UNIVERSITY OF PITTSBURGH LAW REVIEW
Vol. 87 ● Spring 2026

ARTICLES

AMERICA'S FAILURE TO HOLD PRESIDENT TRUMP ACCOUNTABLE FOR THE CRIMES OF JANUARY 6: A STORY OF THE JUSTICE DEPARTMENT'S DELAY, THE SPECIAL COUNSEL'S BAD CHOICES, AND THE SUPREME COURT'S MISGUIDED IMMUNITY DECISION

Albert W. Alschuler

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

(cc) BY-NC-ND

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.

Pitt Open Library Publishing
This journal is published by Pitt Open Library Publishing.

ARTICLES

AMERICA'S FAILURE TO HOLD PRESIDENT TRUMP ACCOUNTABLE FOR THE CRIMES OF JANUARY 6: A STORY OF THE JUSTICE DEPARTMENT'S DELAY, THE SPECIAL COUNSEL'S BAD CHOICES, AND THE SUPREME COURT'S MISGUIDED IMMUNITY DECISION

Albert W. Alschuler*

Table of Contents

INTRODUCTION 556

PART ONE
THE PROSECUTION

I. A HESITANT DEPARTMENT OF JUSTICE 560
A. Attorney General Garland's Pledge 560
B. The State of the Evidence on the Day Garland Took Office ... 563
1. Trump's Big Lie 563
2. The December 18 White House Meeting 564

* Julius Kreeger Professor Emeritus, The University of Chicago Law School. I am grateful to Randall Eliason for perceptive and extremely helpful comments on two drafts of this manuscript. I am also grateful to Bryan Lammon, Bruce Shirk, Charles Tyler, Malcolm Feeley, and Linda Alschuler for help with specific issues and questions.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

3. The Raffensperger Call 564
4. Trump's Effort to Enlist the Department of Justice 565
5. The Fake Electors 565
6. The Rally on January 6 566
7. Trump's Refusal to Ask the January 6 Rioters to Desist and His Mid-Riot Tweet About Pence 568

C. The Investigation 570

II. THE JUDGMENT CALLS OF SPECIAL COUNSEL SMITH 580

A. Omitting Trump's Most Serious Offense from the Indictment 580
1. Ways of Violating Section 2383 580
2. The Indictment's Charges 581
a. Lawfare and Legalese 581
b. Conspiracy to Defraud the United States 584
c. Obstructing an Official Proceeding 585
d. Conspiracy Against Rights 586
e. Why Omit the Worst Crime? 587
3. Disqualification From Holding Office 587
4. The Special Counsel's Reasons 591
a. The *Brandenburg* Standard 592
b. Defining "Insurrection" 593
c. Proving Trump's Criminal Intent 596
5. Did the Omission Make a Difference? 598
6. Saying Too Much 600

B. The Special Counsel's Brief and Argument in the Supreme Court 601
1. The Brief: Failing to Distinguish Immunities from Defenses and Declaring Some Presidential Powers "Preclusive" ... 601
2. The Argument: Old Adversaries Meet Again 607

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

PART TWO
THE SUPREME COURT'S ASTONISHER DECISION

III. PROCEEDING WITHOUT JURISDICTION 614

IV. THE COURT'S FAILURE TO ADDRESS THE ISSUE BEFORE IT 616

A. Adjudicating Immunity Claims 616

B. Close-Illusion Legerdemain: Making Trump's Alleged Crimes Disappear from View by Diverting Attention to His Alleged Manner and Means 620

V. THE SUPREME COURT'S FRAMEWORK 625

A. Private or Official 625

B. Core or Noncore 627

C. The Core Error: Why Absolute Immunity Is Unjustified 633

D. Presumptive Immunity 640

E. Selling Pardons 641

VI. APPLYING THE STANDARDS 645

PART THREE
CONSEQUENCES

VII. TRUMP 2.0 650

A. What Crimes and What Immunities? 651

1. Retaliatory Firings 652

2. Retaliatory Investigations 657

3. Deporting and Imprisoning People Without Hearings 660

4. Killing Suspected Drug Traffickers 660

B. What Prosecutions? 665

VIII. CONCLUSION: A CHANGED COURT AND A CHANGED AMERICA 667

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

INTRODUCTION

The Supreme Court's decision in *Trump v. United States*[1] was an astonisher. Although the dictionaries don't recognize that word, Abraham Lincoln used it to describe another Supreme Court decision that, even after *Trump*, ranks as the worst of all time, *Dred Scott v. Sandford*.[2] Lincoln's word fits the *Trump* decision too.

Before this decision, the general understanding was the one Justice Brett Kavanaugh voiced when asked about presidential immunity at his Senate confirmation hearing: "I do not think anyone thinks of immunity. And why not? No one is above the law. That is just such a foundational principle under the Constitution and equal justice under law."[3]

When Trump was tried by the Senate following his impeachment for inciting the violence of January 6, 2021, his lawyers took the same view. One assured the Senators that "no former officeholder is immune . . . [from] investigation, prosecution, and punishment."[4] Another added: "[T]he text of the Constitution . . . makes very clear that a former President is subject to criminal sanction after his Presidency for any illegal acts he commits."[5]

The leader of Trump's party in the Senate, Senator Mitch McConnell, took that view as well. Because McConnell believed the Senate lacked jurisdiction to try a President who was no longer in office, he did not join the fifty-seven Senators who

[1] 603 U.S. 593 (2024) [hereinafter cited without cross-reference as *Trump*, 603 U.S.].

[2] Dred Scott v. Sandford, 60 U.S. 393, 403–04 (1857) (holding that "the descendants of Africans who were imported into this country and sold as slaves" can "claim none of the rights and privileges which [the Constitution] provides for and secures to citizens of the United States"); *see* Abraham Lincoln, *Speech at Chicago, Illinois*, *in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN 485, 495 (Roy P. Basler ed., 1953).

[3] *What Conservative Justices Said About Immunity—Before Giving it to Trump*, WASH. POST (July 2, 2024), https://www.washingtonpost.com/politics/2024/07/02/what-conservative-justices-said-about-immunity-before-giving-it-trump/ [https://perma.cc/2FEP-QEX6]. Kavanaugh evidently changed his mind. He joined the majority opinion in *Trump*.

[4] 167 CONG. REC. S607 (daily ed. Feb. 9, 2021).

[5] *Id.* at S693 (daily ed. Feb. 12, 2021). Dissenting in *Trump*, Justice Sotomayor quoted other statements by Trump's lawyers to the same effect. *See Trump*, 603 U.S. at 665–66 (Sotomayor, J., dissenting). No President before Trump had asserted immunity from criminal prosecution. In the White House tapes case, President Nixon's lawyers assured the Supreme Court that he would be subject to prosecution after leaving office. Brief for Respondent, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766 & 73-1834), 1974 WL 174855, at *98.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

voted in favor of Trump's conviction.[6] McConnell, however, acknowledged that Trump was "morally responsible" for the attack on the Capitol. He said that the rioters who "beat and bloodied our own police[,] . . . stormed the Senate floor[,] . . . tried to hunt down the Speaker of the House[,] . . . built a gallows[,] and chanted about murdering the Vice President . . . did this because they had been fed wild falsehoods by the most powerful man on Earth—because he was angry he'd lost an election."[7]

McConnell then noted that the former President "didn't get away with anything yet."[8] He said: "Justice Story specifically reminded that while former officials were not eligible for impeachment or conviction, they were 'still liable to be tried and punished in the ordinary tribunals of justice.'"[9]

This Article offers a retrospective on the Supreme Court's immunity decision and on the events that led to it. Section I describes the Justice Department's reluctance to prosecute Trump "in the ordinary tribunals of justice" following his Senate trial. A serious Justice Department investigation of the former President did not begin until more than a year after Attorney General Merrick Garland took office.

Section II criticizes some judgment calls of Special Counsel Jack Smith. Section II.A focuses on his decision not to charge Trump with aiding the insurrection of January 6 and to charge only crimes of conspiracy, fraud, and obstruction instead. Omitting an insurrection charge facilitated the Supreme Court's decision in *Trump v. Anderson* that Trump was eligible to become President again, and the Special Counsel's omission also might have affected the Court's ruling on Trump's

---

[6] Almost all of the forty-three Senators who voted not to convict maintained that the Senate lacked jurisdiction to try a former President. Like McConnell, many of them offered no other reason for their votes. *See* Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JUST SEC. (Feb. 15, 2021), https://www.justsecurity.org/74725/in-their-own-words-the-43-republicans-explanations-of-their-votes-not-to-convict-trump-in-impeachment-trial/ [https://perma.cc/R8GP-Q5NY]. The vote in the Senate fell 10 votes short of the two-thirds majority needed to convict and bar Trump from holding any office of honor, trust, or profit under the United States.

[7] *Read McConnell's Remarks on the Senate Floor Following Trump's Acquittal*, CNN: POLITICS (Feb. 13, 2021, 5:50 PM EST), https://www.cnn.com/2021/02/13/politics/mcconnell-remarks-trump-acquittal/index.html [https://perma.cc/9HDH-UHF6].

[8] Kevin Breuninger, *McConnell Votes for Acquittal, but Then Says There's 'No Question' Trump is Responsible for Riot*, CNBC: POLITICS (Feb. 13, 2021, 5:10 PM EST), https://www.cnbc.com/2021/02/13/mcconnell-votes-for-acquittal-but-says-no-question-trump-responsible-for-riot.html [https://perma .cc/3CEZ-JCHX].

[9] *Read McConnell's Remarks on the Senate Floor Following Trump's Acquittal*, *supra* note 7. The language McConnell quoted appeared in 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 801 (1833).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

immunity from criminal prosecution. The reasons the Special Counsel's *Final Report* gave for not including this charge were unconvincing.

Section II.B assesses the Special Counsel's brief and argument in the Supreme Court. It was the Special Counsel, not Trump's lawyers, who argued that core presidential powers entitle presidents to commit whatever crimes they like without sanction. This argument proved disastrous.

The Article then turns from the Justice Department's investigation and prosecution to the Court's "astonisher" decision. Section III contends that the Court lacked jurisdiction to decide Trump's case. This case came before the Court on a pretrial appeal because the defendant maintained that presidential immunity barred his trial for the crimes charged. At argument, however, Trump's counsel acknowledged that several of Trump's alleged acts were not immune. Because these acts would have allowed a trial to proceed on all counts, no exception to the final decision rule applied, and the Court should have dismissed Trump's appeal.

Section IV contends that the Court not only proceeded without jurisdiction but also ignored the substantive issue before it—whether Trump was immune from prosecution for the crimes with which he was charged. Disregarding these crimes altogether, the Court treated the alleged "Manner and Means" of Trump's conspiracy as though they were crimes themselves. The Court seemed unaware that its entire decision was devoted to evidentiary issues rather than to whether Trump was immune from prosecution.

The Court's piecemeal consideration of Trump's alleged acts distorted its analysis. The central issue was not whether the separate prosecution of these acts—acts that were not alleged to be crimes—would "chill" the appropriate exercise of power by future Presidents. It was whether prosecution for the conspiracy alleged in the indictment would do so. Would the prosecution of Donald Trump for conspiring to retain power through fraud and the obstruction of a congressional proceeding be likely to make law-abiding Presidents too cautious?

Section V examines the Court's framework for determining whether the acts alleged by the government were immune from use as evidence or, as the Court erroneously saw the case, from prosecution as distinct crimes.

The first step in the Court's analysis was to assess whether the alleged acts were private or official. The Court not only classified as "official" all acts "not manifestly or palpably beyond [presidential] authority" but also forbade any consideration of a President's motives. When a President has used executive-branch personnel or machinery to commit a crime or when his alleged behavior sufficiently resembled something Presidents had traditionally done or were authorized to do, he apparently was entitled to either "presumptive" or "absolute" immunity. A confession that he acted with criminal intent and was motivated by personal greed

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

or hatred would be irrelevant and inadmissible. Section V.A concerns this initial stage of analysis.

Section V.B concerns the second stage. Upon finding an act "official," a court must determine whether it involved the use of a "core" or a "noncore" power. The Court ruled that every exercise of a "core" presidential power is entitled to "absolute" immunity, and it said that the exercise of a "noncore" power might be entitled to absolute immunity as well. Setting that question aside, it ruled that acts pursuant to noncore powers are entitled to at least "presumptive" immunity.

Section V.C criticizes the Court's conclusion that some provisions of the Constitution grant Presidents the power to commit serious crimes without risk of criminal punishment. This conclusion, drawn from the Special Counsel's brief, is unsupported by historical evidence, is inconsistent with the constitutional text, and is morally repugnant. The Supreme Court's ruling that the Constitution's grant of "core" powers authorizes presidents to commit murder, treason, and insurrection defames the Framers of that document.

Section V.D considers the Court's standard for determining whether a President's criminal use of a "noncore" power is presumptively immune. This standard allows the government to prosecute only when it can show that prosecution would pose "no dangers of intrusion on the authority and functions of the Executive Branch." Under this standard, legal restraint vanishes when prosecution poses even a slight risk of overdeterrence. In the Court's view, an outside chance of inhibiting a legitimate exercise of presidential power outweighs the benefit of encouraging Presidents to refrain from crime.

Section V.E considers a hypothetical case that both Chief Justice John Roberts' majority opinion and a separate opinion by Justice Amy Coney Barrett discussed—that of a President who grants a pardon in exchange for a bribe. Both writers believed that their opinions would allow the prosecution of this President, thereby revealing that the justices in the majority did not understand the standard they approved.

Section VI examines the Court's application of its standards to the acts alleged in *Trump*. The availability of presidential immunity apparently depends on whom a corrupt President tries to enlist as accomplices. When Trump allegedly lied to induce state officials to refuse to certify lawful electoral votes, the Court said that his conduct might be private campaign conduct and subject to prosecution. When, however, Trump instructed his Acting Attorney General to tell the same lies to the same state officials, his act was no longer campaign conduct and no longer private. It was now official, core, and absolutely immune. And when Trump repeated his lies to the Vice President and pressed him to reject certified electoral votes, his conduct was official but not core. This conduct could be prosecuted if the proceeding would pose no danger of intrusion on the functioning of the executive branch.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Section VII considers whether and how much the decision in *Trump* might have encouraged the rampant lawlessness of the second Trump administration.

Section VIII offers some thoughts about how the *Trump* decision might affect the public as well as the presidency.

PART ONE
THE PROSECUTION

I. A HESITANT DEPARTMENT OF JUSTICE

A. Attorney General Garland's Pledge

One day before the first anniversary of the attack on the Capitol, Attorney General Merrick Garland addressed Justice Department employees in the department's Great Hall.[10] He recounted the horrors of January 6, invited a moment of silence for fallen police officers, and noted that the department had already "charged more than 725 defendants, in nearly all 50 states and the District of Columbia, for their roles in the . . . attack."[11] Garland then declared: "The Justice Department remains committed to holding all January 6 perpetrators, at any level, accountable under law . . . . We will follow the facts wherever they lead."[12]

Commentators applauded Garland's pledge, but they seemed not to notice what he said next:

> Everyone in this room and on these screens is familiar with the way we conduct investigations, and particularly complex investigations. We build investigations by laying a foundation. We resolve more straightforward cases first because they provide the evidentiary foundation for more complex cases. Investigating the more overt crimes generates linkages to less overt ones. Overt actors and the

[10] *Attorney General Merrick B. Garland Delivers Remarks on the First Anniversary of the Attack on the Capitol*, U.S. DEPT. OF JUST. ARCHIVES (Jan. 5, 2022), https://www.justice.gov/archives/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-first-anniversary-attack-capitol [https://perma.cc/45LZ-APRM]. The Attorney General's remarks were transmitted to other department employees throughout the United States.

[11] *Id.* Federal courts ultimately convicted 1270 participants in the attack on the Capitol. On the day Trump was inaugurated for a second term, he pardoned 1256 of these offenders and commuted the sentences of the remaining fourteen to the time they had already served. The Justice Department dismissed hundreds of other cases in which alleged participants were awaiting trial or sentencing. *See List of Cases of the January 6 United States Capitol Attack*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_cases_of_the_January_6_United_States_Capitol_attack [https://perma.cc/R27Z-34AU] (last visited Mar. 15, 2026).

[12] *Attorney General Merrick B. Garland Delivers Remarks on the First Anniversary of the Attack on the Capitol*, *supra* note 10.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

> evidence they provide can lead us to others who may also have been involved. And that evidence can serve as the foundation for further investigative leads and techniques. In circumstances like those of January 6th, a full accounting does not suddenly materialize.[13]

Garland pledged to follow the facts wherever they led while making it almost certain they would not lead anywhere. Did he imagine that the attack on the Capitol was the work of a hierarchical crime family in which a Soldier could incriminate a Capo, who could incriminate an Underboss, who could incriminate the Godfather or Don? Finding and charging 725 widely dispersed foot soldiers within a year was impressive and important, but there was little reason to believe it would lay a foundation for investigating and prosecuting former President Trump.

That foundation was in fact in place on Garland's first day as Attorney General. The following section reviews some of the evidence that was public knowledge when he took the oath of office on March 11, 2021.

You may wish to skim this section. Most of the facts it recites are familiar, and I review them primarily to show how much was known at the time Garland came aboard. If your memory of the lawlessness of the first Trump administration has begun to fade, however (perhaps because it has been crowded out by the lawlessness of the second), you may find this review helpful.

My purpose in the discussion that follows is primarily to set the historical record straight. Despite Garland's pronouncement about following the evidence wherever it might lead, he initially did little to investigate and prosecute Trump's likely crimes.

There were plausible reasons for proceeding slowly. Prosecuting a former President would have antagonized millions of his dedicated followers and polarized the nation further. A trial would have dominated public attention and might have distracted from the goals of a new administration.[14] But the lesson to be drawn from

---

[13] *Id.*

[14] Immediately after Trump's acquittal by the Senate, it might have seemed that the discredited former President posed no threat of further criminality. But a few months later, Trump indicated he would seek the presidency in 2024, *see infra* note 65, and, from that time on, he ranked well above other prospective candidates in Republican primary polling. *See* Alexander Hutzler, *Poll Shows Donald Trump Leading 2024 GOP Field by More Than 30 Points, DeSantis in Second*, NEWSWEEK (updated July 21, 2021, 12:57 PM EDT), https://www.newsweek.com/poll-shows-donald-trump-leading-2024-gop-field-more-30-points-desantis-second-1611620 [https://perma.cc/7RAV-8VTN]; *Nationwide Opinion Polling for the 2024 Republican Party Presidential Primaries*, WIKIPEDIA, https://en.wikipedia.org/wiki/Nationwide_

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Garland's hesitation may be that enforcing the law is more imperative than he realized. If the nation's chief prosecutor had sought justice not only for the people who attacked the Capitol but also for the instigator of their crimes, history might have been different.

I recognize that the Justice Department might not have obtained a verdict before Trump's second election to the presidency put him in a position to end his prosecution. Perhaps the department could not even have brought Trump to trial. If, as some suspect, the Supreme Court was determined to approve a complex form of presidential immunity that would require elaborate pretrial hearings and ensure at least two full rounds of pretrial appeals, that procedure coupled with the defendant's efforts to delay things might have saved him from the judgment of his peers.[15] But one theme of this Article is that unfortunate choices by Attorney General Garland and Special Counsel Smith made the ruling in *Trump* more likely. Even if greater prosecutorial expedition alone would not have altered history, greater expedition coupled with better charging decisions and better arguments might have.

It has been said that the American people got the government they deserved when, knowing of Trump's part in the January 6 attack, they elected him President a second time. But it might also be said that America got the lawless government it deserved when its legal system proved incapable of bringing Trump to trial within four years for a crime that most House Members and most Senators already had concluded he committed. A jury that considered all the evidence would have been better able to judge Trump's guilt than voters affected by other issues and guided in part by internet influencers, partisan broadcasters, and the fact-free rhetoric of the former President himself. Delay, unfortunate prosecutorial choices, and an "astonisher" Supreme Court decision all contributed to the fact that no trial was even on the horizon at the time voters returned Trump to the White House. Quantifying the effects of these possible causes of the failure of American criminal justice is probably impossible.[16]

---

opinion_polling_for_the_2024_Republican_Party_presidential_primaries [https://perma.cc/AL3C-9MNM] (last visited Apr. 19, 2026). Nothing in Trump's past warranted dismissing the possibility of criminal recidivism.

[15] *See infra* text accompanying notes 376–79.

[16] President Trump's verbal abuse of Attorney General Garland and Special Counsel Smith, the threats of violence these officials endured, and the unfounded accusations of "weaponization" made by Trump and other MAGA politicians make it uncomfortable to second-guess their judgments. The careers of Garland and Smith leave no doubt of their dedication, impartiality, and integrity. *See Merrick Garland*, WIKIPEDIA, https://en.wikipedia.org/wiki/Merrick_Garland [https://perma.cc/P92N-3W9J] (last visited

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

B. The State of the Evidence on the Day Garland Took Office

1. Trump's Big Lie

After President Trump lost a presidential election on November 3, 2020, he proclaimed that he had won and advanced numerous claims of election fraud for which he offered no significant evidence.[17] His supporters filed sixty-two lawsuits challenging the election results and prevailed in only one, a case that did not involve a claim of fraud.[18] One judge spoke of "strained legal arguments and speculative accusations,"[19] another of a complaint "sorely wanting of relevant or reliable evidence,"[20] and a third of "nothing but speculation or conjecture."[21]

On December 1, 2020, Attorney General William Barr told an interviewer that the Justice Department had seen no evidence of outcome-determinative fraud. Both the Justice Department and the Department of Homeland Security had investigated the only significant allegation of systemic fraud, the claim that voting machines had been programmed to alter election results. "So far," Barr said, "we haven't seen anything to substantiate that."[22] (Barr resigned two weeks later.[23] White House aide

---

Apr. 12, 2026); *Jack Smith (lawyer)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Jack_Smith_(lawyer) [https:// perma.cc/FQV4-XZML] (last visited Apr. 12, 2026). Nevertheless, a full account of the decision in *Trump* and of Trump's triumph requires a review of their performance as lawyers, prosecutors, and public officials.

[17] *See Remarks by President Trump on the Election*, WHITE HOUSE ARCHIVES (Nov. 5, 2020, 6:48 PM EST), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-election/ [https://perma.cc/3XJ3-VZ5H].

[18] H.R. REP. NO. 117-663, at 210–13 (2022).

[19] Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 906 (M.D. Pa. 2020).

[20] Bowyer v. Ducey, 506 F. Supp. 3d 699, 706 (D. Ariz. 2020).

[21] King v. Whitmer, 505 F. Supp. 3d 720, 738 (E.D. Mich. 2020).

[22] Evan Perez & Devan Cole, *William Barr Says There is No Evidence of Widespread Fraud in Presidential Election*, CNN: POLITICS (Dec. 1, 2020, 5:47 PM EST), https://www.cnn.com/2020/12/01/politics/william-barr-election-2020 [https://perma.cc/BY29-96F7]; *see also infra* text accompanying notes 424–29 (describing the findings of the Cybersecurity and Infrastructure Security Agency in the Department of Homeland Security).

[23] Allie Malloy et al., *Attorney General William Barr Resigns*, CNN: POLITICS (Dec. 15, 2020, 4:30 AM EST), https://www.cnn.com/2020/12/14/politics/william-barr-out-as-attorney-general [https://perma.cc/D6YY-XLDR].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Cassidy Hutchinson later testified that the news of Barr's interview so enraged Trump that he threw a plate of food at a wall. She and a valet wiped up the ketchup.[24])

2. The December 18 White House Meeting

A raucous, widely reported White House meeting on December 18, 2020, included President Trump, Sidney Powell, Rudolph Giuliani, Michael Flynn, White House Chief of Staff Mark Meadows, White House Counsel Pat Cipollone, and others.[25] Powell had alleged a Venezuelan plot to rig voting machines, and the discussion focused on whether to seize voting machines and appoint her special counsel in charge of investigating election fraud.[26] Cipollone insisted that the seizure would be illegal, and he and Meadows strongly opposed the plan. It was not implemented.

3. The Raffensperger Call

On January 2, 2021, President Trump called Georgia Secretary of State Brad Raffensperger.[27] He recited multiple claims of fraud, asserting, for example, that at least "a couple hundred thousand" signatures had been forged in Fulton County, that close to 5,000 dead people had voted, and that a tape showed Ruby Freeman, a "professional vote scammer and hustler," and her daughter stuffing ballot boxes with at least 18,000 phony ballots. (An alleged co-conspirator of Trump who had no civil and criminal immunity made the same allegation about Freeman and her daughter, and a jury later ordered him to pay the pair $148 million in compensatory and punitive damages.[28])

---

[24] Nicholas Wu, *'Ketchup Dripping Down the Wall': 5 Stunning Moments from Cassidy Hutchinson's Jan. 6 Testimony*, POLITICO (June 28, 2022, 4:40 PM EST), https://www.politico.com/news/2022/06/28/january-6-hearings-cassidy-hutchinson-key-moments-video-analysis-00042914 [https://perma.cc/H2XF-BER8].

[25] *See* Maggie Haberman & Zolan Kanno-Youngs, *Trump Weighed Naming Election Conspiracy Theorist as Special Counsel*, N.Y. TIMES (Jan. 18, 2021), https://www.nytimes.com/2020/12/19/us/politics/trump-sidney-powell-voter-fraud.html [https://perma.cc/6NZ6-9Y8V].

[26] Trump also asked about Flynn's proposal to impose martial law and use the military to rerun the election. *Id.*

[27] Amy Gardner & Paulina Firozi, *Here's the Full Transcript and Audio of the Call Between Trump and Raffensperger*, WASH. POST: POLITICS (Jan. 5, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html [https://perma.cc/WL96-WJ3T].

[28] *See* Daniel Barnes, Ryan K. Reilly & Dareh Gregorian, *Rudy Giuliani Hit With $148M Verdict for Defaming Two Georgia Election Workers*, NBC NEWS (Dec. 15, 2023, 4:21 PM EST), https://www.nbcnews.com/politics/politics-news/rudy-giuliani-hit-148m-verdict-defaming-two-georgia-election-workers-rcna129807 [https://perma.cc/N5XS-W967].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Raffensperger and other Georgia officials on the call responded that they had investigated Trump's claims and had found no evidence to support them. Trump nevertheless insisted: "I just want you to find 11,780 votes." That number was one vote above the margin of Trump's loss in Georgia. Trump reiterated this request in almost identical language six times. "I only need 11,000 votes. Fellas, I need 11,000 votes. Give me a break." The President then added a threat to his request: "[Y]ou know what they did and you're not reporting it. That's a criminal, that's a criminal offense. And you can't let it happen."

A day after the call, Trump tweeted about it. In response to his misrepresentations, Raffensperger released a tape.[29] The House of Representatives described the call in its Article of Impeachment.[30]

4. Trump's Effort to Enlist the Department of Justice

After Trump's Senate trial but before Garland took office, the *New York Times* reported that Trump had met with Assistant Attorney General Jeffrey Clark and that Clark had drafted a letter to Georgia officials claiming falsely that the Department was investigating election irregularities and had identified significant concerns.[31] According to the *Times*, Acting Attorney General Jeffrey Rosen refused to send Clark's letter, and Trump then threatened to appoint Clark as Acting Attorney General in place of Rosen. The story described a White House meeting on January 3 at which a threat of mass resignations by Justice Department officials and strong opposition by White House Counsel Cipollone dissuaded Trump from firing Rosen.

5. The Fake Electors

Nine days before Garland took office, *American Oversight* reported that, through a Freedom of Information request to the National Archives, it had obtained copies of seven fake electoral certificates that Trump supporters in Arizona, Georgia, Michigan, New Mexico, Nevada, Pennsylvania, and Wisconsin had submitted. It published these certificates along with the signatures of the purported electors.[32]

---

[29] *Trump-Raffensperger Phone Call*, WIKIPEDIA, https://en.wikipedia.org/wiki/Trump%E2%80%93Raffensperger_phone_call [https://perma.cc/2439-CPF6] (last visited Mar. 15, 2026).

[30] Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors, H.R. Res. 24, 117th Cong. (2021).

[31] Katie Benner, *Trump and Justice Department Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES (Jan. 22, 2021, updated Oct. 13, 2022), https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html [https://perma.cc/MHG7-QA4H].

[32] *American Oversight Obtains Seven Phony Certificates of Pro-Trump Electors*, AM. OVERSIGHT: NEWS (Mar. 2, 2021), https://americanoversight.org/american-oversight-obtains-seven-phony-certificates-of-pro-trump-electors/ [https://perma.cc/MZ8H-GEBM].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

6. The Rally on January 6

On December 19, 2020, at 1:42 a.m., just after the White House meeting about whether to make Sidney Powell special counsel had ended, a presidential tweet called for a "big protest in D.C. on January 6th" and added: "Be there, will be wild!"[33] January 6 was the day a joint session of Congress would count the electoral votes for President.[34]

Early on the morning of January 6, Trump tweeted: "If Vice President @Mike_Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect and even fraudulent numbers . . . . Mike can send it back!"[35]

At noon, Trump addressed a crowd on the Ellipse behind the White House.[36] He estimated his audience at 250,000 people. His hour-long remarks included a recitation of more than thirty claims of fraud—claims that the courts, his former Attorney General, his Acting Attorney General, officials on the Raffensperger call, and many others had told him were unfounded. He declared: "With only three of the seven states in question, we win the presidency of the United States."

Among his claims were:

> In Pennsylvania, you had 205,000 more votes than you had voters.
>
> According to eyewitness testimony, Postal Service workers in Wisconsin were . . . instructed to illegally backdate approximately 100,000 ballots.
>
> In Fulton County, Republican poll watchers were ejected, in some cases, physically from the room under the false pretense of a pipe burst. . . . Then election officials pull boxes, Democrats, and suitcases of ballots out from under a table. You all saw it on television, totally fraudulent. And illegally scanned them for nearly two hours, totally unsupervised. Tens of thousands of votes.

---

[33] *Tweets of December 19, 2020*, THE AM. PRESIDENCY PROJECT: DONALD J. TRUMP (1ST TERM) (Jan. 8, 2021), https://www.presidency.ucsb.edu/documents/tweets-december-19-2020 [https://perma.cc/WX69-9FYK].

[34] *See* 3 U.S.C. § 15 (a provision of the Electoral Count Act of 1887).

[35] *Tweets of January 6, 2021*, THE AM. PRESIDENCY PROJECT: DONALD J. TRUMP (1ST TERM) (Jan. 8, 2021), https://www.presidency.ucsb.edu/documents/tweets-january-6-2021 [https://perma.cc/8AET-ECW9].

[36] Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR: POLITICS (Feb. 10, 2021, 2:43 PM EST), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial [https://perma.cc/VD4K-BPMQ].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

> In the state of Arizona, over 36,000 ballots were illegally cast by non-citizens. More than 22,000 ballots were returned before they were ever supposedly mailed out. They returned, but we haven't mailed them yet.
>
> In Detroit, turnout was 139% of registered voters. Think of that. So you had 139% of the people in Detroit voting.
>
> In addition, there is the highly troubling matter of Dominion Voting Systems. In one Michigan county alone, 6,000 votes were switched from Trump to Biden. The Dominion Voting Machines employed in Fulton County had an astronomical and astounding 93.67% error rate. It's only wrong 93% of the time.

A second theme of Trump's remarks was that Vice President Mike Pence could stop the steal by returning electoral ballots to the states:

> I hope Mike is going to do the right thing. I hope so. I hope so. Because if Mike Pence does the right thing, we win the election.
>
> All Vice President Pence has to do is send it back to the states to recertify and we become president and you are the happiest people.
>
> I said: "Mike, that doesn't take courage. What takes courage is to do nothing. That takes courage." And then we're stuck with a president who lost the election by a lot and we have to live with that for four more years. We're just not going to let that happen.
>
> So I hope Mike has the courage to do what he has to do. And I hope he doesn't listen to the RINOs and the stupid people that he's listening to.
>
> And Mike Pence is going to have to come through for us, and if he doesn't, that will be a, a sad day for our country because you're sworn to uphold our Constitution.
>
> And Mike Pence, I hope you're going to stand up for the good of our Constitution and for the good of our country. And if you're not, I'm going to be very disappointed in you.
>
> Mike Pence has to agree to send it back. [The crowd then chanted "send it back."]

Finally, Trump urged the crowd to save the country:

> We must stop the steal and then we must ensure that such outrageous election fraud never happens again.
>
> Looking out at all the amazing patriots here today, I have never been more confident in our nation's future. And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore.
>
> We will not let them silence your voices. We're not going to let it happen.
>
> [W]e will never concede. . . . You don't concede when there's theft involved.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

> Because you'll never take back our country with weakness. You have to show strength and you have to be strong. We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated.
>
> When you catch somebody in a fraud, you're allowed to go by very different rules.
>
> You will have an illegitimate president. That's what you'll have. And we can't let that happen.
>
> Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you, we're going to walk down, we're going to walk down.
>
> We're going to walk down to the Capitol, and we're going to cheer on our brave senators and congressmen and women, and we're probably not going to be cheering so much for some of them.
>
> I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard.

7. Trump's Refusal to Ask the January 6 Rioters to Desist and His Mid-Riot Tweet About Pence

For 187 minutes on January 6, as Trump's supporters injured 174 police officers, contributed to several deaths, caused $2.7 million in property damage, terrorized members of Congress and Congressional staffs, and disrupted a joint session of Congress,[37] Trump declined to ask them to go home.[38] He did send tweets at 2:38 and 3:13 p.m. asking the rioters to "remain" or "stay" peaceful.[39] Finally, at 4:17 p.m., he posted a video that concluded: "Go home, we love you."[40] And, at 6:01 p.m., he sent the rioters a farewell message: "These are the things that happen

[37] *See January 6 United States Capitol Attack*, WIKIPEDIA, https://en.wikipedia.org/wiki/January_6_United_States_Capitol_attack [https://perma.cc/93XY-7QPW] (last visited Mar. 15, 2026).

[38] *See* H.R. REP. NO. 117-663, *supra* note 18, at 577–612.

[39] *Donald J. Trump (1st Term), Tweets of January 6, 2021*, *supra* note 35. On February 9, the *Washington Post* reported: "One person familiar with discussions . . . said Trump had resisted adding the final phrase: 'Stay peaceful.'" Rosalind S. Helderman & Josh Dawsey, *Trump's Lawyers Say He Was Immediately 'Horrified' by the Capitol Attack. Here's What His Allies and Aides Said Really Happened That Day*, WASH. POST (Feb. 9, 2021), https://www.washingtonpost.com/politics/trump-actions-capitol-attacks/2021/02/09/6dada250-6a3b-11eb-9ead-673168d5b874_story.html [https://perma.cc/9RKG-LUG2].

[40] *President Trump Video Statement on Capitol Protesters*, C-SPAN (Jan. 6, 2021), https://www.c-span.org/program/white-house-event/president-trump-video-statement-on-capitol-protesters/587285 [https://perma.cc/A4CU-HAAW].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

when a sacred landslide victory is so unceremoniously, viciously stripped away from great patriots . . . . Go home with love and peace. Remember this day forever."[41]

While sheltering in a secure location during the attack, House Minority Leader Kevin McCarthy gave an interview to CBS News. He said he had spoken with Trump and had been "very clear" in telling him "to talk to the nation to tell them to stop this."[42] McCarthy did not describe the President's response during the interview, but Representative Jaime Herrera Beutler reported on February 12 that he revealed it to her and other Republican Members of Congress. Trump said: "Well, Kevin, I guess these people are more upset about the election than you are."[43]

After conversing with senior White House officials, Republican Senator Ben Sasse said on January 8 that Trump was "delighted" when rioters entered the Capitol. According to Sasse, the President was "confused about why other people on his team weren't as excited as he was."[44]

The *Washington Post* reported on January 11 that a group of aides including Senior Advisor Ivanka Trump, Press Secretary Kayleigh McEnany, and Chief of Staff Mark Meadows "implore[d] Trump to speak out against the violence."[45] Republican Senator Lindsay Graham said that Trump's aides "were all trying to get him to speak out, to tell everyone to leave." According to Graham, "it took him

---

[41] *Donald J. Trump (1st Term), Tweets of January 6, 2021*, *supra* note 35.

[42] H.R. REP. NO. 117-663, *supra* note 18, at 598; *see also House Minority Leader Kevin McCarthy: "I Completely Condemn the Violence in the Capitol,"* CBS NEWS (Jan. 6, 2021), https://www.cbsnews.com/video/house-minority-leader-kevin-mccarthy-condemn-the-violence/ [https://perma.cc/FC9B-AUTA].

[43] Nicholas Fandos, *Herrera Beutler Says McCarthy Told Her Trump Sided with the Capitol Mob as the Assault Unfolded*, N.Y. TIMES (Feb. 13, 2021), https://www.nytimes.com/2021/02/12/us/kevin-mccarthy-trump-herrera-beutler.html [https://perma.cc/5QHR-V7EE].

[44] *Senator Ben Sasse on Impeachment and Transition, the GOP in Minority*, HUGH HEWITT & DUANE PATTERSON (Jan. 8, 2021), https://hughhewitt.com/senator-ben-sasse-on-impeachment-and-transition-the-gop-in-minority [https://perma.cc/UT3X-ZRB9]. Sasse's statement, like some others noted here, was inadmissible hearsay. I do not suggest that the case against Trump was ready for prosecution on the day Attorney General Garland took office but only that Trump's commission of the crimes with which he ultimately was charged already seemed likely and that a strong foundation for further investigation existed. Despite Garland's pronouncements, he was unwilling to follow the evidence wherever it led, for it already pointed to the Oval Office.

[45] Ashley Parker, Josh Dawsey & Philip Rucker, *Six Hours of Paralysis: Inside Trump's Failure to Act After a Mob Stormed the Capitol*, WASH. POST (Jan. 11, 2021), https://www.washingtonpost.com/politics/ trump-mob-failure/2021/01/11/36a46e2e-542e-11eb-a817-e5e7f8a406d6_story.html [https://perma.cc/ B4UE-3U2J].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

awhile to appreciate the gravity of the situation. The president saw these people as allies in his journey."[46]

Trump not only failed to ask the rioters to depart but also nudged them on. At 1:02 p.m., just as the Joint Session of Congress to certify the results of the presidential election was about to begin and shortly after rioters had broken through police barricades on the west side of the building, Vice President Pence issued a statement saying he had no authority to reject electoral votes.[47] At 2:24 p.m., Trump tweeted: "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!"[48] Broadcasters later showed films of rioters chanting "Hang Mike Pence."[49]

All the material noted in this section was available to the public before Merrick Garland became Attorney General. A year after the attack, however, Garland insisted that the Justice Department would "resolve the more straightforward [January 6] cases first" because "investigating the more overt crimes generates linkages to less overt ones."[50]

C. The Investigation

Any serious investigation of President Trump's attempt to steal an election and of his responsibility for the violence of January 6 would have included efforts to gather evidence from people inside the White House. Sometime during the week of July 18, 2022, eighteen months after the attack, Marc Short, who had been Vice President Pence's Chief-of-Staff, and Greg Jacob, who had been Pence's Legal

[46] *Id.*

[47] Aaron Glantz, *Read Pence's Full Letter Saying He Can't Claim 'Unilateral Authority' to Reject Electoral Votes*, PBS NEWS (Jan. 6, 2021, 1:43 PM EDT), https://www.pbs.org/newshour/politics/read-pences-full-letter-saying-he-cant-claim-unilateral-authority-to-reject-electoral-votes [https://perma.cc/MT4Q-CD93].

[48] *Donald J. Trump (1st Term), Tweets of January 6, 2021*, *supra* note 35.

[49] *Must-See New Video Shows Capitol Riot Was Way Worse Than We Thought*, MS NOW (Jan. 8, 2021), https://www.msnbc.com/all-in/watch/must-see-new-video-shows-capitol-riot-was-way-worse-than-we-thought-99178053752 [https://perma.cc/WQ8F-LU7L].

[50] *Attorney General Merrick B. Garland Delivers Remarks on the First Anniversary of the Attack on the Capitol*, *supra* note 10.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Counsel, testified before a federal grand jury.[51] Their appearances were apparently the first before any investigative grand jury by anyone from inside the Trump-Pence White House.[52]

Both of these officials had been deposed more than five months earlier by the House Select Committee to Investigate the January 6 Attack. Short gave testimony on January 26, 2022[53] and Jacob on February 1.[54] The Select Committee presented their testimony at its third public hearing on June 16, more than a month before these witnesses appeared before the grand jury.[55] At this televised hearing, Short and Jacob described a meeting on January 4, 2021, that they attended with President Trump, Vice President Pence, and lawyer John Eastman. Jacob also described a meeting the next day between him and Eastman.

Eastman urged Pence to reject the certified electoral ballots of seven states and then either accept alternative slates or ask these states' legislatures to reconsider. As Jacob recognized, Pence had no authority to reject certified electoral ballots. Moreover, the alternative slates were fraudulent.

---

[51] *See* Katherine Faulders, Alexander Mallin & John Santucci, *Former Pence Chief of Staff Appeared Before Grand Jury Probing Jan. 6*, ABC NEWS (July 25, 2022, 8:52 PM), https://abcnews.go.com/US/pence-chief-staff-appeared-grand-jury-probing-jan/story?id=87384833 [https://perma.cc/6Z69-7UQZ]; Kyle Cheney, *2 Top Pence Aides Appear Before Jan. 6 Grand Jury*, POLITICO (July 25, 2022, 4:26 PM EDT), https://www.politico.com/news/2022/07/25/pence-chief-of-staff-january-6-00047772 [https://perma.cc/E6AG-SUEA].

[52] Because grand jury proceedings are secret, I cannot be entirely sure of this statement. In newsworthy cases, however, journalists notice who enters the grand jury room, and witnesses themselves often reveal their appearances. Moreover, it seems doubtful that the many White House witnesses who testified after Jack Smith became Special Counsel had appeared earlier. *See infra* notes 68–69 and accompanying text. Sometime in the summer of 2022, the Justice Department subpoenaed text and email records from former White House Chief of Staff Mark Meadows. Pamela Brown et al., *Exclusive: Mark Meadows Complied with DOJ Subpoena in January 6 Probe*, CNN: POLITICS (Sept. 15, 2022, 12:06 AM EDT), https://www.cnn.com/2022/09/14/politics/mark-meadows-subpoena-justice-department-january-6 [https://perma.cc/NAC7-47U8]. Meadows then delivered the same materials he had given to the House Select Committee to Investigate the January 6 Attack six or seven months earlier. *See* Jamie Gangel & Zachary Cohen, *January 6 Committee Gets Meadows Texts, Emails With 'Wide Range' of People While Attack Was Underway*, CNN: POLITICS (Dec. 9, 2021, at 4:39 EST), https://www.cnn.com/2021/12/09/politics/january-6-committee-mark-meadows-texts [https://perma.cc/EL7Y-XPEZ].

[53] *Deposition of Marc Short Before the U.S. H.R. Select Comm. to Investigate the January 6th Attack on the U.S. Capitol*, 117th Cong. (2022).

[54] *Deposition of Greg Jacob Before the U.S. H.R. Select Comm. to Investigate the January 6th Attack on the U.S. Capitol*, 117th Cong. (2022).

[55] *Here's Every Word of the Third Jan. 6 Committee Hearing on Its Investigation*, NPR (June 16, 2022, 8:25 PM ET), https://www.npr.org/2022/06/16/1105683634/transcript-jan-6-committee [https://perma.cc/BT99-WBZU].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Eastman acknowledged in the presence of the President that his plan would not be upheld by the Supreme Court and that it violated the Electoral Count Act. Eastman hoped, however, that the Court would not reach these questions. Pence, who had consulted with Jacob and others, insisted that he could not legally reject the certified ballots.

Early in the January 6 investigation, the Inspector General of the National Archives had asked the Justice Department to investigate the fake electors' certificates, but the department had declined.[56] A book published by Bob Woodward and Robert Costa on September 21, 2021—*Peril*—might have prompted the department to reconsider. Woodward and Costa were the first to report a memorandum by John Eastman detailing his plan.[57] This memorandum, which made clear how the certificates might have been used to steal an election (or perhaps cast the nation into chaos), was printed verbatim in the press the same day. It began: "7 states have transmitted dual slates of electors to the President of the Senate."[58] Requests from the Attorneys General of Michigan and New Mexico also might have influenced the department to begin an investigation.[59]

Deputy Attorney General Lisa Monaco said on January 24, 2022: "We've received those referrals. Our prosecutors are looking at those and I can't say anything more."[60] The *New York Times* reported on March 30, 2022, that prosecutors had widened their investigation to include "the push by some Trump allies to promote slates of fake electors" and "planning for the rallies that preceded the assault on the

[56] Carol D. Leonnig & Aaron C. Davis, *FBI Resisted Opening Probe into Trump's Role in Jan. 6 for More than a Year*, WASH. POST (June 20, 2023), https://www.washingtonpost.com/investigations/2023/06/19/fbi-resisted-opening-probe-into-trumps-role-jan-6-more-than-year/ [https://perma.cc/KG8U-BRMN]; *see infra* note 64.

[57] BOB WOODWARD & ROBERT COSTA, PERIL 209–11, 225–27 (2021).

[58] *READ: Trump Lawyer's Memo on Six-Step Plan for Pence to Overturn the Election*, CNN: POLITICS (Sept. 21, 2021, 8:20 AM EDT), https://www.cnn.com/2021/09/21/politics/read-eastman-memo [https://perma.cc/YGM3-Z4DR].

[59] *See* David Eggert, *Michigan AG Asks Feds to Investigate Fake GOP Electors*, AP (Jan. 14, 2022, 7:01 PM EDT), https://apnews.com/article/joe-biden-michigan-elections-electoral-college-criminal-investigations-8a0454f0a28fd3f5903fa3ab962f764b [https://perma.cc/UP3U-8J6A].

[60] Evan Perez & Tierney Sneed, *Exclusive: Federal Prosecutors Looking at 2020 Fake Elector Certifications, Deputy Attorney General Tells CNN*, CNN: POLITICS (Jan. 26, 2022, 6:56 PM EST), https://www.cnn.com/2022/01/25/politics/fake-trump-electoral-certificates-justice-department [https://perma.cc/8EHU-7D3Q].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Capitol."[61] Two days earlier, a federal judge considering whether the House Select Committee could obtain John Eastman's emails found it "more likely than not that President Trump corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021."[62] Judge David Carter wrote: "If the country does not commit to investigating and pursuing those responsible, the Court fears January 6 will repeat itself."[63]

Carol Leonnig and Aaron Davis recently made clear that the fake electors' certificates were a smoking gun at the scene of the crime—highly incriminating evidence that the Justice Department failed to examine for over a year. In a footnote, I summarize their account and add a few observations of my own.[64]

---

[61] Alan Feuer, Katie Benner & Maggie Haberman, *Justice Dept. Widens Jan. 6 Inquiry to Range of Pro-Trump Figures*, N.Y. TIMES (Mar. 30, 2022), https://www.nytimes.com/2022/03/30/us/politics/justice-dept-widens-jan-6-inquiry.html [https://perma.cc/BDG6-U7YF].

[62] Eastman v. Thompson, 594 F. Supp. 1156, 1193 (C.D. Cal. 2022).

[63] *Id.* at 1198-99.

[64] The forgery was obvious. The certificates lacked state seals and were submitted by private parties rather than state election officials. Most had amateurish typed headers, and most looked alike. Each declared that the loser of a state's election had won. *See* CAROL LEONNIG & AARON C. DAVIS, INJUSTICE: HOW POLITICS AND FEAR VANQUISHED AMERICA'S JUSTICE DEPARTMENT 131 (2025). Interviewing the signers or subpoenaing them to appear before a grand jury would have revealed that many of them were duped by assurances that the certificates would be used only if judges determined that voting fraud had affected the outcome of their states' elections.

It would not have been difficult to learn who misled these signers and who then attempted to use the certificates to deceive Congress. An investigator also could have connected the dots to the "seven states" Trump mentioned in his January 6 remarks on the Ellipse. Moreover, as indicated above, interviewing Marc Short or Greg Jacob would have been likely to reveal (1) John Eastman's plan to use the certificates as a device for disrupting the January 6 count, (2) Trump's knowledge and approval of Eastman's plan, and (3) Trump's awareness that the plan was unlawful. Although moving up the chain from the rioters to the President looked hopeless, moving up the chain from the fake electors to the President probably would have been easy.

Waleska McLellan was in charge of investigations for the Inspector General's Office of the National Archives. On December 15, 2020, after conferring about five of the fake certificates with her superior and with Miriam Vincent, a knowledgeable National Archives lawyer, she followed the appropriate procedure for notifying the U.S. Attorney's Office for the District of Columbia of a potential crime. After two of her emails went unanswered, a third on December 30 led to a conversation with a line prosecutor. Finally, on January 8, this prosecutor, Amanda Vaughn, advised McLellan: "We just don't think there's a case here." *See id.* at 129–33.

Vaughn suggested that McLellan could pursue the matter with state investigators. That was not an appropriate way to investigate a multi-state conspiracy, but, for a year, McLellan and others in the Archives Inspector General's Office encouraged and cooperated with state investigations. *See id.* at 203–

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Twenty-two months after the assault on the Capitol, Attorney General Garland appointed a Special Counsel to oversee both the Justice Department's investigation of interference with the transfer of power following the 2020 election and its investigation of Trump's misuse of classified and other presidential records.[65] The

07. Then, in mid-January 2022, Thomas Windom, an experienced federal prosecutor, contacted McLellan and asked for National Archives assistance in investigating the fake certificates.

Windom had been transferred to the United States Attorney's Office for the District of Columbia in late 2021. *See* Glen Thrush, Alan Feuer & Michael S. Schmidt, *The Man Helping to Drive the Investigation Into Trump's Push to Keep Power*, N.Y. TIMES (updated June 30, 2022), https://www.nytimes.com/2022/06/28/us/politics/trump-investigation-thomas-windom.html [https://perma.cc/T35Z-YXXE]. He was the only lawyer anywhere in the Department of Justice investigating whether a conspiracy to subvert the presidential election included acts other than the attack on the Capitol. *See* LEONNIG & DAVIS, *supra* at 185–86, 190, & 221 (noting that, at the end of January 2022, "Windom remained the only full-time prosecutor [probing a possible criminal conspiracy to obstruct certification of the 2020 election] out of 113,000 [lawyers] on the DOJ payroll" and that "none of the 38,000 FBI employees were yet cleared to join").

Requesting investigative assistance from the National Archives rather than the FBI was unorthodox, but Windom told McLellan that the FBI was not yet working with him and that she was "the first on board." *Id.* at 208. Stephen D'Antuono, the Special Agent in Charge of the FBI Field Office in the District of Columbia, earlier had rejected Windom's request to subpoena telephone records from the Willard Hotel in an effort to determine the part of Roger Stone and others in the events of January 6. *See id.* at 192–96. Two agents of the Archives Inspector General's Office were the first investigators to join Windom's team. *Id.* at 208.

In late January, Windom and the U.S. Attorney for the District of Columbia proposed that the FBI interview eighty-four signers of the fake electoral certificates, and Special Agent D'Antuono approved their request. *Id.* at 209-10. Wrangling about the scope of the investigation in the FBI Director's Office and elsewhere, however, delayed the start of the investigation.

Finally, on April 14, the FBI presented its plan for investigating the fake electors to Attorney General Garland, who approved it. *Id.* at 229. By May 5, Windom had subpoenaed at least one witness to appear before a federal grand jury. *See* Thrush et al., *supra*. On June 22, more than seventeen months after the January 6 attack, FBI agents "fanned out to swing states that appeared central to Trump's plot. They arrived at the homes of several Republican officials who had participated in crafting . . . fake elector slates in Georgia, Arizona, New Mexico, and Michigan." *Id.* at 255.

[65] *See* Press Release, *Appointment of a Special Counsel*, U.S. DEPT. OF JUSTICE (Nov. 18, 2022), https://www.justice.gov/archives/opa/pr/appointment-special-counsel-0 [https://perma.cc/C43Y-6V5V]. Trump's formal announcement a few days earlier that he would be a candidate for President in 2024 triggered Garland's appointment of a Special Counsel. *See id.*; 28 C.F.R. § 600.1 (2025) (declaring that "the Attorney General . . . will appoint a Special Counsel when he or she determines that criminal investigation of a person or matter is warranted and . . . [t]hat investigation or prosecution . . . by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest . . . .").

As early as April 2021, however, Trump had told an interviewer that he was "100 percent" thinking of running in 2024 and believed he would "be very successful." *See* LEONNIG & DAVIS, *supra* note 64, at 162; *id.* at 280 (noting Trump's statement in the fall of 2021: "I know what I'm going to do, but we're

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

House Select Committee's thorough investigation of the crimes of January 6 and its impressive public presentation probably influenced Garland's belated move.[66] But former President Trump's criminality after leaving office might have been equally or more important.

When Trump left the White House, he unlawfully retained thousands of government documents, hundreds of them highly classified.[67] Lengthy negotiations led him to return fifteen boxes to the National Archives, which regarded this return as incomplete. It referred the matter to the Department of Justice, and the Department issued a subpoena requiring Trump to produce all documents with classification markings in his possession.

One of Trump's lawyers produced thirty-eight documents in response to this subpoena, but a later search pursuant to a warrant recovered 102 more documents marked classified, including thirty-eight marked top secret. Trump allegedly had suggested to lawyers that they could deny the existence of any responsive

---

not supposed to be talking about it yet, from the standpoint of campaign finance laws."). Garland apparently concluded that only Trump's formal announcement created a sufficient conflict of interest to require the appointment of a Special Counsel.

Roughly two months before that appointment, however, when the issue was not whether to ramp up the investigation of the former President but rather to suspend it, Garland was less concerned about formalities. He declared that the Justice Department's "60-day-rule" required it to pause all investigation of Trump's likely crimes because he was the de facto leader of the Republican Party.

The "60-day-rule" is not a written rule. It is a general policy of avoiding new charges and overt investigations that could affect the result of an election during the sixty days before that election. *See* Jack Goldsmith, *What Does the 60-Day Rule Require?*, LAWFARE (Oct. 15, 2024, 12:00 PM), https://www.lawfaremedia.org/article/what-does-the-60-day-rule-require [https://perma.cc/FN4L-QYRQ] (noting conflicting descriptions of the rule and calling for its clarification). Trump was neither a de facto nor a de jure candidate for election in the off-year election of 2022; he had no official party position; and the investigative steps that Garland forbade (interviews and grand jury subpoenas) would not have been public. Garland nevertheless shut down both the department's January 6 investigation and its classified-documents investigation, saying that disclosures were likely and that, for practical purposes, Trump was the head of the Republican Party. *See* LEONNIG & DAVIS, *supra* note 64, at 279–80 (noting that Garland's "very conservative interpretation of the rule" had "dumbfounded" prosecutors). Surely no U.S. Attorney General ever sought harder than Merrick Garland to avoid even a hint of "weaponization" or "lawfare."

[66] *See generally* H.R. REP. NO. 117-663, *supra* note 18; LIZ CHENEY, OATH AND HONOR: A MEMOIR AND A WARNING (2023). Attorney General Garland watched the committee's public hearings on television. *See* LEONNIG & DAVIS, *supra* note 64, at 252. When Cassidy Hutchinson testified on June 28, 2022, he asked: "Did we know about this witness?" Associate Deputy Attorney General Rush Atkinson answered no. *Id.* at 259. It was unclear, however, why Garland needed to ask. No Justice Department investigation appeared to be underway that might have revealed the witness's existence.

[67] The following account of Trump's misuse of national security information is drawn from MELISSA MURRAY & ANDREW WEISSMANN, THE TRUMP INDICTMENTS: THE HISTORIC CHARGING DOCUMENTS WITH COMMENTARY 219–23 (2024).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

documents. Then he had hidden documents from the lawyers. He also ordered the destruction of a surveillance tape that showed an employee moving documents.

Attorney General Garland was unwilling to disregard Trump's defiance of the Justice Department's authority, and it would have been difficult to prosecute this misconduct while continuing to move slowly on the crimes of January 6. Trump's relentless post-presidential criminality might have triggered a more intense Justice Department investigation of his earlier crimes—an investigation the former President conceivably might have avoided if he had been less disdainful of the rules. Garland's appointment of Jack Smith as Special Counsel came on November 18, 2022.

One indication of how little the Justice Department had done to investigate Trump's January 6 crimes before that date was how much Smith's office did after. A *Wikipedia* entry[68] notes grand jury appearances by such potentially significant witnesses as Vice President Mike Pence, White House Counsel Pat Cipollone, Deputy Counsel Patrick Philbin, Senior Policy Advisor Stephen Miller, Homeland Security official Ken Cuccinelli, Director of National Intelligence John Ratcliffe, Deputy Chief of Staff Dan Scavino, Senior Advisor Jared Kushner, Counselor Hope Hicks, Trump personal aides John McEntee and Nick Luna, "five or six" Secret Service agents, and "at least two" fake electors who testified with "limited immunity." The *Wikipedia* entry also notes investigative interviews with such witnesses as Georgia Secretary of State Brad Raffensperger and Arizona Speaker of the House Rusty Bowers, numerous subpoenas for documents and physical evidence, and "proffer" interviews with Trump Campaign Director Mike Roman and Trump lawyer Rudolph Giuliani.[69]

---

[68] *Smith Special Counsel Investigation*, WIKIPEDIA, https://en.wikipedia.org/wiki/Smith_special_counsel_investigation [https://perma.cc/65ZC-RMU5] (last visited Mar. 15, 2026).

[69] In addition, Leonnig and Davis describe a lengthy proffer interview with White House Chief of Staff Mark Meadows, *see* LEONNIG & DAVIS, *supra* note 64, at 296–97, 302–04, and multiple interviews with Meadows' aide, Cassidy Hutchinson. *Id.* at 310.

The Special Counsel's Office did not attempt to interview one knowledgeable witness, but this witness probably would not have told what he knew however hard he was pressed. Soon after an eleven-minute phone conversation with President Trump on the day before the attack, Steve Bannon told his podcast audience: "All hell is going to break loose tomorrow. It's all converging and now we're on, as they say, the point of attack, the point of attack tomorrow. I'll tell you this, it's not going to happen like you think it's going to happen, Ok? It's going to be quite extraordinarily different. And all I can say is strap in." *Here's Every Word from the Seventh Jan. 6 Committee Hearing on its Investigation*, NPR (July 12, 2022, 6:32 PM ET), https://www.npr.org/2022/07/12/1111123258/jan-6-committee-hearing-transcript [https://perma.cc/8DEW-YFUN]; *see Deposition of Jack Smith* at 132–33, Committee on the

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

The Special Counsel's *Final Report* on January 7, 2025, describes as "a time-consuming investigative challenge" his office's litigation about Trump's effort to block the testimony of fourteen witnesses by invoking executive privilege.[70] Vice President Pence's invocation of the privilege of the Speech or Debate Clause and Twitter's resistance to a search warrant seeking information about Trump's account led to extended litigation too.[71] There seems to have been no reason why the Justice Department could not have completed most of this burdensome litigation and most of the necessary investigative steps a year or more earlier.

A special investigation by the *Washington Post* in 2023 concluded that, following Garland's confirmation as Attorney General, "more than a year [passed] before prosecutors and FBI agents jointly embarked on a formal probe of actions directed from the White House to try to steal the election. Even then, the FBI stopped short of identifying the former president as a focus of that investigation."[72] Before

---

Judiciary, U.S. House of Representatives (Dec. 17, 2025), https://www.documentcloud.org/documents/26450308-jack-smith-deposition/ [https://perma.cc/GWT7-J7UP] (acknowledging that the Special Counsel's Office did not seek information from Bannon).

[70] JACK SMITH, U.S. DEP'T OF JUST., 1 FINAL REPORT ON THE SPECIAL COUNSEL'S INVESTIGATIONS AND PROSECUTIONS 116 (2025) [hereinafter *Final Report*], https://www.justice.gov/storage/Report-of-Special-Counsel-Smith-Volume-1-January-2025.pdf [https://perma.cc/3R5T-EXPD]. The Special Counsel prevailed in all of these cases.

Volume 2 of the Special Counsel's final report has not been released. It describes the prosecution of Donald Trump in the Southern District of Florida for misusing national security information and of Trump and others for obstructing justice. Judge Aileen Cannon of that court blocked the release of this report until the Eleventh Circuit ordered her to issue a long-delayed ruling on a motion by *American Oversight* to allow its release. Judge Cannon then ruled that, in the absence of further legal objections, the Justice Department could release the report on February 24, 2026. Trump and other former defendants objected, and, on February 23, Judge Cannon permanently enjoined release of the report. Further appellate proceedings are likely, but, even if Judge Cannon's order is reversed, the Trump-directed Justice Department is unlikely to approve release. *See* Kyle Cheney, *Judge Cannon Clears Way for Release of Classified Docs Report—But Gives Trump an Out*, POLITICO (Dec. 22, 2025, 11:54 EST), https://www.politico.com/news/2025/12/22/classified-documents-case-aileen-cannon-00704266 [https://perma.cc/9XKF-F9KE]; Ruth Marcus, *Jack Smith's Closing Argument*, THE NEW YORKER (Jan. 5, 2026), https://www.newyorker.com/news/the-lede/jack-smiths-closing-argument [https://perma.cc/8VGB-S6C3]; United States v. Trump, No. 23-80101-CR-CANNON, 2026 U.S. Dist. LEXIS 36799 (S.D. Fla., Feb 23, 2026); *American Oversight Condemns Judge Cannon's Blocking Release of Jack Smith Report*, AM. OVERSIGHT (Feb. 23, 2026), https://americanoversight.org/american-oversight-condemns-judge-cannons-order-permanently-blocking-release-of-volume-ii-of-jack-smith-report/ [https://perma.cc/2BNG-CD87].

[71] *See id.* at 108–11. Twitter had recently been acquired by Trump supporter Elon Musk. *See* Max Zahn, *A Timeline of Elon Musk's Tumultuous Twitter Acquisition*, ABC NEWS (Nov. 11, 2022, 2:21 PM), https://abcnews.go.com/Business/timeline-elon-musks-tumultuous-twitter-acquisition-attempt/story?id=86611191 [https://perma.cc/8ZUR-6583].

[72] Leonnig & Davis, *supra* note 56.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Garland's arrival, federal prosecutors had proposed investigating White House links to the riot, but the Justice Department and the FBI had rejected that proposal in favor of "focusing first on the rioters." According to the *Post*, when Garland and Deputy Attorney General Monaco came aboard, they approved what was already the department's go-slow strategy and "remained committed to it even as evidence emerged of an organized week-long effort by Trump and his advisers before Jan. 6 to pressure state leaders, Justice officials and Vice President Mike Pence to block the certification of Biden's victory."

Commentator and former U.S. Attorney Harry Litman called the allegation of foot-dragging by Attorney General Garland a "bum rap" and attempted to identify some investigation of Trump's conduct by the Justice Department during Garland's first year.[73] But he failed.

Litman wrote: "Garland and Monaco focused on Rudy Giuliani (later identified as 'Co-Conspirator 1') from Monaco's first day in office. They executed a warrant at Giuliani's apartment on April 21, 2021 . . . . Similarly, they expedited the collection of evidence by subpoenaing another Trump lawyer, Sidney Powell (Co-Conspirator 3), who wasn't positioned to advance claims of executive privilege." Litman failed to mention that the search of Giuliani's apartment sought evidence of his illegal lobbying on behalf of Ukrainian officials, not of conspiring with Trump to steal an election.[74] Litman also failed to note that the September 2021 subpoena to groups controlled by Sidney Powell sought only evidence of their accounts and fundraising.[75] Dominion Voting Systems, which had sued Powell for defamation on January 8, 2021, had complained about the groups' financial irregularities, and Florida authorities had fined one of these groups for obtaining contributions by means of "deception, false pretense, misrepresentation, or false promise."[76]

---

[73] *See* Harry Litman, *Merrick Garland is Getting a Bum Rap: The Claim that He is Responsible for Trump's Evasion of Accountability is Clearly Wrong*, TALKING FEDS SUBSTACK (Jan. 16, 2025), https://harrylitman.substack.com/p/merrick-garland-is-getting-a-bum [https://perma.cc/624L-Y9EK].

[74] *See* Richard Luscombe, *Rudy Giuliani's Apartment Searched as Part of Ukraine Investigation*, THE GUARDIAN (Apr. 28, 2021, 15:26 EDT), https://www.theguardian.com/us-news/2021/apr/28/rudy-giuliani-apartment-search-warrant-federal-investigators [https://perma.cc/7LLS-A3NF].

[75] Alison Durkee, *Sidney Powell's Fundraising Groups Reportedly Subpoenaed as Part of Criminal Investigation*, FORBES (Apr. 21, 2022, 8:12 AM EDT), https://www.forbes.com/sites/alisondurkee/2021/11/30/sidney-powell-fundraising-groups-reportedly-subpoenaed-as-part-of-criminal-investigation/ [https://perma.cc/D76S-VNKP].

[76] *Id.* Litman also wrote that the Special Counsel's *Final Report* set out "the broad range of investigative measures that *preceded* his appointment and that 'developed a thorough record of independently verified

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Jonathan Karl's 2025 bestseller *Retribution* also indicated that Garland had been diligent: "[T]he notion that he waited more than a year to begin looking into Trump's efforts to subvert the 2020 election is simply not true."[77] Unlike Litman, Karl offered a specific example (but only one). In the spring of 2021, the Justice Department received a tip that Trump's Deputy Chief of Staff had "set up a meeting between Trump and leaders of the Proud Boys during a visit to Las Vegas on September 15, 2020." The department investigated and determined that the tip was false.[78]

Karl also wrote that the Justice Department "looked into the 'War Room' at the Willard Hotel . . . where several Trump associates—including Rudy Giuliani, Steve Bannon, John Eastman, and Boris Epshteyn—reportedly gathered while the January 6 attack was underway."[79] But Karl supplied no details, and the department could not have looked very deeply.[80] According to Leonnig and Davis, when Assistant U.S. Attorney Thomas Windom proposed an administrative subpoena of

---

facts.'" Litman, *supra* note 73. But nothing in the Special Counsel's report catalogued the investigative measures taken prior to his appointment. A baffling sentence in the report apparently referred to the Special Counsel's Office itself and indicated that it had begun work before it existed. If this sentence did refer to the investigation that preceded the office's creation, it said only that this investigation contributed something to the whole: "[T]he Office, spanning the period predating the Special Counsel's appointment to the completion of its work, developed a thorough record of independently verified facts . . . ." *Final Report*, *supra* note 70, at 92–93.

[77] JONATHAN KARL, RETRIBUTION: DONALD TRUMP AND THE CAMPAIGN THAT CHANGED AMERICA 352 (2025).

[78] *Id.* at 352–53.

[79] *Id.* at 353.

[80] The term "War Room" was John Eastman's. In May 2021, he used it to describe the suite of rooms where he, Giuliani, and others were assembled during the January 6 attack. For days prior to the attack, he and others had called Republican state legislators from this suite to urge them to switch their states' electoral votes from Biden to Trump, and their calls continued after the attack began. According to a recipient of one call, they failed to offer significant evidence in support of their assertions of electoral fraud. *See* Jacqueline Alemany et al., *Ahead of Jan. 6, Willard Hotel in Downtown D.C. Was a Trump Team "Command Center" for Efforts to Deny Biden the Presidency*, WASH. POST (Oct. 23, 2021), https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html [https://perma.cc/BA83-JJHQ].

President Trump conferred several times with the Willard group by telephone. *See* Hugo Lowell, *Trump Called Aides Hours Before Capitol Riot to Discuss How to Stop Biden Victory*, THE GUARDIAN (Nov. 30, 2021, at 8:31 EST), https://www.theguardian.com/us-news/2021/nov/30/donald-trump-called-top-aides-capitol-riot-biden [https://perma.cc/EQ38-J2CJ]. He spoke with the lawyers and non-lawyers separately because "Giuliani did not want non-lawyers to participate on legal calls and jeopardise attorney-client privilege." *Id.* As a federal court later reminded John Eastman, however, the attorney-client privilege is subject to a crime-fraud exception. *See supra* text accompanying notes 62–63.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Willard Hotel telephone records, the special agent in charge of the FBI field office rejected his request.[81]

At the tumultuous conclusion of Donald Trump's first term as President, the United States was a divided nation. Attorney General Garland might plausibly have concluded that, despite Trump's likely guilt of serious crimes, the Justice Department should proceed slowly. In retrospect, however, the Attorney General misapprehended his historic role.

II. THE JUDGMENT CALLS OF SPECIAL COUNSEL SMITH

A. Omitting Trump's Most Serious Offense from the Indictment

1. Ways of Violating Section 2383

A criminal statute enacted by Congress in 1862 could not have been drafted with Donald Trump in mind, but it would be difficult to draft a provision that better fit his conduct. This statute, 18 U.S.C. § 2383, says in full:

> Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.[82]

This statute specifies several ways to commit the crime of insurrection, and one of them is to "incite" other people to commit this crime. Prosecuting Trump simply for making his speech on the Ellipse, however, would present a constitutional issue. The Supreme Court held in 1969 in *Brandenburg v. Ohio*[83] that advocating unlawful conduct can be punished as a crime only when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[84]

[81] LEONNIG & DAVIS, *supra* note 64, at 192–96.

[82] 18 U.S.C. § 2383.

[83] 395 U.S. 444 (1969).

[84] *Id.* at 447.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Trump's speech may meet this standard ("if you don't fight like hell, you're not going to have a country anymore"),[85] but focusing on other ways of committing insurrection would have made it unnecessary to consider the question. A prosecutor would have been wise to ignore the word "incite" and to allege instead that Trump "assisted" or "gave aid or comfort" to the January 6 insurrection. With that shift, the applicable constitutional rule would have become much simpler: "[S]peech . . . that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment."[86] Moreover, a charge of giving aid and comfort to an insurrection would have invited an examination of all of Trump's conduct—from his invitation to a "wild" rally, through his speech on the Ellipse, to his refusal to ask his supporters to desist, to his tweeted denunciation of Vice President Pence.

The House Select Committee to Investigate the January 6 Attack referred former President Trump to the Justice Department for possible prosecution, listing insurrection as one of the crimes there was reason to believe he committed.[87] But, following the Special Counsel's recommendation, a grand jury did not indict Trump for this crime. Instead, it charged him with conspiracy to defraud the United States,[88] conspiracy to obstruct an official proceeding,[89] obstructing and attempting to obstruct an official proceeding,[90] and conspiracy against rights (in particular, the right to vote and to have one's vote counted).[91]

2. The Indictment's Charges

a. Lawfare and Legalese

One need not go beyond the titles of Section 2383 and the four crimes the Special Counsel charged to sense a significant difference between them.

---

[85] *See* Thompson v. Trump, 590 F. Supp. 3d 46, 115 (D.D.C. 2022) (ruling that Trump's January 6 remarks were "plausibly words of incitement not protected by the First Amendment"); *Final Report*, *supra* note 70, at 66; Alexander Tsesis, *Incitement to Insurrection and the First Amendment*, 57 WAKE FOREST L. REV. 971, 1029 (2022) (concluding after extended analysis that Trump's speech on the Ellipse was unprotected).

[86] Rice v. Paladin Enters., Inc., 128 F.3d 233, 242 (4th Cir. 1997); *see* United States v. Hansen, 599 U.S. 762, 783 (2023) ("Speech intended to bring about a particular unlawful act has no social value; therefore, it is unprotected."); Nat'l Org. for Women v. Operation Rescue, 37 F.3d 646, 656 (D.C. Cir. 1994) ("That 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality.").

[87] H.R. REP. NO. 117-663, *supra* note 18, at 109–12.

[88] 18 U.S.C. § 371.

[89] 18 U.S.C. § 1512(k).

[90] 18 U.S.C. § 1512(c)(2).

[91] 18 U.S.C. § 241.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Insurrection sounds like a crime of violence. The statute is clear and straightforward. A conviction of this crime would have held Donald Trump directly accountable for the attack on the Capitol. The crimes charged by the Special Counsel sound like fancy federal ways to lock people up.

The indictment in *Trump* would have permitted prosecutors to introduce evidence of the attack on the Capitol—but only through the back door. In setting forth the "manner and means" by which Trump allegedly conspired to defraud the United States, the indictment recited evidence of the attack under the heading "The Defendant's Exploitation of the Violence and Chaos at the Capitol."[92] What apparently mattered was not the violence itself but the defendant's exploitation of it. According to the indictment, this exploitation occurred when Trump and his coconspirators continued to call Senators after the attack to urge their rejection of certified electoral votes.[93] The assistance the attack gave to Trump's effort to commit a white-collar crime was apparently what made it significant. The tail wagged the dog.[94]

Together, the Special Counsel's four charges alleged a conspiracy to steal an election through fraud and obstruction. Prosecuting Trump for this misconduct on the basis of strong evidence was not "lawfare," a term that refers to prosecuting political opponents for political reasons. To the contrary, as the preceding section of this Article showed, the Justice Department was too wary of prosecuting the former President. But, however outrageous a politician's alleged crimes and however strong the apparent proof of his guilt, cries of lawfare are likely.[95] In *Trump*, the Supreme Court cited the danger of political motivation as a reason for approving presidential

[92] Indictment at 39, United States v. Trump, 704 F. Supp. 3d 196 (2023) (No. 1:23-cr-00257-TSC) (available at https://www.justice.gov/storage/US_v_Trump_23_cr_257.pdf [https://perma.cc/TJU7-JTSR]).

[93] *Id.* at 39–42. An alleged conspirator also sent an email to the Vice President's counsel at 11:44 p.m. on January 6 asking the Vice President to commit a "relatively minor violation" of the Electoral Count Act by adjourning the joint session of Congress for ten days. *Id.* at 42.

[94] Special Counsel Smith's grand jury investigation of the crimes of January 6 included subpoenaing the phone records (but not the call contents) of eight Republican Senators and one Republican Member of Congress. Although the Supreme Court has held that telephone company customers have no reasonable expectation of privacy in the numbers they dial, *see* Smith v. Maryland, 442 U.S. 735 (1979), and although Smith's defenders note that grand jury investigations regularly include subpoenas for relevant phone records, these subpoenas led to sharp MAGA criticism. *See Arctic Frost Investigation*, WIKIPEDIA, https://en.wikipedia.org/wiki/Arctic_Frost_investigation [https://perma.cc/E7RQ-2FCL] (last visited Apr. 28, 2026).

[95] *See, e.g.*, Jared Gans, *Bob Menendez Lashes Out at Obama Over Iran Deal, 'Weaponization' of DOJ*, THE HILL (May 30, 2025, at 14:45 ET), https://thehill.com/homenews/senate/5326155-menendez-accuses-obama-justice-department/ [https://perma.cc/2276-5B82].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

immunity. Moreover, it pointed to one of the charges in *Trump*—conspiring to defraud the United States—to illustrate the danger. The Court wrote of the

> likely prospect of an Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors . . . . 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.[96]

A brief look at the crimes charged in the indictment follows.

[96] *Trump*, 603 U.S. at 640 (citation omitted). The Court's image of partisan prosecutors eager to prosecute former Presidents for legitimate exercises of executive discretion seemed strained when *Trump* was decided, but President Trump's second-term appointments and his public directions to the Attorney General to prosecute several prominent critics have now made that prospect less far-fetched. *See* Kyle Cheney, Erica Orden & Hassan Ali Kanu, *How Trump's Message to "Pam" Got Exactly the Results He Wanted*, POLITICO (Oct. 10, 2025, at 5:55 EDT), https://www.politico.com/news/2025/10/10/trump-doj-prosecutions-comey-james-00601838 [https://perma.cc/6DR5-PBP4].

Trump's ongoing trial in a New York state court during the Supreme Court's deliberations in *Trump* might have heightened the Court's concern about lawfare. One month before the Court announced its decision, a New York jury convicted Trump of falsifying the records of his business organization "with intent to defraud." It is doubtful that any prosecutor previously had charged that crime when the allegedly falsified records were unlikely to be seen by anyone outside the organization.

The successful New York prosecution was clearly the weakest of the criminal cases against Trump. Because this prosecution concerned private, pre-presidential conduct, however, no presidential immunity standard could have blocked it. *See Prosecution of Donald Trump in New York*, WIKIPEDIA, https://en.wikipedia.org/wiki/Prosecution_of_Donald_Trump_in_New_York [https://perma.cc/4U7Z-JFHG] (last visited May 11, 2026). The immunity ruling in *Trump* did generate post-conviction litigation concerning the admissibility of particular pieces of evidence. *See* Will Spillman, *It's Up to You, New York: Narrowing the* Trump v. United States *Evidentiary Privilege* (Feb. 4, 2026), https://ssrn.com/abstract=6184839 (declaring that, by establishing "a novel evidentiary privilege," the *Trump* decision led to an "appellate debacle" in the New York proceedings).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

b. Conspiracy to Defraud the United States

When Congress made conspiring to defraud the United States a crime in 1867, the word *fraud* referred to efforts to acquire property through misrepresentation.[97] But, early in the twentieth century, aggressive prosecutors and amenable courts interpreted the statute to proscribe conspiracies to interfere with lawful governmental functions as well.[98] These prosecutors and courts gave the statute the breadth that the *Trump* majority said lent it to lawfare.

Recently, however, the Supreme Court has resurrected traditional concepts of fraud and has narrowed the scope of federal fraud statutes other than the one proscribing conspiracies to defraud the United States.[99] Neither the original understanding of fraud nor the concept now embodied in these other statutes would reach the conduct alleged in *Trump*, and a commentator has suggested that the expansive concept of fraud still read into the statute whose violation was alleged in *Trump* is unlikely to survive.[100] The Special Counsel's Office devoted several pages of its *Final Report* to assessing this possibility. It argued that the statute's current sweep is justified.[101]

---

[97] *See* United States v. Coplan, 703 F.3d 46, 59 (2d Cir. 2012) ("At common law, the words 'to defraud' meant to deprive another of property rights by dishonest means."); *see also* United States v. Hirsch, 100 U.S. 33, 35 (1879) (fraud against the United States "may be against the coin, or consist in cheating the government of its land or other property"); McNally v. United States, 483 U.S. 350, 356–60 (1987) (describing the original meaning of the word *fraud* in the federal mail fraud statute of 1872); MELVILLE M. BIGELOW, THE LAW OF FRAUD AND THE PROCEDURE PERTAINING TO THE REDRESS THEORY 1 (1877).

[98] *See* Haas v. Henkel, 216 U.S. 462, 479–80 (1910) (rejecting the argument that a conspiracy to defraud requires a contemplated monetary or property loss); Hammerschmidt v. United States, 265 U.S. 182, 188 (1924) ("To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest."); United States v. Klein, 247 F.2d 908, 916 (2d Cir. 1957) (turning the *Hammerschmidt* dictum into holding and creating "the *Klein* doctrine").

[99] *See McNally*, 483 U.S. at 373; Skilling v. United States, 561 U.S. 358 (2010); Kelly v. United States, 590 U.S. 391 (2020); Ciminelli v. United States, 598 U.S. 306 (2023); Percoco v. United States, 598 U.S. 319 (2023); Kousisis v. United States, 605 U.S. 114, 115 (2025) ("[I]t was the deception-induced deprivation of property—not economic loss—that common-law courts generally deemed injurious.").

[100] Jeremy H. Temkin, *Is the 'Klein' Conspiracy Doctrine Doomed?*, N.Y. L.J. 1 (Nov. 15, 2023), https://static.maglaw.com/docs/NYLJ11152023MorvilloTemkin11.15.pdf [https://perma.cc/48MA-AMDA] ("[I]t is not a matter of if, but when, the doctrine falls.").

[101] *Final Report*, *supra* note 70, at 40–45. Even if the Supreme Court were inclined to narrow the sweep of the statute proscribing conspiracies to defraud the United States, it might have hesitated to do so in a case in which scrapping its 100-year-old precedents would have been widely regarded as partisan. Abandoning a rule that had lasted 100 years when the defendant's name was Trump might not have seemed coincidental. The Special Counsel's Office was probably correct that it had little reason to worry about this risk.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

c. Obstructing an Official Proceeding

After Trump's indictment, the Supreme Court narrowed the scope of another statute whose violation the indictment alleged. The charges of conspiring to obstruct an official proceeding and of actually obstructing it depended on 18 U.S.C. § 1512(c), and the decision in *Fischer v. United States*[102] concerned the relationship between the two subsections of this statute.

The statute provides:

> Whoever corruptly—
> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
> (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,
> shall be fined under this title or imprisoned not more than 20 years, or both.[103]

The defendant in *Fischer* had entered the Capitol on January 6 and assaulted a police officer. With thousands of others, he had sought to halt or delay a joint session of Congress. A jury had convicted him of violating subsection (2) of this statute and of other offenses.

Three justices of the Supreme Court would have affirmed Fischer's conviction of obstruction. These justices contended that the words "otherwise obstructs" in subsection (2) reach all forms of obstruction not listed in subsection (1). But a six-justice majority concluded: "[T]he 'otherwise' provision of Section 1512(c)(2) is limited by the preceding list of criminal violations."[104] According to the Court, subsection (2) encompasses only efforts to impair "the availability or integrity for use in an official proceeding of records, documents, objects, or . . . other things used in the proceeding."[105]

The U.S. Attorney's Office for the District of Columbia reported that *Fischer* invalidated the obstruction convictions of 249 January 6 defendants. One hundred

[102] 603 U.S. 480 (2024).

[103] 18 U.S.C. §§ 1512(c)(1)–(2).

[104] *Fischer*, 603 U.S. at 489.

[105] *Id.* at 517.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

ninety-nine of these defendants, however, had been convicted of at least one other felony.[106]

The Special Counsel's *Final Report* maintained that the obstruction charges in *Trump* itself would have survived. These charges alleged the falsification of elector certificates, and *Fischer* allows prosecution for "creating false evidence."[107]

d. Conspiracy Against Rights

Even the last of the charges in the indictment alleged the violation of a statute whose scope has grown beyond the situation it was created to address. This 1870 statute prohibits conspiracies to injure, oppress, threaten, or intimidate someone in the exercise or enjoyment of a constitutional right.[108]

In 1915, Justice Oliver Wendell Holmes wrote for the Supreme Court: "The source of this section in the doings of the Ku Klux and the like is obvious, and acts of violence obviously were in the mind of Congress."[109] But Holmes and the Court then held that the statute encompassed a nonviolent conspiracy not to count valid votes.[110] Courts have since concluded that the statute proscribes conspiracies to stuff ballot boxes,[111] falsely tabulate votes,[112] and throw away ballots.[113]

Violating the right to vote and *injuring, oppressing, threatening, or intimidating* someone in the exercise or enjoyment of that right are not quite the same thing. A voter's right can be violated without "injuring, oppressing, threatening, or intimidating" her. But courts have concluded that this difference does not matter.

---

[106] *Fact Sheet:* Fischer v. United States, U.S. ATT'Y'S OFFICE FOR THE DIST. OF COLUMBIA (June 28, 2024), https://www.justice.gov/usao-dc/pr/fact-sheet-fischer-v-united-states [https://perma.cc/R366-FG3F]; *see* Ryan Goodman, Mary B. McCord & Andrew Weissmann, *The Limited Effect of* Fisher, JUST SEC. (June 28, 2024), https://www.justsecurity.org/96493/supreme-court-obstruction-january-6th/ [https://perma.cc/N7LZ-YKZS].

[107] *Final Report*, *supra* note 70, at 46 (citing *Fischer*, 603 U.S. at 491).

[108] 18 U.S.C. § 241.

[109] United States v. Mosley, 238 U.S. 383, 387 (1915).

[110] *Id.* at 387–88.

[111] United States v. Saylor, 322 U.S. 385, 387 (1944).

[112] United States v. Pleva, 66 F.2d 529, 531 (2d Cir. 1933).

[113] United States v. Townsley, 843 F.2d 1070, 1073–75 (8th Cir. 1988).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

e. Why Omit the Worst Crime?

The awkwardness of some of the charges in the *Trump* indictment stems from the need for prosecutors and courts to try to make sense of archaic criminal statutes that Congress has failed for decades to update and synthesize in a modern code,[114] and all four of the charges in *Trump* were appropriate. But why did the Special Counsel fail to charge Trump with insurrection as well? Might including a more vivid and less technical charge have tempered the allegations of lawfare by critics? Might the inclusion of a crime widely regarded as Trump's most serious offense have made the Supreme Court's disregard of the need to deter presidential wrongdoing less likely?

This Article will describe one more difference between the crimes the *Trump* indictment charged and the one it left out. Then it will consider the Special Counsel's explanation of why he did not charge Donald Trump with insurrection.

3. Disqualification From Holding Office

The statutes Trump was charged with violating do not authorize a sanction that Section 2383 makes mandatory. That statute says that a person convicted of insurrection "shall be incapable of holding any office under the United States."[115]

The Fourteenth Amendment, which was ratified six years after Congress approved Section 2383, also requires the disqualification of insurrectionists. Section 3 of that amendment provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[116]

---

[114] For discussions of Congress' failure to approve a coherent criminal code, *see* Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects*, 41 L. & CONTEMP. PROBS. 1, 15 (1977), and Albert W. Alschuler, *Terrible Tools for Prosecutors: Notes on Senator Leahy's Proposal to "Fix"* Skilling v. United States, 67 S.M.U. L. REV. 501, 521–22 (2014).

[115] 18 U.S.C. § 2383.

[116] U.S. CONST. amend. XIV, § 3.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Before these enactments, the Constitution of 1788 specified the qualifications needed to serve in the Senate, House, and Presidency. It said, for example, that the President must be a natural-born citizen, at least thirty-five years old, and have resided in the United States for fourteen years.[117] The Fourteenth Amendment established a new qualification for serving in any elective federal office, and, being a constitutional amendment, it could not be unconstitutional. But the earlier statutory prohibition of officeholding by convicted insurrectionists was probably invalid.

In 1969, in *Powell v. McCormack*,[118] the Supreme Court held that Congress may not add qualifications to those specified in the Constitution. The House of Representatives had refused to seat Harlem Representative Adam Clayton Powell although he had been duly elected and met the constitutional qualifications for serving. The Court said that for the House to exclude him on the ground that he had been convicted of criminal contempt and had engaged in financial misconduct was unconstitutional.

Applying Section 2383 to prevent an insurrectionist from serving as President seems unconstitutional for the same reason.[119] Moreover, the ruling in *Powell* was sound. A congressional power to add qualifications for holding elective office could readily be used to incapacitate political opponents. Consider a statute disqualifying prospective officeholders who have been convicted of marching without a permit.

Nevertheless, in *Trump v. Anderson*[120] in 2024, the Supreme Court made Section 2383 the only mechanism available for disqualifying an insurrectionist from office. Because the Special Counsel already had decided not to charge Donald Trump with this crime, the former President's ability to serve as President a second time was assured. One person, Jack Smith, had resolved Trump's eligibility for the nation's highest office in Trump's favor, and he had done it without determining that Trump was *not* an insurrectionist. Moreover, the Supreme Court had given Smith the awesome power to make this determination without ever concluding that Section 2383 was constitutional.

Here is how it happened.

---

[117] U.S. CONST. art. II, § 1, cl. 5.

[118] 395 U.S. 486, 550 (1969).

[119] *See* Josh Blackman & Seth Barrett Tillman, *What Happens if the Biden Administration Prosecutes and Convicts Donald Trump of Violating 18 U.S.C. § 2383?*, 2021 U. ILL. L. REV. ONLINE 190, 193–94 (2021), https://illinoislawreview.org/symposium/first-100-days-biden/what-happens-if-the-biden-administration-prosecutes-and-convicts-donald-trump-of-violating-18-u-s-c [https://perma.cc/FEM3-A94L].

[120] 601 U.S. 100 (2024).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

In *Trump v. Anderson*, the Supreme Court reversed a Colorado Supreme Court decision that, because Donald Trump had engaged in the January 6 insurrection, the Fourteenth Amendment disqualified him from appearing on a Colorado presidential ballot.[121] The Supreme Court ruled unanimously that states have no power to enforce Section 3 with respect to federal office holders.

A five-justice majority then went further. Section 5 of the Fourteenth Amendment provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[122] The Court held that this provision "vests in Congress the [exclusive] power to enforce" the disqualification provision of Section 3.[123] It noted, moreover, that one congressionally approved procedure for enforcing the Constitution's disqualification requirement "remains on the books today." This provision was Section 2383.[124]

The Court thus credited the Congress of 1862 with an astonishing feat—exercising its power to enforce the provisions of the Fourteenth Amendment six years before that amendment became part of the Constitution.[125] Moreover, neither any member of the Court nor any counsel questioned the constitutionality of Section 2383. If anyone knew of *Powell v. McCormack*, he or she did not say so.[126]

---

[121] *Id.* at 115 (reversing Anderson v. Griswold, 543 P.3d 283 (Colo. 2023)).

[122] U.S. CONST. amend. XIV, § 5.

[123] Trump v. Anderson, 601 U.S. at 117.

[124] *See id.* at 114–15.

[125] Perhaps a statute that was unconstitutional at the time it was enacted can be retroactively validated by a constitutional amendment granting Congress the power to enact it. No purpose might be served by demanding the statute's reenactment. But the metaphysics are daunting, and a statute actually drafted for the purpose of enforcing Section 3 probably would differ significantly from Section 2383. Even if retroactive validation were possible, Section 2383 would be unconstitutional insofar as it mandates the disqualification of people whom the Fourteenth Amendment does not disqualify—people who have never held office and have never sworn to uphold the Constitution.

[126] The disqualification provisions of the Fourteenth Amendment and of Section 2383 differ in several respects. The statute speaks of an "insurrection against the authority of the United States or the laws thereof" while the Fourteenth Amendment speaks of an insurrection against "the Constitution of the United States." Judge Michael Luttig has suggested that this difference in phrasing is significant and that, as a result, the Constitution may disqualify people the statute does not. *See* Jordan Rubin, *Judge Luttig Explains Why Donald Trump is Disqualified from the Presidency*, MS NOW (Nov. 2, 2023, at 2:42 PM EDT), https://www.msnbc.com/deadline-white-house/deadline-legal-blog/trump-14th-amendment-judge-luttig-rcna123336 [https://perma.cc/NJ5N-63Y2] (transcript of an interview with Judge Luttig).

The statute disqualifies insurrectionists from holding "any office under the United States" while the Fourteenth Amendment disqualifies them from holding both federal and state offices. The Fourteenth

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Far from suggesting that the statutory disqualification might be invalid, Trump's brief in the Supreme Court argued for the position the Court eventually adopted: Section 2383 is "the exclusive means of enforcing" Section 3.[127]

At argument, Justice Kavanaugh asked Trump's counsel: "And just to be clear, . . . you agree that someone could be prosecuted for insurrection by federal prosecutors and, if convicted could or shall be disqualified then from office?" Counsel answered yes (noting, however, that Trump claimed immunity from prosecution).[128]

Justice Kavanaugh then posed this question to the counsel for the Colorado voters who were seeking Trump's disqualification:

> If the concern you have . . . is that insurrectionists should not be able to hold federal office, there is a tool to ensure that that does not happen, namely, federal prosecution of insurrectionists. And . . . if convicted, Congress made clear you are automatically barred from holding a federal office. That tool exists, you agree, and could be used but has not . . . . You agree with that?

Counsel replied: "That's absolutely right, Your Honor."[129]

When the Special Counsel's Office prepared the indictment in *Trump*, the Special Counsel could not have known how the Supreme Court would decide *Trump v. Anderson*. He could not have realized the extent of the power he had. But he could have known that his choice was likely to influence rulings on Trump's ability to return to the White House.

His position was sensitive. Critics would surely (and outrageously) have portrayed a decision to charge Trump with insurrection as an effort by "the Biden

---

Amendment, unlike Section 2383, disqualifies only insurrectionists who have previously taken an oath as an office holder to support the Constitution of the United States. The statute, unlike the Fourteenth Amendment, disqualifies only insurrectionists who have been convicted of committing that crime. Finally, the disqualification imposed by the Fourteenth Amendment can be removed by a two-thirds vote of each house of Congress, but the disqualification imposed by the statute cannot.

[127] Brief for Petitioner at 40, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719).

[128] Transcript of Oral Argument at 55, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719).

[129] *Id.* at 115. Kavanaugh also asked: "Congress has enacted statutes, including one still in effect. Section 2383 of Title 18 prohibits insurrection. It's a federal criminal statute. And if you're convicted of that, . . . it says, 'shall be disqualified' from holding any office. And so there is a federal statute on the books, but President Trump has not been charged with that. So what—what are we to make of that?" Counsel for the voters answered that Section 2383 "wasn't enacted as implementing legislation related to Section 3." *Id.* at 114.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

administration" to procure the disqualification of President Biden's most likely opponent in the election of 2024. And the same critics would have portrayed a decision *not* to charge Trump with insurrection as proof that even "deranged" Jack Smith[130] had acknowledged that a charge of insurrection could not be proven. Smith chose the second horn of the dilemma (the magnanimous one), thereby making it possible for Trump's brief in *Trump v. Anderson* to tell the Supreme Court:

> No prosecutor has attempted to charge President Trump with insurrection . . . in the three years since January 6, 2021, despite the relentless and ongoing investigations of President Trump. And for good reason: President Trump's words that day called for peaceful and patriotic protest and respect for law and order.[131]

4. The Special Counsel's Reasons

The Special Counsel's *Final Report* on January 7, 2025, set forth his reasons for omitting an insurrection charge from Trump's indictment.[132] It did not say that, because Trump's words on January 6 called only for "peaceful and patriotic protest and respect for law and order," he was innocent.

The *Report* also did not mention that a conviction of violating Section 2383 would disqualify Trump from holding federal office. It concluded: "[T]he charges the Office brought fully addressed Mr. Trump's criminal conduct, and pursuing a charge under Section 2383 would not have added to or otherwise strengthened the Office's evidentiary presentation at trial."[133] Even if that inaccurate statement had been true, pursuing a charge under Section 2383 would have added significantly to

---

[130] Donald Trump's Truth Social posts have called Jack Smith "deranged," a "nut job," and a "thug" more than 175 times. Dareh Gregorian & Jasmine Cui, *Trump Ramps Up Attacks on the Justice System When Trials and Key Rulings Loom, Analysis Shows*, NBC NEWS (Jan. 12, 2024, 6:00 AM EST), https://www.nbcnews.com/politics/donald-trump/trump-trials-attacks-judges-rcna131916 [https://perma.cc/ZX29-SA9B]. Trump has also called Smith "lamebrain," "mad dog psycho," "animal," and "lunatic."

[131] Brief for Petitioner at 33, Trump v. Anderson, *supra* note 127. One of the three justices of the Colorado Supreme Court who dissented from the court's ruling disqualifying Trump cited the failure to charge Trump with insurrection as a reason for his dissent. He wrote: "To the extent there is interest in seeking to disqualify President Trump from holding public office . . . based on the allegation that he engaged in insurrection . . ., why wasn't he charged under section 2383?" Anderson v. Griswold, 543 P.3d 283, 355 (Colo. 2023) (Samour, J., dissenting). He also declared: "Given the current absence of federal legislation to enforce Section Three, and given that President Trump has not been charged pursuant to section 2383, the district court should have granted [Trump's] motion to dismiss." *Id.* at 361.

[132] *Final Report*, *supra* note 70, at 61–67.

[133] *Id.* at 67.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

the *sanctions* a conviction would bring. That consideration seemed worth mentioning.

The *Report* noted that Section 2383 "originated during the Civil War," that cases interpreting it are "scarce," and that "it does not appear that any defendant has been charged with violating the statute in more than 100 years."[134] The Special Counsel then pointed to three potential infirmities of an insurrection charge. First, a court might hold that Trump's speech on the Ellipse was constitutionally protected. Second, the lack of an authoritative definition of the term *insurrection* posed a "litigation risk." And third, "the Office did not develop direct evidence—such as an explicit admission or communication with co-conspirators—of Mr. Trump's subjective intent to cause the full scope of the violence that occurred on January 6." None of these concerns was substantial. Moreover, even if a judge dismissed an insurrection charge or a jury acquitted, the other charges would have remained. The Special Counsel did not explain how including the omitted charge would have harmed the government's position. When asked to describe their charging practices, many prosecutors say that they charge "the highest and most" the evidence permits. When asked why, they reply: Because the defendant did it.[135]

a. The *Brandenburg* Standard

The *Report* said that "there were reasonable arguments to be made that Mr. Trump's Ellipse Speech . . . could satisfy the Supreme Court's standard for 'incitement' under *Brandenburg v. Ohio*," but it noted that the *Brandenburg* standard is "rigorous" and "concluded that pursuing an incitement to insurrection charge was unnecessary."[136] The Special Counsel's Office seemed unaware that it could make the *Brandenburg* standard inapplicable by ignoring the word *incitement*, emphasizing the word *assist*, and treating the Ellipse Speech as part of a course of conduct that was intended to and did aid criminal conduct by others.[137]

Oddly, the Special Counsel's *Report* recognized that *Brandenburg* would not bar the use of Trump's speech to show that he had conspired to defeat a government function, injure the right to vote, or obstruct an official proceeding. It wrote:

---

[134] *Id.* at 61-62.

[135] *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 88–89 (1968).

[136] *Final Report*, *supra* note 70, at 66.

[137] *See supra* text accompanying notes 85–86.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

> It is well established that the First Amendment does not protect speech that is used as an instrument of crime. Many long established criminal laws permissibly criminalize speech that is intended to induce or commence illegal activities, such as fraud, bribery, perjury, extortion, threats, incitement, solicitation, and blackmail. Prosecutions for conspiring, directing, and aiding and abetting do not run afoul of the Constitution when those offenses are carried out through speech.[138]

Brandenburg has as little relevance to the crime of giving aid and comfort to an insurrection as it does to the crimes included in Trump's indictment—which is to say, none.[139]

b. Defining "Insurrection"

Whether the events of January 6 were an "insurrection" is, as Ilya Somin has written, an "easy call." Those events qualify "under any plausible definition of that term."[140] A thorough historical study by Mark A. Graber demonstrates that, at the time of the Civil War, "insurrection" had "a precise and well-understood meaning." This study also shows that the events of January 6 easily fit within this meaning.[141]

The word *insurrection* seemed apt to the House of Representatives when it impeached President Trump for "Incitement of Insurrection."[142] It seemed apt to one of the lawyers representing Trump in the Senate who said: "[T]he question before us is not whether there was a violent insurrection of the Capitol. On that point, everyone agrees."[143] It seemed apt to Congress when it enacted a statute awarding medals to police officers who sought to protect the Capitol from "a mob of

---

[138] *Final Report*, *supra* note 70, at 59–60 (citations and internal quotation marks omitted).

[139] In the district court, Trump maintained that the Special Counsel's charges would punish his protected political speech, but the court rejected this claim: "It is well established that the First Amendment does not protect speech that is used as an instrument of crime." United States v. Trump, 704 F. Supp. 3d 196, 220 (D.D.C. 2023), *aff'd*, 91 F.4th 1173 (D.C. Cir.), *vacated*, 603 U.S. 593 (2024). Trump did not challenge this ruling on appeal. *See* United States v. Trump, 91 F.4th 1173, 1183 n.3 (D.C. Cir.), *vacated*, 603 U.S. 593 (2024).

[140] Ilya Somin, *A Lost Opportunity to Protect Democracy Against Itself: What the Supreme Court Got Wrong in* Trump v. Anderson, 2023–24 CATO SUP. CT. REV. 319, 349 (2024).

[141] Mark A. Graber, *Section Three of the Fourteenth Amendment: Insurrection*, 33 WM. & MARY BILL OF RTS. J. 1, 1-3 (2024).

[142] Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors, H.R. Res. 24, 117th Cong. (2021).

[143] 167 CONG. REC. S729 (daily ed. Feb. 13, 2021).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

insurrectionists."[144] And it seemed apt to the more than forty judges who have used that word in written opinions to describe the attack on the Capitol.[145]

Whether the word fit the January 6 attack was disputed in litigation concerning the Fourteenth Amendment's disqualification provision, but every authority that considered the issue said that it did. A New Mexico court said so when it ruled that a January 6 rioter could not run for local office.[146] A Cook County, Illinois court agreed when it ruled that Trump was disqualified.[147] An opinion of the Maine Secretary of State took the same view.[148] The trial court in the case that reached the Supreme Court as *Trump v. Anderson* ruled that the January 6 attack was an insurrection,[149] and so did the Colorado Supreme Court.[150]

[144] An Act to Award Four Congressional Gold Medals to the United States Capitol Police and Those Who Protected the U.S. Capitol on January 6, 2021, Pub. L. No. 117-32, 135 Stat. 322 (2021).

[145] *See, e.g.*, United States v. Munchel, 991 F.3d 1273, 1279, 1281 (D.C. Cir. 2021); United States v. Carpenter, No. 21-305, 2023 U.S. Dist. LEXIS 21774, at *11 (D.D.C. 2023) ("What occurred on January 6 was in fact a riot and an insurrection[.]"); United States v. Chwiesiuk, No. 21-0536, 2023 U.S. Dist. LEXIS 68584, at *9 (D.D.C. Apr. 19, 2023) ("As this Court and other courts in the United States District Court for the District of Columbia have stated previously, what occurred on January 6, 2021 was in fact an insurrection and involved insurrectionists and, therefore, the terms to which Defendants object are accurate descriptors.").

[146] N.M. *ex rel*. White, No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 1, at *47–54 (First Jud. Dist. Ct. of N.M., Santa Fe Cnty., Sept. 6, 2022).

[147] Anderson v. Trump, No. 2024COEL000013, 2024 Ill. Cir. LEXIS 1, at *30–41 (Ill. Cir. Ct., Feb. 28, 2024).

[148] Hayley Meissner, *READ: Maine Secretary of State's Ruling Disqualifying Trump from Primary Ballot*, MSNBC 23–26 (Dec. 28, 2023, 9:01 EST), https://www.msnbc.com/deadline-white-house/deadline-legal-blog/full-text-maine-decision-trump-ballot-2024-pdf-rcna131552 [https://perma.cc/FST5-PZQQ] (discussing the meaning of *insurrection* at pages 23-26); *see* Order and Decision at 3, Trump v. Bellows, No. AP-24-01, 2024 WL 989060, at *2 (Me. Super. Ct. Jan. 17, 2024) (remanding the Secretary of State's ruling with instructions to reconsider after the Supreme Court renders its decision in *Trump v. Anderson*).

[149] Anderson v. Griswold, No. 2023CV32577, 2023 Colo. Dist. LEXIS 362, at *91 (Colo. Dist. Ct. Nov. 17, 2023), *rev'd*, 543 P.3d 283 (Colo. 2023), *aff'd on other grounds sub nom.* Trump v. Anderson, 601 U.S. 100 (2024). This decision held that Trump was not disqualified because, as President, he was not an "officer of the United States." *Anderson*, 601 U.S. at 107. Before making that ruling, however, the court held that the attack on the Capitol was an insurrection.

[150] Anderson v. Griswold, 543 P.3d 283, 329–31 (Colo. 2023), *rev'd sub nom.*, Trump v. Anderson, 601 U.S. 100 (2024). The Colorado Supreme Court reversed the trial court's ruling that Trump had never been an officer of the United States, but it affirmed the trial court's ruling that the attack of January 6 was an insurrection.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Trump's lawyer in the Supreme Court decided not to argue the point. His brief maintained that Trump had not participated in an insurrection but did not deny that the attack on the Capitol was one.[151]

As Ilya Somin wrote, Noah Webster's definition of insurrection in 1828 fits the events of January 6 "to a T."[152] According to Webster, an insurrection is:

> A rising against civil or political authority; the open and active opposition of a number of persons to the execution of a law in a city or state. It is equivalent to sedition, except that sedition expresses a less extensive rising of citizens. It differs from rebellion, for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one or to place the country under another jurisdiction. . . . [I]nsurrection is however used with such latitude as to comprehend either sedition or rebellion.[153]

Judge Peter Grosscup's charge to a federal grand jury in 1894 expanded on Webster's definition:

> Insurrection is a rising against civil or political authority,—the open and active opposition of a number of persons to the execution of law in a city or state. . . . If, therefore, [arrests for federal offenses have] been opposed by such a number of persons as would constitute a general uprising in that particular locality, and as threatens for the time being the civil and political authority, then the fact of an insurrection, within the meaning of the law, has been established; and he who by speech, writing, or other inducement assists in setting it on foot, or carrying it along, or gives it aid or comfort, is guilty of a violation of law. It is not necessary that there should be bloodshed; it is not necessary that its dimensions should be so portentous as to insure probable success . . . . It is necessary, however, that the rising should be in opposition to the execution of the laws of the United States, and should be so formidable as for the time being to defy the authority of the United States. When men gather to resist the civil or political power of the United States, or to oppose the execution of its laws, and are in such force that the civil authorities are inadequate to put them down . . . they become insurgents; and every person who knowingly incites, aids, or abets them, no matter what his motives may be, is likewise an insurgent. The penalty for the offense is severe,

---

[151] Brief for Petitioner at 33, Trump v. Anderson, *supra* note 127.

[152] Somin, *supra* note 140, at 352.

[153] *Insurrection*, AM. DICTIONARY OF THE ENG. LANGUAGE, https://webstersdictionary1828.com/Dictionary/insurrection [https://perma.cc/N59X-A6BB].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

> and, as I have said, is designed to protect the government and its authority against direct attack.[154]

A brief restatement of Judge Grosscup's charge might say: Insurrection means combined resistance to lawful authority with intent to prevent the exercise of that authority. This resistance must be so formidable that it cannot be effectively addressed by ordinary law enforcement measures.[155]

c. Proving Trump's Criminal Intent

Only a fainthearted Special Counsel could have doubted his ability to prove that the attack on the Capitol was an insurrection, and, if this Special Counsel also doubted his ability to show that Donald Trump intended to give aid and comfort to the insurrection, he might have been the most timorous prosecutor ever.[156]

Perhaps the evidence of Trump's intent to aid the occupation of the Capitol was inconclusive before the occupation began. Although the President gave an incendiary speech to a crowd that he probably knew included people carrying weapons,[157] his remarks ended by speaking of "peacefully and patriotically mak[ing]

---

[154] *In re* Charge to Grand Jury, 62 F. 828, 830 (N.D. Ill. 1894).

[155] The Constitution gives Congress the power to provide for calling forth the militia to suppress insurrections or invasions. U.S. CONST. art. I, § 8, cl. 15. This provision reinforces the sense that a disturbance qualifies as an insurrection only when it has moved beyond the ability of ordinary law enforcement to control. In 2020, when White House officials maintained that some Black Lives Matter protests constituted an insurrection and proposed using the military to suppress them, the Chairman of the Joint Chiefs of Staff, General Mark Milley, pointed to a picture of Abraham Lincoln. He reportedly told President Trump: "That guy had an insurrection. You don't have an insurrection. When guys show up in gray and start bombing Fort Sumter, you'll have an insurrection." CAROL LEONNIG & PHILIP RUCKER, I ALONE CAN FIX IT: DONALD J. TRUMP'S CATASTROPHIC FINAL YEAR 157–58 (2021).

[156] That Trump did give aid and comfort to the attack on the Capitol either intentionally or inadvertently is clear. The attack would not have happened without him.

[157] White House aide Cassidy Hutchinson testified to the House Select Committee that she heard Deputy Chief of Staff Tony Ornato's description of the crowd's armaments to Chief of Staff Mark Meadows. They included "knives, guns in the form of pistols and rifles, bear spray, body armor, spears and flag poles." Meadows asked Ornato whether he had informed the President, and Ornato said: "Yes, Sir. He's aware." Hutchinson herself heard President Trump order the removal of magnetometers from an area near the stage, saying "something to the effect of . . . I don't f'ing care that they have weapons. They're not here to hurt me. Take the f'ing mags away. Let my people in." *Here's Every Word from the Sixth Jan. 6 Committee Hearing on its Investigation*, NPR (June 28, 2022, 6:28 PM ET), https://www.npr.org/2022/06/28/1108396692 [https://perma.cc/X75Z-DLLZ].

Without revealing which of Hutchinson's statements were disputed or by whom, Leonnig and Davis reported: "[F]ormer Trump administration officials uniformly and fiercely disputed her accounts

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

your voices heard." When the insurrection began, however, Trump watched it on television,[158] and, for 187 minutes, he refused to ask his supporters to desist.

With his refusal, the proof of Trump's criminal intent shot up to beyond a reasonable doubt. *Nothing* could explain his refusal to ask his supporters to depart other than his desire for the insurrection to continue. *No other inference is possible*. The quantum of proof leapt higher still when Trump responded to an advisor's report that Vice President Pence had been taken to a secure location by asking "So what?"[159] and it reached its apex when Trump informed the mob that "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution."[160]

This conduct supplied proof of Trump's intent both during the insurrection and before it, and Trump's conduct was itself an aid and comfort to the insurrection. A President's constitutional obligation is to "take Care that the Laws be faithfully executed,"[161] and Trump probably could have brought the occupation to an end with a word. His omission resembled that of a police officer assigned to guard the Capitol who abandoned her post as an armed mob approached because she hoped they would burn the place down. She, too, would be guilty of giving aid and comfort to an insurrection.

Trump's failure to enforce the law should be considered with his other conduct, but, even if this failure had stood alone, it would have entitled the Special Counsel to a jury instruction like this one:

---

under oath. Prosecutors told [Special Counsel Jack] Smith that they wouldn't want to use Hutchinson in court. Smith agreed." LEONNIG & DAVIS, *supra* note 64, at 310. Leonnig and Davis also noted, however: "[B]efore Trump took the stage, agents manning the magnetometers had confiscated a small arsenal from those who opted to enter the stage area: 269 knives or blades, 242 cannisters of pepper spray, 18 sets of brass knuckles, 29 tasers, 6 pieces of body armor, 3 gas masks, 30 batons or blunt instruments." *Id.* at 107. Whether the Special Counsel could prove Trump's knowledge of the crowd's armaments is uncertain. But, even if administration officials disputed Hutchinson's testimony about Trump's order to remove the magnetometers, it is difficult to believe that she had no basis for that testimony. Inventing her account would have required the literary talent of a JRR Tolkien or Stephen King, and the language she attributed to Trump seems characteristic of his manner.

[158] *Final Report*, *supra* note 70, at 29. In addition, the Special Counsel's Office obtained access to the cell phone Trump used on January 6. Prosecutors could show that Trump "look[ed] at multiple images depicting the violence at the Capitol, including violent confrontations between officers and protesters, and photos of Ashli Babbitt, who was later pronounced dead at the hospital after being shot as she tried to break into the chamber of the House of Representatives." KARL, *supra* note 77, at 328–29.

[159] *Final Report*, *supra* note 70, at 30.

[160] *Donald J. Trump (1st Term), Tweets of January 6, 2021*, *supra* note 35.

[161] U.S. CONST. art. II, § 3, cl. 1.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

> Ordinarily, to commit an offense, a defendant must commit a conscious and voluntary act, with the required state of mind. . . . However, a failure to act or an omission can be the basis for criminal responsibility if the government proves beyond a reasonable doubt that the defendant had a legal duty to act, but failed or omitted to perform that legal duty with the required mental state.[162]

One virtue of charging Trump with aiding an insurrection in addition to his other crimes would have been that this charge would focus attention directly on his acts and omissions during the attack. This conduct appalled his family,[163] his close White House associates, and supporters who had believed his lies about the election. It would have appalled a jury as well.

Contrary to the analysis of the Special Counsel's *Final Report*, proving Trump's guilt of insurrection would have been no more difficult than proving his guilt of the crimes the Special Counsel charged. Indeed, it might have been easier. The principal reason for omitting this charge from Trump's indictment was probably that insurrections in the United States have been rare, that charges of violating Section 2383 have been infrequent, and that few published opinions have interpreted this statute's language. Federal prosecutors delight in conspiracy charges just as defense attorneys despise them. Like the rest of us, they may think: "Just gimme something I'm used to."

5. Did the Omission Make a Difference?

Because Trump's case would never be tried, the failure to charge him with insurrection might not have mattered. It did, however, enable the Supreme Court to imply in *Trump v. Anderson* that the Fourteenth Amendment's disqualification provision could have been implemented if only that charge had been filed. The Court indicated (and perhaps believed) that it was Jack Smith, not the Court itself, who had decided to allow Trump to return to the White House. If a charge of insurrection had

---

[162] *Model Criminal Jury Instructions, Chapter 5: Considerations of Mental State*, U.S. CT. OF APPEALS FOR THE THIRD CIR. § 5.10, https://www.ca3.uscourts.gov/sites/ca3/files/1%202024%20Chapter%205%20for%20posting%20rev%2010%2024.pdf [https://perma.cc/BYM8-SXZ5]; *see also Model Criminal Jury Instructions, Chapter 7: Additional Bases for Criminal Liability*, U.S. CT. OF APPEALS FOR THE THIRD CIR. § 7.02 comment, https://www.ca3.uscourts.gov/sites/ca3/files/1%202024%20Chapter%207%20for%20posting.pdf [https://perma.cc/BP3K-L5EQ] ("A defendant may also be responsible as an accomplice (aider and abettor) based on his or her failure to act despite having a legal duty to act. When the government's theory is that the defendant was an accomplice through failure(s) to act or omission(s), the court should give [the instruction quoted in text].").

[163] *See* Paul LeBlanc, *Donald Trump Jr. Said His Father Needed to 'Condemn' Capitol Violence as it Unfolded, Meadows' Texts Reveal*, CNN: POLITICS (Dec. 14, 2021, at 01:24 ET), https://www.cnn.com/2021/12/13/politics/trump-jr-text-mark-meadows-january-6 [https://perma.cc/3E8E-UD55].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

been filed and was awaiting trial, one wonders whether the Court would have ruled, first, that Section 2383 is the exclusive mechanism for implementing the Fourteenth Amendment's disqualification provision and, second, that a President who aided an insurrection in order to prevent a duly elected successor from taking office cannot be prosecuted for that crime. Would the Court have made Section 3 of the Fourteenth Amendment a nullity for insurrectionist Presidents?[164]

Whether the ruling in *Trump v. United States* would have barred Trump's prosecution for violating Section 2383 is unclear. Indeed, for the Supreme Court to hold that purposely aiding a violent occupation of the Capitol was an official presidential act would have been astonishing.

As this Article will explain, however, the ruling in *Trump* might well have produced this holding. Three crucial elements of the Court's analysis were: ignoring the crimes charged, treating every act offered as evidence of these crimes as though it were a crime itself, and declaring the President's mental state irrelevant. The Court in fact indicated (although it did not hold) that most of the acts comprising Trump's aid to the insurrection—his invitation to a "wild" rally, his "fight like hell" speech on the Ellipse, and his incendiary tweet about Vice President Pence—were "official." It wrote that "the President possesses 'extraordinary power to speak to his fellow citizens and on their behalf'" and that "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities."[165] This analysis might have made Trump's invitation, his speech on the Ellipse, and his tweet about Pence presumptively or absolutely immune even if the President, in performing these acts, intended even more than he did—say, the permanent disbanding of Congress and the tarring and feathering of its Democratic members.

The Court did not mention the 187 minutes in which Trump refused to enforce the law by asking his supporters to end their occupation of the Capitol, but it might have held that refusing to enforce the law was part of his job as well. It wrote: "[T]he Executive Branch has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute."[166] Perhaps the Court's mode of granting

[164] Nullifying Section 3 by making Trump immune from prosecution would not have blocked Congress from enacting new legislation providing for noncriminal enforcement of this provision, but a ruling that a standard enforcement mechanism was unavailable to Congress would have rested on a never-before-noticed immunity supplied implicitly by constitutional provisions that preexisted the Fourteenth Amendment. Because the Special Counsel had not charged Trump with insurrection, the Court could maintain that a workable remedy already existed but had not been used.

[165] *Trump*, 603 U.S. at 629.

[166] *Id.* at 620.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

immunity (ignore the crime charged, ignore all evidence of the President's criminal intent, and consider each piece of evidence separately) would have become so bizarre and unconvincing if used to portray deliberate aid to a violent insurrection as "official" that some members of the majority would have backed away. If so, the Special Counsel's decision to pull his toughest punch might have affected both the ruling in *Trump v. Anderson* and the ruling in *Trump v. United States*.

6. Saying Too Much

A federal indictment need set forth only a "plain, concise, and definite written statement of the essential facts constituting the offense" and provide citations of the statutes the defendant is alleged to have violated.[167] For decades, however, the practice of federal prosecutors in major cases has been to file "speaking indictments." These indictments provide a narrative of the alleged crime and set forth in detail the evidence the government expects to present at trial.

Critics complain that these indictments allow prosecutors to evade restrictions on what they may say to the press.[168] Moreover, when judges allow jurors to consult indictments during their deliberations, a speaking indictment may effectively give the government a second closing argument.[169]

Some courts have joined the criticism. The D.C. Circuit wrote: "Despite the all too common use of 'speaking' indictments, the function of a federal indictment is to state concisely the essential facts constituting the offense, not how the government plans to go about proving them."[170] In the "other" federal prosecution of Donald Trump (the prosecution for misusing national security information), Judge Aileen Cannon noted the defendants' characterization of the government's speaking (and pictorial) indictment as a "portable closing argument." She declined, however, to strike any of the indictment's allegations "at this stage" because "[d]efendants have not clearly shown that [these allegations] are flatly irrelevant or prejudicial."[171] Of

---

[167] FED. R. CRIM. P. 7(c)(1).

[168] *See, e.g.*, Joanne Armstrong Brandwood, Note, *You Say "Fair Trial" and I Say "Free Press": British and American Approaches to Protecting Defendants' Rights in High Profile Trials*, 75 N.Y.U. L. REV. 1412, 1450 (2000) ("New regulations should prohibit so-called 'speaking-indictments,' through which prosecutors evade no-comment rules by including highly prejudicial information in official court documents that are accessible by the press.").

[169] Ronald H. Levine, *Talk is Cheap: The Misuse of "Speaking" Indictments*, BUS. CRIMES BULL. (Nov. 2016), https://www.postschell.com/uploads/post__schell__talk_is_cheap__the_misuse_of_speaking__indictments__business_crimes_bulletin__nov_2016.pdf [https://perma.cc/D69H-QG65].

[170] United States v. Edmond, 924 F.2d 261, 269 (D.C. Cir. 1991) (citation omitted).

[171] United States v. Trump, 736 F. Supp. 3d 1206, 1216–17 (S.D. Fla. 2024).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

course, a virtue of speaking indictments is that they give defendants greater notice of the government's evidence than the defendants would have without them.

The indictment in *Trump* ran forty-five pages.[172] Count 1 charged the defendant with conspiring to defraud the United States. Then, under the heading "manner and means," it set forth the evidence of five actions that allegedly showed an implicit agreement between Trump and his coconspirators. The conspirators had: (1) presented fraudulent claims to state officials in an effort to persuade them to alter vote counts, (2) created and submitted false slates of electors, (3) sought to cause the Justice Department to send false information about its investigations to state officials, (4) attempted to persuade the Vice President to fraudulently alter election results, and (5) exploited the violence of January 6 by "redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification based on those claims." The three remaining counts recited no additional evidence. Each "re-allege[d] and fully incorporate[d]" the evidentiary allegations of Count 1.[173]

This indictment was conventional and unobjectionable. But, by filing it, the Special Counsel might have lost a case he could have won. A simpler "nonspeaking" indictment would have made impossible the Supreme Court's labyrinthine opinion addressing the five groups of evidence noted in the indictment. It would have required the Court to address the issue that Trump's case in fact presented—whether the defendant was immune from prosecution for the crimes the grand jury had charged.

B. The Special Counsel's Brief and Argument in the Supreme Court

1. The Brief: Failing to Distinguish Immunities from Defenses and Declaring Some Presidential Powers "Preclusive"

Supreme Court advocates and Supreme Court justices addressing the issue of presidential immunity might be supposed to have mastered the difference between an immunity and a defense. The majority opinion in *Trump*, however, muddled these things together, and the Special Counsel's brief probably led to the Court's confusion.

Justice Ketanji Brown Jackson's dissenting opinion in *Trump* quoted the definition of immunity provided by a law dictionary: An immunity is an

[172] Indictment, *supra* note 92.

[173] *Id.* at 43–45.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

"exemption" from the duties and liabilities imposed by law.[174] A *defense* says that a President acted within his authority. He did not commit a crime. An *immunity* says that, even if the President acted unlawfully, he should not be prosecuted.

The arguments for approving an immunity include excuse, distraction, harassment, and overdeterrence, but they do not include legal justification. Here are some illustrations:

Excuse: The Supreme Court has held that, even when a police officer has violated the Fourth Amendment by making an unreasonable search or seizure, she is entitled to immunity from a civil suit for damages if a reasonable officer would not have realized that her conduct was unlawful.[175] This officer has an excuse but not a justification.

Distraction: The Justice Department has concluded that a President may not be indicted while he remains in office.[176] This time-limited immunity allows him to concentrate on his presidential duties without distraction.[177]

Harassment: A former President is entitled to "absolute" immunity from civil suits for damages for actions that he took "within the outer perimeter" of his official presidential duties.[178] According to the Supreme Court, one reason for this immunity is that "the visibility of his office and the effect of his actions on countless people" make him "an easily identifiable target."[179] The suggestion in *Trump* that immunity is necessary to protect against lawfare reflects a similar concern that federal and state prosecutors might hound a former President with unfounded and improperly motivated charges.[180]

Overdeterrence: Although a former President might deserve punishment, prosecution might make his successors too cautious and chill their legitimate exercise of presidential power. This concern appeared to be the principal motivation for the decision in *Trump*. The Court noted that the prosecution of a former President

---

[174] *Trump*, 603 U.S. at 686 (Jackson, J., dissenting) (quoting BLACK'S LAW DICTIONARY 898 (11th ed. 2019)).

[175] *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 635 (1987).

[176] A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 222 (Oct. 16, 2000).

[177] An indictment could distract a President even if her trial were delayed until she left office. Requiring her to stand trial and to be present in a courtroom could impede physically the performance of her duties.

[178] Nixon v. Fitzgerald, 457 U.S. 731, 732 (1982).

[179] *Id.* at 753.

[180] *See supra* text accompanying notes 94–96.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

could lead a future President to "apprehen[d] that criminal penalties may befall him upon his departure from office,"[181] could cause a President to "hesitat[e] to execute the duties of his office fearlessly and fairly,"[182] could diminish a President's "vigor" and "energy,"[183] and could make a President fearful of "tak[ing] the 'bold and unhesitating action' required of an independent Executive."[184]

When a President has done what the Constitution entitled him to do, he needs no immunity. A statute that purported to punish his actions would be unconstitutional, and even a statute that was valid in most applications might be unconstitutional when applied to the President.[185] For example, an anti-nepotism statute might bar federal officials from granting specified governmental benefits to close relatives, but it could not block a President from nominating his brother to be Attorney General (as President Kennedy did) or from pardoning his son (as President Biden did). Although valid in other situations, this statute would be unconstitutional "as applied."[186] The Constitution says that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States."[187] It also says that he "shall have Power to grant Reprieves and Pardons for Offenses against the United States."[188] Congress may not take any part of those powers away.

At the outset of its "Summary of Argument," however, the Special Counsel's brief in the Supreme Court treated defenses and immunities as the same thing:

> Under this Court's established separation-of-powers framework, a claim of presidential exemption from a statutory limitation requires the President to

[181] *Trump*, 603 U.S. at 613.

[182] *Id.* at 595.

[183] *Id.* at 614.

[184] *Id.* at 604.

[185] *But see* United States v. Trump, 91 F.4th 1173, 1192 (D.C. Cir.) ("Here, former President Trump's actions violated generally applicable criminal laws, meaning those acts were not properly within the scope of his lawful discretion[.]"), *vacated*, 603 U.S. 593 (2024).

[186] *Cf.* Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges, 19 Op. O.L.C. 350, 358 (Dec. 18, 1995) (construing a federal anti-nepotism statute not to bar the President's nomination of a sitting judge's son to be a judge on her court and declaring: "Because the Constitution gives the President alone the power to nominate non-inferior officers of the United States, any attempt by Congress to restrict his choice of nominees, otherwise than by the Senate's refusing to consent to a nomination, is questionable under the Constitution.").

[187] U.S. CONST. art. II, § 2, cl. 2.

[188] U.S. CONST. art. II, § 2, cl. 1.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

> identify an Article II basis that precludes the application of that congressional act. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring). No presidential power at issue in this case entitles the President to claim immunity from the general federal criminal prohibitions supporting the charges.[189]

This passage says that no presidential *power* entitled President Trump to claim *immunity*, and it cites Justice Robert Jackson's much admired concurring opinion in *Youngstown*. In that case, the Supreme Court held that neither the commander-in-chief power nor the "take care" power nor any other presidential power enabled President Truman to seize steel mills in order to halt a strike during the Korean War.[190]

Justice Jackson's analysis of presidential power said nothing at all about immunity, and it is difficult to know what to make of the government's argument. Did the Special Counsel mean that a President would be entitled to "immunity" only if the Constitution gave him the power to do what he did—in other words, only if he had a constitutional defense and needed no immunity? Asserting in a backhanded and conclusory way that there is no such thing as immunity seems unhelpful. Nevertheless, the brief's talk of Article II powers and its reliance on Justice Jackson's opinion reappeared in the majority opinion in *Trump*, and it apparently influenced the *Trump* dissenters too.

The import of the government's position became clearer when, a few pages later, its brief returned to Justice Jackson's concurrence in *Youngstown*. Quoting Justice Jackson's language, it declared:

> [W]here "the President takes measures incompatible with the express or implied will of Congress," . . . [he] can prevail only when he asserts an Article II power "so conclusive and preclusive" as to "disabl[e] the Congress from acting upon the subject." . . . .
>
> [A]n Act of Congress may trench upon an Article II power "that Congress may not qualify." This Court has held, for example, that Congress may not constrain the President's power to recognize foreign countries, to grant pardons, or to remove at will a principal officer who leads an executive agency headed by a single director. . . .

---

[189] Brief for the United States at 4, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939), 2024 WL 1592669, at *4.

[190] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

> [P]etitioner does not purport to identify any "exclusive" and "preclusive" power that would justify such an exemption.[191]

While again asserting that no true immunities exist, this passage of the government's brief indicates that some presidential powers are so unqualified that Congress cannot restrict their use even by proscribing serious crimes.

As this Article will explain, the claim that some constitutional powers give Presidents a right to commit treason and murder seriously overreads Justice Jackson's opinion, has no support in other opinions, lacks historical justification, and is inconsistent with the text of the Constitution.[192] But the Supreme Court majority picked up the fumbled ball and walked it into the end zone. It ruled not only that preclusive presidential powers can authorize Presidents to commit serious crimes but that they did authorize some of Trump's. The majority spoke of "conclusive" and "preclusive" grants of power as conferring, not constitutional defenses, but "absolute immunity."

The most memorable lines of Justice Sonia Sotomayor's dissenting opinion in *Trump* described the majority's ruling this way:

> When [the President] uses his official powers in any way, . . . 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.[193]

Justice Sotomayor's declaration seems to have been prompted by the Court's approval of "absolute" immunity for actions taken pursuant to "preclusive" and

---

[191] Brief for the United States, *supra* note 189, at 11–12.

[192] *See infra* Section V.C.

[193] *Trump*, 603 U.S. at 685 (Sotomayor, J., dissenting). The Justices in the majority were offended by these comments. Chief Justice Roberts' majority opinion declared: "[T]he dissents . . . strike a tone of chilling doom that is wholly disproportionate to what the Court actually does today." *Id.* at 637 (majority opinion). It accused the dissenters of "fear mongering on the basis of extreme hypotheticals." *Id.* at 640. But the majority did not expressly deny that it *had* immunized a President who ordered a coup or an assassination. One sentence could have erased Justice Sotomayor's illustrations. Readers were left to infer that the Court's ruling was as dreadful as the dissenters said it was. Justice Sotomayor's zingers had landed. *But see infra* text accompanying notes 299–315 (explaining why the decision in *Trump* would not in fact block the prosecution of a President who ordered Seal Team 6 to assassinate a rival but would preclude the prosecution of a President who pardoned a professional hitman in exchange for his promise to do the deed).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

"conclusive" powers. Few readers would have guessed that the existence of this "immunity" had been proposed, not by Trump's counsel, but by the lawyers prosecuting him. The prosecutors differed with the Supreme Court majority only about which powers were "preclusive." The Court noted that the government "agree[s] with much of our analysis."[194]

Although Justice Barrett did not quarrel with most of the majority's rulings, her separate opinion questioned the majority's use of the word *immunity*:

> I would have framed the underlying legal issues differently. The Court describes the President's constitutional protection from certain prosecutions as an "immunity." As I see it, that term is shorthand for two propositions: The President can challenge the constitutionality of a criminal statute as applied to official acts alleged in the indictment, and he can obtain interlocutory review of the trial court's ruling.[195]

Justice Barrett's terminology said more clearly than the majority's that, just as Article II of the Constitution allows the President to nominate his brother to be Attorney General, it allows him to direct his Attorney General to lie to state officials about the Justice Department's findings for the purpose of stealing an election.[196] Indeed, it entitles the President to commit any crime he likes as long as he can commit it by exercising a "conclusive and preclusive" power—for example, his power to give directions to "high ranking Justice Department officials."[197]

---

[194] *Id.* at 634.

[195] *Id.* at 651 (Barrett, J., concurring in part).

[196] *See id.* at 651 n.1.

[197] *Id.* As Justice Barrett indicated, her view of what the majority calls "absolute immunity" was the majority's view as well. *See id.* at 609 (majority opinion); *infra* text at notes 314–16. What the majority called "presumptive" immunity, however, is a conventional immunity. It blocks a former President's prosecution, not because he has exercised a power granted him by the Constitution, but primarily because prosecuting his unlawful act might make future Presidents too cautious. Justice Barrett's effort to treat "presumptive" as well as "absolute" immunity as raising only a question of "the constitutionality of a criminal statute" was awkward and unhelpful. *See Trump*, 603 U.S. at 652–53 (Barrett, J., concurring in part).

For an insightful discussion of when and whether the *Trump* decision exempts Presidents from "the primary obligations imposed by the criminal laws" or merely "from being subjected to certain types of sanctions," see Carlos M. Vázquez, *What is Trump Immunity?*, 100 NOTRE DAME L. REV. ONLINE 205

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

By treating constitutional defenses as immunities, the Special Counsel's brief cast aside the government's best argument—that the framers and ratifiers of Article II did not intend to give the president *any* immunity from criminal prosecution. The evidence in favor of that proposition is overwhelming.[198] But declaring that every exercise of a "core" or "preclusive" presidential power is entitled to "immunity" disabled the government from endorsing this position. Later sections of this Article will show how harmful the Special Counsel's misconceived argument turned out to be.

2. The Argument: Old Adversaries Meet Again

In 2016, Michael R. Dreeben became the seventh person in history to have argued 100 cases in the Supreme Court. In *Trump*, he argued his 107th,[199] appearing on behalf of the Special Counsel's Office. Throughout Dreeben's thirty-year career in the Solicitor General's Office, he represented the government in criminal cases.

(2025), https://scholarship.law.nd.edu/ndlr_online/vol100/iss3/4/ [https://perma.cc/3J4V-WSZK]. Vázquez explains nicely why this distinction matters in resolving specific legal issues.

Justice Barrett accurately described the *procedural* implications of the majority's use of the word immunity, but note that speaking of "immunity from prosecution" can be misleading. That term is accurate when the facts alleged in the indictment establish that the defendant may not be placed on trial. But when the determinative facts are unclear, "immunity" issues need not be resolved definitively before trial. *See infra* text at notes 241–44; United States *ex rel.* Drury v. Lewis, 200 U.S. 1 (1905) (denying two federal officers' claims of immunity from prosecution and permitting a state court to try them when the facts that would establish their immunity were disputed); Johnson v. Jones, 515 U.S. 304, 313 (1999) (holding that a denial of summary judgment to officers claiming qualified immunity in a civil action for damages cannot be appealed before trial when the denial rests on a determination that material facts are in dispute).

Note also that criminal defendants other than former Presidents cannot appeal before trial the denial of claims that the statutes they have been accused of violating are unconstitutional. *See, e.g.*, Class v. United States, 583 U.S. 174, 193-94 (2018) ("[W]e have never permitted a defendant to appeal a pretrial order rejecting a constitutional challenge to the statute the defendant allegedly violated. In fact we have repudiated the very suggestion.") (citing United States v. Hollywood Motor Car Co., 458 U.S. 263, 270 (1982)). Justice Barrett apparently would alter that rule for former Presidents but not other litigants—for example, criminal defendants who claim they are being prosecuted under invalid statutes for exercising the right to speak or worship. *See Trump*, 603 U.S. at 651 (Barrett, J., concurring in part) (suggesting that "safeguard[ing] . . . Executive Branch independence on matters Article II assigns to the President's discretion" justifies an interlocutory appeal).

[198] *See* Brief of Amici Curiae Scholars of the Founding Era in Support of Respondent at 2, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939) ("Sometimes history speaks ambiguously. But here, it speaks with surpassing clarity . . . . As James Iredell . . . explained, 'If [the President] commits any crime, he is punishable by the laws of his country.'"); *id.* at 4 ("There is no evidence that any Framer intended for a President . . . to be immune from prosecution."); Saikrishna Bangalore Prakash, *Prosecuting and Punishing Our Presidents*, 100 TEX. L. REV. 55, 65–75 (2021).

[199] *Michael R. Dreeben*, OYEZ, https://www.oyez.org/advocates/michael_r_dreeben [https://perma.cc/KNH4-N33D] (last visited Mar. 15, 2026).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

His reputation as one of the finest advocates of our time is well deserved, and I am one of his fans. In voicing my disappointment with his argument in *Trump*, I am not saying I could have done better.

In Dreeben's first case before the Supreme Court, his opposing counsel was another lawyer who had not previously argued in that Court. His name was John Roberts. From the center of the bench thirty-six years later, Chief Justice Roberts took on Dreeben again. He asked: "The court of appeals . . . said: 'A former president can be prosecuted for his official acts because the fact of the prosecution means that the former president has allegedly acted in defiance of the laws.' Do you agree with that statement?"[200]

Dreeben had a unanimous court of appeals decision to defend, and that decision and the statement about which Chief Justice Roberts asked were defensible. I think an appropriate response might have been:

> I do agree, but of course the court of appeals referred to a President's defiance of *valid* criminal laws. Its statement in fact came at the end of a long discussion of which presidential actions Congress may regulate and which it may not. When a law intrudes on powers the Constitution grants the President, of course it is invalid. Moreover, courts must construe statutes to avoid constitutional questions, and this doctrine gives Presidents an extra margin of protection. The court of appeals concluded that these doctrines and others fully safeguard presidential power and that giving absolute immunity to a President who has acted in willful defiance of valid laws would be overkill.

Dreeben answered differently. He said of the court of appeals' statement: "Well, I think it sounds tautologically true."[201]

Roberts then sprang, and Dreeben waffled:

> CHIEF JUSTICE ROBERTS: I think it sounds tautologically true as well, and that, I think, is the clearest statement of the court's holding, which is why it concerns me. As I read it, it says simply a former president can be prosecuted because he's being prosecuted.
>
> MR. DREEBEN: "Well, I—I would not suggest that's either the proper approach in this case or certainly not the government's approach. . . .

[200] Transcript of Oral Argument at 73, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939).

[201] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

> CHIEF JUSTICE ROBERTS: . . . [S]hortly after that statement, [the court of appeals] said, but there's no reason to worry because the prosecutor will act in good faith and . . . a grand jury will have returned the indictment. Now you know how easy it is in many cases for a prosecutor to get a grand jury to bring an indictment, and reliance on the faith—good faith of the prosecutor may not be enough in some cases. . . . So, if it's tautological and those are the only protections that the court of appeals below gave and that is no longer your position, you're not defending that position, why shouldn't we either send it back to the court of appeals or issue an opinion making clear that's not the law?
>
> MR. DREEBEN: Well, I—I am defending the court of appeals' judgment.[202]

Dreeben's response seemed to indicate that he was willing to defend the court of appeals' judgment but not its reasoning. One knowledgeable observer, Jack Goldsmith, interpreted the exchange that way.[203]

Much of Dreeben's argument focused on safeguards that he said made immunity unnecessary. There was further discussion of whether prosecutorial discretion and grand jury indictment offer significant protection from unjustified prosecution. Dreeben's insistence that groundless prosecutions are "not going to get

---

[202] *Id.* at 73–74.

[203] Jack Goldsmith, *The Presidency After* Trump v. United States, 2024 SUP. CT. REV. 1, 10 (2024). The Chief Justice's dismissal of the court of appeals decision was unjustified. The statement he singled out as a truism was not meant to be a statement of the court's holding or even an argument. It was meant to be a description and summary what the Supreme Court had ruled in prior cases. At the end of a discussion of these cases, the statement appeared in this passage. It constituted only part of a sentence:

> The separation of powers doctrine, as expounded in *Marbury* and its progeny, necessarily permits the Judiciary to oversee the federal criminal prosecution of a former President for his official acts because the fact of the prosecution means that the former President has allegedly acted in defiance of the Congress's laws. Although certain discretionary actions may be insulated from judicial review, the structure of the Constitution mandates that the President is 'amenable to the laws for his conduct' and 'cannot at his discretion' violate them.

Trump v. United States, 91 F.4th 1173, 1191–92 (D.C. Cir.) (referring to and quoting Marbury v. Madison, 5 U.S. 137, 166 (1803)), *vacated*, 603 U.S. 593 (2024).

The court of appeals' holding was not difficult to discern. It was that, contrary to Trump's contention, the Constitution does not afford absolute immunity to all official presidential acts that have not led to impeachment by the House and conviction by the Senate. Moreover, the court of appeals did not suggest that a prosecutor's good faith and a grand jury's decision to indict ensure that there is "no reason to worry." Former Presidents enjoy broad immunity from civil actions for damages, see *Nixon v. Fitzgerald*, 457 U.S. 731, 748 (1982), and the court simply included the ethical obligations of prosecutors and the requirement of grand jury indictment on its list of things that make criminal prosecutions different. *See Trump*, 91 F.4th at 1197.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

out of the starting gate" allowed Justice Samuel Alito to invoke "the old saw about indicting a ham sandwich."[204]

Dreeben also asserted: "A politically driven prosecution would violate the Constitution under Wayte versus United States."[205] He apparently relied on a dictum that did not refer directly to politically driven prosecutions,[206] and he did not mention that, after *Wayte*, the Supreme Court made discriminatory prosecution almost impossible to prove.[207]

When Justice Alito asked, "If the president gets advice from the attorney general that something is lawful, is that an absolute defense?" Dreeben gave an answer that astonished some observers.[208] He said: "Yes, I think that it is. Under the principle of entrapment by estoppel, . . . if an authorized government representative tells you that what you are about to do is lawful, it would be a root violation of due process to prosecute you for that."[209]

---

[204] Transcript of Oral Argument, *supra* note 200, at 103–04. Sol Wachtler, the Chief Judge of the New York Court of Appeals, remarked in 1985 that any good prosecutor can get a grand jury to "indict a ham sandwich." Marcia Kramer & Frank Lombardi, *Top Judge: Abolish Grand Juries*, N.Y. DAILY NEWS, Feb. 1, 1985, at C4.

[205] Transcript of Oral Argument, *supra* note 200, at 75 (referring to Wayte v. United States, 470 U.S. 598 (1985)).

[206] In *Wayte*, a defendant maintained that he would not have been prosecuted for failing to register for the draft if he had not vocally protested the duty to register, and the Supreme Court ruled against him. The Court said in dictum: "[T]he decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Wayte*, 470 U.S. at 608.

[207] *See* United States v. Armstrong, 517 U.S. 456, 465 (1996); *cf.* United States v. Segal, 495 F.3d 826, 832–33 (7th Cir. 2007) ("The Constitution prohibits initiating a prosecution based *solely* on vindictiveness. . . . [But i]t remains a fact that a pretrial claim of vindictive prosecution is extraordinarily difficult to prove.").

[208] *See* James M. Burnham, *The Special Counsel Made a Dangerous Argument About Trump Immunity*, WASH. POST (May 1, 2024), https://www.washingtonpost.com/opinions/2024/05/01/jack-smith-argument-trump-immunity/ [https://perma.cc/GQR9-K6TQ].

[209] Transcript of Oral Argument, *supra* note 200, at 107–08. Perhaps Dreeben could not imagine a President whose first choice for Attorney General would be Matt Gaetz and whose second would be Pamela Bondi. Earlier, Dreeben had noted a qualification of his answer: "[I]t would be a due process problem to prosecute a president who received advice from the attorney general that his actions were lawful absent the kind of collusion or conspiracy that itself represented a criminal violation . . . ." Transcript of Oral Argument, *supra* note 200, at 71. But Dreeben failed to mention a more significant qualification—the requirement that reliance on a public official's assurance be reasonable. *See, e.g.*, United States v. Ramirez-Valencia, 202 F.3d 1106, 1109–10 (9th Cir. 2000).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Dreeben did not make much effort to clarify the issue before the Court. Was it whether Trump's counsel succeeded in showing that the Constitution immunizes all official presidential conduct unless the House has impeached and the Senate has convicted? The court of appeals carefully considered Trump's counsel's arguments for that proposition and rejected them. If that court was correct, should anything more be said? In an adversary system, shouldn't an advocate who fails to make his case lose? Trump, a capably represented, non-indigent defendant, made a plea for total immunity that the court of appeals rejected. If that court did not err, was the defendant entitled to a second chance or a Supreme Court rescue?[210]

When an Attorney General has said without qualification that the courts would uphold a President's proposed action and the President has never had reason to doubt the Attorney General's assurance, the doctrine of entrapment by estoppel probably would apply. But capable lawyers rarely give unqualified assurances of erroneous legal propositions. Indeed, they rarely give unqualified assurances at all. When an Attorney General has told the President of a substantial risk that courts would not accept his view or when the President was aware that knowledgeable lawyers disagreed with the Attorney General, the President's reliance might not have been reasonable.

It might also matter whether the Attorney General was Robert Jackson or Matt Gaetz, whether this official ever had declined to render an opinion the President wanted, and whether lawyers who refused to issue opinions the President sought had previously been fired. The applicability of the defense and the reasonableness of the President's reliance would be questions for a jury. *See, e.g.*, United States v. Georgescu, 699 F. App'x 73, 74–76 (2d Cir. 2017); United States v. Schafer, 625 F.3d 629, 635-38 (9th Cir. 2010); *see generally* Albert W. Alschuler, *Why Hasn't the Justice Department Charged Mark Meadows With Contempt?*, LAWFARE (Apr. 13, 2022), https://www.lawfaremedia.org/article/why-hasnt-justice-department-charged-mark-meadows-contempt [https://perma.cc/TWA9-S8W6] (contending that a former Chief of Staff to President Trump could not reasonably rely on a legal opinion by a Trump-appointed Assistant Attorney General when that opinion took an untenable position that no court had endorsed and that two federal district courts had rejected, when a letter from the House Select Committee to Investigate the January 6 Attack to the former Chief of Staff had cited the relevant authorities and fully briefed the issue, when the former Chief of Staff was represented by a respected lawyer who had been Deputy Attorney General in a Republican administration, and when the former Chief of Staff probably understood the law far better than others for whom ignorance of the law would be no excuse); *see also DOJ Spares Meadows and Scavino from Contempt Charges*, PBS NEWS (June 4, 2022, 11:36 AM EDT), https://www.pbs.org/newshour/world/doj-spares-meadows-and-scavino-from-contempt-charges [https://perma.cc/F9TX-TJTU] (reporting the Justice Department's unexplained rejection of the House of Representatives' request that the department prosecute Mark Meadows, a former Chief of Staff to President Trump, for contempt of Congress although Meadows, by then a private citizen, had refused to appear in response to a subpoena seeking his unprivileged testimony); *supra* note 65 ("Surely no U.S. Attorney General ever sought harder than Merrick Garland to avoid even a hint of 'weaponization' or 'lawfare.'").

[210] *See* Wood v. Milyard, 566 U.S. 463, 472 (2012) ("[A] federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system."); Greenlaw v. United States, 554 U.S. 237, 243–44 (2003) ("To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant's rights.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Was the issue, not whether the argument advanced by Trump's counsel was valid, but whether the Court itself could come up with a valid historical or textual argument for presidential immunity?

Or was the issue not textual and historical? Was it how to keep our "living Constitution" in "tune with the times" by ensuring that Article II adequately protects Presidents against lawfare and overdeterrence in an era of hyper partisanship? Most of the questions asked by supposedly originalist justices during the argument in *Trump* concerned pragmatic, consequentialist issues of the sort that originalists generally say are not the concern of judges.[211]

Emphasizing the first issue (did the court of appeals properly reject Trump's argument?) probably would not have helped Dreeben's cause. As this Article will explain, the Court's statement of the question presented by Trump's case revealed its low regard for the adversary system.[212] But Dreeben might have fared better by nudging the argument toward the second (does presidential immunity have any textual or historical foundation?) than by emphasizing the third (would presidential immunity make the world a better place?).[213] And, because Dreeben's argument faltered, it might have been good to have a fallback position.[214]

Trump's counsel had one. His brief in the Supreme Court maintained that, if the Court rejected his claim of absolute immunity, it should approve "qualified immunity like that afforded to state governors and subordinate executive officials."[215] (These officials have no immunity from criminal prosecution. Counsel

[211] At the Founding, there were no political parties, and grand juries did not indict ham sandwiches. Some purportedly originalist Justices may secretly believe that their "different experience of life in our polity" entitles them "to conceive of the problems of its constitution in a new way." *See* Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 223 (1981); *but see* Ushma Patel, *Scalia Favors "Enduring," Not Living, Constitution*, PRINCETON UNIV. (Dec. 11, 2012, at 13:00 EST), https://www.princeton.edu/news/2012/12/11/scalia-favors-enduring-not-living-constitution [https://perma.cc/QT4T-5J5V] (reporting Justice Antonin Scalia's now famous summary of his originalist understanding: "It isn't a living document! It's dead. Dead, dead, dead!").

[212] *See infra* text accompanying notes 218–20.

[213] Dreeben's ability to argue history was hobbled, however, by the Special Counsel Office's unfortunate muddling of immunities and defenses. *See supra* Section II.B.1.

[214] A section of the brief of the Special Counsel's Office was headed, "Even if a former president has some immunity from federal criminal prosecution for official acts, this prosecution should proceed." Brief for the United States, *supra* note 189, at 44–49. But this section did not discuss what sort of immunity the Supreme Court might approve if it rejected the Special Counsel's argument that a President should be "immune" only if the Constitution gave him the power to do what he did.

[215] Brief of Petitioner President Donald J. Trump at 45, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939), 2024 WL 1234260, at *45.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

apparently referred to their qualified immunity from civil actions for damages under a federal civil rights statute.[216]) Counsel proposed a form of qualified immunity that would allow a President's prosecution and conviction only when the illegality of his alleged action was "beyond debate."[217]

Counsel had not advanced this position in the district court or the court of appeals, and the Supreme Court ordinarily refuses to consider questions "not pressed or passed upon in the courts below."[218] But, when the Court granted certiorari in *Trump*, it offered a broad formulation of the issue the case presented: "[Certiorari] is granted limited to the following question: Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office."[219] This order indicated that the Court's inquiry probably would not be limited to issues raised or considered in the courts below. The Court often uses the word *limited* to mean *expanded*.

A slightly different, less slanted form of qualified immunity might have supplied an appropriate fallback for the Special Counsel's Office. This formulation would say: A former President may not be prosecuted for any official action a reasonable President could have believed was within his authority.

If the defendant's lawyer and the lawyers prosecuting the defendant had offered "second best" or "fallback" positions that looked alike, the Court probably would have noticed. It might in fact have been astonished, and it might have considered their "second best" proposals seriously.

The suggested fallback formulation for the Special Counsel's Office would have been superior in several respects to standards approved in *Trump*. Unlike the Supreme Court's complex scheme of layered inquiries that this Article will describe, this formulation would have been comprehensible. It would have been easier to apply. It would not have required soothsaying speculation about whether a particular prosecution would pose a chance of intrusion on the authority and functions of the

---

[216] *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 238–50 (1974).

[217] Brief of Petitioner President Donald J. Trump, *supra* note 215, at 47.

[218] *See* Illinois v. Gates, 462 U.S. 213, 218 (1983). In *Gates*, the Court directed the parties to brief an issue that had not been contested in the courts below, and the parties did. Then, with apologies, the Court concluded that it would be inappropriate to address an issue that had not been considered by the lower courts. The Court provided an extended discussion of the rule that appellate courts may consider only issues "pressed or passed upon" by lower courts, noting that the Court once had viewed this rule as limiting its jurisdiction but had treated it in some recent decisions as "merely a prudential restriction." *See id.* at 217–24.

[219] Trump v. United States, 144 S. Ct. 1027 (2024) (granting certiorari in United States v. Trump, 91 F.4th 1173 (D.C. Cir. 2024)).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

executive branch. It would not have prompted alarming hypotheticals about the use of Seal Team 6 to assassinate rivals. It would not have provoked accusations that the Court had placed a favored President above the law. It would have focused clearly on the crimes with which a former President was charged and avoided the error of treating acts presented as evidence of these crimes as though they were crimes themselves. Like the Court's formulation, however, it would have avoided questions about a particular President's understanding of his authority and would have guarded against chilling legitimate exercises of presidential power. It is difficult to see why a former President should have any greater protection.[220]

From the perspective of the Special Counsel's Office, a further advantage of the suggested formula is that it would not appear to pose a substantial hurdle to the prosecution of former President Trump. A reasonable President could not have believed that conspiring to steal an election through fraud, obstruction, and the exploitation of violence was within his authority. But perhaps some members of the Supreme Court saw the inability of this formula to provide much protection to Trump as a drawback, not a virtue.

With the benefit of hindsight, the performance of the Justice Department in *Trump v. United States* looks imperfect, and perhaps some lessons can be drawn—for example, that temporizing about the prosecution of serious crimes is likely to be a mistake.[221] But the Justice Department's failings do not come close to matching those of the Supreme Court. The remainder of this Article will address the *Trump* decision and its effects.

PART TWO
THE SUPREME COURT'S ASTONISHER DECISION

III. PROCEEDING WITHOUT JURISDICTION

When Trump's case was before the D.C. Circuit, neither party challenged the court's jurisdiction to hear it, but an *amicus curiae* did. Because a court without

[220] The suggested formulation would not, however, have had better textual or historical credentials than other formulations for affording presidential immunity.

[221] *See* IMMANUEL KANT, THE PHILOSOPHY OF LAW 195 (W. Hastie, trans.) (1887) ("The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it."); *but see* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Last Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 14–22 (2003) (arguing that, although the imposition of deserved punishment is not the categorical imperative Kant said it was, it should be valued both for itself and for its consequences). I consider the effects of exempting Trump from punishment in the concluding sections of this Article.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

subject matter jurisdiction must refuse to proceed regardless of the parties' wishes, the court devoted several pages of its opinion to whether it had jurisdiction.[222]

Federal appellate courts have jurisdiction to review only the final decisions of trial courts.[223] The Supreme Court has noted: "In criminal cases, this prohibits appellate review until after conviction and imposition of sentence."[224] But the Court has approved a "narrow" exception that it claims to apply "with the utmost strictness" in criminal cases, and this exception applies when a trial court has allegedly denied a defendant's right not to be placed on trial for one or more charges at all.[225]

Because Trump claimed "absolute immunity from criminal prosecution for all 'official acts' undertaken as President" and because he maintained that this category encompassed "all of the conduct alleged in the indictment," the D.C. Circuit concluded that it had jurisdiction to consider his interlocutory appeal.[226] It then rejected Trump's claim that he was "entitled to categorical immunity from criminal liability for any assertedly 'official' action that he took as President," and it affirmed the district court's refusal to dismiss his indictment.[227]

The issue before the Supreme Court did not differ from the one before the court of appeals: Did the defendant have a right *not to be placed on trial* because he was immune from prosecution?

Trump's brief in the court of appeals declared: "The indictment alleges only official acts, so it must be dismissed."[228] In the Supreme Court, however, in response

---

[222] United States v. Trump, 91 F.4th 1173, 1183-88 (D.C. Cir.), *vacated*, 603 U.S. 593 (2024).

[223] 28 U.S.C. § 1291.

[224] Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989); Mitchell v. Forsyth, 472 U.S. 511, 525-26 (1985).

[225] *Midland*, 489 U.S. at 798–801. This exception does not make every denial of a motion to dismiss a prosecution immediately appealable. Even when a defendant claims to have been indicted by an improperly constituted grand jury, to have been charged with conduct that is not a crime, or to have been charged with violating an unconstitutional statute, she may not appeal a court's refusal to dismiss her case until after she has been convicted and sentenced. The exception applies only when setting aside an improper conviction would be ineffective because the right she asserts was intended to preclude not only her conviction but her trial as well. Like the right not to be placed twice in jeopardy for the same offense, immunity from prosecution is such a right. *See id.* at 802; Nixon v. Fitzgerald, 457 U.S. 731, 741–42 (1982); *see also* note 197 *supra*.

[226] *Trump*, 91 F.4th at 1188.

[227] *Id.* at 1208.

[228] Opening Brief of Defendant-Appellant President Donald J. Trump at 5, United States v. Trump, 91 F.4th 1173 (D.C. Cir.) (No. 23-3228), *vacated*, 603 U.S. 593 (2024).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

to questions at argument posed by Justice Barrett, Trump's counsel acknowledged that the indictment alleged several private acts that could legitimately be prosecuted. They were: using a private attorney to spread false claims of election fraud, conspiring with another private attorney to make a perjurious declaration to a court, and conspiring with these attorneys and another private actor to submit fraudulent slates of presidential electors and thereby obstruct a congressional proceeding.[229]

Counsel proposed a pretrial hearing to determine which of the indictment's other allegations were official and which were private,[230] but, even if the three acknowledged allegations of private acts had stood alone, they would have been sufficient to justify Trump's trial for all of the crimes alleged.[231] Counsel thus abandoned Trump's prior claim that he had a right not to be placed on trial, exploding the issue that had seemed to justify an interlocutory appeal. (Trump's counsel, D. John Sauer, is now the U.S. Solicitor General.) The Court should have dismissed Trump's appeal for want of jurisdiction.[232] But no one seemed to notice.[233]

IV. THE COURT'S FAILURE TO ADDRESS THE ISSUE BEFORE IT

A. Adjudicating Immunity Claims

This section of this Article and the one following it will show that the Supreme Court departed radically from the procedures generally followed in trying immunity cases and disregarded the substantive issues Trump's case presented.

Prior to the decision in *Trump*, federal law had recognized only two situations in which a federal officer or official was entitled to immunity from criminal prosecution. First, the Constitution's Supremacy Clause had been interpreted to

[229] Transcript of Oral Argument, *supra* note 200, at 28–30.

[230] *Id.* at 31.

[231] This Article will explain why the focus of the Supreme Court and both parties on particular presidential acts rather than the crimes charged was a serious mistake. But even if none of a President's official acts could be considered in prosecuting him for these crimes, Trump's trial could have proceeded on every count.

[232] If the Supreme Court had dismissed the appeal as it should have, it could have left in place the decision of the court of appeals. On the basis of the record before it, that court had jurisdiction. Trump's brief made extravagant claims in the court of appeals that his counsel in the Supreme Court contradicted, but Trump did not prevail in the court of appeals.

[233] If the Special Counsel's Office had recognized that the Court lacked subject-matter jurisdiction, it would have been ethically obliged to disclose that fact. *See* Aves v. Shah, 997 F.2d 762, 767 (10th Cir. 1993); I.L. v. Alabama, 739 F.3d 1273, 1284 n.6 (11th Cir. 2014). Strategic benefit would have been irrelevant to its duty, but, because the office had prevailed in the court of appeals and its argument in the Supreme Court had gone badly, dismissal of the appeal would have been to its advantage.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

exempt a *federal* officer from *state* prosecution when "in the course of performing an act which he is authorized to do under federal law, [he] had an objectively reasonable and well-founded basis to believe that his actions were necessary to fulfill his duties."[234] Second, the Constitution's Speech and Debate Clause says that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."[235] Apart from the limited immunity afforded by these two constitutional provisions, no federal employee was immune from being prosecuted in a state or federal court.[236]

The Supreme Court had held, however, that many federal and state public officials and employees were entitled to immunity from civil suits for damages under federal civil rights statutes. Some officials and employees—Presidents, judges, prosecutors, and state legislators—were entitled to "absolute" immunity.[237] Most, however—governors, presidential aides, other executive officers, police officers, school officials, and others—were entitled only to "qualified" immunity.[238] A civil plaintiff could overcome a claim of qualified immunity by showing that the defendant violated "clearly established . . . rights of which a reasonable person would have known."[239]

In civil cases, trial courts consider the immunity of public officials at three procedural stages. First, the plaintiff's complaint itself may show that a defendant is entitled to immunity. For example, it may allege conduct that did not violate a "clearly established" right. Second (and much more commonly[240]), a defendant may seek summary judgment after discovery has been completed, alleging that uncontested facts establish her immunity. A trial court's rejection of a defendant's

[234] Wyoming v. Livingston, 443 F.3d 1211, 1222 (10th Cir. 2006); *see In re* Neagle, 135 U.S. 1 (1890).

[235] U.S. CONST. art. I, § 6, cl. 1.

[236] Granting immunity to members of Congress and not to Presidents was apparently deliberate. *See* Brief of Amici Curiae Scholars of the Founding Era in Support of Respondent, *supra* note 198, at 13–16.

[237] *See* Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982) (Presidents); Pierson v. Ray, 386 U.S. 547, 554 (1967) (judges); Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (prosecutors); Tenney v. Brandhove, 341 U.S 367, 379 (1951) (state legislators).

[238] *See* Scheuer v. Rhodes, 416 U.S. 232, 238–50 (1974) (governors); Harlow v. Fitzgerald, 457 U.S. 800, 807–09 (1982) (presidential aides and other executive officers); Safford Unified Sch. Dist. v. Redding, 557 U.S. 364, 377 (2009) (school officials).

[239] *Harlow*, 457 U.S. at 800.

[240] *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 44 (2017); Bryan Lammon, *Reforming Qualified-Immunity Appeals*, 87 MO. L. REV. 1137, 1157 Table 1 (2023).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

claim of immunity at either (or both) of these pretrial stages can be challenged on an interlocutory appeal (or two).[241]

When facts that would establish an immunity claim are disputed, however, a court may resolve the defendant's claim only at a third stage, which generally arrives only after the plaintiff has prevailed at trial. Ideally, immunity should save a defendant from the burdens of both discovery and trial, and the Supreme Court has therefore stressed "the importance of resolving immunity questions at the earliest possible stage in litigation."[242] But when some witnesses say that a police officer used excessive force that violated a plaintiff's clearly established rights and others describe the conduct of the officer differently, the claim cannot be resolved before trial. A trial judge may submit special interrogatories to the jury to aid her in resolving the claim after the trial ends.[243]

The second stage of this procedure has no close analogue in criminal cases. Criminal defendants are entitled to substantially less pretrial discovery than civil defendants.[244] In particular, they can rarely depose prosecution witnesses.[245] Moreover, criminal proceedings lack a procedure for summary judgment. A defendant, however, might move to dismiss her case on the ground that material obtained in discovery established her immunity.

Trump's counsel sought dismissal at stage one, the earliest stage of the proceedings. He alleged that "official" presidential acts are "absolutely" immune and that all the acts alleged in the Special Counsel's speaking indictment were official. As explained in the previous section of this Article, counsel's later acknowledgment that some of these acts were not official removed the jurisdictional basis for hearing Trump's appeal. Counsel's concession simultaneously showed that Trump was not entitled to a pleading-stage dismissal on the merits of his immunity claim. Even a Court that disregarded its lack of jurisdiction should have ruled against him.

---

[241] *See* Midland Asphalt Corp. v. United States, 489 U.S. 794, 800–01 (1989); Behrens v. Pelletier, 516 U.S. 299 (1996). *See generally* Lammon, *supra* note 240 (describing the procedural disarray created by the Supreme Court's and other courts' decisions concerning the pretrial appealability of immunity rulings).

[242] *See* Pearson v. Callahan, 555 U.S. 223, 231–32 (2009) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)) (internal quotation marks omitted).

[243] *See, e.g.*, Taylor v. City of Milford, 10 F.4th 800, 812 (7th Cir. 2021).

[244] *See* FED. R. CRIM. P. 16.

[245] *See* Fed. R. Crim. P. 15.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

That ruling would not have prevented counsel from arguing that some or all of Trump's official acts should be excluded from evidence, but he should have been required to make that contention initially in the trial court. Absent a forfeiture of the issue, counsel also might have sought a form of stage 2 relief after failing to obtain relief at stage 1.[246] Noting the limited discovery allowed in criminal cases, he could have sought an evidentiary hearing on whether undisputed facts established his immunity. If the determinative facts did appear to be disputed, ordinary procedure would defer the resolution of the defendant's immunity claim until after a trial, but counsel could have requested a less burdensome procedure. If granted a hearing, he might have argued that the court should resolve the defendant's claim definitively before trial after considering both disputed and undisputed evidence. Again, the appropriate place for Trump to make these requests initially would have been the district court, and the appropriate time to make them would have been after the Supreme Court had resolved the pleading-stage issues before it. When the Supreme Court addressed at once issues like these and others not raised or considered in the courts below (and often not raised in the Supreme Court either), the Court disregarded its frequent reminder that it is "a court of review, not of first view."[247] Its bypass of ordinary procedure seemed to affect the quality of its work.

Moreover, a basic substantive error infected every aspect of the Supreme Court's decision. In prior cases, it and other courts applied immunity standards to the entire course of conduct alleged to have violated a civil plaintiff's rights. Courts did not subdivide this conduct into single acts or groups of acts and consider these acts or groups of acts piecemeal. When a plaintiff alleged, for example, that a police officer had used excessive force and violated her clearly established rights, courts did not say: "None of the officer's acts considered separately violated any clearly established right, so the officer is immune." They understood that individual acts that would not have been actionable if viewed in isolation could establish a wrongful course of conduct. An officer's many blows should be considered together.[248]

The following section of this Article will show that the Supreme Court improperly subdivided the evidence in *Trump* and failed to consider the crimes the indictment alleged. The Court focused on acts of the defendant that, even together, did not constitute the conspiracy with which he was charged. The indictment alleged

---

[246] *See* Behrens v. Pelletier, 516 U.S. 299 (1996); Asante-Chioke v. Dowdle, 102 F.4th 1126 (5th Cir. 2024).

[247] E.g., Manuel v. City of Joliet, 580 U.S. 357, 372 (2017). For a discussion of the Supreme Court's increasingly frequent departure from this concept of its role, see Stephen I. Vladeck, *A Court of First View*, 138 HARV. L. REV. 533 (2024).

[248] *See, e.g.*, Barnes v. Felix, 605 U.S. 73, 76 (2025) ("To assess whether an officer acted reasonably in using force, a court must consider all the relevant circumstances.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

only that these acts were the methods and means of a criminal conspiracy. They were evidence from which the defendant's unlawful agreement with others could be inferred. Debating about whether the prosecution and punishment of a single act in a series of evidentiary acts might inhibit the legitimate actions of later Presidents was far from the mark when the government had never sought to prosecute this act.[249]

B. Close-Illusion Legerdemain: Making Trump's Alleged Crimes Disappear from View by Diverting Attention to His Alleged Manner and Means

In fact, the Supreme Court did not say a word about whether Trump was immune from prosecution for any of the crimes with which he was charged. After noting that he was charged with a "conspiracy to overturn the legitimate results of the 2020 presidential election," it declared that he was alleged to have advanced this goal through five primary means.[250] The means to which the Court referred were the five listed in the Special Counsel's "speaking" indictment. For the remainder of its opinion, the Court considered only these "means."[251]

The Court treated each of these means as though it had been charged as a separate crime. Considering them one-by-one, it asked whether Trump should be immune from prosecution for each of the clusters of evidence the indictment set forth. It began by holding that Trump's efforts to corrupt the Justice Department were immune from prosecution.[252] Then, after discussing the issues posed by the other groups, it ordered the district court to determine initially whether these groups were immune from prosecution too.[253] A reader might have assumed that the indictment contained a "Justice Department count," a "state officials count," a "fake electors count," a "badger the Vice President count," and an "exploit the violence count." But it didn't.

---

[249] One blow in a series of blows can be part of the actus reus of an alleged tort or crime, and that characterization may be accurate when an officer is alleged to have used unreasonable force. When, however, an indictment charges that an officer conspired with others to use improper force, a single blow is merely evidence of their agreement. In both situations, failing to consider the alleged conduct or evidence as a whole is a gross mistake.

[250] *Trump*, 603 U.S. at 597.

[251] *Id.* at 602–05; *see supra* Section II.A.6.

[252] *Trump*, 603 U.S at 619–21.

[253] *Id.* at 621–30.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

The Special Counsel had listed the "manner and means" in order to divide the evidence of a single criminal agreement into coherent groups.[254] It alleged that all of this evidence showed an overarching agreement. Trial judges usually rule on evidentiary issues as they arise during a trial, and, even when these judges resolve evidentiary issues before trial, their rulings are not final decisions. These orders cannot be appealed until the trial ends.

In *Trump*, however, the highest court in the land devoted its entire opinion to a consideration of evidentiary issues before trial.[255] Moreover, it did not review a lower court's resolution of these issues, for no lower court had considered them. On its own, the Court developed a framework for analyzing the evidentiary issues that neither party had proposed and that neither party had any opportunity to address.

The Court seemed unaware that most of its opinion concerned questions of evidence. In addressing a tangential issue, however, it ruled that acts can be immune from use in evidence. That ruling was a judicial first.

The Constitution's Speech and Debate Clause[256] bars not only the prosecution of congressional speeches but also their use as incriminating evidence.[257] Congressional speeches aside, neither the Supreme Court nor any other court had previously held an act immune from introduction in evidence.

A request by the Special Counsel led to the Court's distinctive ruling. The Special Counsel's brief noted that, even if all of Trump's official acts were stricken from the indictment, he would be subject to prosecution for the private acts this document alleged. It asked the Supreme Court to rule that evidence of official acts could be received in the trial of these private acts to establish Trump's knowledge

---

[254] Note that a conventional "nonspeaking" indictment would have left the Supreme Court unaware of everything its opinion discussed.

[255] The Court wrote: "Presidents . . . cannot be indicted based on conduct for which they are immune. . . . [T]he indictment here alleges at least some such conduct." *Trump*, 603 U.S. at 630. As the Court used the words, an indictment appears to be "based on" all the evidence supporting it. The Court seemed to say that a former President may not be indicted for a crime if any act tending to show his crime would have been immune from prosecution *if it had been prosecuted itself*. But acts tending to show a crime need not be criminal. They commonly include such inoffensive acts as wearing a blue T-shirt reading "Aloha!"—acts that are "immune" in a sense because they are not crimes and because people have a right to do them. It would be strange to say that an indictment cannot be "based on" a defendant's acts unless these acts would be subject to prosecution themselves. It would also be strange to say that an indictment cannot be "based on" acts that are not being prosecuted because, if they *were* prosecuted, the government could not show that their prosecution would pose "no dangers of intrusion on the authority and functions of the Executive Branch." *See id.* at 615 (setting forth the "no dangers" test).

[256] U.S. CONST. art. I, § 6, cl. 1. The language of this clause is quoted *supra* in text at note 235.

[257] *See* United States v. Johnson, 383 U.S. 169, 185 (1966).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

and intent.[258] The Court rejected this argument and held that a former President's immunized conduct may not be used as evidence against him.[259]

The Court's ruling was in tension with common practice. Courts regularly receive evidence of conduct that cannot be punished in order to prove conduct that can be. For example, it is no crime for a criminal defendant to confess. A law forbidding her to acknowledge her criminal conduct would violate the First Amendment. A defendant might therefore ask a court to exclude her confession, arguing that, because the act of confession may not be punished, it also may not be used as evidence. Borrowing language from the majority opinion in *Trump*, the defendant might protest that admitting her confession would "permit a prosecutor to do indirectly what he cannot do directly"[260]—punish her for exercising her constitutional right to confess. The admission of her confession could indeed lead to years of imprisonment, but she would not be taken seriously.[261]

Justice Barrett, who joined most of the majority opinion, dissented from the majority's evidentiary ruling.[262] She apparently failed to realize that all the rest of the majority opinion addressed the admission of evidence too. The opinion she joined depended on the ruling she rejected. Unlike Justice Barrett, the other members of the *Trump* majority did not contradict themselves, but they were equally confused.

Conspiracy charges pose a challenge. They often enable prosecutors to allege as "manner and means" a wide range of acts by the defendant that sound appalling, some of them criminal and some of them not. But these acts do not constitute the

[258] Brief for the United States, *supra* note 189, at 46–49. The Special Counsel's Office appeared to want as many issues as possible settled before trial on an interlocutory appeal, and it therefore asked the Court to rule on an evidentiary issue the Court had no jurisdiction to resolve. This issue had not been raised or considered in either of the courts below, and its resolution would not have been subject to an interlocutory appeal even if it had been raised. As a tactical matter, the Special Counsel's Office gave insufficient weight to the fact that the Supreme Court was not the most favorable forum for resolving this issue. Few other courts would have ruled as the Supreme Court did, and, although the issue could properly have come before the Supreme Court following a conviction, it might have been resolved differently in that context. Appellate courts rarely reverse convictions for errors in the admission of evidence, and creating an entirely unprecedented evidentiary rule to invalidate a former President's conviction of a serious crime would have been unlikely. A lawyer for the defendant choosing the most promising arguments to present in a word-limited brief might not have devoted any words to this one.

[259] *Trump*, 603 U.S. at 630–32.

[260] *Id.* at 631.

[261] The Supreme Court has ruled that the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." Wisconsin v. Mitchell, 508 U.S. 476, 489 (1999).

[262] *Trump*, 603 U.S. at 656–57 (Barrett, J., concurring in part).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

crime of conspiracy. As the Supreme Court has noted, "[T]he criminal agreement itself is the *actus reus* and has been so viewed since *Regina v. Gass* [in 1705]."[263]

If the Court had tried to determine whether Donald Trump was immune from prosecution for conspiring to defraud the United States, obstruct justice, and interfere with the exercise of constitutional rights, its first inquiry would have been whether his subjective agreement with other conspirators to commit these crimes was official or unofficial. This "predominantly mental"[264] inquiry might have been difficult to resolve in view of the Court's statement that "[i]n dividing official from unofficial conduct, courts may not inquire into the President's motives."[265]

The Office of Special Counsel probably cared as much about punishing Trump's "manner and means" as it cared about punishing his mental state, and a court might have been tempted to ignore the formal definition of conspiracy, pierce the veil, and examine the "manner and means" at the heart of the case. If one assumes that all of Trump's official acts were absolutely immune from punishment (say, because he exercised only "conclusive" and "preclusive" powers that entitled him to commit any crimes he liked without risking punishment), punishing a conspiracy shown only by these acts would look like punishing the acts themselves. Punishing a conspiracy shown by many official acts and only a few private acts might look like punishing the official acts as well. Perhaps the government should be required to prove the conspiracy with evidence of the private acts alone.

Even under the ruling in *Trump*, however, most presidential acts are not absolutely immune. And when acts are only presumptively immune, they cannot be excised from an indictment in the same way. *Trump* held that these acts are subject to prosecution only when the government can show that prosecuting them would pose no risk of chilling legitimate exercises of presidential power. In the Court's words, their prosecution must pose "no dangers of intrusion on the authority and functions of the Executive Branch."[266] But applying that standard to individual pieces of evidence would not make sense when these evidentiary items were *not*

---

[263] United States v. Shabani, 513 U.S. 10, 16 (1994) (citing Regina v. Gass, 88 Eng. Rep. 881, 882 (K.B. 1705)); *see* Iannelli v. United States, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act."). The statute proscribing conspiracies to defraud the United States requires not only agreement but also an overt act by one of the conspirators in furtherance of the agreement. 18 U.S.C. § 371. The other conspiracy statutes that Trump was accused of violating do not require proof of an overt act. *See* 18 U.S.C. §§ 241, 1512(k).

[264] *See, e.g.*, United States v. Chalker, 966 F.3d 1177, 1185 (11th Cir. 2020) ("The crime of conspiracy is predominantly mental in composition . . . ."). Similar language has appeared in many judicial opinions.

[265] *Trump*, 603 U.S. at 618.

[266] *Id.* at 615.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

being prosecuted—when they were merely components of a prosecution that itself posed no risk of chilling legitimate exercises of presidential power.

The Supreme Court did not address whether prosecuting Trump for the conspiracy actually charged would pose any "dangers of intrusion on the authority and functions of the Executive Branch." The Court should have asked that question, not only because whether Trump was immune from prosecution for the crimes actually charged was the only issue it had jurisdiction to decide, but also because that is the way future Presidents and everyone else would see Trump's case. A future President would not be concerned about hypothetical prosecutions that never were brought. She would not say to herself: "If the acts alleged as manner and means in paragraphs 13 through 69 somehow were charged as a separate crime, I'd be nervous, so I'd better play it safe and abandon my plan to protect the American people."

Focusing on the only issue actually before the Court might have made Trump's case easy. No law-abiding President who considered Trump's alleged conspiracy to steal an election would fear that, if she executed the duties of her office "fearlessly and fairly," she would land in the dock herself. If the Court had asked whether Trump's prosecution posed any "dangers of intrusion on the authority and functions of the Executive Branch," the answer would have been no. Trump was charged with a plot that verged on treason. He was in a criminal class by himself.

The Supreme Court's approval of different standards for judging three kinds of acts by Presidents seemed to contribute to its disregard of the issue Trump's case presented. The Court held that exercises of "core" powers are absolutely immune, exercises of "noncore" powers are presumptively immune, and "unofficial" or "private" acts are not immune. If the crime charged had consisted of a single physical act accompanied by a specified mental state (as most crimes do), this framework might have been workable. But when a conspiracy was allegedly shown by acts of all three types, this classification provided no solution. Rather than fit its standards to the issue posed by Trump's case, the Court seemed to fit the issues to its standards.[267]

[267] If the Court had focused on whether Trump was immune from prosecution for a crime shown by evidence of all three types, my guess is that it would have approved a conventional form of qualified immunity. The Special Counsel's Office, which did not challenge the defendant's and the Justices' focus on particular means or acts, bears considerable responsibility for the Court's failure to address the issue Trump's case presented.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

V. THE SUPREME COURT'S FRAMEWORK

A. Private or Official

The Supreme Court's framework for deciding whether presidential acts are immune from prosecution (or from use in evidence) begins with a determination of whether they are private or official.[268] Private conduct is entitled to no immunity. Neither Trump nor anyone else has ever argued to the contrary.

The Court's concept of official presidential action, however, is broad. It includes all "acts within the outer perimeter of [a President's] official responsibility"[269] and all acts "not manifestly or palpably beyond [his] authority."[270] The fact that an action is illegal does not make it unofficial.[271] In addition: "In dividing official from unofficial conduct, courts may not inquire into the President's motives."[272]

The Supreme Court's reluctance to examine the motives behind a presidential action is understandable. The exercise of a presidential power does not become "unofficial" whenever a President seeks a personal advantage as well as (or instead of) a benefit to the public, and "an expedition into the minds" of former Presidents often might seem "a grave and fruitless misallocation of judicial resources."[273]

After declaring both a President's criminality and his subjective motivation irrelevant, however, the Court did not indicate how the line between private and official action should be drawn. Whether the President was in the Oval Office or on a golf course does not determine whether he was on the job. Much of the Court's opinion indicated that, if the President's act sufficiently resembled something Presidents had traditionally done or were legally entitled to do—or if the President used executive branch personnel or machinery to accomplish his purposes—his act was official.[274] So, if a President ordered Seal Team 6 to kill a political rival, his act would be official, but it would not be official if the President killed the rival himself.

---

[268] *Trump*, 603 U.S. at 595–96.

[269] *Id.* at 595.

[270] *Id.* at 596 (quoting Blassingame v. Trump, 87 F.4th 1, 13 (D.C. Cir. 2023)).

[271] *Id.*

[272] *Id.*

[273] *Cf.* United States v. Leon, 468 U.S. 897, 992 n.23 (1984) (quoting Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting)) ("[W]e believe that 'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.'").

[274] *See infra* Section VI.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

A law-breaking President would accordingly be wise to select trustworthy criminals as subordinates. He could instruct these subordinates to commit crimes on his behalf and thereby make all of his crimes official.

Although using executive branch machinery may be sufficient, the Court indicated that it was not necessary. The Court said, for example, that Trump's privately arranged speech on the Ellipse might be official. It wrote that a President possesses "extraordinary power to speak to his fellow citizens" and that "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities."[275] It recognized, however, that there could "be contexts in which the President, notwithstanding the prominence of his position, speaks in an unofficial capacity—perhaps as a candidate for office."[276] It directed the district court to determine whether the Ellipse speech was official or private. It did not indicate how the court could make that determination without considering the President's motives.

Similarly, the Court directed the district court to determine whether Trump's efforts to persuade state officials to withdraw their states' certifications of electors were private or official. Perhaps these efforts were official because they were "undertaken to ensure the integrity and proper administration of the federal election" (note the Court's own reference to motive—even the authors of the prohibition did not avoid the forbidden inquiry), or perhaps his efforts were private because they were "campaign conduct."[277] Again, the Court did not reveal how the district court could make its determination without considering the President's motives.

A President might confess that he had three reasons for ordering his rival's killing—personal hatred, private vengeance, and racial animus. But, because the President's motives are irrelevant, the confession would be inadmissible. A contrite defendant might even admit that he meant to steal an election, obstruct a congressional proceeding, and aid an insurrection. Nevertheless, he would be entitled to either absolute or presumptive immunity. Although, as Justice Alito has noted, "[c]ommon-law commentators recognized th[e] elementary distinction between intent and motive,"[278] the Court did not draw that distinction. When a President has used an official power to accomplish his personal objectives, he has

[275] *Trump*, 603 U.S. at 629 (quoting Trump v. Hawaii, 585 U.S. 667, 701 (2018)).

[276] *Id.*

[277] *Id.* at 626–27.

[278] *See* Rosemond v. United States, 572 U.S. 65, 88 (2014) (Alito, J., concurring in part and dissenting in part).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

acted "officially," and, if that power is a "core" power, he is home free.[279] Like the historic Kings of England, a President employing core powers can do no wrong.

B. Core or Noncore

If the President's conduct was "official," the next step is determining whether he acted pursuant to a "core" or a "noncore" power. The Court held that a former President may not be prosecuted for conduct taken pursuant to a "core" power. When he has committed a crime by exercising a "core" power, he is entitled to absolute immunity.[280]

A President who has used a "noncore" power to commit a crime may be entitled to absolute immunity too. The Court set that issue aside.[281] For now, it was enough to hold that actions pursuant to a "noncore" power are entitled to at least presumptive immunity. As noted above, that means they may not be prosecuted unless the government can show that prosecuting them would pose "no dangers of intrusion on the authority and functions of the Executive Branch."[282]

---

[279] A footnote in the Court's opinion indicated that evidence of a President's subjective mental state would be inadmissible even in deciding whether he was guilty of a crime, but the Court could not have meant that. *See Trump*, 603 U.S. at 632 n.3; *infra* text accompanying notes 327–31.

Although evidence of motive and intent cannot determine whether a President's act was official, it should be admissible in judging whether prosecution for his use of a noncore power would pose any "dangers of intrusion on the authority and functions of the Executive Branch." *See Trump*, 603 U.S. at 618. That standard calls for a realistic assessment of the effects of allowing a prosecution on the conduct of future Presidents, and those effects depend in part on the former President's evident motives. *See infra* Section V.D. For example, if Chief of Staff Iago were to tell President Othello that First Lady Desdemona had been unfaithful, if Othello then were to order Seal Team 6 to kill Desdemona, and if a remorseful Othello were to confess after receiving the *Miranda* warnings, prosecuting Othello would pose no dangers of intrusion on the legitimate authority and functions of the Executive Branch.

[280] *Trump*, 603 U.S. at 618.

[281] *Id.* at 615.

[282] *Id.* (quoting Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982)). At least one Justice would have approved absolute immunity for all official presidential acts. Justice Thomas' separate opinion in *Trump* began: "Few things would threaten our constitutional order more than criminally prosecuting a former President for his official acts. Fortunately, the Constitution does not permit us to chart such a dangerous course." *Trump*, 603 U.S. at 643 (Thomas, J., concurring). His opinion ended by reiterating his view and misrepresenting the Court's: "In this case, there has been much discussion about ensuring that a President 'is not above the law.' But, as the Court explains, the President's immunity from prosecution for his official acts *is* the law." *Id.* at 650. Justice Thomas, a purported originalist, did not discuss any of the evidence bearing on whether the authors and ratifiers of the Constitution meant the President to have the sweeping immunity he approved. *See infra* text accompanying notes 332–44 (showing that they plainly did not).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

The Court found the distinction between "core" and "noncore" powers in the Special Counsel's brief.[283] This brief cited, as examples of core powers, the power "to recognize foreign countries, to grant pardons, [and] to remove at will a principal officer who leads an executive agency headed by a single director."[284] At argument, counsel added the veto power and the power to direct troops in the field to the list.[285]

The Supreme Court substantially broadened one item on this list. Although the Special Counsel had spoken of the President's power "to remove at will a principal officer who leads an executive agency headed by a single director," the Court spoke of "the President's 'unrestricted power of removal' with respect to 'executive officers of the United States whom he has appointed'" and of his "power to remove—and thus supervise—those who wield executive power on his behalf."[286]

Jack Goldsmith comments that *Trump* may be the closest the Supreme Court has come to fully embracing the unitary executive theory.[287] He predicts that *Trump*'s rulings on presidential power will have more impact than its rulings on immunity, and that prediction seems sound.[288]

The Court added another major item to the list of core powers. It declared that the President has "'exclusive authority and absolute discretion' to decide which

---

Justice Thomas evidently disagreed with much of the Court's opinion and with its decision to remand the case for further proceedings. Nevertheless, he joined the Court's opinion in full. *See Trump*, 603 U.S. at 600 (note by the Reporter of Decisions) ("Roberts, C.J., delivered the opinion of the Court, in which Thomas, Alito, Gorsuch, and Kavanaugh, JJ., joined in full, and in which Barrett, J., joined except as to Part III-C.").

There might have been a horse trade. The Court formally reserved the question whether Presidents are entitled to absolute immunity for noncore as well as core official acts. But its opinion included a statement that seemed to contradict this reservation and to resolve the issue it said it had left open: "The reasons that justify the President's absolute immunity from criminal prosecution for acts within the scope of his exclusive authority . . . do not extend to conduct in areas where his authority is shared with Congress." *Id.* at 609–10. It seems likely that the majority promised Justice Thomas that it would reserve for another day an issue it was prepared to decide (and that, despite its express reservation, it did decide), and Justice Thomas promised the majority that he would endorse an opinion he did not in fact approve (and that he then contradicted in a separate opinion).

[283] *See supra* Section II.B.1.

[284] Brief for the United States, *supra* note 189, at 11 (citations omitted).

[285] Transcript of Oral Argument, Trump v. United States, *supra* note 200, at 114–15.

[286] *Trump*, 603 U.S. at 608–09 (quoting Myers v. United States, 272 U.S. 52 (1926) and Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 197 (2020)).

[287] Goldsmith, *supra* note 203, at 25. On the unitary executive theory, see Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83.

[288] Goldsmith, *supra* note 203, at 2.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

crimes to investigate and prosecute."[289] Goldsmith observes that this addition "throws a bomb into [an] important corner of the law" and that it contradicts several earlier decisions. These decisions include:

- an 1838 decision in which the Supreme Court said that the clause requiring the President to "take care that the laws be faithfully executed" gives him no "dispensing power."[290] If he had such a power, the Court said, he would be able "entirely to control the legislation of congress, and paralyze the administration of justice."[291]
- a 1985 decision saying that "Congress may limit an agency's exercise of enforcement power . . . either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."[292]
- and a 2023 decision noting that an "extreme case of non-enforcement [of criminal laws] arguably could exceed the bounds of enforcement discretion."[293]

The Court, however, found support for its formulation in a statement of the Court in *United States v. Nixon*[294] and in a dissenting opinion of Justice Antonin

---

[289] *Trump*, 603 U.S. at 620 (quoting United States v. Nixon, 418 U.S. 683, 693 (1974)).

[290] Kendall v. United States *ex rel*. Stokes, 37 U.S. 524, 612–13 (1838).

[291] *Id.* The Court also said: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Id.* at 613.

[292] Heckler v. Chaney, 470 U.S. 821, 833 (1985).

[293] United States v. Texas, 599 U.S. 670, 683 (2023).

[294] *See Trump*, 603 U.S. at 620 (quoting United States v. Nixon, 418 U.S. 683, 693 (1974)). *Nixon* had said: "[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." United States v. Nixon, 418 U.S. 683, 693 (1974). Citing this statement, *Trump* made it broader: "[T]he Executive Branch has 'exclusive authority and absolute discretion' to decide which crimes to *investigate* and prosecute . . . ." *Trump*, 603 U.S. at 620 (emphasis added) (quoting *Nixon*, 418 U.S. at 693).

In the early Republic, the Executive Branch did not have exclusive authority to decide which crimes to investigate. The authority of a grand jury was as great or greater. *See, e.g.*, Respect Due to Consuls (Feb. 20, 1794), 1 Op. Att'ys Gen. 41, 42–43 (1852) (declaring that, even after a federal District Attorney and the Attorney General had concluded that a complainant had not alleged a violation of federal law, this complainant could go "to the grand jury with his witnesses; and if the grand jury will take it upon themselves to present the offence in that court, it will be the duty of the district attorney to reduce

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Scalia. Or, rather, it found support in an approving quotation of Justice Scalia's dissenting opinion in the brief of the not-too-adversarial Special Counsel's Office.[295]

Justice Barrett, who provided a sixth vote for most of the majority opinion, wrote in an opinion concurring in part: "I do not understand the Court to hold that all exercises of the Take Care power fall within the core executive power. I agree with the dissent that the Constitution does not justify such an expansive view."[296]

While leaving to the district court the initial determination of whether most of the "means" noted in the Special Counsel's speaking indictment were immune from use in evidence, the Court itself ruled out evidence of one of these means. Its analysis of Trump's alleged effort to corrupt the Department of Justice shows the stunning breadth of its concept of absolute immunity.

Trump's indictment alleged that he urged his Acting Attorney General to send formal letters to state officials falsely claiming the existence of significant evidence of voter fraud and encouraging these officials to call special sessions of state legislatures in order to substitute new slates of presidential electors supporting Donald Trump for the slates supporting the candidate chosen by the voters.[297] Trump threatened to dismiss the Acting Attorney General unless he acquiesced in this

---

the presentment into form, and the point in controversy will thus be put in a train for judicial determination.") (emphasis omitted).

In the early Republic, the only federal law enforcement agencies were the Marshals Service and the Revenue Marine, and the Marshals Service might have been considered part of the judicial branch if anyone had cared about the classification. *See Origins & Early Days of the U.S. Marshals*, U.S. MARSHALS MUSEUM (2019), https://marshalsmuseum.org/wp-content/uploads/2020/10/2018-2009-Origins-Early-Days-of-the-USMS-Final.pdf [https://perma.cc/TRF5-J33L]. Most criminal investigation was done privately.

Although *Nixon*'s earlier statement was closer to the truth, it was not entirely correct. The Supreme Court wrote in 1868: "Public prosecutions . . . are so far under [the federal prosecutor's] control that he may enter a *nolle prosequi* at any time before the jury is empanelled for the trial of the case, except in cases where it is otherwise provided in some act of Congress." Confiscation Cases, 74 U.S. 454, 457 (1868). A federal prosecutor's power to enter a nolle prosequi apparently could be limited by Congress. In the absence of congressional action, a federal prosecutor could openly reject a grand jury's judgment after that body had filed an indictment, but he could not block a grand jury from indicting. *Contra* United States v. Cox, 342 F.2d 167 (5th Cir. 1965) (en banc) (a decision cited favorably by the Supreme Court in *Nixon*, 418 U.S. at 693, and several later Supreme Court decisions).

[295] *See Trump*, 603 U.S. at 620 (quoting Brief for the United States, *supra* note 189, at 19, quoting Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting)). In *Morrison*, no other member of the Court joined Justice Scalia's dissent from an opinion written by Chief Justice William Rehnquist, but this dissent seems to have become a lodestar of conservative legal thought.

[296] *See Trump*, 603 U.S. at 651 n.1 (Barrett, J., concurring in part).

[297] Indictment, *supra* note 92, ¶¶ 70–85, at 27–31.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

scheme. The President desisted only when he realized that carrying out his threat would lead to mass Justice Department resignations.

The Supreme Court concluded that all of this alleged conduct constituted the exercise of "conclusive and preclusive" or "core" presidential powers. These powers were the power to decide which crimes to investigate and prosecute, the power to discuss the exercise of this power with Justice Department officials, and the power to remove executive officers of the United States whom the President has appointed.[298] None of this conduct could be prosecuted, and none could be introduced as evidence of Trump's crimes.

The Court's analysis left no room to distinguish even more striking cases. A President might say to his Attorney General: "I direct you to plant cocaine in my rival's bedroom and make sure the DEA finds it. If you won't do that, I'll fire you and appoint someone who will." This President would employ the same "preclusive" powers that, in the Court's view, Trump employed, and the absolute immunity approved by the Supreme Court would protect this presidential conduct.[299]

Would a President who directed Seal Team 6 to kill a rival employ a "core" or a "noncore" power? Article II, Section 2, Clause 1 of the Constitution provides: "The President shall be Commander in Chief of the Army and Navy of the United States."[300] This power does not appear on the Court's list of core powers, but some early commentary on *Trump* assumed that the commander-in-chief power must be "core."[301] Unlike some of the powers on the Court's list, the Constitution grants this power expressly rather than by implication, and the exercise of this power comprises a larger share of the President's work than, say, exercise of the pardon power.

---

[298] *Trump*, 603 U.S. at 619–21.

[299] One wonders how the Court would have ruled if Trump had demanded fraudulent letters from executive branch employees other than the Attorney General (say, the Vice President, the Director of the FBI, and a file clerk in the Department of Transportation). Or if he had demanded fraudulent findings from members of regulatory agencies (say, the Federal Election Commission). Or if he had instructed the Attorney General commit perjury in court or before Congress. Would all of his demands have been exercises of core presidential powers?

[300] U.S. CONST. art. II, § 2, cl. 1.

[301] *See* Tyler Bartlam, *How the Supreme Court's Immunity Decision Affects Trump's Legal Cases*, NPR (July 8, 2024, at 5:00 ET), https://www.npr.org/2024/07/08/g-s1-8581/how-supreme-court-immunity-decision-affects-trump-legal-cases [https://perma.cc/KJ6P-6MN7]; Randall Eliason, *Presidential Immunity: SCOTUS Throws Trump a Lifeline*, SIDEBARS (July 1, 2024), https://www.sidebarsblog.com/p/presidential-immunity [https://perma.cc/GZ2B-LJ29].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

As the word *core* is used in the *Trump* opinion, however, it does not mean central, basic, essential, or heartland. It means preclusive, exclusive, and conclusive.[302] The Court wrote:

> [O]f course not all of the President's official acts fall within his "conclusive and preclusive" authority. . . . The reasons that justify the President's absolute immunity from criminal prosecution for acts within the scope of his exclusive authority . . . do not extend to conduct in areas where his authority is shared with Congress.[303]

Some of the powers conferred by the Commander-in-Chief Clause appear to be exclusive or nearly so. As counsel for the Office of Special Counsel noted at argument, neither Congress nor the courts may review a President's orders concerning troop movements during a war.[304] But other powers conferred by the clause are not exclusive. *Youngstown* held that, in the absence of congressional authorization, the commander-in-chief power did not authorize President Truman to seize steel mills during the Korean war.[305]

Classifying the power to assassinate a political rival is challenging because this power *does not exist*[306] and also because, if it existed, it would not be closely analogous to any customary presidential action. But most of the other powers implied by the Commander-in-Chief Clause are not exclusive.[307] The Constitution does not give the President a "preclusive" power to use Seal Team 6 to eliminate a

[302] Justice Jackson emphasized in *Youngstown* that preclusive presidential power over any governmental activity is rare. He wrote: "The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

[303] *Trump*, 603 U.S. at 609–10. Notice that this statement is inconsistent with the Court's declaration that it may eventually hold the exercise of noncore as well as core presidential powers absolutely immune from prosecution. For speculation about a bargain among the Justices that might have led to this contradiction, see *supra* note 282.

[304] Transcript of Oral Argument, Trump v. United States, *supra* note 200, at 115.

[305] *Youngstown*, 343 U.S. at 585–88 (emphasizing the absence of congressional authorization of the President's action).

[306] *See infra* Section V.C.

[307] *See* Goldsmith, *supra* note 203, at 33 n.146.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

rival any more than it gives him a "preclusive" power to use Seal Team 6 to seize steel mills.[308]

If the President's order were entitled only to presumptive immunity, the issue would become whether prosecuting the President who issued it posed "no 'dangers of intrusion on the authority and functions of the Executive Branch.'"[309] And prosecuting a murderous President does not seem to pose any danger that a law-abiding future President would "apprehen[d] that criminal penalties may befall him upon his departure from office."[310] Justice Sotomayor erred in declaring that the Court had made ordering a military unit to assassinate a political rival immune from prosecution.[311]

C. The Core Error: Why Absolute Immunity Is Unjustified

Because a President who ordered Seal Team 6 to murder a rival probably would be entitled only to presumptive immunity, a President who sought absolute assurance that he would escape prosecution might be wise to use a "core" power instead. Rather than call on Seal Team 6, this savvy President might pardon a professional hitman in exchange for his agreement to do the job. The pardon power is the first "core" power on the Supreme Court's list. The Court quoted an 1870 decision that said: "To the executive alone is intrusted the power of pardon . . . ."[312]

Why distinguish the "pardoned hitman case" from the "Seal Team 6 case"? The reason cannot be that absolute immunity is more needed in one case than the other to ensure that future Presidents are able to execute the powers of their office fearlessly and fairly.

In guarding against over-deterrence, absolute immunity in fact adds little to the *Trump* Court's standard for presumptive immunity. *Trump* declares that "noncore" official actions are immune unless the government can show that prosecution would pose "no 'dangers of intrusion on the authority and functions of the Executive Branch.'"[313] This standard affords immunity whenever a *chance* exists that

---

[308] *See id.* at 33 ("[T]he assassination order would almost certainly not be an exclusive presidential power.").

[309] *Trump*, 603 U.S. at 615 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982)).

[310] *Id.* at 613.

[311] *See id.* at 685 (Sotomayor, J., dissenting). For a discussion of Trump's second-term orders to Seal Team 6 to kill suspected drug smugglers, *see infra* text accompanying notes 441–68.

[312] *Trump*, 603 U.S. at 608 (quoting United States v. Klein, 80 U.S. 128, 147 (1872)).

[313] *Id.* at 615 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982)).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

prosecution would render future Presidents too timorous. It not only fully guards against over-deterrence but also adds abundant prophylactic protection.

When the standard for presumptive immunity fully protects the interests immunity might serve, there seems to be no reason to go further. But the Court provided absolute immunity for all presidential acts pursuant to "core" powers and indicated that it might provide this immunity for acts pursuant to "noncore" powers too. The Court offered no justification for an immunity so broad, but, as noted above, what it approved was not an immunity.[314] It was a constitutional right of Presidents to commit crimes without limit as long as they employ "core" powers and perhaps even when they do not.

The Court's opinion explained:

> 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. . . . We thus conclude that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.[315]

The distinction between the "pardoned hitman case" and the "Seal Team 6" case makes sense only if a President's use of the pardon power to kill his rival is within his "exclusive constitutional authority"—that is to say, only if the statute prohibiting murder is *unconstitutional* as applied to the hitman pardon. If no power of the President authorizes him to kill rivals, the distinction between "core" and "noncore" powers collapses and, with it, the Court's justification for absolute immunity. Headlines reporting the decision in *Trump* might have read: "High Court Holds All Criminal Statutes Unconstitutional as Applied to a President Using 'Core' Powers."

The *Trump* majority embraced this proposition; Justice Barrett's separate opinion embraced it too;[316] and Justice Sotomayor's dissenting opinion came very close to embracing it. She wrote that "the idea of a narrow core immunity might have some intuitive appeal," noting that the power to remove high-ranking executive officers, the power to recognize foreign countries, and the pardon power could fall

[314] *See supra* Section II.B.1.

[315] *Trump*, 603 U.S. at 609.

[316] *See id.* at 651 (Barrett, J, concurring in part); *supra* text accompanying notes 195–97.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

"within this narrow category."[317] If they did, the President's power would be "conclusive and preclusive," and Congress would be unable to "ac[t] upon the subject" at all.[318]

Why did Justice Sotomayor find intuitively appealing the proposition that constitutional provisions granting "core" powers authorize Presidents to commit serious crimes without limit? Did she agree with the majority that the Constitution authorized the President in the pardoned hitman case to do what he did? Were both the dissenters and the majority dazzled by the Special Counsel's brief and its invocation of Justice Jackson's venerated opinion in *Youngstown*?[319]

Did the Justices suppose that the people who wrote and ratified the Constitution meant to empower Presidents to commit crimes with impunity? Did the Justices themselves think it was a fine idea? If no one liked the idea, how did it become enshrined in Article II?

The Court offered hardly any analysis of this issue. It did not probe the Framers' intentions, assess the original public meaning of Article II, or balance interests. It did, however, point to words and phrases characterizing particular presidential powers that prior opinions had employed in situations very different from the one presented by *Trump*.

Citing a 1974 decision, the Court said: "[T]he Executive Branch has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute."[320] Citing 1926 and 1952 decisions, it said that the power to remove executive officers whom the President has appointed is "excusive" and "unrestricted."[321] Citing a 2015 decision, it declared: "The power 'to control recognition determinations' of foreign countries is likewise an 'exclusive power of the President.'"[322] And citing an 1872 decision, it wrote: "To the executive alone is intrusted the power to pardon . . . ."[323]

---

[317] *Trump*, 603 U.S. at 678 (Sotomayor, J., dissenting).

[318] *Id.* (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J., concurring)).

[319] *See supra* Section II.B.1.

[320] *Trump*, 603 U.S. at 608–09 (quoting United States v. Nixon, 418 U.S. 683, 693 (1974)); *see supra* note 294 (describing the Court's erroneous expansion of *Nixon*'s already questionable statement).

[321] *Trump*, 603 U.S. at 608–09 (quoting Myers v. United States, 272 U.S. 52, 106 (1926) and *Youngstown*, 343 U.S. at 638 n.4 (Jackson, J., concurring)).

[322] *Id.* (quoting Zivotofsky v. Kerry, 576 U.S. 1, 32 (2015)).

[323] *Id.* at 608 (quoting United States v. Klein, 80 U.S. 128, 147 (1872)).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

The authors of these statements probably did not have in mind Presidents who order military units to murder rivals or who conspire to steal elections. These authors probably did not mean to exempt Presidents from compliance with criminal proscriptions whose observance by everyone is thought necessary to the peace and well-being of society. They probably meant to say only that judges and legislators may not second-guess the reasonableness of some exercises of presidential power.[324]

Similarly, when Justice Jackson spoke in *Youngstown* of "conclusive and preclusive" powers that "disabl[e] the Congress from acting on the subject,"[325] the subject he addressed was whether the "seizure of . . . strike-bound industries is within [the President's] domain and beyond control by Congress."[326] Read broadly, however, Jackson's statement and the Court's earlier characterization of some powers as exclusive might mean what the Supreme Court said they mean—that Congress may not limit the exercise of "conclusive and preclusive" powers even by forbidding their use to commit murder.[327]

The *Trump* majority's view of language seems comparable to that of an employee hypothesized by William Eskridge. When this employee's supervisor told him that many smokers were coming to a meeting and asked him to collect all the ashtrays he could find, the employee took his job seriously. He delivered some ashtrays that he pulled from a wall and others that he stole.[328]

Justice Jackson suggested a different way of viewing language, one that focuses less on dictionary definitions and more on what words were intended to accomplish. Speaking in *Youngstown* of the commander-in-chief power, he observed

---

[324] *See* Cohens v. Virginia, 19 U.S. 264, 399 (1821) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.").

[325] *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring).

[326] *Id.* at 640.

[327] *See* Cass R. Sunstein, *Presidential Immunity and Democratic Disorder* at 7, HARVARD PUBLIC LAW WORKING PAPERS (July 16, 2024), https://ssrn.com/sol3/papers.cfm?abstract_id=4896559 [https://perma.cc/2L8B-ANLH] (noting the *Trump* Court's view of preclusive presidential power and declaring: "The distance from Justice Jackson could not be greater."); Katherine Shaw, *Power and Immunity in* Youngstown *and* Trump v. United States, 174 U. PA. L. REV. ONLINE 39, 41 (2026), https://pennlawreview.com/2026/03/06/power-and-immunity-in-youngstown-and-trump-v-united-states/ [https://perma.cc/QU2S-QGRN] (calling *Trump*'s reliance on Justice Jackson's opinion "cynical and disingenuous").

[328] *See* William N. Eskridge Jr., *Textualism: The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1549 (1998). I have slightly embellished Eskridge's illustration. *Compare* 1 BLACKSTONE, COMMENTARIES *60 ("[T]he Bolognian law, mentioned by Puffendorf, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

that this provision, read literally, could give a President the "power to do anything, anywhere, that can be done with an army or navy."[329] That would include not only the power to seize steel mills but also the power to commit every crime in the book. Jackson concluded, however, that the commander-in-chief power should not be read as it would be in a "militaristic system."[330] This power is "subject to limitations consistent with a constitutional Republic."[331]

Like the commander-in-chief power, the pardon power and other "core" powers appear in the Constitution without express qualification. But, like the commander-in-chief power, they are "subject to limitations consistent with a constitutional Republic." Not even core powers were meant to exempt a President from compliance with *core* criminal prohibitions.

This limitation could reasonably be implied, but the Constitution does not leave it to implication. One section provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[332] Another declares: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[333]

These provisions contradict the decision in *Trump*. They reveal that no presidential power gives the chief executive a right to commit treason, bribery, or other high crimes and misdemeanors. There are no *entirely* conclusive and preclusive powers. The Constitution also makes plain that officers who commit high crimes and misdemeanors have no constitutional immunity from prosecution. They are subject to indictment, trial, judgment and punishment according to law.

Trump's counsel did not dispute these propositions. Unlike the Special Counsel's Office, he did not maintain that any provision of the Constitution gives the President a right to commit high crimes and misdemeanors. Moreover, he did not argue that a President who commits these crimes is immune from prosecution. He argued instead that a court may try a former President for crimes he committed

[329] *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring).

[330] *Id.* at 645.

[331] *Id.*

[332] U.S. CONST. art. II, § 4.

[333] *Id.* art. I, § 3, cl. 7.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

while acting officially only if this President has first been impeached by the House of Representatives and convicted by the Senate.[334]

The Supreme Court rejected counsel's reading of the impeachment clause.[335] Then it gave him more than he sought. The Court held that even a former President who has been impeached and removed from office may claim immunity from prosecution.

Were the Framers unclear? Didn't they say the opposite? Doesn't the Constitution provide that an official who has been impeached and removed from office "shall . . . be liable and subject to Indictment, Trial, Judgement and Punishment, according to Law"?

The Court had a one-sentence answer: "[T]hat Clause does not indicate whether a former President may, consistent with the separation of powers, be prosecuted for his *official* conduct . . . ."[336] Perhaps the clause meant only that a President who shoplifted personal items from Walmart (but not office supplies) could be prosecuted following his impeachment.

The Court's disregard of text and history was glaring. The Constitution's specific examples of impeachable offenses—treason and bribery—refer to the misuse of official power, and the Constitution drew its general standard for impeachment—"high Crimes and Misdemeanors"—from English practice, where those words referred to "political crimes against the state."[337] Moreover, all the grounds for impeachment mentioned at the Constitutional Convention involved abuses of public power or corrupt efforts to gain power. "There were no references to private crimes, such as murder and assault. . . . [I]t is possible that the Framers would have considered some such crimes to be 'high Crimes and Misdemeanors.' But the debates strongly suggest that the model for impeachment was the large-scale abuse of public office."[338]

---

[334] *See* Brief of Petitioner President Donald J. Trump, *supra* note 215, at 6 ("The Constitution authorizes the criminal prosecution of a former President, but it builds in a formidable structural check against politically motivated prosecutions by requiring a majority of the House and a supermajority of the Senate to authorize such a dramatic action.").

[335] *See Trump*, 603 U.S. at 632–34 (noting that it would be incongruous for a president's crimes to "forever remain impervious to prosecution" because he had "manage[d] to conceal [them] throughout his Presidency").

[336] *Id.* at 638.

[337] Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 291 (1998) (quoting RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 59–67 (1973) (emphasis omitted)).

[338] *Id.* at 289.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

So, the Framers expected that all or nearly all of the officials tried by the Senate and removed from office would have been removed for misusing official power. It was these officials, not private shoplifters or street muggers, who the Constitution said would be "liable and subject to Indictment, Trial, Judgement and Punishment, according to Law."

George Mason might have had a prescient vision of President Trump and the January 6 attack when he told the Virginia ratification convention:

> I conceive that the President ought not to have the power of pardoning, because he may frequently pardon crimes which were advised by himself. It may happen, at some future day, that he may establish a monarchy, and destroy the republic. . . . The case of treason ought, at least, to be excepted.[339]

Edmund Randolph voiced the same concern at the Constitutional Convention: "The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The Traytors may be his own instruments."[340] Despite Randolph's entreaty, the delegates left the pardon power intact. James Wilson's response seemed to carry the day: "If [the President] be himself a party to the guilt he can be impeached *and prosecuted*."[341] Wilson seemed not to realize that he and other Framers had tucked presidential immunity into Article II where six Supreme Court justices would find it 237 years later.[342]

That most members of the *Trump* majority boast of being textualists and originalists is flabbergasting.[343]

---

[339] George Mason, Convention of Virginia, *reprinted in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 497 (Jonathan Elliot ed., 2d ed., 1863).

[340] James Madison, *Notes on the Constitutional Convention* (Sept. 15, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 626 (Max Ferrand ed., 1911).

[341] *Id.* (emphasis added).

[342] For additional historical evidence inconsistent with the Court's position, see *Trump*, 603 U.S. at 662–64 (Sotomayor, J., dissenting); Brief of Amici Curiae Scholars of the Founding Era in Support of Respondent, *supra* note 198; Prakash, *supra* note 198, at 65–75; and Shaw, *supra* note 327, at 43.

[343] *See* Sunstein, *supra* note 327 at 10 ("The Court pointed to nothing at all—not text, not the original understanding, not considerations of constitutional structure."); Aziz Z. Huq, *Structural Logics of Presidential Immunity*, 75 DUKE L.J. 565, 568 (2026) (declaring that all standard sources of constitutional meaning including text, original public meaning, and history "counseled single-mindedly against the Court's immunity decision"); Allen Rostron, *Originalism, the Second Amendment, and the Vibe of the Constitution*, 69 ST. LOUIS L.J. 697, 708 (2025) ("Originalism conveniently took a vacation when the Supreme Court decided *Trump v. United States*.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

D. Presumptive Immunity

In *Nixon v. Fitzgerald*, which held that a President acting "within the 'outer perimeter' of his official responsibility" is entitled to absolute immunity from civil suits for damages even after leaving office,[344] the Court described its task as one of "balanc[ing] the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch."[345]

The *Trump* opinion also spoke of balancing.[346] Then, quoting *Fitzgerald*, it disregarded half of *Fitzgerald*'s balance. It ruled that a President's criminal use of a "noncore" power was entitled to at least "presumptive" immunity.[347] Prosecution could proceed, but only if the government could show that this prosecution would pose "*no* '*dangers* of intrusion on the authority and functions of the Executive Branch.'"[348] Although *Fitzgerald* spoke of balancing the danger of intrusion against other interests, *Trump* announced that the Court would tolerate no dangers at all. Its "zero dangers" standard revealed how obsessed it was with the risk of over-deterrence and how oblivious it was to the opposite risk.

Justice Sotomayor wrote in dissent: "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."[349] The "zero dangers" standard does seem daunting, but it may not be as demanding as it seems.[350] This Article has maintained that, if the Court had addressed the issue before it—whether Trump was immune from prosecution for the conspiracy alleged in the indictment—it could not have found a danger that prosecution would inhibit the appropriate actions of later

---

[344] Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982).

[345] *Id.* at 754. The Court noted the "lesser public interest in actions for civil damages than . . . in criminal prosecutions." *Id.* at 754 n.37. It had written in an earlier opinion: "This Court has never suggested that the policy considerations which compel civil immunity for certain government officials also place them beyond the reach of the criminal law." Imbler v. Pachtman, 424 U.S. 409, 429 (1976). The four Justices who dissented in *Fitzgerald* noted: "[T]here is no contention that the President is immune from criminal prosecution . . . . Nor would such a claim be credible." *Fitzgerald*, 457 U.S. at 780 (White, J., dissenting).

[346] *Trump*, 603 U.S. at 614.

[347] *Id.* The Court left open whether the exercise of this power might be entitled to absolute immunity.

[348] *Id.* at 615 (emphasis added) (quoting *Fitzgerald*, 457 U.S. at 754).

[349] *Trump*, 603 U.S. at 666 (Sotomayor, J., dissenting).

[350] Physicists speak of "the butterfly effect," the possibility that the fluttering of a butterfly's wings in Brazil can cause a tornado in Texas. *See Butterfly Effect*, WIKIPEDIA, https://en.wikipedia.org/wiki/Butterfly_effect [https://perma.cc/HHP2-PU5V] (last visited Mar. 15, 2026). The Court, however, probably would require more than a de minimus or "butterfly" chance of an adverse effect on executive-branch functioning.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Presidents. Trump's prosecution posed no danger of intrusion on the authority and functions of the executive branch.[351]

E. Selling Pardons

The pardon power is golden.[352] Pardons can be traded for cash.[353] They can reward donors.[354] They can purchase the silence of witnesses.[355] They might even be used to procure the assassination of rivals.

Bribery includes trading an official act for "anything of value,"[356] and, with very few exceptions, anything to which a public official attaches subjective value

[351] *See supra* text accompanying notes 266–67. For further discussion of the Court's presumptive-immunity standard, see Albert W. Alschuler, *Does a "Presumptive" Privilege Protect President Trump from Prosecution for Pressuring Pence?*, JUST SEC. (Oct. 29, 2024), https://www.justsecurity.org/104385/presumptive-privilege-trump-pence/ [https://perma.cc/4B78-WFRH]. In general, "[w]hen a former president has been charged with a serious crime on the basis of substantial evidence, a law-abiding successor would have no reason to apprehend that criminal penalties might befall him upon his departure from office." *Id.*

[352] *Cf. "I've Got This Thing and it's F---ing Golden,"* SALON (Dec. 9, 2008, 4:49 PM EST), https://www.salon.com/2008/12/09/blagojevich_complaint_2/ [https://perma.cc/TN3S-QP9F] (describing Illinois Governor Rod Blagojevich's famed remark about his power to make an interim appointment to the U.S. Senate: "I've got this thing and it's fucking golden, and . . . I'm just not giving it up for fuckin' nothing.").

[353] *See Ray Blanton*, WIKIPEDIA, https://en.wikipedia.org/wiki/Ray_Blanton [https://perma.cc/2SDN-EMT7] (last visited Mar. 15, 2026).

[354] *See* Eric Lichtblau & Davan Maharaj, *Clinton Pardon of Rich a Saga of Power, Money and Influence*, L.A. TIMES (Feb. 18, 2001, 12 AM), https://www.latimes.com/archives/la-xpm-2001-feb-18-mn-27173-story.html [https://perma.cc/3RVE-CM84]; Kenneth P. Vogel, *Trump Pardoned Tax Cheat After Mother Attended $1 Million Dinner*, N.Y. TIMES (May 27, 2025), https://www.nytimes.com/2025/05/27/us/politics/trump-pardon-paul-walczak-tax-crimes.html [https://perma.cc/A34A-CSCT].

[355] *See* JEFFREY TOOBIN, THE PARDON: THE POLITICS OF PRESIDENTIAL MERCY 34–40 (2025) (describing President Nixon's unexecuted plans to contain the Watergate scandal by granting pardons); ANDREW WEISSMANN, WHERE LAW ENDS: INSIDE THE MUELLER INVESTIGATION xxiii (2020) ("The President's dangling of pardons to those who were considering cooperating with our investigation served, by design, to thwart our uncovering the true facts.").

[356] 18 U.S.C. § 201; *see* Albert W. Alschuler, *Why Broad Definitions of Bribery Make Things Worse*, 84 FORDHAM L. REV. 463, 474–76 (2015) (describing how Section 201, which seems on its face to proscribe giving gifts with intent to influence and accepting gifts with intent to be influenced, has been read instead to require an agreement to trade a quid for a quo).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

appears to be a "thing of value."[357] Cash, silence, perjury, and assassinating a rival all seem to qualify.[358]

Both Chief Justice Roberts' majority opinion in *Trump* and Justice Barrett's separate opinion declared that the Court's ruling would allow the prosecution of a President who traded a pardon for cash. Justice Sotomayor, however, dissented. She wrote: "Takes a bribe in exchange for a pardon? . . . Immune, immune, immune."[359]

The issue arose because Justice Barrett, who joined most of Chief Justice Roberts' majority opinion, dissented from the Court's ruling that evidence of immunized conduct may not be introduced when a former President is on trial for engaging in non-immunized conduct. (As noted above, Justice Barrett, like the rest of the Court, seemed unaware that the entire majority opinion concerned the admissibility of evidence.[360])

Justice Barrett wrote: "The Constitution, of course, does not authorize a President to seek or accept bribes, so the Government may prosecute him if he does so. . . . Yet excluding from trial any mention of the official act connected to the bribe would hamstring the prosecution."[361]

Including the words "of course" in Justice Barrett's statement that the government may prosecute a bribe-taking President was probably a mistake. The words "of course not" would have been more appropriate.[362]

An opinion in *Trump* might have begun: "The Constitution, of course, does not authorize a President to conspire to defraud the United States, obstruct justice, or conspire against the right to vote, so the Government may prosecute him if he does

---

[357] *See* United States v. Renzi, 769 F.3d 731, 744 (9th Cir. 2014); ELLEN L. WEINTRAUB, FED. ELECTION COMM'N, THE LAW OF "THING OF VALUE" (2019), https://www.fec.gov/resources/cms-content/documents/2019-10-ELW-the-law-of-a-thing-of-value.pdf [https://perma.cc/33PW-HC9D] (collecting decisions interpreting the words "thing of value" in bribery law, campaign-finance law, and other contexts).

[358] Political logrolling and trades of leniency for testimony, confessions, and guilty pleas appear to be exceptions. *See, e.g.*, United States v. Singleton, 144 F.3d 1297 (10th Cir. 1999) (en banc).

[359] *Trump*, 603 U.S. at 684 (Sotomayor, J., dissenting).

[360] *See supra* text accompanying notes 258–62.

[361] *Trump*, 603 U.S. at 655–56 (Barrett, J., concurring in part).

[362] Justice Barrett might have meant that of course no sensible judge would grant immunity to a bribe-taker, so of course she and five other Justices of the Supreme Court had not done so. But activist judges confident of their abilities and heedless of adversary procedure might inadvertently create a standard that, if faithfully applied, would preclude the prosecution of a pardon-selling President.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

so." Justice Barrett probably would not have regarded that statement as a satisfactory analysis of the issue or even a good start.

When the Supreme Court declares that an exercise of a "core" power like the pardon power is absolutely immune, it must mean, at a minimum, that the exercise of that power cannot be made the *actus reus* of a crime.[363] That proposition, however, does not necessarily resolve a bribery case. A President who agrees to trade a pardon for cash commits the crime of bribery whether or not he delivers the pardon. The agreement itself is criminal.[364] In some cases, then, as Justice Barrett indicated, granting a pardon may be evidence of a completed crime.[365]

In other cases, however, there might have been no agreement in advance. Granting the pardon might constitute the acceptance of the bribe giver's offer.[366] If a President were not absolutely immune in this sort of case (in which there would be no criminal act without the pardon), no one could ever be absolutely immune. Yet it would be bizarre to hold a President immune from prosecution for bribery when his pardon completed a crime and not when it evidenced a prior agreement.

Trump in fact made clear that using a "core" power to complete a crime is not required. The Supreme Court concluded that, because Trump's power to discharge his Acting Attorney General was conclusive and preclusive, his efforts to corrupt the Justice Department were absolutely immune.[367] But Trump did not exercise that preclusive power. He simply threatened to use it. If threatening the use of a core power confers immunity, promising to use a core power must confer immunity as well. In both situations, a President conditions his exercise of a preclusive power on someone else's delivery of something the President wants. Because the pardon power is a power whose use, threatened use, or promised use entitles a President to absolute immunity, a President who takes a bribe to give a pardon must be immune.

---

[363] One vice of the *Trump* opinion is its failure to focus on what relationship an immunized act must have to the commission of an alleged crime. The Court merely asserted that "Presidents . . . cannot be indicted *based on* conduct for which they are immune." *Id.* at 630 (emphasis added); *see supra* note 255.

[364] *See* 18 U.S.C. § 201.

[365] *See* Randall Eliason, *Prosecuting a President for Bribery After* Trump v. United States, SIDEBARS (July 11, 2024), https://www.sidebarsblog.com/p/prosecuting-a-president-for-bribery [https://perma.cc/2A5M-2YWM].

[366] For example, a bribe giver or a bagman might place an envelope of cash in a drawer of the Resolute desk with a note, and a corrupt President might respond by doing what the note asked.

[367] *See Trump*, 603 U.S. at 619–21.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

His case is indistinguishable from that of a corrupt President who threatens to use a different core power to procure someone's cooperation in a crime.[368]

Like Justice Barrett, the majority seemed confident that a bribe-taking President was subject to prosecution. Footnote 3 of Chief Justice Roberts' majority opinion responded to Justice Barrett's contention that the Court had made this prosecution too difficult:

> [Justice Barrett argues] that in a bribery prosecution, . . . excluding "any mention" of the official act associated with the bribe "would hamstring the prosecution." But of course the prosecutor may point to the public record to show the fact that the President performed the official act. And the prosecutor may admit evidence of what the President allegedly demanded, received, accepted, or agreed to receive or accept in return for being influenced in the performance of the act. What the prosecutor may not do, however, is admit testimony or private records of the President or his advisers probing the official act itself. Allowing that sort of evidence would invite the jury to inspect the President's motivations for his official actions and to second-guess their propriety.[369]

The Court's statement that a prosecutor may use a public record to show a President's performance of an immunized act is another statement that should not have included the words "of course." Once again, the words "of course not" would have been more appropriate.

The Court had held just the opposite of what it wrote in that footnote. It had said, not that the government must prove immunized conduct in a particular way,

---

[368] In the absence of a discernable empirical or moral baseline for distinguishing threats from promises, the difference between them is simply verbal. The statement "I'll fire you unless you help me defraud state officials" is a threat. The statement "I'll keep you as my Attorney General if you'll help me defraud state officials" is a promise. Similarly, the statement "I'll pardon your crimes and nominate you to be a federal judge if you pay me $10 million" is a promise. *See* Albert W. Alschuler, Lafler *and* Frye*: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 685–87, 696–704 (2013) (discussing whether a distinction can be drawn between rewarding criminal defendants who plead guilty and penalizing defendants who exercise the right to trial). Notice that, if the Constitution precludes any review of a President's reasons for conditioning the exercise of a core power, every power designated "core" becomes true Blagojevich gold. A corrupt President may then trade an exercise of this power for either cash or the commission of crimes without risking the eight years that former Governor Blagojevich spent in prison before President Trump commuted his fourteen-year sentence and then granted him a full pardon. *See* Albert W. Alschuler, *The Corruption of the Pardon Power*, 18 U. ST. THOMAS L.J. 1, 22–23 (2022); Julie Bosman, *Trump Pardons Rod Blagojevich, the Former Illinois Governor*, N.Y. TIMES (Feb. 10, 2025), https://www.nytimes.com/2025/02/10/us/politics/rod-blagojevich-trump-pardon.html [https:// perma.cc/5MZZ-KBTV].

[369] *Id.* at 632 n.3 (citations omitted).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

but that a jury could not consider immunized conduct at all. It wrote: "If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the 'intended effect' of immunity would be defeated."[370]

Why treat two ways of proving the same fact differently? Allowing the President's advisors to testify, the Court said, "would invite the jury to inspect the President's motivations for his official actions and to second-guess their propriety." Perhaps a judge would not know how to limit the advisors' testimony.

The Court had said earlier that a judge could not consider a President's motives in determining whether his acts were official or private.[371] Now it said that a jury could not consider a President's motives in a trial for accepting a thing of value "corruptly" and with the intent of "being influenced in the performance of any official act."[372] It would be unconstitutional to allow a jury to assess whether the President had the criminal intent required by the statute he was accused of violating. Although the President's motives would be off limits even in this bribery case so that he could not be convicted, he would not be immune from conviction because the Constitution (of course) does not authorize a President to seek or accept bribes.[373]

The majority's discussion of whether its ruling blocked a former President's prosecution for selling a pardon strongly suggests that its standards are a jumble and that it did not know what it was saying.

VI. APPLYING THE STANDARDS

Although the Supreme Court ruled that Trump's efforts to corrupt the Department of Justice were immune from prosecution and from use in evidence, it did not determine whether the other "manner and means" alleged in the Special Counsel's speaking indictment were immune. Rather, after discussing (1) Trump's efforts to press state officials in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin to withdraw previously certified slates of electors; (2) his efforts to submit to Congress false slates of electors from Arizona, Georgia, Michigan, New

[370] *Id.* at 631.

[371] *Id.* at 618.

[372] *See* 18 U.S.C. § 201.

[373] *See* Akhil Reed Amar, *Something Has Gone Deeply Wrong at the Supreme Court*, THE ATLANTIC (July 2, 2024), https://www.theatlantic.com/politics/archive/2024/07/trump-v-united-states-opinion-chief-roberts/678877/ [https://perma.cc/J7G7-NC9H] ("In a quid-pro-quo bribery case—money for a pardon—[Chief Justice] Roberts apparently would allow evidence of the quid (the money transfer) and evidence of the quo (the fact of a later pardon) but not evidence of the pro: evidence that the pardon was given *because of* the money, that the pardon was *motivated by* the money. This is absurd.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Mexico, Nevada, Pennsylvania, and Wisconsin; (3) his remarks to supporters on January 6 and other public messages; and (4) his efforts to persuade Vice President Pence to reject certified electoral ballots, the Court directed the district court to determine initially whether these "means" were immune.

The Court's discussion of Trump's efforts to persuade state officials to withdraw certified election results and his efforts to submit false slates of electors focused on whether these efforts constituted private or official conduct. Perhaps they were "official" because they were "undertaken to ensure the integrity and proper administration of the federal election" and because they employed "the President's broad power to speak on matters of public concern."[374] Or perhaps they were "private" because they were "campaign conduct."[375] The Court said that determining which "characterization may be correct, and with respect to which conduct, requires a close analysis of the indictment's extensive and interrelated allegations."[376]

Justice Barrett saw no need to remand this issue to the district court. She wrote in her separate opinion: "[A] President has no legal authority—and thus no official capacity—to influence how the States appoint their electors. I see no plausible argument for barring prosecution of that alleged conduct."[377]

But the Court's professed inability to resolve this issue for itself might have indicated that it wanted the pretrial proceedings in *Trump* to continue indefinitely. The Court's treatment of other allegations also indicated its desire to keep the wheels of justice grinding slowly. If Trump's election as president in 2024 had not brought his prosecution to a halt and if the district court had failed to rule in Trump's favor on all of the issues the Supreme Court remanded to it, a second (equally improper[378]) interlocutory appeal would have followed. There would have been briefs and arguments in the D.C. Circuit, the preparation of an opinion analyzing and resolving a lengthy list of issues, and then a petition for rehearing en banc. After that, the parties would have filed pleadings seeking and opposing Supreme Court review. The Court would have been likely to take the case. Then there would have been another

[374] *Trump*, 603 U.S. at 626–27.

[375] *Id.* at 626.

[376] *Id.* at 628.

[377] *Id.* at 653 n.2 (Barrett, J., concurring in part). The Court did not discuss how Trump's lies to state officials and his part in submitting false slates of electors could make future Presidents wary of taking "bold and unhesitating action." *See Trump*, 603 U.S. at 595 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 745 (1982)). Determining that Trump's actions posed "no 'dangers of intrusion on the authority and functions of the Executive Branch'" would have made it unnecessary to consider whether they were official or private.

[378] *See supra* Section III.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

round of briefs, an argument, and time for a Justice to draft a majority opinion and for every other justice who wished to concur or dissent to write a separate opinion of her own. Then there might have been more pretrial proceedings, a lengthy trial, and then, if Trump were convicted, more appeals to the D.C. Circuit and the Supreme Court. In the world's most over-proceduralized legal system, both substance and procedure seemed likely to make Trump's prosecution sink beneath the waves.[379]

The Court's discussion of Trump's remarks to his followers on January 6 similarly focused on whether this conduct was official or private. The Court said that a President possesses "extraordinary power to speak to his fellow citizens" and that "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities."[380] It acknowledged, however, that there might "be contexts in which the President, notwithstanding the prominence of his position, speaks in an unofficial capacity—perhaps as a candidate for office."[381]

The Court did not mention the 187 minutes in which Trump refused to ask his supporters to end their violent occupation of the Capitol. The Constitution says that the President "shall take Care that the Laws be faithfully executed,"[382] but the Court might have considered Trump's refusal an exercise of his "core" power not to enforce the law faithfully or at all. As the Court wrote when it declared Trump's efforts to corrupt the Justice Department immune, "the Executive Branch has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute."[383]

If the Court viewed Trump's approval of the insurrection as the exercise of a preclusive presidential prerogative, one can understand why it hesitated to say so out loud. Announcing that conclusion would have countenanced a crime arguably more serious than using Seal Team 6 to kill a rival. Trump's discretion to decide which crimes to investigate and prosecute also might have made his threat to prosecute

---

[379] To be sure, our legal system has devised an effective means of undermining its unworkable procedures, and this system looks different from the perspective of most defendants, especially those who lack Trump's resources. *See* UNITED STATES SENTENCING COMMISSION, FISCAL YEAR 2021 OVERVIEW OF FEDERAL CRIMINAL CASES 8 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf ("In fiscal year 2021, the vast majority of offenders (98.3%) pleaded guilty."); Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALBANY L. REV. 919 (2017); Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURVEY AM. LAW 205 (2021).

[380] *Id.* at 629 (quoting Trump v. Hawaii, 585 U.S. 667, 701 (2018)).

[381] *Id.*

[382] U.S. CONST. art. II, § 3, cl. 1.

[383] *Trump*, 603 U.S. at 620 (quoting United States v. Nixon, 418 U.S. 683, 693 (1974)).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Georgia Secretary of State Brad Raffensperger for failing to find 11,780 votes absolutely immune.[384]

The Court said of Trump's efforts to convince Vice President Pence to reject properly certified electoral ballots: "Whenever the President and Vice President discuss their official responsibilities, they engage in official conduct."[385] Accordingly, "[t]he indictment's allegations that Trump attempted to pressure the Vice President to take particular acts in connection with his role at the certification proceeding . . . involve official conduct, and Trump is at least presumptively immune from prosecution for such conduct."[386]

The Court recognized that the joint session of Congress at which Pence would preside is "not an 'executive branch' function" and that the Vice President would participate in this session as President of the Senate.[387] But it described how Vice Presidents have served informally as presidential advisors and attended cabinet meetings, and it concluded:

> We . . . remand to the District Court to assess in the first instance, with appropriate input from the parties, whether a prosecution involving Trump's alleged attempts to influence the Vice President's oversight of the certification proceeding in his capacity as President of the Senate would pose any dangers of intrusion on the authority and functions of the Executive Branch.[388]

How Trump's prosecution for abusing his Vice President could make future Vice Presidents less effective as presidential advisors is difficult to fathom. It was Trump's abuse of Pence, not Trump's prosecution for abusing Pence, that ended Pence's own effectiveness.

The indictment alleged that Trump knowingly made false claims of the Vice President's legal authority; knowingly made false claims of election fraud; badgered the Vice President for refusing to follow his unlawful instructions; threatened to criticize the Vice President publicly (prompting the Vice President's Chief of Staff to voice concern about the Vice President's safety to the Secret Service); publicly

---

[384] *See supra* text accompanying notes 27–30. It is difficult to understand why conservatives who purport to favor limited government enthusiastically applaud unchecked presidential power.

[385] *Trump*, 603 U.S. at 597.

[386] *Id.* at 597–98.

[387] *Id.* at 624.

[388] *Id.* at 624–25.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

declared, "The Vice President and I are in total agreement that the Vice President has the power to act," when in fact they totally disagreed; publicly declared, "If Vice President @Mike_Pence comes through for us, we will win the Presidency"; reinserted remarks that he had drafted for delivery to a crowd of supporters on January 6 concerning the Vice President's ability to alter the election results (after advisors had persuaded him to drop these remarks); repeatedly told the crowd things like, "if Mike Pence does the right thing, we win this election"; added that if the crowd did not "fight like hell," they wouldn't "have a country anymore"; and asked the crowd to march to the Capitol.[389]

The indictment also recited actions that allegedly occurred after the Vice President released a statement saying that he lacked the authority to reject certified ballots unilaterally. Soon after rioters entered the building, Trump tweeted: "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution." Rioters chanted, "Hang Mike Pence!"; "Where is Pence? Bring him out!"; and "Traitor Pence!"[390] Trump, however, "refused to approve a message directing rioters to leave the Capitol, as urged by his most senior advisors."[391]

One's first thought upon reading these allegations probably would not be that prosecuting Trump could make future Vice Presidents less effective in Oval Office discussions. But that was what the Supreme Court cared about. It was *all* the Supreme Court cared about. Any possibility of impairing, even slightly, the functioning of the executive branch would bar Trump's prosecution.

Putting the Court's analysis of all the alleged manner and means together, it appears that the existence of presidential immunity depends on whom a President has attempted to enlist as his knowing or inadvertent accomplices. When Trump lied to induce state officials to aid his conspiracy, the Court left open the possibility that his conduct might be private campaign conduct and subject to prosecution. Working to deceive state officials might not have laundered his crimes at all. When, however, Trump instructed his Acting Attorney General to tell the same lies to the same state officials, his conduct was no longer private. What might have been campaign conduct when Trump spoke with the state officials had been transformed, and his crimes were now laundered. They had become official, pure, "core," and absolutely immune. Lying to a Vice President while this official was acting as President of the Senate was less effective than lying to a cabinet officer, but it supplied greater

[389] *See* Indictment, United States v. Trump, *supra* note 92, ¶¶ 86–105.

[390] *Id.* ¶ 113.

[391] *Id.* ¶¶ 106–14, at 39–40.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

protection than lying to state officials. It gave Trump's crimes a pre-wash, making them official but not "core." The laundry would be finished only if a prosecutor tried to show that prosecution would pose no danger of intrusion on the functioning of the executive branch and failed. The Supreme Court's message was that a cagey President should appoint only executive-branch officials who are willing and anxious to commit crimes and should rely on them, not state officials or a Vice President presiding over the Senate, to carry out his schemes.

That is pretty much what happened after Trump took the oath of office a second time on January 20, 2025.

PART THREE
CONSEQUENCES

VII. TRUMP 2.0

Former Judge Michael Luttig wrote of Trump's second term: "The president's utter contempt for the Constitution and laws of the United States has been on spectacular display since Inauguration Day."[392] Luttig supplied a lengthy list of unlawful acts committed during the first few months of Trump 2.0.

The link between the lawlessness of the second Trump administration and the *Trump* decision may seem obvious. Only a day after the decision, Kevin Roberts, the organizer of a blueprint for the second Trump administration called *Project 2025*[393] seemed delighted by the opportunities for lawlessness and near lawlessness the Supreme Court had supplied. "That Supreme Court ruling yesterday on immunity

[392] J. Michael Luttig, *The End of Rule of Law in America*, THE ATLANTIC (May 15, 2025, 10:45 AM ET), https://www.theatlantic.com/ideas/archive/2025/05/law-america-trump-constitution/682793/ [https://perma.cc/AS6Q-85ZK]; *see also* Paul Rosenzweig, *The Destruction of the Department of Justice*, THE ATLANTIC (May 4, 2025), https://www.theatlantic.com/ideas/archive/2025/05/trump-destroying-doj/682681/ [https://perma.cc/F7GT-KGPP]; Devon Ombres, *The President and Constitutional Violations: Will the Federal Courts Contain the President's Power Grabs?*, CTR. FOR AM. PROGRESS (May 20, 2025), https://www.americanprogress.org/article/the-president-and-constitutional-violations-will-the-federal-courts-contain-the-presidents-power-grabs/; The Editorial Board, *"Egregious." "Brazen." "Lawless.": How 48 Judges Describe Trump's Actions, in Their Own Words*, N.Y. TIMES (July 12, 2025), https://www.nytimes.com/interactive/2025/07/12/opinion/editorials/federal-judges-quotes-trump-administration.html [https://perma.cc/7432-RRHQ]; *Litigation Tracker: Legal Challenges to Trump Administration Actions*, JUST SEC., https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/ [https://perma.cc/UA2J-H72R] (last visited Mar. 23, 2026) (tracking the more than 700 lawsuits that have been filed to challenge the legality of actions by the Trump administration during Trump's second term).

[393] *See* PROJECT 2025 PRESIDENTIAL TRANSITION PROJECT, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE (Heritage Foundation 2023), https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf [https://perma.cc/H33Z-ZYV8].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

is vital, and it's vital for a lot of reasons," Roberts declared.[394] "[W]e are in the process of the second American Revolution, which will remain bloodless if the left allows it to be."[395] Some Trump administration critics have readily drawn a connection between the decision in *Trump* and the pervasive disrespect for law Luttig described.[396]

But the connection is less clear and direct than it may seem. It is far from certain that any acts of the second Trump administration would have led to criminal punishment of the President in the absence of the Supreme Court's decision. Even if this decision affected the President's conduct, it might not have done so through a direct economic calculus of prospective pleasure and pain. The remainder of this Section will offer a preliminary and incomplete assessment of some crimes the President might have committed in the first year of his second term and of the likelihood that these crimes would have led to prosecution and punishment if the Supreme Court had not decided as it did. It will also consider the applicability of the decision in *Trump* to these possible crimes.

A. What Crimes and What Immunities?

The unmistakable purpose of many Trump-administration actions was to punish the President's political opponents and perceived enemies. "I am your retribution," Trump said while running for office,[397] and he meant it. In the second Trump presidency, people and organizations that have crossed or displeased the

---

[394] *Heritage Foundation President Celebrates Supreme Court Immunity Decision: "We Are in the Process of the Second American Revolution,"* MEDIA MATTERS FOR AM. (July 2, 2024, at 11:35 AM ET), https://www.mediamatters.org/project-2025/heritage-foundation-president-celebrates-supreme-court-immunity-decision-we-are [https://perma.cc/26M2-MA4D] (video and verbatim transcript).

[395] *Id.*

[396] *See, e.g.*, Devon Ombres, Trump v. United States*: Revisiting the Presidential Immunity Decision One Year Later*, CTR. FOR AM. PROGRESS (July 31, 2025), https://www.americanprogress.org/article/trump-v-united-states-revisiting-the-presidential-immunity-ruling-1-year-later/ [https://perma.cc/UA2L-BEK2]; Thomas B. Edsall, *Why Trump Won't Face Prosecution When He Leaves Office in 2029*, N.Y. TIMES (Nov. 25, 2025), https://www.nytimes.com/2025/11/25/opinion/trump-corruption-crypto-immunity.html [https://perma.cc/SB96-RSFA] (quoting many legal authorities).

[397] *See* David Smith, *"I Am Your Retribution": Trump Rules Supreme at CPAC as He Relaunches Bid for White House*, THE GUARDIAN (Mar. 4, 2023, 8:52 PM EST), https://www.npr.org/2024/10/21/1211597189/a-look-into-trumps-recent-rhetoric-focusing-on-revenge-and-threats [https://perma.cc/DHQ6-SFFD]; *see* Alan Feuer & Maggie Haberman, *Jan. 6 Prosecutors Ask for Protective Order, Citing Threatening Trump Post*, N.Y. TIMES (Aug. 5, 2023), https://www.nytimes.com/2023/08/05/us/politics/jack-smith-trump-threat-social-media.html [https://perma.cc/J7QQ-CC56] (quoting Trump's social media post: "IF YOU GO AFTER ME, I'M COMING AFTER YOU!").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

President are investigated.[398] Their grants are revoked. When they are government employees, they are found and fired. When they work for private employers, their employers are encouraged to discharge them. Their movements in public are tracked. Some of them are deported. Their accreditations may be withdrawn. Their taxes may be increased. The visas of their employees and students are denied. They are forbidden to enter government buildings. Their actual or imagined regulatory violations incur stiff penalties. Their mergers and acquisitions are disapproved (unless they pay tribute and/or purge Trump critics). They are named as defendants in baseless lawsuits and charged with crimes on flimsy evidence. They lose government contracts.

None of these things happen to the President's friends and supporters. Rather, their attacks on police officers and terrorization of members of Congress are praised and pardoned.[399]

1. Retaliatory Firings

While acknowledging that political views and party membership are legitimate criteria for filling some governmental positions, the Supreme Court has held that the Constitution forbids discharging many government employees solely because of their political beliefs. In 1980, for example, it held that the First Amendment barred a Democratic public defender from firing lawyers in his office simply because they were Republicans.[400]

A federal statute, Section 242, makes it a crime for a public official to willfully deprive someone of a right "secured or protected by the Constitution or laws of the

[398] *See* Tom Dreisbach, *Trump Has Used Government Powers to Target More than 100 Perceived Enemies*, NPR (Apr. 29, 2025, at 5:00 EST), https://www.npr.org/2025/04/29/nx-s1-5327518/donald-trump-100-days-retribution-threats [https://perma.cc/DW8B-HE78].

[399] *See* The President of the United States, *Granting Pardons and Commutation of Sentences for Certain Offenses Relating to the Events at or Near the United States Capitol on January 6, 2021*, THE WHITE HOUSE (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/granting-pardons-and-commutation-of-sentences-for-certain-offenses-relating-to-the-events-at-or-near-the-united-states-capitol-on-january-6-2021/ [https://perma.cc/TNQ7-PPPJ].

[400] Branti v. Finkel, 445 U.S. 507, 508 (1980) ("[T]he First and Fourteenth Amendments to the Constitution protect an assistant public defender who is satisfactorily performing his job from discharge solely because of his political beliefs."); *see* Elrod v. Burns, 427 U.S. 347, 351 (1976) (holding that an elected sheriff violated employees' constitutional rights by discharging them simply "because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

United States."[401] Another statute, Section 241, a statute whose violation was alleged in *Trump*,[402] forbids conspiring to injure, oppress, threaten, or intimidate any person in the free exercise or enjoyment of a right secured by the Constitution or laws of the United States.[403]

In the second Trump presidency, at least thirty-seven people who had worked with Special Counsel Jack Smith were abruptly discharged from their government positions. They included not only Justice Department lawyers but also support staff and U.S. Marshals.[404] The letters firing them gave their work for the Special Counsel as the reason.[405] Similarly, dozens of lawyers in the United States Attorney's Office for the District of Columbia were fired because they participated in the prosecution of January 6 defendants.[406] Other career Justice Department lawyers and law enforcement agents were dismissed because they had associated with perceived enemies of the Trump administration or had engaged in supposed acts of disloyalty.[407] The *New York Times* reported in November 2025: "To date, more than

[401] 18 U.S.C. § 242. This statute was part of the Civil Rights Act of 1866. Although amended several times, its language has not changed significantly. *See* Joanna R. Lampe, *Federal Police Oversight: Criminal Civil Rights Violations Under 18 U.S.C. § 242*, LIBR. OF CONG., https://www.congress.gov/crs-product/LSB10495 [https://perma.cc/AX43-9QHV] (last accessed Apr. 3, 2026).

[402] *See supra* text accompanying notes 108–13.

[403] 18 U.S.C. § 241.

[404] Sarah N. Lynch & Andrew Goudsward, *US Justice Department Fires Several More Employees from Jack Smith's Team, Sources Say*, REUTERS (July 14, 2025, at 6:08 AM EDT), https://www.reuters.com/world/us/us-justice-fires-nine-more-employees-jack-smiths-team-sources-say-2025-07-12/ [https://perma.cc/S8RZ-CZPD].

[405] *See* Ken Dilanian & Ryan J. Reilly, *Trump Administration Fires DOJ Officials Who Worked on Criminal Investigations of the President*, NBC NEWS (Jan. 27, 2025, 4:21 PM EST), https://www.nbcnews.com/politics/justice-department/trump-administration-fires-doj-officials-worked-criminal-investigation-rcna189512 [https://perma.cc/ESN6-B42Z].

[406] Kyle Cheney & Josh Gerstein, *DOJ Fires Dozens of Prosecutors Who Handled Jan. 6 Cases*, POLITICO (Jan. 31, 2025, 6:50 PM EST), https://www.politico.com/news/2025/01/31/doj-purges-prosecutors-january-6-cases-00201904 [https://perma.cc/DW9Y-KGJF].

[407] *See* Patrick Marley, Jeremy Roebuck & Yvonne Wingett Sanchez, *Trump's DOJ Has Fired Dozens of Prosecutors, Upending Decades-Old Norm*, WASH. POST (July 19, 2025), https://www.washingtonpost.com/politics/2025/07/19/justice-career-prosecutors-staff-firings-trump/ [https://perma.cc/W57Z-JAT3]; Michael Feinberg, *Goodbye to All That: My Resignation from the FBI*, LAWFARE (July 3, 2025, 1:37 PM ET), https://www.lawfaremedia.org/article/goodbye-to-all-that [https://perma.cc/X87N-86J4]; Benjamin Wittes, *The Situation: The Case of Erez Reuveni*, LAWFARE (July 13, 2025, 1:04 PM ET), https://www.lawfaremedia.org/article/the-situation--the-case-of-erez-reuveni [https://perma.cc/78HU-USS6]; *Restoring Accountability and Attacks on the Rule of Law: Hearing Before the H. & S. Judiciary Comm.* (Apr. 7, 2025), https://www.schiff.senate.gov/wp-content/uploads/2025/04/20250407-Liz-Oyer-Hearing-Statement-4.7.25.pdf [https://perma.cc/3C3L-XKGW] (statement of Elizabeth G. Oyer, Former

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

200 career [Justice Department] attorneys have been fired, and thousands have resigned."[408] Deputy Attorney General Todd Blanche cheered the crowd when he told the Conservative Political Action Conference (CPAC) in March 2026 that there was no longer "a single man or woman at the Department of Justice who had anything to do with" the prosecution of Donald Trump. He boasted that FBI Director Kash Patel had "cleaned house" too.[409]

Although many people lost their jobs, President Trump did not fire them, and he apparently did not direct other people to fire them. He simply nudged a little. On the first day of his second term, the President issued an executive order titled "Ending the Weaponization of the Federal Government."[410] It accused the "previous administration" of "an unprecedented, third-world weaponization of prosecutorial power" and listed as an illustration the Justice Department's "ruthless[] prosecut[ion of] more than 1,500 individuals associated with January 6."[411] The order directed the Attorney General to review the activities of the Justice Department and other agencies over the past four years and recommend appropriate remedial action.

In response to this order, Attorney General Pamela Bondi created a Weaponization Working Group charged with examining among other things:

- Weaponization by Special Counsel Jack Smith and his staff, who spent more than $50 million targeting President Trump . . . ;
- Federal cooperation with the weaponization by the Manhattan District Attorney Alvin Bragg, New York Attorney General Letitia James, their respective staffs, and other New York officials to target President Trump, his family, and his businesses; [and]

Dep't of Just. Pardon Att'y); Jonah E. Bromwich & Benjamin Weiser, *Prosecutor Fired by Trump Calls Fear the "Tool of a Tyrant,"* N.Y. TIMES (July 17, 2025), https://www.nytimes.com/2025/07/17/nyregion/maurene-comey-fired-trump.html [https://perma.cc/4UFG-DKKU]; William K. Rashbaum, Jonah E. Bromwich & Benjamin Weiser, *Fired Prosecutor Challenges Trump's Claims to Sweeping Power in Lawsuit*, N.Y. TIMES (Sept. 15, 2025), https://www.nytimes.com/2025/09/15/nyregion/maurene-comey-fired-lawsuit-trump.html [https://perma.cc/3EYY-U3GS].

[408] Emily Bazelon & Rachel Posner, *The Unraveling of the Justice Department*, N.Y. TIMES (Nov. 15, 2025), https://www.nytimes.com/interactive/2025/11/16/magazine/trump-justice-department-staff-attorneys.html [https://perma.cc/23US-9956].

[409] WATCH: *Fireside Chat with Deputy Attorney General Todd Blanche at CPAC* at 3:30, YOUTUBE (Mar. 26, 2026), https://www.youtube.com/watch?v=sYwQMhXAhCc.

[410] Exec. Order No. 14147 (Ending the Weaponization of the Federal Government), 90 Fed. Reg. 8235 (Jan. 20, 2025).

[411] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

- The pursuit of improper investigative tactics and unethical prosecutions relating to events at or near the United States Capitol on January 6, 2021 . . . .[412]

Like the President's order, the Attorney General's memorandum creating a working group did not speak directly of firing anyone or of breaking any laws.

Bondi chose Ed Martin to be the Director of the Weaponization Working Group. Earlier, as Interim U.S. Attorney for the District of Columbia, Martin had dismissed about thirty prosecutors for having worked on January 6 cases.[413] Martin had been present on the Capitol grounds on January 6 and had represented several January 6 defendants.[414]

Martin hired Jared Wise to be his senior advisor and counselor. Wise had been charged with assaulting police officers and other crimes on January 6 and was on trial when President Trump took office in 2025. His prosecution, like that of hundreds of others, was dismissed. Wise acknowledged at his trial that he had shouted to other rioters attacking police officers: "Kill 'em! Kill 'em! Kill 'em!" But he testified that he meant that exhortation figuratively.[415]

---

[412] *Memorandum from the Att'y Gen. on Restoring the Integrity and Credibility of the Department of Justice*, U.S. DEPT. OF JUST. (Feb. 5, 2025), https://www.justice.gov/ag/media/1388506/dl?inline [https://perma.cc/MQW2-BFXQ].

[413] *See Ed Martin (Missouri Politician)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Ed_Martin_(Missouri_politician) [https://perma.cc/5CZD-X533] (last visited Apr. 3, 2026); Kyle Cheney & John Gerstein, *DOJ Fires Dozens of Prosecutors Who Handled Jan. 6 Cases*, POLITICO (Jan. 31, 2025, 6:50 PM EST), https://www.politico.com/news/2025/01/31/doj-purges-prosecutors-january-6-cases-00201904 [https://perma.cc/DW9Y-KGJF].

[414] *See* Alanna Durkin Richer & Michael Kunzelman, *D.C.'s New Top Prosecutor Advocated for Jan. 6 Rioters and Echoed Trump's False 2020 Election Claims*, PBS NEWS (Jan. 28, 2025, 1:35 PM EDT), https://www.pbs.org/newshour/politics/d-c-s-new-top-prosecutor-advocated-for-jan-6-rioters-and-echoed-trumps-false-2020-election-claims [https://perma.cc/6KE9-86HK].

[415] *See* Alan Feuer & Adam Goldman, *Pardoned Jan. 6 Rioter Who Threatened Police Joins Justice Dept.*, N.Y. TIMES (July 1, 2025), https://www.nytimes.com/2025/07/01/us/politics/justice-department-rioter-weaponization.html [https://perma.cc/W6PX-B7A4]; Tom Dreisbach, *Video Shows Department of Justice Official Urging Jan. 6 Rioters to "Kill" Cops*, NPR (Aug. 7, 2025, 5:00 AM ET), https://www.npr.org/2025/08/07/nx-s1-5493197/doj-trump-jan-6-defendant-jared-wise-capitol-riot [https://perma.cc/65VZ-4JL7]; Press Release, U.S. Att'ys Off. for the Dist. of Columbia, Former FBI Supervisory Special Agent Indicted in Federal Court on Felony Charges Related to U.S. Capitol Breach (June 1, 2023), https://www.justice.gov/usao-dc/pr/former-fbi-supervisory-special-agent-indicted-federal-court-felony-charges-related-us [https://perma.cc/L8WP-C9PS]; Transcript of Jury Trial at 117–18, United States v. Wise, No. 23-CR-184 (D.D.C. Jan. 16, 2025), excerpt available at https://www.documentcloud.org/documents/26040338-23-cr-184-us-v-jared-wise-1-16-25-jared-wise-excerpt/ [https://perma.cc/BB54-M74R].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

The "weaponization" group found additional prosecutors, paralegals, and support staff to discharge.[416] Martin also announced that he would attempt to prosecute the weaponizers: "If they can be charged, we'll charge them, . . . [b]ut if they can't be charged, we will name them. And . . . in a culture that respects shame, they should be . . . ashamed. . . . That's the way things work."[417]

The facts recited above might conceivably justify charging Trump with violating Section 241 by conspiring with Bondi and others to deprive the fired employees of their constitutional rights. But, even if the employees were discharged for constitutionally impermissible reasons, making a case against the kingpin would be difficult. The most effective criminal organizations are those whose participants understand what they are to do without much palaver,[418] and President Trump's second-term appointments created an effective and loyal organization.

Even if a case against Trump could be made, he would be entitled to at least presumptive immunity. Presidential acts that violate Section 241 are "official." Moreover, Trump's immunity might be absolute.

The discharged employees were not presidential appointees, so the Supreme Court's recognition of "the President's 'unrestricted power of removal' with respect to 'executive officers of the United States whom he has appointed'"[419] would not confer absolute immunity. But the Court also spoke of the "power to remove—and thus supervise—those who wield executive power on [the President's] behalf."[420] Full embrace of the "unitary executive" principle would make Trump's immunity absolute.

If Trump's immunity were only "presumptive," the question would be whether the government could show that prosecuting him would pose "no 'dangers of

---

[416] Jacob Rosen & Scott MacFarlane, *Justice Department Purge Continues; Firings Include Trump Classified Document Case Investigators and Jan. 6 Prosecutors*, CBS NEWS (July 12, 2025, 4:39 PM EDT), https://www.cbsnews.com/news/justice-department-firings-include-trump-investigators-jan-6-prosecutors/ [https://perma.cc/H6QA-WPG8].

[417] Glenn Thrush & Alan Feuer, *If Justice Dept. Can't Prosecute Trump's Foes, It Will "Shame" Them, Official Says*, N.Y. TIMES (May 21, 2025), https://www.nytimes.com/2025/05/21/us/politics/trump-justice-department-ed-martin-weaponization.html [https://perma.cc/8NUQ-56L2].

[418] *See, e.g.*, People v. Bailey, 322 N.E.2d 804 (Ill. 1975) (reversing a conviction for conspiracy to commit murder although the shouted words "D's" and "Blackstones" prompted members of the Blackstone Rangers to fire from both sides of the street toward the vehicle of a rival gang member).

[419] *Trump*, 603 U.S. at 609 (quoting Myers v. United States, 272 U.S. 52, 106 (1926)).

[420] *Id.* at 608 (quoting Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 204 (2020)).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

intrusion on the authority and functions of the Executive Branch.'"[421] In a case as shaky as the one just described, a prosecutor probably could not make this showing, and Trump's immunity from prosecution would be secure.

Bondi, Blanche, Patel, Martin, and Wise, however, are probably not entitled to any sort of immunity from prosecution.[422] Charging public officials with a crime for improperly firing government employees would be unprecedented, but the vindictiveness of these officials is also unprecedented. If their successors in the Justice Department belonged to a different party, they might face charges. But of course, President Trump could pardon them before leaving office.[423]

2. Retaliatory Investigations

On occasion, President Trump might have deprived someone of a constitutional right in violation of Section 242 without leaving the task to underlings. Consider an executive order titled, "Addressing Risks from Chris Krebs and Government Censorship" that President Trump issued on April 9, 2025.[424]

---

[421] *Id.* at 615 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982)).

[422] *See* Harlow v. Fitzgerald, 457 U.S. 800, 808–13 (1982) (declining to extend the President's absolute immunity from civil actions for damages to presidential aides but affording the aides qualified immunity from civil damages actions); *cf.* Gravel v. United States, 408 U.S. 606, 616–18 (1972) (holding that the privilege of the Speech and Debate Clause extends to legislative aides whose "day-to-day work . . . is so critical to the Members' performance that they must be treated as the latter's alter egos" and adding that this privilege must be invoked by the members, not the aides themselves).

[423] *See* Irie Sentner et al., *Biden Issues Preemptive Pardons for Fauci, Milley, Jan. 6 Committee and Others*, POLITICO (Jan. 20, 2025, 11:30 AM EST), https://www.politico.com/news/2025/01/20/biden-pardons-fauci-milley-jan-6-committee-00199244 [https://perma.cc/92LV-GCMC]. Fortunately, and contrary to much discussion of the issue, a President has no power to pardon himself. *See* Presidential or Legislative Pardon of the President, 1 Op. O.L.C. 370, 370 (1974). A constitutional provision noted in this Article makes that conclusion clear. Article I, section 3, clause 7 provides that, after a President has been removed from office by impeachment, he shall "be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." If a President could pardon himself prior to his removal—perhaps even while the Senate was voting to remove him—this provision would be a nullity. The Framers could not have meant to give the President an easy way to defeat in every case the legal accountability they plainly intended in at least some cases. For further discussion, see Albert W. Alschuler, *Limiting the Pardon Power*, 63 ARIZ. L. REV. 545, 553-59 (2021).

[424] *Memorandum from President Donald J. Trump on Addressing Risks from Chris Krebs and Government Censorship*, THE WHITE HOUSE (Apr. 9, 2025), https://www.whitehouse.gov/presidential-actions/ 2025/04/addressing-risks-from-chris-krebs-and-government-censorship/ [https://perma.cc/26QZ-4LME]; *see also Memorandum from President Donald J. Trump on Addressing Risks Associated with an Egregious Leaker and Disseminator of Falsehoods*, THE WHITE HOUSE (Apr. 9, 2025), https://www .whitehouse.gov/presidential-actions/2025/04/addressing-risks-associated-with-an-egregious-leaker-and-disseminator-of-falsehoods/ [https://perma.cc/6459-UE4H] (a similar executive order concerning Miles Taylor).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

During Trump's first term, Chris Krebs was the Director of the Cybersecurity and Infrastructure Security Agency, an agency in the Department of Homeland Security whose responsibilities included assisting state and local authorities to secure the presidential election of 2020. After the election, the agency released a statement calling the election "the most secure in American history."[425] It also created a website to correct misinformation about the election.[426]

When Trump attorney Sidney Powell said on Fox News that a secret government supercomputer and special software had switched votes from Trump to Biden, Krebs called the allegation "nonsense" and a "hoax."[427] He later declared that fifty-nine security experts had examined every known claim of manipulated election systems and found none that could be substantiated. On the day Krebs made that statement, Trump fired him by Tweet.[428] Trump campaign lawyer Joseph diGenova called for Krebs to be "drawn and quartered. Taken out at dawn and shot."[429]

More than four years later, after Trump had returned to the presidency, he issued the executive order concerning Krebs. It instructed the Attorney General and the Secretary of Homeland Security to investigate "significant bad-faith actor" Christopher Krebs, who had "falsely and baselessly denied that the 2020 election was rigged and stolen."[430] The President ordered Krebs' security clearance revoked,

---

[425] *See* Press Release, Cybersecurity and Infrastructure Sec. Agency, Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020), https://www.cisa.gov/news-events/news/joint-statement-elections-infrastructure-government-coordinating-council-election-infrastructure [https://perma.cc/DN8C-5E9M].

[426] *See Election Security Rumor vs. Reality*, CYBERSECURITY AND INFRASTRUCTURE SEC. AGENCY, https://web.archive.org/web/20250130231413/https://www.cisa.gov/topics/election-security/rumor-vs-reality [https://perma.cc/SP7J-CFJR].

[427] Angelo Fichera & Saranac Hale Spencer, *Bogus Theory Claims Supercomputer Switched Votes in Election*, FACTCHECK.ORG (Nov. 13, 2020), https://www.factcheck.org/2020/11/bogus-theory-claims-supercomputer-switched-votes-in-election/ [https://perma.cc/AB8T-WA52].

[428] Ellen Nakashima & Nick Miroff, *Trump Fires Top DHS Official Who Refuted His Claims That the Election Was Rigged*, WASH. POST (Nov. 17, 2020), https://www.washingtonpost.com/national-security/trump-fires-dhs-election-official/2020/11/17/97d3fa5c-251c-11eb-952e-0c475972cfc0_story.html [https://perma.cc/8KAJ-4N6U]; Christopher Krebs, *Trump Fired Me for Saying This, But I'll Say It Again: The Election Wasn't Rigged*, WASH. POST (Nov. 20, 2020), https://www.washingtonpost.com/opinions/christopher-krebs-trump-election-wasnt-hacked/2020/12/01/88da94a0-340f-11eb-8d38-6aea1adb3839story.html [https://perma.cc/59BP-Y7JT].

[429] Josephine Harvey, *Trump Lawyer Says Fired Cybersecurity Chief Should be "Shot" for Defending Election*, HUFFPOST (Dec. 1, 2020), https://www.huffpost.com/entry/joseph-digenova-chris-krebs-2020-election-threats_n_5fc5a5ddc5b66bb88c69d093 [https://perma.cc/SVA9-AQNV].

[430] *Memorandum from President Donald J. Trump on Addressing Risks from Chris Krebs and Government Censorship*, *supra* note 424.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

and, for good measure, he suspended the security clearances of everyone else at the firm where Krebs worked. Krebs then resigned from the firm, saying, "[T]his is my fight, not the company's . . . ."[431]

Targeting Krebs for investigation in the absence of any evidence of wrongdoing and in retaliation for his honest statements appears to be a willful violation of the First and Fifth Amendments.[432]

But of course Trump would have immunity from prosecution for ordering the investigation. The decision in *Trump* says the President has "'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute."[433] Even if Trump had expressly targeted for investigation all Black residents of cities with Democratic mayors, his immunity from prosecution would be absolute.

The act of revoking Krebs's security clearance might be less protected. Although the President's power to revoke security clearances appears to be based on his commander-in-chief power and other constitutionally granted powers, it is subject to congressional regulation and so is not "core."[434] Would prosecuting Trump for his retaliation against Krebs pose any danger of intrusion on the authority and functioning of the executive branch?

---

[431] David DiMolfetta, *Former Cyber Official Chris Krebs to Leave SentinelOne in Bid to Fight Trump Pressure*, NEXTGOV/FCW (Apr. 16, 2025), https://www.nextgov.com/cybersecurity/2025/04/former-cyber-official-chris-krebs-leave-sentinelone-bid-fight-trump-pressure/404634/ [https://perma.cc/ZV4P-Y42F].

[432] Recall Michael Dreeben's assurance during the argument in *Trump* that "a politically driven prosecution would violate the Constitution." *See supra* text accompanying note 182. In 1971, White House Counsel John Dean sent a confidential memorandum that addressed "how we can use the available federal machinery to screw our political enemies." Memorandum from John Dean titled "Dealing with our Political Enemies" (Aug. 16, 1971) (available at https://exhibits.lib.unc.edu/items/show/7896 [https://perma.cc/AQ4R-GTKY]) (last visited Jan. 7, 2026). The White House already had lists of political opponents, and it maintained them throughout Richard Nixon's presidency. *See Richard Nixon's Enemies List*, WIKIPEDIA, https://en.wikipedia.org/wiki/Richard_Nixon%27s_enemies_list [https://perma.cc/PXU8-E89E] (last visited Mar. 15, 2026). Articles of Impeachment approved by the House Judiciary Committee in 1974 charged that Nixon's efforts to procure tax audits of the people on one list "violat[ed] the constitutional rights of citizens." *Articles of Impeachment Adopted by the House of Representatives Committee on the Judiciary*, THE AM. PRESIDENCY PROJECT (July 27, 1974), https://www.presidency.ucsb.edu/documents/articles-impeachment-adopted-the-house-representatives-committee-the-judiciary [https://perma.cc/M4F2-52ED]. William F. Buckley, Jr. said that Nixon's list was "fascist in its reliance on the state as the instrument of harassment." Ken Hughes, *How Nixon's "Enemies List" Led to an Impeachment Effort*, UNIV. OF VA. MILLER CENT. (Dec. 18, 2024), https://millercenter.org/how-nixons-enemies-list-led-impeachment-effort [https://perma.cc/T22J-C8FD].

[433] Trump v. United States, 603 U.S. 593, 620 (2024) (quoting United States v. Nixon, 418 U.S. 683, 693–94 (1974)).

[434] *See* Dep't of the Navy v. Egan, 484 U.S. 518, 525–30 (1988).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

3. Deporting and Imprisoning People Without Hearings

One possible prosecution of President Trump would focus on his role in deporting 238 suspected members of the Venezuelan gang Tren de Aragua without any judicial process to be confined in an infamous El Salvador prison.[435] The Supreme Court ruled unanimously that the Constitution entitled these suspects to hearings before being deported,[436] and their confinement in an inhumane prison pursuant to an agreement between the United States and El Salvador[437] was probably a constitutional violation as well.

The Alien Enemies Act of 1798, however, authorizes the President to restrain and remove "enemy aliens" following an "invasion or predatory incursion" by a "foreign nation or government."[438] Although the only federal court of appeals to rule on the issue, the Fifth Circuit, has rejected the government's claim that Tren de Aragua's activities amounted to an invasion or predatory incursion,[439] the statute might have lent sufficient color to the President's acts to preclude a determination that he willfully violated the Constitution.[440] Moreover, even an outside chance that prosecution might make a future President overly cautious about ordering deportations (or anything else) would ensure Trump's immunity.

4. Killing Suspected Drug Traffickers

President Trump announced on September 2, 2025, that, pursuant to his orders, the U.S. Navy had killed eleven foreign nationals operating a speedboat on the high

---

[435] *See* Luke Garrett, *U.S. Deports Hundreds of Venezuelans to El Salvador, Despite Court Order*, NPR (Mar. 16, 2025, 5:59 PM ET), https://www.npr.org/2025/03/16/g-s1-54154/alien-enemies-el-salvador-trump [https://perma.cc/82ZV-JAT5].

[436] *See* Trump v. J.G.G., 604 U.S. 670, 673 (2025).

[437] *See* Nick Penzenstadler & Eduardo Cuevas, *Trump Administration's $4.7M Contract for El Salvador Prison Revealed*, USA TODAY (Sept. 10, 2025, 8:51 PM ET), https://www.usatoday.com/story/news/nation/2025/09/09/trump-el-salvador-prison-cecot-agreement-revealed/86063219007/ [https://perma.cc/K3KK-MP5K].

[438] 50 U.S.C. § 21.

[439] *See* W.M.M. v. Trump, No. 25-10534, 2025 U.S. App. LEXIS 22605, at **28–55 (5th Cir. Sept. 2, 2025), *rehearing en banc granted*, 2025 U.S. App. LEXIS 25354 (5th Cir. Sept. 30, 2025). Judge Oldham dissented from the Fifth Circuit panel decision, contending that the president's declaration of an invasion or incursion by a foreign government is conclusive. *See id.* at *76 (Oldham, J., dissenting).

[440] *See, e.g.*, United States v. Lanier, 520 U.S. 259, 265 (1997) (explaining that the statutory requirement of willfulness embodies "the principle . . . that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

seas.[441] Seal Team 6 conducted the operation,[442] and Trump maintained that the occupants of the speedboat were heading to the United States and transporting illegal drugs. The next day, Secretary of State Marco Rubio told reporters: "Instead of interdicting it, on the president's orders, we blew it up. And it'll happen again. Maybe it's happening right now."[443] Secretary of Defense Pete Hegseth declared: "This is a deadly, serious mission for us and it won't stop with just this strike. Anyone else trafficking in those waters who we know is a designated narco-terrorist will face the same fate."[444]

By May 5, 2026, the U.S. military had killed at least 187 people in at least fifty strikes on vessels in the Caribbean and Eastern Pacific.[445] Both Vice President JD Vance and President Trump joked: "I wouldn't go fishing right now in that area of the world."[446] Fishermen were in fact afraid and had limited their activities.[447]

---

[441] *Donald J. Trump (2nd Term), Statement on the United States Airstrike on a Tren de Aragua Vessel in the Caribbean Sea*, THE AM. PRESIDENCY PROJECT (Sept. 2, 2025), https://www.presidency.ucsb.edu/documents/statement-united-states-military-action-against-tren-de-aragua-narcoterrorists [https://perma.cc/FM49-XZEV].

[442] *See* Alex Horton & Ellen Nakashima, *Hegseth Order on First Caribbean Boat Strike, Officials Say: Kill Them All*, WASH. POST (updated Nov. 28, 2025), https://www.washingtonpost.com/national-security/2025/11/28/hegseth-kill-them-all-survivors-boat-strike/ [https://perma.cc/4MU6-TMEA]. Two occupants of the destroyed boat survived the initial attack and were killed by a second strike as they were "clinging to the smoldering wreck." No evidence suggests that President Trump approved this second strike, but the officer who ordered it, Admiral Frank Bradley, might have believed he was following an earlier order by Defense Secretary Pete Hegseth. *See id.*

[443] Jennifer Hansler & Kylie Atwood, *Rubio Says Intercepting Drug Vessels Doesn't Work, Blowing Them Up Does*, CNN (Sept. 3, 2025), https://www.cnn.com/2025/09/03/politics/rubio-blow-up-drug-ships [https://perma.cc/2AW5-7G4K].

[444] Kerry Breen, *Hegseth Warns "Narco-Terrorists Will Face the Same Fate" After U.S. Military Strikes Boat Off Venezuela*, CBS NEWS (Sept. 3, 2025, 10:51 AM EST), https://www.cbsnews.com/news/hegseth-narco-terrorists-venezuela-boat-strike-response/ [https://perma.cc/Z9YR-JRM2].

[445] John Yoon, *U.S. Military Strikes Boat in Caribbean, Killing* 2, N.Y. TIMES (Mar. 5, 2026, 1:01 AM ET), https://www.nytimes.com/2026/05/05/us/us-military-boat-strike-caribbean.html [https://perma.cc/6YMK-ZMQ9].

[446] Rachel Dobkin, *"I Wouldn't Go Fishing Right Now": JD Vance Sparks Backlash After Joking About Controversial US Strikes on Venezuelan Boats*, THE INDEP. (Sept. 17, 2025, 22:01 EST), https://www.the-independent.com/news/world/americas/us-politics/jd-vance-venezuela-drug-boat-strikes-b2828675.html [https://perma.cc/VFU3-D25J]; *Trump Says Venezuelan Boat Strikes Are "Saving Tremendous Amounts of Lives*," YOUTUBE at 0:43 (undated), https://www.youtube.com/watch?v=SuvviVllGjM (last visited Apr. 18, 2026) (phrasing the supposed witticism in language slightly different from the Vice President's).

[447] Amanda Coletta, *U.S. Boat Strikes Spread Fear Across the Caribbean*, WASH. POST (Oct. 31, 2025), https://www.washingtonpost.com/world/2025/10/31/united-states-boat-strikes-caribbean-trinidad/ [https://perma.cc/4NER-34WP].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

A federal statute defines murder as "the unlawful killing of a human being with malice aforethought."[448] Another statute proscribes conspiring within the United States to commit murder outside the United States.[449] A third grants the federal courts jurisdiction to try U.S. nationals for murder on the high seas.[450]

Malice aforethought, the mental state required for murder, is a term of art that requires neither maliciousness nor forethought. Federal judges instruct jurors: "To kill with malice aforethought means to kill either deliberately and intentionally or recklessly with extreme disregard for human life."[451] Trump's killing and his intent to kill are clear. The remaining element of murder is that his order must have been unlawful.

Neither Trump nor anyone else in his administration supplied a plausible justification for his order. The President's notification to Congress of the initial boat strike merely recited without elaboration the words, "self-defense," "Commander in Chief," and "Chief Executive."[452] His notification of a later strike declared that the United States is engaged in "a noninternational armed conflict" with drug cartels and that drug runners for these cartels are "unlawful combatants."[453]

No knowledgeable authority outside the administration appears to have accepted these claims or concluded that Trump's order was lawful. According to Marty Lederman, Trump's action was

> so manifestly unlawful that in any other administration, including Trump's first, if anyone had even dared to propose it, virtually any and every attorney who got wind of it, across the government—and many non-lawyer officials, too—would

[448] 18 U.S.C. § 1111.

[449] 18 U.S.C. § 956.

[450] 18 U.S.C. § 7.

[451] *See* United States v. Begay, 33 F.4th 1081, 1091 (9th Cir. 2022) (quoting Ninth Cir. Model Crim. Jury Instruction 8.108) (emphasis omitted).

[452] Letter from President Donald J. Trump to the Honorable Charles Grassley, President pro tempore of the Senate (Sept. 4, 2025), available at https://static01.nyt.com/newsgraphics/documenttools/8616481a85b02a2c/b05f64ca-full.pdf [https://perma.cc/872J-ZRVE].

[453] Charlie Savage & Eric Schmitt, *Trump "Determined" the U.S. is Now in a War with Drug Cartels, Congress is Told*, N.Y. TIMES (Oct. 2, 2025), https://www.nytimes.com/2025/10/02/us/politics/trump-drug-cartels-war.html [https://perma.cc/PC6N-JJ7A].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

> have immediately dismissed it as obviously out-of-bounds. It wouldn't have been a close call . . . .[454]

Geoffrey S. Corn, formerly a senior adviser to the Army on law-of-war issues, said of the claim that the President can declare drug traffickers enemy combatants and kill them: "This is not stretching the envelope. This is shredding it."[455] A group of independent UN experts concluded that the strikes were "extrajudicial execution."[456] The UN's High Commissioner for Human Rights demanded that the U.S. "halt such attacks and take all measures necessary to prevent the extrajudicial killing of people aboard these boats, whatever the criminal conduct charged against them."[457]

The killings commanded by President Trump were more clearly unlawful than earlier killings ordered by Presidents, some of which might have been unlawful themselves.[458] The people he ordered killed were civilians, not enemy combatants; they did not threaten imminent death or serious bodily injury; they had not engaged in a sudden invasion of the United States; no congressional authorization of the use of military force (like those approving force against Iraq[459] and the September 11 attackers[460]) applied; and, most importantly, if any legitimate preventive purpose existed, it could have been achieved by seizing vessels and arresting and prosecuting

---

[454] Marty Lederman, *The Many Ways in Which the September 2 Caribbean Strike was Unlawful . . . and the Grave Line the Military Has Crossed*, JUST SEC. (Sept. 10, 2025), https://www.justsecurity.org/120296/many-ways-caribbean-strike-unlawful/ [https://perma.cc/5ZTT-33YL].

[455] *See* Savage & Schmitt, *supra* note 453.

[456] Jasper Ward, *UN Experts Say US Strikes Against Venezuela in International Waters Amount to "Extrajudicial Executions,"* REUTERS (Oct. 21, 2025, 3:27 PM EDT), https://www.reuters.com/world/americas/un-experts-say-us-strikes-against-venezuela-international-waters-amount-2025-10-21/ [https://perma.cc/M95C-UD9B].

[457] Nick Cumming-Bruce, *U.N. Says Strikes on Boats Trump Claims Are Smuggling Drugs Are Illegal*, N.Y. TIMES (Oct. 31, 2025), https://www.nytimes.com/2025/10/31/world/americas/un-us-military-boat-strikes.html [https://perma.cc/96VU-YKX2].

[458] *See, e.g.*, Nick Cumming-Bruce, *The Killing of Qassim Suleimani Was Unlawful, Says U.N. Expert*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/07/09/world/middleeast/qassim-suleimani-killing-unlawful.html [https://perma.cc/N66P-EQL5].

[459] H.R.J. Res. 114, 107th Cong. (2002).

[460] S.J. Res. 21, 107th Cong. (2001).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

their occupants. In every other case of targeted killing by Presidents no option of interdiction and capture existed.[461]

Justice Sotomayor's dissent in *Trump* said that, if a President ordered Seal Team 6 to assassinate a political rival, the ruling in *Trump* would make the assassination "[i]mmune, immune, immune."[462] This Article has explained, however, why Justice Sotomayor got it wrong.[463] Trump's actual assassination order presents a closer case, but, even under the standards of the *Trump* decision, the President might not be immune from prosecution.

Unless the Supreme Court were to extend unqualified immunity to all official actions (as it said it might), its ruling would not entitle Trump to Class A or absolute immunity. Although his order was official, it was not issued pursuant to a core power—that is, a power beyond Congress' authority to regulate. The Constitution gives Congress, not the President, the power to "declare War," to "make Rules concerning Captures on Land and Water," and to "define and punish . . . Felonies committed on the high Seas, and Offenses against the Law of Nations."[464]

A prosecutor can defeat a claim of Class B or presumptive immunity by showing that prosecution would pose "no 'dangers of intrusion on the authority and functions of the Executive Branch.'"[465] This standard effectively gives Presidents a "reasonable mistake-of-law" excuse as well as other protections. Because prosecuting a former President for an action he reasonably believed to be lawful could lead later Presidents to play it safer than they should, the prosecution could pose a danger of intruding on the functions of the executive branch. But prosecuting a President for a clearly unlawful act would not give law-abiding successors any reason for concern. It would pose no danger of intruding on legitimate executive functions.

---

[461] Secretary of State Rubio offered this justification of the administration's policy: "Interdiction doesn't work because these drug cartels . . . know they're going to lose two percent of their cargo. They bake it into their economics. What will stop them is when you blow them up, you get rid of them." Hansler & Atwood, *supra* note 443. When, however, the seizure of a vessel and the drugs it carries is followed by the prosecution, conviction, and imprisonment of its crew, a cartel is deprived of the same goods and the same personnel it loses when the United States kills the crew. But killing may be less expensive than imprisonment (despite the high cost of Hellfire missiles and MQ-9 Reaper drones), and imposing the death penalty without trial may have a deterrent effect.

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

[463] *See supra* text accompanying notes 300–11.

[464] U.S. CONST. art. I, § 8, cls. 10–11.

[465] *Trump*, 603 U.S. at 615 (citing Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982)).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Of course, one cannot be confident that the Supreme Court would reject Trump's claim of immunity. Targeted killings by a President might seem to some Justices a poster case for blocking prosecution. Trump's counsel in the Supreme Court began his argument by declaring: "Without presidential immunity from criminal prosecution, there can be no presidency as we know it."[466] In a parade of potential horribles, he asked: "Could President Obama be charged with murder for killing U.S. citizens abroad by drone strike?"[467]

A judge should not second-guess a President's conduct of a legitimate military campaign. But judges are well qualified to say that using unnecessary deadly force to arrest drug smugglers breaks the law. They are also well qualified to say that no reasonable President could think otherwise. A "hands off" refusal to consider the legality of presidentially ordered killings would (tautologically) enable a President to kill whomever he likes. Justice Sotomayor's Seal Team 6 illustration would not be the "fear mongering" and "extreme" hypothetical the Court said it was.[468]

B. What Prosecutions?

Examining whether President Trump's second-term actions violated criminal statutes and whether he would have immunity from prosecution may seem an academic exercise when, even apart from the decision in *Trump*, the chance that he would be tried and punished for his crimes would be small.

Even in cases of serious misconduct like the crimes of January 6 and Watergate, prosecutors have been reluctant to prosecute former Presidents.[469] As this Article has shown, the last Democratic Attorney General hesitated to prosecute Trump despite strong evidence that he aided an insurrection and conspired to steal an election. Certainly, lesser crimes like initiating an improper investigation of Chris Krebs would not have led Merrick Garland (or probably any other Attorney General) to proceed.

As executive officers and presidential appointees themselves, Attorneys General tend to favor broad executive power and to resist investigations of executive-branch officials. They realize that members of an opposing political party are prepared to do unto them whatever they have done to the members of that party.

---

[466] Transcript of Oral Argument, Trump v. United States, *supra* note 200, at 3.

[467] *Id.* at 4.

[468] *Trump*, 603 U.S. at 640; *see id.* at 637 ("[T]he dissents . . . strike a tone of chilling doom that is wholly disproportionate to what the Court actually does today . . . .").

[469] Jeffrey Toobin reports that, before President Gerald Ford pardoned former President Richard Nixon for his Watergate crimes, Special Prosecutor Leon Jaworski had decided not to indict him. TOOBIN, *supra* note 355, at 167–68.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

These officials also know that prosecuting a former President would alienate his followers and be divisive and distracting.

Of the possible second-term crimes discussed above, only Trump's murder of alleged drug runners appears to be a plausible candidate for prosecution, and it is not very likely that this charge will be filed.[470] Because the risk of prosecution for lesser crimes was tiny before the decision in *Trump*, that decision could not have lowered the risk substantially.[471]

Nevertheless, by reducing the likelihood of punishment for serious crimes, by adding legal restrictions to a formerly discretionary prosecutorial choice (removing the law's ability to bark even when prosecutors are unlikely to bite[472]), and by giving a corrupt President his triumph, the Supreme Court might have contributed to the lawlessness of Trump's second term. A President able to get away with conspiring to steal an election might expect to get away with almost anything.

Trump could not be charged with any crime while he remained in office,[473] and a successor MAGA administration certainly would not prosecute him. As indicated above, a successor Democratic administration might not prosecute him either.

Trump-Bondi-style prosecutors are different, but even if an aggressive prosecutor in a Democratic administration were to charge Trump with second-term crimes, America's Dickensian legal system might enable the former President to

---

[470] *See* Albert W. Alschuler, *Could President Trump Be Punished for Killing Suspected Drug Traffickers on the High Seas?*, JUSTIA VERDICT (Nov. 4, 2025), https://verdict.justia.com/2025/11/04/could-president-trump-be-punished-for-killing-suspected-drug-traffickers-on-the-high-seas [https://perma.cc/74P4-UXMS].

[471] Jack Goldsmith offers a similar conclusion but for different reasons. He maintains that "a President had all the [legal] tools he needed to achieve rampant criminality long before *Trump*, to which the decision adds relatively little." Goldsmith, *supra* note 203, at 31. I differ from Goldsmith on some points. For example, compare *id.* at 37–41 (contending that favorable Justice Department legal opinions give Presidents a "golden shield" against criminal prosecution), with this Article's discussion of the limited protection supplied by these opinions in *supra* note 209. I focus less than Goldsmith on legal protections like the President's possible power to pardon himself and more on prosecutorial discretion, historic deference, and the political incentives of U.S. Attorneys General. We agree, however, that Presidents contemplating unlawful official action prior to *Trump* rarely had reason to fear criminal prosecution.

[472] *See generally* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (examining Jeremy Bentham's distinction between "conduct rules" directed to the public and "decision rules" directed to officials who apply the "conduct rules").

[473] A Sitting President's Amenability to Indictment and Criminal Prosecution, *supra* note 176. *But see* Claire O. Finkelstein & Richard W. Painter, *Presidential Accountability and the Rule of Law: Can the President Claim Immunity if He Shoots Someone on Fifth Avenue?*, 24 U. PA. J. CONST. L. 93, 101, 121, 134 (2022).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

delay punishment for these crimes for years. The life expectancy of the proceedings might substantially exceed that of the defendant.

VIII. CONCLUSION: A CHANGED COURT AND A CHANGED AMERICA

The effects of the *Trump* decision on American society could prove to be as unfortunate as its effects on the American presidency. Although criminal law works partly by threatening punishment for breaking its rules, I have contended it works primarily by reassuring virtuous people that violations of the law by others will not put them at a significant disadvantage.[474] When free riding succeeds—and, worse, when it becomes common—even good people begin to cut corners, resentments increase, and social bonds weaken. Virtuous but imperfect people may prefer a regime of mutual cooperation to a regime of every person for herself. They may willingly do their part when they sense that others are doing theirs. But these good people are likely to prefer a regime of every person for herself to one of cooperation for chumps. Criminal law is one of the institutions that keeps the giving-receiving ratio in balance and the social contract intact. It discourages a Trumpian view of the world.

The familiar idea that no one is above the law contributes to the sense of reciprocity that holds a society together.[475] The President appears in headlines and on screens almost daily. He sets an example, and so does the Supreme Court. Indifference to lawbreaking can be as pernicious as lawbreaking itself.

The Supreme Court's part in curbing presidential corruption fifty years ago reveals how much that Court and America have changed.

On June 25, 1973, in testimony before the Senate Select Watergate Committee, former White House Counsel John Dean described how President Richard Nixon had obstructed investigation of the Watergate burglary.[476] Shortly thereafter, White House aide Alexander Butterfield revealed the existence of Oval Office tapes that

---

[474] *See* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 149–50 (2000).

[475] *See* United States v. Lee, 106 U.S. 196, 220 (1882) ("No officer of the law may set that law at defiance with impunity. All the officers of government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government . . . ."); Abraham Lincoln, *The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois* (Jan. 27, 1838), *in* ABRAHAM LINCOLN, HIS SPEECHES AND WRITINGS 76, 81 (Roy P. Basler ed., 1946) (describing "reverence for law" as "the political religion of the nation").

[476] *See John Dean Testifies Before Senate Select Watergate Committee*, AM. ARCHIVE OF PUB. BROAD. (June 25, 1973), https://americanarchive.org/primary_source_sets/watergate/3-512-251fj2b06r [https://perma.cc/686A-MF7D].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

could confirm, supplement, or contradict Dean's testimony.[477] As part of an investigation led initially by Special Prosecutor Archibald Cox and then by Special Prosecutor Leon Jaworski, a federal grand jury subpoenaed the relevant tapes.[478]

President Nixon contended that executive privilege entitled him to withhold this evidence of private conversations with his advisors. In *United States v. Nixon*, the Supreme Court recognized the existence of an executive communications privilege but rejected Nixon's claim that it applied.[479] Noting "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions,"[480] it held that Nixon's "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."[481]

The Court that decided *Nixon* was similar in some respects to the Court that decided *Trump*. Four members of that Court had been appointed by President Nixon. One of them, however, Justice William Rehnquist, did not participate in the *Nixon* decision, leaving three Nixon appointees who did participate.[482] Similarly, three members of the Court that decided *Trump* had been appointed by President Trump.

Two other members of the *Nixon* Court had been appointed by other Presidents of Nixon's party (the Republican Party), and three additional members of the *Trump* Court had been appointed by other Presidents of Trump's party (again the Republican Party).[483] The opinions in both *Nixon* and *Trump* were delivered by Chief Justices of the United States (Warren Burger and John Roberts). In *Trump*, however, the Supreme Court was divided, with the six Justices appointed by Republican presidents on one side and the three appointed by Democrats on the other. In *Nixon*, the Court was unanimous.

---

[477] James M. Naughton, *Surprise Witness Butterfield, Ex-Aide at White House, Tells of Listening Devices*, N.Y. TIMES (July 17, 1973), https://www.nytimes.com/1973/07/17/archives/surprise-witness-butterfield-exaide-at-white-house-tells-of.html [https://perma.cc/8D97-5AKY].

[478] Grand Jury subpoena issued by Special Prosecutor Archibald Cox to President Richard Nixon (Misc. 47–73) (D.D.C. filed July 24, 1973), Gerald R. Ford Libr. & Museum, Nat'l Archives, https://www.fordlibrarymuseum.gov/galleries/images-grand-jury-subpoena-issued-special-prosecutor-archibald-cox-president-richard#3296 [https://perma.cc/Y7ZA-5QUX] (last visited Mar. 15, 2026).

[479] United States v. Nixon, 418 U.S. 683, 706, 713 (1974).

[480] *Id.* at 707.

[481] *Id.* at 713. The defendants in the pending criminal trial to which the Court referred were John Mitchell, John Ehrlichman, H.R. Haldeman, and four others. *See id.* at 687 n.3.

[482] *Id.* at 716.

[483] *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/B3HQ-99XB] (last visited Mar. 15, 2026).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

Although the Supreme Courts of 1974 and 2024 looked alike (apart from increases in the number of women Justices from zero to four and in minority Justices from one to three), their proceedings were strikingly different. As noted, Justice Rehnquist declined to participate in *Nixon*. He apparently recused himself because, prior to his appointment to the Court more than two years earlier, he had been an Assistant Attorney General in the Nixon administration.[484] The Attorney General during the early years of his Justice Department service was John Mitchell, whose pending trial for crimes committed after leaving office was said to establish the grand jury's need for the Oval Office tapes.

No member of the *Trump* Court recused him or herself, although Justice Clarence Thomas had reason to do so. Justice Thomas had maintained contact with a former law clerk, John Eastman, who appeared as unindicted Co-Conspirator 2 in Trump's indictment.[485] Moreover, Justice Thomas' wife, Virginia Thomas, was a witness to relevant events. She had sent twenty-one text messages to President Trump's Chief of Staff Mark Meadows during the period of the alleged conspiracy and had received eight replies from him. Her messages, which urged overturning the results of the 2020 presidential election, said things like: "The majority knows Biden and the Left is attempting the greatest Heist in our History," and "Release the Kraken and save us . . . ." Meadows replied sympathetically. He wrote: "Evil always looks like the victor until the King of Kings triumphs."[486]

In *Nixon*, the Supreme Court granted the Special Prosecutor's request to bypass proceedings in the court of appeals and review the district court's judgment directly.[487] In *Trump*, Special Counsel Jack Smith cited this precedent and requested the same procedure. He wrote: "It is of imperative public importance . . . that

---

[484] Christopher R. Vaccaro, *"Shaping the Future," a Look at the U.S. Chief Justices: Part III*, 13 MASS. BAR ASS'N LAWS. J., Mar. 2006, at 20, 23.

[485] *See* Emma Brown & Rosalind S. Helderman, *For John Eastman and Clarence Thomas, an Intellectual Kinship Stretching Back Decades*, WASH. POST (Dec. 23, 2022), https://www.washingtonpost.com/investigations/2022/12/23/john-eastman-clarence-thomas-clerk/ [https://perma.cc/WM6W-N5T6]; Marshall Cohen, *Who Are the Trump Co-Conspirators in the 2020 Election Interference Indictment?*, CNN (Aug. 1, 2023, 11:37 PM ET), https://www.cnn.com/2023/08/01/politics/co-conspirators-trump-indictment [https://perma.cc/Q8E2-8DNM].

[486] Bob Woodward & Robert Costa, *Virginia Thomas Urged White House Chief to Pursue Unrelenting Efforts to Overturn the 2020 Election, Texts Show*, WASH. POST (Mar. 24, 2022), https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts/ [https://perma.cc/H7KD-JVSJ].

[487] *Nixon*, 418 U.S. at 690.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

respondent's trial proceed as promptly as possible . . . ."[488] Trump opposed Smith's request, and, eleven days after Smith made it, the Court denied it.[489] Its ruling ensured that Trump's trial would not occur before the election of 2024. Proceedings in the court of appeals took six weeks.[490]

The Supreme Court agreed to review the court of appeals' decision on February 28, 2024. It heard argument on April 25 and issued its decision on July 1, the last day of the October 2023 Term.[491] The Court said that it had decided the case "on an expedited basis, less than five months after [the Court agreed to review it]."[492]

The Supreme Court's expedition in *Trump* did not come close to matching its expedition in *Nixon*. The *Nixon* Court decided the case less than two months after agreeing to hear it.[493] The opinion in *Trump* came sixty-seven days after the Court heard argument. The *Nixon* opinion appeared sixteen days after argument.[494]

As noted, the Court in *Nixon* was unanimous. Justices William Brennan and Thurgood Marshall on the left joined Chief Justice Warren Burger and Justice Lewis Powell on the right, and, together with the rest of the Court, they stood for law. If

---

[488] Petition for a Writ of Certiorari Before Judgment at 2, United States v. Trump, 144 S. Ct. 539 (2023) (No. 23-624) (mem).

[489] United States v. Trump, 144 S. Ct. 539 (2023) (mem.).

[490] *See Trump v. United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/Trump_v._United_States [https://perma.cc/67TM-XBJH] (last visited Mar. 15, 2026).

[491] *Id.*

[492] *Trump*, 603 U.S. at 616–17; *see also id.* at 628 (referring again to "the expedition of this case"), 648 (referring to the case's "expedited treatment").

[493] *Nixon*, 418 U.S. at 690.

[494] United States v. Nixon, 418 U.S. 683, 683 (1974). The D.C. Circuit was also much speedier than the Supreme Court. It delivered its opinion in *Trump* twenty-eight days after hearing argument. *See* United States v. Trump, 91 F.4th 1173, 1173 (D.C. Cir. 2024), *vacated*, 603 U.S. 593 (2024). One difference between the Supreme Court in *Trump* and both the D.C. Circuit in *Trump* and the Supreme Court in *Nixon* was that the D.C. Circuit and the *Nixon* Court decided only the issues before them.

Trump could have been a simple case. Until it reached the Supreme Court, Trump's counsel had argued only that a former President was entitled to absolute immunity from prosecution for all official acts unless he had been impeached by the House of Representatives and convicted by the Senate. A ruling that Trump was not entitled to the broad, unconditional immunity he sought could have brought his interlocutory appeal to an end and allowed his prosecution to proceed. The Court could have "just said no," as the district court and the court of appeals already had. Instead, largely disregarding the parties' submissions and the opinions of the courts below, the Court sought to create from scratch an enduring framework for resolving issues of presidential immunity. In sixty-seven days, with just a little help from its friends in the Special Counsel's Office, it constructed the Rube Goldberg contraption this Article has described.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu

the President of the United States was a criminal, the Court wanted his misconduct known and addressed promptly. Richard Nixon resigned from office sixteen days after the Court's ruling.[495] The decision in *United States v. Nixon* had shown the nation a *court*, and it was good.[496]

The criminal coverup that seemed intolerable in 1974 paled beside the attempted theft of a presidential election that occurred in January 2021. But mass communications had changed, the distribution of wealth had changed, Congress had changed, the electorate had changed, the Supreme Court had changed, and the center had not held.

The Court's opinion in *Trump* displayed its indifference to presidential lawlessness on almost every page. Without blushing, without addressing the issues presented by the parties, without jurisdiction to decide even those issues, with little regard for the sources of constitutional meaning most Justices in the majority claimed to respect, with abysmal legal craftsmanship, and without understanding what it was saying, the Court held that Presidents have a constitutional right to commit whatever crimes they like as long as they use core powers. And, when Presidents use noncore powers, they can be held to account only if their prosecution would pose no danger of making a future President too cautious. In every respect, the decision in *Trump v. United States* was an astonisher.

---

[495] *See United States v. Nixon*, WIKIPEDIA, https://en.wikipedia.org/wiki/United_States_v._Nixon [https://perma.cc/2H42-C5A2] (last visited Apr. 15, 2026).

[496] The day after Nixon's resignation, I sat in the University of Texas Law School faculty lounge and watched Gerald Ford take the presidential oath of office. The only other person in the room was my colleague Charles Alan Wright, who had been one of Nixon's lawyers. After Ford took the oath, I blurted, "God damn, it feels good," and immediately felt badly. I had made an unthinking remark in the company of an associate, friend, and mentor who had worked closely with Nixon and had lost the tapes case. But Charlie replied: "It sure does."

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2026.1166
http://lawreview.law.pitt.edu