contemplating criminalizing some presidential conduct or a prosecutor is considering pursuing an indictment for some presidential action.

A crucial difference between the majority opinion and the dissent turns on a prediction about the future. The majority worries that a hyperpolarized world will subject former Presidents to questionable criminal prosecutions and undermine the ability of the President to perform his constitutional functions. The dissent imagines that the criminal justice system will rise above such pressures but that a President unconcerned about criminal sanctions will inevitably abuse his powers. Constitutional jurisprudence frequently depends on such assessments about the balance of probabilities and the realities of how institutions will operate. Which opinion currently seems more persuasive depends in part on our intuitions about those political realities and where our country is headed. Which opinion will in the future seem more prescient will depend on how those predictions turn out. If Presidents begin to behave in a more criminal fashion, then Sotomayor will have been vindicated in thinking that the threat of criminal prosecution was doing some real work in deterring presidential misconduct. If politicized lawfare becomes a routine feature of our domestic politics, then we may be thankful that Roberts saw what was coming and constructed some constitutional barriers to Presidents becoming victims of at least some forms of "politics by other means." Do we expect our future Presidents to be petty or not-so-petty criminals, or do we expect our future prosecutors to be partisan zealots? We can hope that neither will be true, but we might have to prepare for the possibility that one or both might be true.