Constitutional Law I

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Supplemental Reading #3 (*Trump v. United States*)[[1]](#footnote-1)

SUPREME COURT OF THE UNITED STATES

No. 23–939

DONALD J. TRUMP, PETITIONER v. UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

July 1, 2024

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

This case concerns the federal indictment of a former President of the United States for conduct alleged to involve official acts during his tenure in office. We consider the scope of a President’s immunity from criminal prosecution.

I

From January 2017 until January 2021, Donald J. Trump served as President of the United States. On August 1, 2023, a federal grand jury indicted him on four counts for conduct that occurred during his Presidency following the November 2020 election. The indictment alleged that after losing that election, Trump conspired to overturn it by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results.

According to the indictment, Trump advanced his goal through five primary means. First, he and his co-conspirators “used knowingly false claims of election fraud to get state legislators and election officials to . . . change electoral votes for [Trump’s] opponent, Joseph R. Biden, Jr., to electoral votes for [Trump].” Second, Trump and his co-conspirators “organized fraudulent slates of electors in seven targeted states” and “caused these fraudulent electors to transmit their false certificates to the Vice President and other government officials to be counted at the certification proceeding on January 6.” Third, Trump and his co-conspirators attempted to use the Justice Department “to conduct sham election crime investigations and to send a letter to the targeted states that falsely claimed that the Justice Department had identified significant concerns that may have impacted the election outcome.” Fourth, Trump and his co-conspirators attempted to persuade “the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results.” And when that failed, on the morning of January 6, they “repeated knowingly false claims of election fraud to gathered supporters, falsely told them that the Vice President had the authority to and might alter the election results, and directed them to the Capitol to obstruct the certification proceeding.” Fifth, when “a large and angry crowd . . . violently attacked the Capitol and halted the proceeding,” Trump and his coconspirators “exploited the disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification.” Based on this alleged conduct, the indictment charged Trump with (1) conspiracy to defraud the United States in violation of 18 U.S.C. §371, (2) conspiracy to obstruct an official proceeding in violation of §1512(k), (3) obstruction of and attempt to obstruct an official proceeding in violation of §1512(c)(2), §2, and (4) conspiracy against rights in violation of §241.1

Trump moved to dismiss the indictment based on Presidential immunity. [The District Court denied the motion and the Court of Appeals for the D.C. Circuit affirmed.]

II

This case is the first criminal prosecution in our Nation’s history of a former President for actions taken during his Presidency. We are called upon to consider whether and under what circumstances such a prosecution may proceed. Doing so requires careful assessment of the scope of Presidential power under the Constitution. We undertake that responsibility conscious that we must not confuse “the issue of a power’s validity with the cause it is invoked to promote,” but must instead focus on the “enduring consequences upon the balanced power structure of our Republic.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 634 (1952) (Jackson, J., concurring).

The parties before us do not dispute that a former President can be subject to criminal prosecution for unofficial acts committed while in office. They also agree that some of the conduct described in the indictment includes actions taken by Trump in his unofficial capacity.

They disagree, however, about whether a former President can be prosecuted for his official actions. Trump contends that just as a President is absolutely immune from civil damages liability for acts within the outer perimeter of his official responsibilities, [Nixon v.] Fitzgerald, 457 U. S., at 756, he must be absolutely immune from criminal prosecution for such acts. And Trump argues that the bulk of the indictment’s allegations involve conduct in his official capacity as President. Although the Government agrees that some official actions are included in the indictment’s allegations, it maintains that a former President does not enjoy immunity from criminal prosecution for any actions, regardless of how they are characterized.

We conclude that under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President’s exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity. At the current stage of proceedings in this case, however, we need not and do not decide whether that immunity must be absolute, or instead whether a presumptive immunity is sufficient.

A

Article II of the Constitution provides that “[t]he executive Power shall be vested in a President of the United States of America.” §1, cl. 1. The President’s duties are of “unrivaled gravity and breadth.” Trump v. Vance, 591 U. S. 786, 800 (2020). They include, for instance, commanding the Armed Forces of the United States; granting reprieves and pardons for offenses against the United States; and appointing public ministers and consuls, the Justices of this Court, and Officers of the United States. See §2. He also has important foreign relations responsibilities: making treaties, appointing ambassadors, recognizing foreign governments, meeting foreign leaders, overseeing international diplomacy and intelligence gathering, and managing matters related to terrorism, trade, and immigration. See §§2, 3. Domestically, he must “take Care that the Laws be faithfully executed,” §3, and he bears responsibility for the actions of the many departments and agencies within the Executive Branch. He also plays a role in lawmaking by recommending to Congress the measures he thinks wise and signing or vetoing the bills Congress passes. See Art. I, §7, cl. 2; Art. II, §3.

No matter the context, the President’s authority to act necessarily “stem[s] either from an act of Congress or from the Constitution itself.” Youngstown, 343 U. S., at 585. In the latter case, the President’s authority is sometimes “conclusive and preclusive.” Id., at 638 (Jackson, J., concurring). When the President exercises such authority, he may act even when the measures he takes are “incompatible with the expressed or implied will of Congress.” Id., at 637. The exclusive constitutional authority of the President “disabl[es] the Congress from acting upon the subject.” Id., at 637–638. And 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.

If the President claims authority to act but in fact exercises mere “individual will” and “authority without law,” the courts may say so. Youngstown, 343 U. S., at 655 (Jackson, J., concurring). In Youngstown, for instance, we held that President Truman exceeded his constitutional authority when he seized most of the Nation’s steel mills. See id., at 582–589 (majority opinion). But once it is determined that the President acted within the scope of his exclusive authority, his discretion in exercising such authority cannot be subject to further judicial examination.

The Constitution, for example, vests the “Power to Grant Reprieves and Pardons for Offences against the United States” in the President. Art. II, §2, cl. 1. During and after the Civil War, President Lincoln offered a full pardon, with restoration of property rights, to anyone who had “engaged in the rebellion” but agreed to take an oath of allegiance to the Union. United States v. Klein, 13 Wall. 128, 139–141 (1872). But in 1870, Congress enacted a provision that prohibited using the President’s pardon as evidence of restoration of property rights. Id., at 143–144. Chief Justice Chase held the provision unconstitutional because it “impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive.” Id., at 147. “To the executive alone is intrusted the power of pardon,” and the “legislature cannot change the effect of such a pardon any more than the executive can change a law.” Id., at 147–148. The President’s authority to pardon, in other words, is “conclusive and preclusive,” “disabling the Congress from acting upon the subject.” Youngstown, 343 U. S., at 637–638 (Jackson, J., concurring).

Some of the President’s other constitutional powers also fit that description. “The President’s power to remove—and thus supervise—those who wield executive power on his behalf,” for instance, “follows from the text of Article II.” Seila Law LLC v. Consumer Financial Protection Bureau, 591 U. S. 197, 204 (2020). We have thus held that Congress lacks authority to control the President’s “unrestricted power of removal” with respect to “executive officers of the United States whom he has appointed.” Myers v. United States, 272 U. S. 52, 106, 176 (1926); see Youngstown, 343 U. S., at 638, n. 4 (Jackson, J., concurring) (citing the President’s “exclusive power of removal in executive agencies” as an example of “conclusive and preclusive” constitutional authority); cf. Seila Law, 591 U. S., at 215 (noting only “two exceptions to the President’s unrestricted removal power”). The power “to control recognition determinations” of foreign countries is likewise an “exclusive power of the President.” Zivotofsky v. Kerry, 576 U. S. 1, 32 (2015). Congressional commands contrary to the President’s recognition determinations are thus invalid. Ibid.

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

B

But of course not all of the President’s official acts fall within his “conclusive and preclusive” authority. As Justice Robert Jackson recognized in Youngstown, the President sometimes “acts pursuant to an express or implied authorization of Congress,” or in a “zone of twilight” where “he and Congress may have concurrent authority.” 343 U. S., at 635, 637 (concurring opinion). The reasons that justify the President’s absolute immunity from criminal prosecution for acts within the scope of his exclusive authority therefore do not extend to conduct in areas where his authority is shared with Congress.

We recognize that only a limited number of our prior decisions guide determination of the President’s immunity in this context. … To resolve the matter, therefore, we look primarily to the Framers’ design of the Presidency within the separation of powers, our precedent on Presidential immunity in the civil context, and our criminal cases where a President resisted prosecutorial demands for documents.

1

The President “occupies a unique position in the constitutional scheme,” Fitzgerald, 457 U. S., at 749, as the only person who alone composes a branch of government. The Framers sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many. They “deemed an energetic executive essential to ‘the protection of the community against foreign attacks,’ ‘the steady administration of the laws,’ ‘the protection of property,’ and ‘the security of liberty.’” Seila Law, 591 U. S., at 223–224 (quoting The Federalist No. 70, p. 471 (J. Cooke ed. 1961) (A. Hamilton)). The purpose of a “vigorous” and “energetic” Executive, they thought, was to ensure “good government,” for a “feeble executive implies a feeble execution of the government.” Id., at 471–472.

The Framers accordingly vested the President with “supervisory and policy responsibilities of utmost discretion and sensitivity.” Fitzgerald, 457 U. S., at 750. He must make “the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.” Id., at 752. There accordingly “exists the greatest public interest” in providing the President with “the maximum ability to deal fearlessly and impartially with the duties of his office.” Ibid. Appreciating the “unique risks to the effective functioning of government” that arise when the President’s energies are diverted by proceedings that might render him “unduly cautious in the discharge of his official duties,” we have recognized Presidential immunities and privileges “rooted in the constitutional tradition of the separation of powers and supported by our history.” Fitzgerald, 457 U. S., at 749, 751, 752, n. 32.

In Nixon v. Fitzgerald, for instance, we recognized that as “a functionally mandated incident of [his] unique office,” a former President “is entitled to absolute immunity from damages liability predicated on his official acts.” Id., at 749. … In holding that Nixon was immune from that suit, “our dominant concern” was to avoid 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. … We therefore concluded that the President must be absolutely immune from “damages liability for acts within the ‘outer perimeter’ of his official responsibility.” Fitzgerald, 457 U. S., at 756.

By contrast, when prosecutors have sought evidence from the President, we have consistently rejected Presidential claims of absolute immunity. For instance, during the treason trial of former Vice President Aaron Burr, Chief Justice Marshall rejected President Thomas Jefferson’s claim that the President could not be subjected to a subpoena. Marshall reasoned that “the law does not discriminate between the president and a private citizen.” United States v. Burr, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807) (Burr I). …

Marshall acknowledged, however, the existence of a “privilege” to withhold certain “official paper[s]” that “ought not on light ground to be forced into public view.” United States v. Burr, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807) (Burr II) …

Similarly, when a subpoena issued to President Nixon to produce certain tape recordings and documents relating to his conversations with aides and advisers, this Court rejected his claim of “absolute privilege,” given the “constitutional duty of the Judicial Branch to do justice in criminal prosecutions.” United States v. Nixon, 418 U. S. 683, 703, 707 (1974). But we simultaneously recognized “the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking,” as well as the need to protect “communications between high Government officials and those who advise and assist them in the performance of their manifold duties.” Id., at 705, 708. Because the President’s “need for complete candor and objectivity from advisers calls for great deference from the courts,” we held that a “presumptive privilege” protects Presidential communications. Id., at 706, 708. That privilege, we explained, “relates to the effective discharge of a President’s powers.” Id., at 711. We thus deemed it “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” Id., at 708.

2

Criminally prosecuting a President for official conduct undoubtedly poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in his possession, as in Burr and Nixon. The danger is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the “bold and unhesitating action” required of an independent Executive. Fitzgerald, 457 U. S., at 745. Although the President might be exposed to fewer criminal prosecutions than the range of civil damages suits that might be brought by various plaintiffs, the threat of trial, judgment, and imprisonment is a far greater deterrent. Potential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decisionmaking than the potential payment of civil damages.

The hesitation to execute the duties of his office fearlessly and fairly that might result when a President is making decisions under a pall of potential prosecution raises “unique risks to the effective functioning of government,” Fitzgerald, 457 U. S., at 751. A President inclined to take one course of action based on the public interest may instead opt for another, apprehensive that criminal penalties may befall him upon his departure from office. And if a former President’s official acts are routinely subjected to scrutiny in criminal prosecutions, the independence of the Executive Branch may be significantly undermined. The Framers’ design of the Presidency did not envision such counterproductive burdens on the “vigor[]” and “energy” of the Executive. The Federalist No. 70, at 471–472.

We must, however, recognize the countervailing interests at stake. Federal criminal laws seek to redress a wrong to the public as a whole, not just a wrong to the individual. There is therefore a compelling public interest in fair and effective law enforcement. The President, charged with enforcing federal criminal laws, is not above them.

… Taking into account these competing considerations, we conclude that the separation of powers principles explicated in our precedent necessitate at least a presumptive immunity from criminal prosecution for a President’s acts within the outer perimeter of his official responsibility. Such an immunity is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution. Indeed, if presumptive protection for the President is necessary to enable the effective discharge of his powers when a prosecutor merely seeks evidence of his official papers and communications, it is certainly necessary when the prosecutor seeks to charge, try, and imprison the President himself for his official actions. 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.” Fitzgerald, 457 U. S., at 754.

But as we explain below, the current stage of the proceedings in this case does not require us to decide whether this immunity is presumptive or absolute. Because we need not decide that question today, we do not decide it. …

C

As for a President’s unofficial acts, there is no immunity. The principles we set out in Clinton v. Jones confirm as much. … Although Presidential immunity is required for official actions to ensure that the President’s decisionmaking is not distorted by the threat of future litigation stemming from those actions, that concern does not support immunity for unofficial conduct. The justifying purposes of the immunity we recognized in Fitzgerald, and the one we recognize today, are not that the President must be immune because he is the President; rather, they are to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions.

III

Determining whether a former President is entitled to immunity from a particular prosecution requires applying the principles we have laid out to his conduct at issue. The first step is to distinguish his official from unofficial actions. In this case, however, no court has thus far considered how to draw that distinction, in general or with respect to the conduct alleged in particular. Despite the unprecedented nature of this case, and the very significant constitutional questions that it raises, the lower courts rendered their decisions on a highly expedited basis. Because those courts categorically rejected any form of Presidential immunity, they did not analyze the conduct alleged in the indictment to decide which of it should be categorized as official and which unofficial. Neither party has briefed that issue before us (though they discussed it at oral argument in response to questions). And like the underlying immunity question, that categorization raises multiple unprecedented and momentous questions about the powers of the President and the limits of his authority under the Constitution. As we have noted, there is little pertinent precedent on those subjects to guide our review of this case—a case that we too are deciding on an expedited basis … Given all these circumstances, it is particularly incumbent upon us to be mindful of our frequent admonition that “[o]urs is a court of final review and not first view.” Zivotofsky v. Clinton, 566 U. S. 189, 201 (2012) (internal quotation marks omitted). Critical threshold issues in this case are how to differentiate between a President’s official and unofficial actions, and how to do so with respect to the indictment’s extensive and detailed allegations covering a broad range of conduct.

We offer guidance on those issues below. Certain allegations—such as those involving Trump’s discussions with the Acting Attorney General—are readily categorized in light of the nature of the President’s official relationship to the office held by that individual. Other allegations—such as those involving Trump’s interactions with the Vice President, state officials, and certain private parties, and his comments to the general public—present more difficult questions. Although we identify several considerations pertinent to classifying those allegations and determining whether they are subject to immunity, that analysis ultimately is best left to the lower courts to perform in the first instance. …

[substantial discussion of the details of the alleged conduct is omitted.]

IV

A

Trump asserts a far broader immunity than the limited one we have recognized. He contends that the indictment must be dismissed because the Impeachment Judgment Clause requires that impeachment and Senate conviction precede a President’s criminal prosecution. The text of the Clause provides little support for such an absolute immunity. It states that an impeachment 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.” Art. I, §3, cl. 7. It then specifies that “the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.” Ibid.

The Clause both limits the consequences of an impeachment judgment and clarifies that notwithstanding such judgment, subsequent prosecution may proceed. By its own terms, the Clause does not address whether and on what conduct a President may be prosecuted if he was never impeached and convicted.

Historical evidence likewise lends little support to Trump’s position. For example, Justice Story reasoned that without the Clause’s clarification that “Indictment, Trial, Judgment and Punishment” may nevertheless follow Senate conviction, “it might be matter of extreme doubt, whether . . . a second trial for the same offence could be had, either after an acquittal, or a conviction in the court of impeachments.” 2 J. Story, Commentaries on the Constitution of the United States §780, p. 251 (1833). James Wilson, who served on the Committee that drafted the Clause and later as a Justice of this Court, similarly concluded that acquittal of impeachment charges posed no bar to subsequent prosecution. See 2 Documentary History of the Ratification of the Constitution 492 (M. Jensen ed. 1979). And contrary to Trump’s contention, Alexander Hamilton did not disagree. The Federalist Papers on which Trump relies, see Brief for Petitioner 17–18, concerned the checks available against a sitting President. Hamilton noted that unlike “the King of Great-Britain,” the President “would be liable to be impeached” and “removed from office,” and “would afterwards be liable to prosecution and punishment.” The Federalist No. 69, at 463; see also id., No. 77, at 520 (explaining that the President is “at all times liable to impeachment, trial, dismission from office . . . and to the forfeiture of life and estate by subsequent prosecution”). Hamilton did not endorse or even consider whether the Impeachment Judgment Clause immunizes a former President from prosecution.

The implication of Trump’s theory is that a President who evades impeachment for one reason or another during his term in office can never be held accountable for his criminal acts in the ordinary course of law. So if a President manages to conceal certain crimes throughout his Presidency, or if Congress is unable to muster the political will to impeach the President for his crimes, then they must forever remain impervious to prosecution. Impeachment is a political process by which Congress can remove a President who has committed “Treason, Bribery, or other high Crimes and Misdemeanors.” Art. II, §4. Transforming that political process into a necessary step in the enforcement of criminal law finds little support in the text of the Constitution or the structure of our Government.

B

The Government for its part takes a similarly broad view, contending that the President enjoys no immunity from criminal prosecution for any action. It maintains this view despite agreeing with much of our analysis.

For instance, the Government does not dispute that Congress may not criminalize Presidential conduct within the President’s “conclusive and preclusive” constitutional authority. And it too accords protection to Presidential conduct if subjecting that conduct to generally applicable laws would “raise serious constitutional questions regarding the President’s authority” or cause a “possible conflict with the President’s constitutional prerogatives.” Indeed, the Executive Branch has long held that view. The Office of Legal Counsel has recognized, for instance, that a federal statute generally prohibiting appointments to “‘any office or duty in any court’” of persons within certain degrees of consanguinity to the judges of such courts would, if applied to the President, infringe his power to appoint federal judges, thereby raising a serious constitutional question. 19 Op. OLC, at 350 (quoting 28 U. S. C. §458); see id., at 350–352. So it viewed such a statute as not applying to the President. Likewise, it has narrowly construed a criminal prohibition on grassroots lobbying to avoid the constitutional issues that would otherwise arise, reasoning that the statute should not “be construed to prohibit the President or executive branch agencies from engaging in a general open dialogue with the public on the Administration’s programs and policies.” Constraints Imposed by 18 U. S. C. §1913 on Lobbying Efforts, 13 Op. OLC 300, 304 (1989); see id., at 304–306.

The Government thus broadly agrees that the President’s official acts are entitled to some degree of constitutional protection. And with respect to the allegations in the indictment before us, the Government agrees that at least some of the alleged conduct involves official acts.

Yet the Government contends that the President should not be considered immune from prosecution for those official acts. On the Government’s view, as-applied challenges in the course of the trial suffice to protect Article II interests, and review of a district court’s decisions on such challenges should be deferred until after trial. If the President is instead immune from prosecution, a district court’s denial of immunity would be appealable before trial.

The Government asserts that the “[r]obust safeguards” available in typical criminal proceedings alleviate the need for pretrial review. First, it points to the Justice Department’s “longstanding commitment to the impartial enforcement of the law,” as well as the criminal justice system’s further protections: grand juries, a defendant’s procedural rights during trial, and the requirement that the Government prove its case beyond a reasonable doubt. Next, it contends that “existing principles of statutory construction and as-applied constitutional challenges” adequately address the separation of powers concerns involved in applying generally applicable criminal laws to a President. Finally, the Government cites certain defenses that would be available to the President in a particular prosecution, such as the public-authority defense or the advice of the Attorney General.

These safeguards, though important, do not alleviate the need for pretrial review. They fail to address the fact that under our system of separated powers, criminal prohibitions cannot apply to certain Presidential conduct to begin with. …

Questions about whether the President may be held liable for particular actions, consistent with the separation of powers, must be addressed at the outset of a proceeding. Even if the President were ultimately not found liable for certain official actions, the possibility of an extended proceeding alone may render him “unduly cautious in the discharge of his official duties.” Fitzgerald, 457 U. S., at 752, n. 32. Vulnerability “to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute.” Id., at 752–753, n. 32. The Constitution does not tolerate such impediments to “the effective functioning of government.” Fitzgerald, 457 U. S., at 751.

As for the Government’s assurances that prosecutors and grand juries will not permit political or baseless prosecutions from advancing in the first place, those assurances are available to every criminal defendant and fail to account for the President’s unique position in the constitutional scheme. We do not ordinarily decline to decide significant constitutional questions based on the Government’s promises of good faith. Nor do we do so today.

C

As for the dissents, they strike a tone of chilling doom that is wholly disproportionate to what the Court actually does today—conclude that immunity extends to official discussions between the President and his Attorney General, and then remand to the lower courts to determine in the first instance whether and to what extent Trump’s remaining alleged conduct is entitled to immunity.

The principal dissent’s starting premise—that unlike Speech and Debate Clause immunity, no constitutional text supports Presidential immunity—is one that the Court rejected decades ago as “unpersuasive.” Fitzgerald, 457 U. S., at 750, n. 31; see also Nixon, 418 U. S., at 705–706, n. 16 (rejecting unanimously a similar argument in the analogous executive privilege context). “[A] specific textual basis has not been considered a prerequisite to the recognition of immunity.” Fitzgerald, 457 U. S., at 750, n. 31. Nor is that premise correct. True, there is no “Presidential immunity clause” in the Constitution. But there is no “‘separation of powers clause’” either. Seila Law, 591 U. S., at 227. Yet that doctrine is undoubtedly carved into the Constitution’s text by its three articles separating powers and vesting the Executive power solely in the President. And the Court’s prior decisions, such as Nixon and Fitzgerald, have long recognized that doctrine as mandating certain Presidential privileges and immunities, even though the Constitution contains no explicit provision for immunity. Neither the dissents nor the Government disavow any of those prior decisions.

The principal dissent then cites the Impeachment Judgment Clause, arguing that it “clearly contemplates that a former President may be subject to criminal prosecution.” But that Clause does not indicate whether a former President may, consistent with the separation of powers, be prosecuted for his official conduct in particular. And the assortment of historical sources the principal dissent cites are unhelpful for the same reason. As the Court has previously noted, relevant historical evidence on the question of Presidential immunity is of a “fragmentary character.” Fitzgerald, 457 U. S., at 752, n. 31; see also Clinton, 520 U. S., at 696–697; cf. Youngstown, 343 U. S., at 634 (Jackson, J., concurring) (noting “the poverty of really useful and unambiguous authority applicable to concrete problems of executive power”). “[T]he most compelling arguments,” therefore, “arise from the Constitution’s separation of powers and the Judiciary’s historic understanding of that doctrine.” Fitzgerald, 457 U. S., at 752, n. 31.

The Court’s prior admonition is evident in the principal dissent’s citations. Some of its cherry-picked sources do not even discuss the President in particular. And none of them indicate whether he may be prosecuted for his official conduct. The principal dissent’s most compelling piece of evidence consists of excerpted statements of Charles Pinckney from an 1800 Senate debate. But those statements reflect only the now-discredited argument that any immunity not expressly mentioned in the Constitution must not exist. And Pinckney is not exactly a reliable authority on the separation of powers: He went on to state on the same day that “it was wrong to give the nomination of Judges to the President”—an opinion expressly rejected by the Framers. Given the Framers’ desire for an energetic and vigorous President, the principal dissent’s view that the Constitution they designed allows all his actions to be subject to prosecution—even the exercise of powers it grants exclusively to him—defies credulity.

Unable to muster any meaningful textual or historical support, the principal dissent suggests that there is an “established understanding” that “former Presidents are answerable to the criminal law for their official acts.” Conspicuously absent is mention of the fact that since the founding, no President has ever faced criminal charges—let alone for his conduct in office. And accordingly no court has ever been faced with the question of a President’s immunity from prosecution. All that our Nation’s practice establishes on the subject is silence.

Coming up short on reasoning, the dissents repeatedly level variations of the accusation that the Court has rendered the President “above the law.” As before, that “rhetorically chilling” contention is “wholly unjustified.” Fitzgerald, 457 U. S., at 758, n. 41. Like everyone else, the President is subject to prosecution in his unofficial capacity. But unlike anyone else, the President is a branch of government, and the Constitution vests in him sweeping powers and duties. Accounting for that reality—and ensuring that the President may exercise those powers forcefully, as the Framers anticipated he would—does not place him above the law; it preserves the basic structure of the Constitution from which that law derives.

The dissents’ positions in the end boil down to ignoring the Constitution’s separation of powers and the Court’s precedent and instead fear mongering on the basis of extreme hypotheticals about a future where the President “feels empowered to violate federal criminal law.” The dissents overlook the more likely prospect of an Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next. For instance, Section 371—which has been charged in this case—is a broadly worded criminal statute that can cover any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government. Virtually every President is criticized for insufficiently enforcing some aspect of federal law (such as drug, gun, immigration, or environmental laws). An enterprising prosecutor in a new administration may assert that a previous President violated that broad statute. Without immunity, such types of prosecutions of ex-Presidents could quickly become routine. The enfeebling of the Presidency and our Government that would result from such a cycle of factional strife is exactly what the Framers intended to avoid. Ignoring those risks, the dissents are instead content to leave the preservation of our system of separated powers up to the good faith of prosecutors.

Finally, the principal dissent finds it “troubling” that the Court does not “designate any course of conduct alleged in the indictment as private.” Despite the unprecedented nature of this case, the significant constitutional questions that it raises, its expedited treatment in the lower courts and in this Court, the lack of factual analysis in the lower courts, and the lack of briefing on how to categorize the conduct alleged, the principal dissent would go ahead and declare all of it unofficial. …

V

This case poses a question of lasting significance: When may a former President be prosecuted for official acts taken during his Presidency? Our Nation has never before needed an answer. But in addressing that question today, unlike the political branches and the public at large, we cannot afford to fixate exclusively, or even primarily, on present exigencies. …

The President enjoys no immunity for his unofficial acts, and not everything the President does is official. The President is not above the law. But Congress may not criminalize the President’s conduct in carrying out the responsibilities of the Executive Branch under the Constitution. And the system of separated powers designed by the Framers has always demanded an energetic, independent Executive. The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts. That immunity applies equally to all occupants of the Oval Office, regardless of politics, policy, or party. The judgment of the Court of Appeals for the D.C. Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

[Concurring opinions of Justice Thomas and Justice Barrett are omitted.]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting.

Today’s decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law. Relying on little more than its own misguided wisdom about the need for “bold and unhesitating action” by the President, the Court gives former President Trump all the immunity he asked for and more. Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent.

I

The indictment paints a stark portrait of a President desperate to stay in power. …

[Substantial discussion of the underlying facts is omitted.

II

The Court now confronts a question it has never had to answer in the Nation’s history: Whether a former President enjoys immunity from federal criminal prosecution. The majority thinks he should, and so it invents an atextual, ahistorical, and unjustifiable immunity that puts the President above the law.

The majority makes three moves that, in effect, completely insulate Presidents from criminal liability. First, the majority creates absolute immunity for the President’s exercise of “core constitutional powers.” This holding is unnecessary on the facts of the indictment, and the majority’s attempt to apply it to the facts expands the concept of core powers beyond any recognizable bounds. In any event, it is quickly eclipsed by the second move, which is to create expansive immunity for all “official act[s].” Whether described as presumptive or absolute, under the majority’s rule, a President’s use of any official power for any purpose, even the most corrupt, is immune from prosecution. That is just as bad as it sounds, and it is baseless. Finally, the majority declares that evidence concerning acts for which the President is immune can play no role in any criminal prosecution against him. That holding, which will prevent the Government from using a President’s official acts to prove knowledge or intent in prosecuting private offenses, is nonsensical.

Argument by argument, the majority invents immunity through brute force. Under scrutiny, its arguments crumble. To start, the majority’s broad “official acts” immunity is inconsistent with text, history, and established understandings of the President’s role. Moreover, it is deeply wrong, even on its own functionalist terms. Next, the majority’s “core” immunity is both unnecessary and misguided. Furthermore, the majority’s illogical evidentiary holding is unprecedented. Finally, this majority’s project will have disastrous consequences for the Presidency and for our democracy.

III

The main takeaway of today’s decision is that all of a President’s official acts, defined without regard to motive or intent, are entitled to immunity that is “at least . . . presumptive,” and quite possibly “absolute.” Whenever the President wields the enormous power of his office, the majority says, the criminal law (at least presumptively) cannot touch him. This official-acts immunity has no firm grounding in constitutional text, history, or precedent. Indeed, those standard grounds for constitutional decisionmaking all point in the opposite direction. No matter how you look at it, the majority’s official-acts immunity is utterly indefensible.

A

The majority calls for a “careful assessment of the scope of Presidential power under the Constitution.” For the majority, that “careful assessment” does not involve the Constitution’s text. I would start there. The Constitution’s text contains no provision for immunity from criminal prosecution for former Presidents. Of course, “the silence of the Constitution on this score is not dispositive.” United States v. Nixon, 418 U. S. 683, 706, n. 16 (1974). Insofar as the majority rails against the notion that a “‘specific textual basis’” is required, it is attacking an argument that has not been made here.

The omission in the text of the Constitution is worth noting, however, for at least three reasons. First, the Framers clearly knew how to provide for immunity from prosecution. They did provide a narrow immunity for legislators in the Speech or Debate Clause. See Art. I, §6, cl. 1 … They did not extend the same or similar immunity to Presidents. Second, some state constitutions at the time of the Framing specifically provided express criminal immunities to sitting governors. The Framers chose not to include similar language in the Constitution to immunize the President… Third, insofar as the Constitution does speak to this question, it actually contemplates some form of criminal liability for former Presidents. The majority correctly rejects Trump’s argument that a former President cannot be prosecuted unless he has been impeached by the House and convicted by the Senate for the same conduct. The majority ignores, however, that the Impeachment Judgment Clause cuts against its own position. That Clause presumes the availability of criminal process as a backstop by establishing that an official impeached and convicted by the Senate “shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.” Art. I, §3, cl. 7. That Clause clearly contemplates that a former President may be subject to criminal prosecution for the same conduct that resulted (or could have resulted) in an impeachment judgment—including conduct such as “Bribery,” Art. II, §4, which implicates official acts almost by definition.

B

Aware of its lack of textual support, the majority points out that this Court has “recognized Presidential immunities and privileges ‘rooted in the constitutional tradition of the separation of powers and supported by our history.’” (quoting Fitzgerald, 457 U. S., at 749). That is true, as far as it goes. Nothing in our history, however, supports the majority’s entirely novel immunity from criminal prosecution for official acts. The historical evidence that exists on Presidential immunity from criminal prosecution cuts decisively against it. For instance, Alexander Hamilton wrote that former Presidents would be “liable to prosecution and punishment in the ordinary course of law.” The Federalist No. 69, p. 452. For Hamilton, that was an important distinction between “the king of Great Britain,” who was “sacred and inviolable,” and the “President of the United States,” who “would be amenable to personal punishment and disgrace.” Id., at 458. In contrast to the king, the President should be subject to “personal responsibility” for his actions, “stand[ing] upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware,” whose State Constitutions gave them some immunity. Id., at 452.

At the Constitutional Convention, James Madison, who was aware that some state constitutions provided governors immunity, proposed that the Convention “conside[r] what privileges ought to be allowed to the Executive.” 2 Records of the Federal Convention of 1787, p. 503 (M. Farrand ed. 1911). There is no record of any such discussion. Ibid. Delegate Charles Pinckney later explained that “[t]he Convention which formed the Constitution well knew” that “no subject had been more abused than privilege,” and so it “determined to . . . limi[t] privilege to what was necessary, and no more.” 3 id., at 385. “No privilege . . . was intended for [the] Executive.” Ibid. Other commentators around the time of the Founding observed that federal officials had no immunity from prosecution, drawing no exception for the President. …

This historical evidence reinforces that, from the very beginning, the presumption in this Nation has always been that no man is free to flout the criminal law. …

C

Our country’s history also points to an established understanding, shared by both Presidents and the Justice Department, that former Presidents are answerable to the criminal law for their official acts. Cf. Chiafalo v. Washington, 591 U. S. 578, 592–593 (2020) (“Long settled and established practice may have great weight in a proper interpretation of constitutional provisions.” Consider Watergate, for example. After the Watergate tapes revealed President Nixon’s misuse of official power to obstruct the Federal Bureau of Investigation’s investigation of the Watergate burglary, President Ford pardoned Nixon. Both Ford’s pardon and Nixon’s acceptance of the pardon necessarily rested on the understanding that the former President faced potential criminal liability. Subsequent special counsel and independent counsel investigations have also operated on the assumption that the Government can criminally prosecute former Presidents for their official acts, where they violate the criminal law. … Indeed, Trump’s own lawyers during his second impeachment trial assured Senators that declining to impeach Trump for his conduct related to January 6 would not leave him “in any way above the law.” …

In sum, the majority today endorses an expansive vision of Presidential immunity that was never recognized by the Founders, any sitting President, the Executive Branch, or even President Trump’s lawyers, until now. …

IV

…

So how does the majority get to its rule? With text, history, and established understanding all weighing against it, the majority claims just one arrow in its quiver: the balancing test in Nixon v. Fitzgerald, 457 U. S. 731 (1983). Yet even that test cuts against it. The majority concludes that official-acts immunity “is required to safeguard the independence and effective functioning of the Executive Branch” by rejecting that Branch’s own protestations that such immunity is not at all required and would in fact be harmful. In doing so, it decontextualizes Fitzgerald’s language, ignores important qualifications, and reaches a result that the Fitzgerald Court never would have countenanced.

… [Fitzgerald held that] a court “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.” … On the facts before it, the Court concluded that a “merely private suit for damages based on a President’s official acts” did not serve those interests. The Court reasoned that the “visibility of [the President’s] office and the effect of his actions on countless people” made him an easy target for civil suits that “frequently could distract [him] from his public duties.” Id., at 753. The public interest in such private civil suits, the Court concluded, was comparatively weak. See id., at 754, n. 37 (“[T]here is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions”). Therefore, the Court held that a former President was immune from such suits.

 In the context of a federal criminal prosecution of a former President, however, the danger to the functioning of the Executive Branch is much reduced. Further, as every member of the Fitzgerald Court acknowledged, the public interest in a criminal prosecution is far weightier. Applying the Fitzgerald balancing here should yield the opposite result. …

The majority’s bare assertion that the burden of exposure to federal criminal prosecution is more limiting to a President than the burden of exposure to civil suits does not make it true, and it is not persuasive. … [F]ederal criminal prosecutions require robust procedural safeguards not found in civil suits. The criminal justice system has layers of protections that filter out insubstantial legal claims, whereas civil litigation lacks analogous checks.

To start, Justice Department policy requires scrupulous and impartial prosecution, founded on both the facts and the law. The grand jury provides an additional check on felony prosecutions, acting as a buffer or referee between the Government and the people, to ensure that the charges are well founded. If the prosecution makes it past the grand jury, then the former President still has all the protections our system provides to criminal defendants. If the former President has an argument that a particular statute is unconstitutional as applied to him, then he can move to dismiss the charges on that ground. …

I am 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. … The concern that countless (and baseless) civil suits would hamper the Executive may have been justified in Fitzgerald, but a well-founded federal criminal prosecution poses no comparable danger to the functioning of the Executive Branch.

… At the same time, the public interest in a federal criminal prosecution of a former President is vastly greater than the public interest in a private individual’s civil suit. All nine Justices in Fitzgerald explicitly recognized that distinction. The five-Justice majority noted that there was a greater public interest “in criminal prosecutions” than in “actions for civil damages.” 457 U. S., at 754, n. 37. Chief Justice Burger’s concurrence accordingly emphasized that the majority’s immunity was “limited to civil damages claims,” rather than “criminal prosecution.” Id., at 759–760. The four dissenting Justices agreed that a “contention that the President is immune from criminal prosecution in the courts,” if ever made, would not “be credible.” Id., at 780 (White, J., dissenting). At the very least, the Fitzgerald Court did not expect that its balancing test would lead to the same outcome in the criminal context.

The public’s interest in prosecution is transparent: a federal prosecutor herself acts on behalf of the United States. Even the majority acknowledges that the “[f]ederal criminal laws seek to redress a wrong to the public as a whole, not just a wrong to the individual”, such that there is “a compelling ‘public interest in fair and effective law enforcement”. … When Presidents use the powers of their office for personal gain or as part of a criminal scheme, every person in the country has an interest in that criminal prosecution. The majority overlooks that paramount interest entirely.

V

Separate from its official-acts immunity, the majority recognizes absolute immunity for “conduct within [the President’s] exclusive sphere of constitutional authority.” Feel free to skip over those pages of the majority’s opinion. With broad official-acts immunity covering the field, this ostensibly narrower immunity serves little purpose. In any event, this case simply does not turn on conduct within the President’s “exclusive sphere of constitutional authority,” and the majority’s attempt to apply a core immunity of its own making expands the concept of “core constitutional powers” beyond any recognizable bounds. …

VII

Today’s decision to grant former Presidents immunity for their official acts is deeply wrong. As troubling as this criminal immunity doctrine is in theory, the majority’s application of the doctrine to the indictment in this case is perhaps even more troubling. In the hands of the majority, this new official-acts immunity operates as a one-way ratchet. First, the majority declares all of the conduct involving the Justice Department and the Vice President to be official conduct, yet it refuses to designate any course of conduct alleged in the indictment as private, despite concessions from Trump’s counsel…. If the majority’s sweeping conception of “official acts” has any real limits, the majority is unwilling to reveal them in today’s decision. Second, the majority designates certain conduct immune while refusing to recognize anything as prosecutable. It shields large swaths of conduct involving the Justice Department with immunity…

Remarkably, the majority goes further and declines to deny immunity even for the allegations that Trump organized fraudulent elector slates, pressured States to subvert the legitimate election results, and exploited violence at the Capitol to influence the certification proceedings. It is not conceivable that a prosecution for these alleged efforts to overturn a Presidential election, whether labeled official or unofficial under the majority’s test, would pose any dangers of intrusion on the authority and functions of the Executive Branch, and the majority could have said as much. Instead, it perseverates on a threshold question that should be immaterial.

Looking beyond the fate of this particular prosecution, the long-term consequences of today’s decision are stark. The Court effectively creates a law-free zone around the President, upsetting the status quo that has existed since the Founding. This new official-acts immunity now “lies about like a loaded weapon” for any President that wishes to place his own interests, his own political survival, or his own financial gain, above the interests of the Nation. Korematsu v. United States, 323 U. S. 214, 246 (1944) (Jackson, J., dissenting). The President of the United States is the most powerful person in the country, and possibly the world. When he uses his official powers in any way, under the majority’s reasoning, he now will be insulated from criminal prosecution. Orders the Navy’s Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.

Let the President violate the law, let him exploit the trappings of his office for personal gain, let him use his official power for evil ends. Because if he knew that he may one day face liability for breaking the law, he might not be as bold and fearless as we would like him to be. That is the majority’s message today.

Even if these nightmare scenarios never play out, and I pray they never do, the damage has been done. The relationship between the President and the people he serves has shifted irrevocably. In every use of official power, the President is now a king above the law. …

With fear for our democracy, I dissent.

[A separate dissenting opinion of Justice Jackson is omitted.]

1. [Editor’s note: This opinion has been edited for purposes of space and readability. Deletions are indicated by ellipses; alterations are indicated by square brackets. Material deletions are accompanied by explanatory notes. Citations and footnotes have generally been shortened or omitted without notation.] [↑](#footnote-ref-1)