No. 23-939

In the
Supreme Court of the United States

DONALD J. TRUMP,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

BRIEF OF PETITIONER PRESIDENT DONALD J. TRUMP

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QUESTION PRESENTED

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.

PARTIES TO THE PROCEEDING

Petitioner is President Donald J. Trump ("President Trump").

Respondent is the United States of America ("Special Counsel" or "government").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional and Statutory Provisions

Other Sources

OPINIONS BELOW

The opinion of the Court of Appeals (J.A.1) is reported at 91 F.4th 1173. Its Judgment is provided in the Joint Appendix. J.A.63. The opinion of the district court (J.A.65) is not yet published in the Federal Supplement but is available at 2023 WL 8359833. The Order entered by the district court is provided in the Joint Appendix. J.A.123.

JURISDICTIONAL STATEMENT

The Court of Appeals entered judgment on February 6, 2024. J.A.63. President Trump filed an Application for a Stay on February 12, 2024, which this Court treated as a Petition for a Writ of Certiorari and granted on February 28, 2024. J.A.237. Jurisdiction rests on 28 U.S.C. § 1254(1).

The lower courts' decisions are "final" under 28 U.S.C. § 1291 and the collateral-order doctrine. *See Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742-33 (1982); J.A.9-19.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant texts for the following are found in the Addendum:

U.S. CONST. Art. I, § 3, cl.7

U.S. CONST. Art. II, § 1, cl.1

18 U.S.C. § 241

18 U.S.C. § 371

18 U.S.C. § 1512(c)(2)

18 U.S.C. § 1512(k)

INTRODUCTION

From 1789 to 2023, no former, or current, President faced criminal charges for his official acts—for good reason. The President cannot function, and the Presidency itself cannot retain its vital independence, if the President faces criminal prosecution for official acts once he leaves office. The President's "personal vulnerability," *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753 (1982), to such prosecution would inevitably "distort[]" the President's "decisionmaking process with respect to official acts," *Trump* v. *Vance*, 140 S. Ct. 2412, 2426 (2020) (cleaned up).

A denial of criminal immunity would incapacitate every future President with *de facto* blackmail and extortion while in office, and condemn him to years of post-office trauma at the hands of political opponents. The threat of future prosecution and imprisonment would become a political cudgel to influence the most sensitive and controversial Presidential decisions, taking away the strength, authority, and decisiveness of the Presidency. The D.C. Circuit's ruling, if allowed to stand, "deeply wounds the President, by substantially reducing the President's ability to protect himself." *Morrison* v. *Olson*, 487 U.S. 654, 713 (1988) (Scalia, J., dissenting).

A President's criminal immunity arises directly from the Executive Vesting Clause and the separation of powers. In *Marbury* v. *Madison*, this Court held that a President's official acts "can never be examinable by the courts," 5 U.S. (1 Cranch) 137, 166 (1803)—a doctrine that this Court has reaffirmed over two centuries. Continuing *Marbury*'s tradition, this Court held in 1982 that the courts cannot hold a former President personally liable "for acts within the

'outer perimeter' of his official responsibility." *Fitzgerald*, 457 U.S. at 756.

The Court should restore the tradition from *Marbury* to *Fitzgerald*—unbroken until last year—and neutralize one of the greatest threats to the President's separate power, a bedrock of our Republic, in our Nation's history. The Court should uphold the President's immunity from criminal prosecution for official acts.

STATEMENT OF THE CASE

On August 1, 2023, President Trump was indicted on four counts for alleged conduct during his Presidency following the 2020 Presidential election. J.A.180. The indictment charges President Trump with five types of conduct, all constituting official acts of the President. *See* Stay Resp. 2 (Special Counsel admitting that the indictment charges "the use of official power").

First, it alleges that President Trump, using official channels of communication, made a series of tweets and other public statements on matters of paramount federal concern, contending that the 2020 federal election was tainted by fraud and irregularities that should be addressed by government officials. J.A.181, 188-92, 195, 202-07, 226-30 (public statements); J.A.197, 199, 206-07, 221-23, 225-27, 231-32 (tweets).

Second, the indictment alleges that President Trump communicated with the Acting Attorney General and officials at the U.S. Department of Justice (DOJ) regarding investigating suspected election crimes and irregularities, and whether to appoint a new Acting Attorney General. J.A.199, 203, 206-07 (communications urging DOJ to investigate widespread reports of election fraud); J.A.216-17, 219-

20 (Oval Office meetings discussing whether to replace the Acting Attorney General).

Third, the indictment alleges that President Trump communicated with state officials about the administration of the federal election and urged them to exercise their official responsibilities in accordance with the conclusion that the 2020 presidential election was tainted by fraud and irregularities. J.A.185-86, 193-95, 196-206.

Fourth, the indictment alleges that President Trump communicated with the Vice President, the Vice President's official staff, and members of Congress to urge them to exercise their official duties in the election certification process in accordance with the position, based on voluminous information available to President Trump in his official capacity, that the election was tainted by extensive fraud and irregularities. J.A.187, 220-27, 234 (Vice President and his official staff); J.A.232-33 (Members of Congress).

Fifth, the indictment alleges that other individuals organized slates of alternate electors from seven States to help ensure that the Vice President would be authorized to exercise his official duties in the manner urged by President Trump. J.A.208-15. According to the indictment, these alternate slates of electors were designed to validate the Vice President's authority to conduct his official duties as President Trump urged. J.A.186, 208.

President Trump moved to dismiss the indictment based on Presidential immunity. D.Ct. Doc. 74. The district court wrongfully held that a former President enjoys no immunity from criminal prosecution for his official acts. J.A.65-122. The D.C. Circuit affirmed, likewise incorrectly holding that a former President

has no immunity from criminal prosecution for official acts. J.A.1-62. This Court granted certiorari. J.A.237.

SUMMARY OF ARGUMENT

I. A former President enjoys absolute immunity from criminal prosecution for his official acts. Criminal immunity arises directly from the Executive Vesting Clause and the separation of powers. From *Marbury* through *Fitzgerald*, and beyond, this Court has consistently held that Article III courts cannot sit in judgment directly over the President's official acts, whether before or after he leaves office. *A fortiori*, the courts cannot sit in *criminal* judgment over him and imprison him based on his official acts.

The Impeachment Judgment Clause reflects the Founders' understanding that only a President "convicted" by the Senate after impeachment could be criminally prosecuted. 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. The Founders thus carefully balanced the public interest in ensuring accountability for Presidential wrongdoing against the mortal danger to our system of government presented by political targeting of the Chief Executive.

The long history of *not* prosecuting Presidents for official acts, despite ample motive and opportunity to do so over the years, demonstrates that the newly discovered alleged power to do so does not exist. This "lack of historical precedent" provides "a telling indication of a severe constitutional problem with the

asserted power." *Trump* v. *Anderson*, 144 S. Ct. 662, 669 (2024) (quotation marks omitted). Further telling is the fact that criminal immunity is more deeply rooted in the common law than civil immunity.

Functional considerations rooted in the separation of powers, which this Court emphasized in *Fitzgerald*, compel a finding of criminal immunity. The threat of future prosecution would distort the "bold and unhesitating action" required of an independent Chief Executive, *Fitzgerald*, 457 U.S. at 745, who is charged with "the most sensitive and far-reaching decisions entrusted to any official under our constitutional system," *id.* at 752. As the recent history of impeachment demonstrates, once our Nation crosses this Rubicon, every future President will face *de facto* blackmail and extortion while in office, and will be harassed by politically motivated prosecution after leaving office, over his most sensitive and controversial decisions. That bleak scenario would result in a weak and hollow President, and would thus be ruinous for the American political system as a whole. That vital consideration alone resolves the question presented in favor of dismissal of this case.

II. The question of a former President's criminal immunity presents grave constitutional questions that strike at the heart of the separation of powers. Accordingly, in addition to the clear provision of Presidential immunity from criminal prosecution based on the Executive Vesting Clause and the separation of powers, the doctrine of immunity dictates that generic criminal laws should not be construed to apply to the President or his official acts.

This Court "require[s] an express statement by Congress before assuming it intended the President's performance" of his official duties to be subject to

judicial review. *Franklin* v. *Massachusetts*, 505 U.S. 788, 801 (1992). By the same token, "textual silence is not enough to subject the President to the provisions," *id.* at 800-01, of "generally applicable criminal laws," J.A.26-27. This Court is "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils," *Public Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989), and it has applied clear-statement rules to "[f]ar less consequential" questions. *NFIB* v. *OSHA*, 595 U.S. 109, 122 (2022) (Gorsuch, J., concurring).

None of the criminal statutes charged in the indictment contains anything resembling a clear statement that it applies to the President or to his official acts. There is no indication that Congress intended to provoke the ultimate inter-branch conflict by abrogating Presidential immunity and authorizing the prosecution of the President through sweeping, vaguely phrased criminal laws. Thus, *Franklin*'s clear-statement rule resolves this case and mandates the indictment's dismissal.

III. The Court should dismiss the indictment. If it somehow does not, in assessing "to what extent" criminal immunity applies to former Presidents, J.A.237, the Court should be guided by four considerations.

First, consistent with *Fitzgerald*, the scope of immunity should extend to the "outer perimeter of a President's official acts," 457 U.S. at 756, and its protection should be absolute, not qualified. Establishing criminal immunity as coextensive with a President's civil immunity follows the compelling logic of *Fitzgerald*. It reflects this Court's preference for bright-line rules, rather than case-by-case

adjudication, for questions involving the separation of powers. Moreover, it protects Article III courts from being drawn into the vortex of political dispute every time immunity questions are raised.

Second, if the Court determines that immunity exists but requires fact-based application, the Court should follow its standard practice and remand to the lower courts to apply that doctrine in the first instance, including conducting any fact-finding necessary to the determination prior to any further proceedings in the case. *See Blassingame* v. *Trump*, 87 F.4th 1, 29-30 (D.C. Cir. 2023).

Third, if the Court adopts a form of qualified immunity, which it should not do, the Court should emphasize two fundamental features of that doctrine. First, the breadth of qualified immunity's protection corresponds to the breadth of an official's duties—which, in the President's case, are extraordinarily, and almost completely, broad. Second, qualified immunity requires a "high degree of specificity" in defining unlawful conduct that "applies with obvious clarity" to the situation, rendering the unlawfulness of the challenged conduct "beyond debate." These principles should continue to guide any application of qualified or modified immunity on remand.

Fourth, the Court should reject the D.C. Circuit's alternative approach of denying a President criminal immunity when his conduct is allegedly motivated by the desire to remain in power unlawfully. J.A.40-43. This approach contradicts *Marbury*'s holding that a President's official acts "can *never* be examinable by the courts." 5 U.S. at 166 (emphasis added). It cannot be squared with this Court's holding, reaffirmed in a long line of cases, that official immunity does not turn on the alleged purpose or motive of the supposed

misconduct. *See, e.g., Fitzgerald*, 457 U.S. at 756. Indeed, because virtually all first-term Presidents' official actions carry some, at least partial, motivation to be re-elected, this exception to immunity would swiftly engulf the rule. Further, such a case-by-case approach would continually thrust this Court into the vortex of dispute. Worst of all, this approach risks creating the appearance of a gerrymandered ruling tailored to deprive only President Trump of immunity, while leaving all other Presidents untouched.

ARGUMENT

I. A Former President Enjoys Absolute Immunity from Criminal Prosecution for His Official Acts.

"In view of the special nature of the President's constitutional office and functions," the President has "absolute Presidential immunity from [civil] damages liability for acts within the 'outer perimeter' of his official responsibility." *Fitzgerald*, 457 U.S. at 756 (quoting *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959) (plurality opinion)). This conclusion rests on the Constitution's text and structure, the common law, historical practice, the Court's precedents, and considerations of public policy. *See id.* at 747. These authorities all point in the same direction—a former President has absolute immunity from criminal prosecution "for acts within the 'outer perimeter' of his official responsibility." *Id.* at 756.

A. The Executive Vesting Clause and Separation of Powers.

Article II, § 1 of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. Under this Clause and the separation of powers

that it commands, Article III courts lack authority to sit in judgment directly over the President's official acts. The Clause has been consistently understood this way from *Marbury* to *Fitzgerald*, and to the present day.

In *Marbury* v. *Madison*, Attorney General Charles Lee "declare[d] it to be [his] opinion, grounded on a comprehensive view of the subject, that the President is *not amenable to any court of judicature for the exercise of his high functions*, but is responsible only in the mode pointed out in the constitution," *i.e.*, the impeachment process. 5 U.S. at 149 (emphasis added). Chief Justice Marshall agreed: "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Id.* at 165-66. "[W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion…. [B]eing entrusted to the executive, the decision of the executive is conclusive." *Id.* at 166. "[I]n cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that" the President's "acts are only politically examinable." *Id.* Accordingly, the President's official acts "*can never be examinable by the courts*." *Id.* at 166 (emphasis added).

An unbroken line of authority reaffirms this view from *Marbury* to the present. In *Martin* v. *Mott*, 25 U.S. 19 (1827) (Story, J.), this Court declined to exercise jurisdiction over President Madison's official acts during the War of 1812. *Id.* at 32-33. *Martin* rejected the notion that the legality of the President's

official acts might "be passed upon by a jury" such that "the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury." *Id.* at 33. "It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself," *i.e.*, through impeachment. *Id.* at 32.

Citing *Marbury*, Justice Story—*Martin*'s author—wrote in 1833 that "[i]n the exercise of his political powers [the President] is to use his own discretion, and is accountable only to his country, and to his own conscience. His decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ch. 37, § 1563 (1833).

This Court reaffirmed the doctrine soon thereafter: "The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power." *Kendall* v. *U.S. ex rel. Stokes*, 37 U.S. 524, 610 (1838).

In *Mississippi* v. *Johnson*, again citing *Marbury*, this Court held that it lacked jurisdiction to enter an injunction against President Johnson to prevent him from enforcing the Reconstruction Acts. 71 U.S. 475, 499 (1866). "[T]he President is the executive department," which cannot "be restrained in its action by the judicial department." *Id.* at 500. "An attempt on the part of the judicial department of the government to enforce the performance of such duties

by the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'" *Id.* at 499 (quoting *Marbury*, 5 U.S. at 170). This immunity is necessary to avoid "collision" between the branches. *Id.* at 501. "[T]his court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Id.*

In 1948, this Court held that official acts that "embody Presidential discretion as to political matters" are "beyond the competence of the courts to adjudicate." *Chi. & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103, 114 (1948) (Jackson, J.). Such matters involve the "exercise of unreviewable Presidential discretion" and lie "within the President's exclusive, ultimate control." *Id.* at 113. "[W]hatever" of such an order that "emanates from the President is not susceptible of review by the Judicial Department." *Id.* at 112.

Accordingly, "no court has authority to direct the President to take an official act." *Franklin*, 505 U.S. at 825–26 (Scalia, J., concurring in part and concurring in the judgment). Article III courts may not "require [the President] to exercise the 'executive Power' in a judicially prescribed fashion." *Id.* (quoting U.S. CONST. art. II, § 1). "No court has ever issued an injunction against the president himself or held him in contempt of court." *Id.* at 827 (quoting C. PYLE & R. PIOUS, THE PRESIDENT, CONGRESS, AND THE CONSTITUTION 170 (1984)). "It is incompatible with [the President's] constitutional position that he be compelled personally to defend his executive actions before a court." *Id.*

Thus, an "'apparently unbroken historical tradition ... implicit in the separation of powers'" dictates "that a President may not be ordered by the

Judiciary to perform particular Executive acts." *Clinton* v. *Jones*, 520 U.S. 681, 719 (1997) (Breyer, J., concurring in the judgment) (quoting *Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part and concurring in the judgment)). "With regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief." *Newdow* v. *Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010). "[T]he federal courts have *never* sustained an injunction against the President in connection with the performance of an official duty." *In re Trump*, 958 F.3d 274, 301 (4th Cir. 2020), *cert. granted, judgment vacated sub nom. Trump* v. *District of Columbia*, 141 S. Ct. 1262 (2021) (Wilkinson, J., dissenting) (italics in original). Importantly, this is also DOJ's consistent litigation position. *See, e.g.*, U.S. Dep't of Justice, Reply Brief for Pet'r, *In re Trump*, No. 18-2486 (4th Cir. filed Feb. 21, 2019), at 4-6.

In *Nixon* v. *Fitzgerald*, the Court held that the President enjoys absolute immunity from civil liability for his official acts, *i.e.*, "acts within the 'outer perimeter' of his official responsibility." 457 U.S. at 756. *Fitzgerald* thus provides "[t]he bookend to Marshall's ruling" in *Marbury*. *Vance*, 140 S. Ct. at 2424. *Fitzgerald* held that the President's civil immunity is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." 457 U.S. at 749; *see also id.* at 748 (rooting the doctrine in the "constitutionally mandated separation of powers").

Fitzgerald lies squarely in the tradition of *Marbury*. The President's official acts "can never be examinable by the courts," *Marbury*, 5 U.S. at 166—

and thus courts cannot impose civil liability on him personally for them, 457 U.S. at 756. For over two centuries, Article III courts have effectively recognized that they cannot "examine," order, declare, enjoin, assess civil liability for, or otherwise sit in judgment directly over the President's official acts.

A fortiori, Article III courts cannot sit in *criminal* judgment over a President's official acts. Because the courts cannot examine the President's official acts, they cannot entertain charges, impose judgment, and imprison him on the basis of those official acts. They cannot conduct a jury trial based on his official acts. "When the President exercises an authority confided to him by law," including a *former* President, his official conduct cannot "be passed upon by a jury" or "upon the proofs submitted to a jury." *Martin*, 25 U.S. at 32-33.

The specter of criminal prosecution of a former President for his official acts—without first being impeached by the House of Representatives and convicted by the Senate, by a high hurdle of a two-thirds majority, as the Constitution requires—creates a maximal intrusion on independence of the Executive Branch, far greater than any threat posed by mere injunctive or declaratory relief. The President's "personal vulnerability," *Fitzgerald*, 457 U.S. at 753, to stigma and criminal punishments will inevitably cause "the distortion of the Executive's 'decisionmaking process' with respect to official acts that would stem from 'worry as to the possibility of'" such liability, *Vance*, 140 S. Ct. at 2426 (quoting *Clinton*, 520 U.S. at 694 n.19). *See infra*, Part I.E.

Criminal prosecution, therefore, differs critically from the two "exercise[s] of jurisdiction over the President" that this Court has long allowed—*i.e.*,

review of subordinate officers' actions, and amenability to criminal subpoenas. *Fitzerald*, 457 U.S. at 753-54. Unlike those forms of judicial process, prosecution involves "personal vulnerability," *id.* at 753, of the most threatening kind. In addition, there is no history or tradition of prosecuting Presidents for their official acts.

B. The Impeachment Judgment Clause Confirms Immunity.

The text of the Impeachment Judgment Clause confirms the original meaning of the Executive Vesting Clause—*i.e.*, that current and former Presidents are immune from criminal prosecution for official acts. The Impeachment Judgment Clause provides that, after impeachment and Senate trial, "the *Party convicted* shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. CONST. art. I, § 3, cl.7 (emphasis added). By specifying that only the "Party convicted" may be subject to criminal prosecution, the Clause dictates the President cannot be prosecuted unless he is first impeached and convicted by the Senate. *Id.*

Thus, the Constitution provides for impeachment and conviction by the political branches—vitally requiring a two-thirds majority of the Senate, and therefore requiring a nationwide political consensus—as the principal structural check against Presidential misfeasance. *See Trump* v. *Mazars USA, LLP*, 591 U.S. 848, 887 (2020) (Thomas, J., dissenting) ("To a limited extent, … the Constitution contains 'a partial intermixture of those departments for special purposes.' One of those special purposes is the system of checks and balances, and impeachment is one of

those checks.") (quoting THE FEDERALIST NO. 66 (Hamilton)).

The Clause's plain language presupposes that an unimpeached and un-convicted President is immune from prosecution. By specifying the consequences of only one of two possible outcomes of impeachment—*i.e.*, "the Party convicted"—the Clause entails that those consequences do *not* apply to the other outcome. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012) ("When a car dealer promises a low financing rate to 'purchasers with good credit,' it is entirely clear that the rate is not available to purchasers with spotty credit."). The Clause's "plain implication is that criminal prosecution, like removal from the Presidency and disqualification from other offices, is a consequence that can come about only after the Senate's judgment, not during or prior to the Senate trial." *Vance*, 140 S. Ct. at 2444 (Alito, J., dissenting).

"This was how [Alexander] Hamilton explained the Impeachment provisions in the Federalist Papers." *Id.* Hamilton described criminal prosecution of a President as a "consequence" of impeachment conviction, and he wrote three times that prosecution of the President can only come "after[]" and "subsequent" to Senate conviction: "The punishment which may be the *consequence* of conviction upon impeachment, is not to terminate the chastisement of the offender. *After* having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law." THE FEDERALIST NO. 65 (Hamilton). "The President of the United States would be liable to be impeached, tried, and, upon

conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would *afterwards* be liable to prosecution and punishment in the ordinary course of law." THE FEDERALIST NO. 69. The President is "at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by *subsequent* prosecution in the common course of law." THE FEDERALIST NO. 77 (emphases added).

The decisive weight of evidence from the Founding generation confirms Hamilton's understanding. As noted above, Chief Justice Marshall, Attorney General Lee, and Justice Story all shared Hamilton's view—that impeachment, not prosecution in Article III courts, provides the constitutional check against Presidential misfeasance. James Wilson likewise asserted that the President "is amenable to [the laws] in his private character as a citizen, and *in his public character by impeachment*." 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 480 (2d ed. 1863) (emphasis added) (quoted in *Clinton*, 520 U.S. at 696).

Likewise, this Court has consistently held that the impeachment and removal process, not litigation in Article III courts, provides the constitutionally sanctioned check against Presidential misconduct. *Marbury*, 5 U.S. at 149 (view of Attorney General Lee) ("[T]he President … is responsible only in the mode pointed out in the constitution."); *id.* at 166 (holding that the President, in his official acts, "is accountable only to his country in his political character," not to "the courts"); *Martin*, 25 U.S. at 32 (stating that "the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny"); *Kendall*, 37 U.S. at

610 (holding that the President "is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power"). The Court has reiterated this point for over two centuries. *Clinton*, 520 U.S. at 696 ("With respect to acts taken in his 'public character'—that is, official acts—the President may be disciplined principally by impeachment"); *Fitzgerald*, 457 U.S. at 757 ("A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment"); *id.* at 758 n.41 ("The remedy of impeachment demonstrates that the President remains accountable under law for his misdeeds in office.").

The government itself, through the Department of Justice, acknowledges that "[w]here the President is concerned, only the House of Representatives has the authority to bring charges of criminal misconduct through the constitutionally sanctioned process of impeachment." *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 U.S. Op. O.L.C. 222, 260 (2000). "The constitutionally prescribed process of impeachment and removal … lies in the hands of duly elected and politically accountable officials." *Id.* at 258. "The House and Senate are appropriate institutional actors to consider the competing interests favoring and opposing a decision to subject the President and the Nation to a Senate trial and perhaps removal." *Id.* "Congress is structurally designed to consider and reflect the interests of the entire nation, and individual Members of Congress must ultimately account for their decisions to their constituencies." *Id.* "By contrast,

the most important decisions in the process of criminal prosecution would lie in the hands of unaccountable grand and petit jurors, deliberating in secret, perhaps influenced by regional or other concerns not shared by the general polity, guided by a prosecutor who is only indirectly accountable to the public." *Id.*

The D.C. Circuit emphasized the historical practice of prosecuting *subordinate* officers before they are impeached and convicted. J.A.46. But, as the D.C. Circuit also recognized, "[t]he Supreme Court has repeatedly emphasized that the President is *sui generis*." J.A.14. The President occupies "a unique position in the constitutional scheme," and "[t]he President's unique status under the Constitution distinguishes him from other executive officials." *Fitzgerald*, 457 U.S. at 749-50. Thus, this Court has "long recognized" that "the scope of Presidential immunity from judicial process differs significantly from that of Cabinet or inferior officers." *Franklin*, 505 U.S. at 826 (Scalia, J., concurring in part and concurring in the judgment); *see also* J.A.164.

DOJ further admits that the Impeachment Judgment Clause does not contemplate that the practice of pre-impeachment prosecution of *subordinate* officers would extend to the President. Citing the 1973 analysis of Solicitor General Robert Bork, DOJ writes that, regarding "the timing of impeachment relative to indictment," "the convention records 'show that the Framers contemplated that this sequence *should be mandatory only as to the President*.'" 24 U.S. Op. O.L.C., at 233 (emphasis added).

In the 1973 brief, SG Bork wrote that the Convention debates distinguished the President from

subordinate officials on this very point: "Certainly nothing in the debates suggest that the immunity contemplated for the President would extend to any lesser officer." *See* Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity (filed Oct. 5, 1973), *In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States* (D. Md. 1973) (No. 73-965), at 7. According to Solicitor General Bork, "[a]s it applies to civil officers *other than the President*, the principal operative effect of Article I, Section 3, Clause 7, is solely the preclusion of double jeopardy in criminal prosecutions following convictions upon impeachments." *Id.* (emphasis added). But this interpretation does not apply to the President: "There are substantial reasons, embedded not only in the constitutional framework but in the exigencies of government, for distinguishing in this regard between the President and all lesser officers including the Vice President." *Id.*

According to DOJ, then, the Founders understood, and the Impeachment Judgment Clause entails, that subordinate officials could be subject to prosecution without first being impeached by the House and convicted by the Senate, but *the President could not be*—which is exactly what centuries of subsequent historical practice reflect.

The Impeachment Judgment Clause, therefore, directly addresses the D.C. Circuit's emphasis on "the fundamental interest in the enforcement of criminal laws." J.A.38. The Founders weighed that "fundamental interest" against the countervailing interest—far more pressing in their eyes—in avoiding the cycles of recrimination that "have been the great

engines by which violent factions … have usually wreaked their alternate malignity on each other" in the history of "free government." THE FEDERALIST NO. 43 (Madison). The Founders thus adopted a carefully balanced approach that permits the criminal prosecution of a former President for his official acts, but only if that President is first impeached by the House and convicted by the Senate—an admittedly formidable structural check. U.S. CONST. art. I, § 3, cl.7. The D.C. Circuit evidently preferred a different calculus, but it had no authority to re-balance what the Founders had already weighed.

C. "The Presuppositions of Our Political History."

This original understanding draws further support from a 234-year unbroken tradition of *not* prosecuting former Presidents for their official acts, despite ample motive and opportunity to do so. American history abounds with examples of Presidents who were accused by their political opponents of allegedly "criminal" behavior in their official acts—yet none was ever prosecuted, from 1789 until 2023.

American history contains no shortage of examples of Presidents committing allegedly "criminal" official acts—at least in the eyes of their political opponents. *See, e.g.,* Stay App. 22-24. For example, John Quincy Adams was accused of a "corrupt bargain" in appointing Henry Clay as Secretary of State after Clay delivered the 1824 election to him in the House. Andrew Jackson disregarded this Court's rulings and forced the resettlement of many people, resulting in the infamous "Trail of Tears." President Roosevelt imprisoned over 100,000 Japanese Americans during World War II. President Clinton repeatedly launched military strikes in the Middle East on the eve of

critical developments in the Monica Lewinsky scandal, with the likely goal of deflecting media attention from his political travails. President Clinton also pardoned fugitive financier Marc Rich, resulting in widespread accusations of criminal corruption, including illegal quid pro quo.[1] President George W. Bush was accused of knowingly providing false information to Congress about Saddam Hussein's "weapons of mass destruction" in order to launch the Iraq War on false pretenses, leading to the deaths of over 4,400 Americans, with almost 32,000 wounded. President Obama targeted and killed U.S. citizens abroad by drone strike without due process. *See, e.g.,* J.A.164 (Special Counsel admitting that a "drone strike" where "civilians were killed … might be the kind of place in which the Court would properly recognize some kind of immunity"). President Biden's mismanagement of the southern border, dealings with Iran, and funding of pro-Hamas groups face similar accusations.[2]

In all of these instances, the President's political opponents routinely accuse him, and currently accuse President Biden, of "criminal" behavior in his official acts. In each such case, those opponents later came to power with ample incentive to charge him. But no

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[1] Andrew C. McCarthy, *The Wages of Prosecuting Presidents for their Official Acts*, NAT'L REVIEW (Dec. 9, 2023), https://www.nationalreview.com/2023/12/the-wages-of-prosecuting-presidents-over-their-official-acts/.

[2] *See, e.g.,* Andrew McCarthy, *Thoughts on Biden's Funding of Terror-Sponsoring UNRWA and D.C. Circuit's Delay on Trump Immunity*, NAT'L REVIEW (Jan. 31, 2024), https://www.nationalreview.com/corner/thoughts-on-bidens-funding-of-terror-sponsoring-unrwa-and-d-c-circuits-delay-on-trump-immunity/.

former President was ever prosecuted for official acts—until 2023.

"Such a lack of historical precedent is generally a 'telling indication' of a 'severe constitutional problem' with the asserted power." *Anderson*, 144 S. Ct. at 669 (quoting *United States* v. *Texas*, 599 U.S. 670, 677 (2023), and *Free Enter. Fund* v. *Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)); *see also, e.g., NFIB*, 595 U.S. at 119 (per curiam); *Seila Law, LLC* v. *CFPB*, 140 S. Ct. 2183, 2201 (2020). "[T]he longstanding 'practice of the government,' can inform our determination of 'what the law is.'" *NLRB* v. *Noel Canning*, 573 U.S. 513, 525 (2014) (quoting *McCulloch* v. *Maryland*, 17 U.S. 316, 401 (1819), and *Marbury*, 5 U.S. at 177). "That principle is neither new nor controversial," and this Court's "cases have continually confirmed [this] view." *Id.*

Fitzgerald likewise emphasized that "powerful support" for Presidential immunity "derives from the actual history of private lawsuits against the President…. [F]ewer than a handful of damages actions ever were filed against the President. None appears to have proceeded to judgment on the merits." 457 U.S. at 750 n.31. Here, the historical record is even clearer—instead of "fewer than a handful" of criminal prosecutions, *id.*, there have been none. Such consistent history provides "an especially telling sign." *Anderson*, 144 S. Ct. at 669. The "presuppositions of our political history," *Fitzgerald*, 457 U.S. at 745, confirm the existence of criminal immunity.

D. Common-Law Immunity Doctrines.

The common law supports immunity here as well. In fact, when it comes to protecting the independence of the coordinate branches, criminal prosecution, not

civil liability, is the "chief fear" that undergirds common-law immunity doctrines. For example, "the privilege" of legislative immunity "was not born primarily of a desire to avoid private suits … but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States* v. *Johnson*, 383 U.S. 169, 181 (1966). "There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the *chief fear* prompting the long struggle for parliamentary privilege in England…." *Id.* at 182 (emphasis added).

"[I]n the context of the American system of separation of powers," protection from criminal prosecution "is the predominate thrust of the Speech or Debate Clause." *Id.* So also, "[t]he doctrine which holds a judge exempt from a civil suit *or indictment* for any act done or omitted to be done by him, sitting as judge, has a deep root in the common law." *Spalding* v. *Vilas*, 161 U.S. 483, 494 (1896) (emphasis added).

"The immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from *criminal or civil* actions based on state law." *Butz* v. *Economou*, 438 U.S. 478, 489 (1978) (emphasis added). So also here.

E. Functional Considerations Rooted in the Separation of Powers.

Criminal prosecution presents a mortal threat to the Presidency's independence. In *Fitzgerald*, this Court held that a former President's *civil* immunity is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." 457 U.S. at 749. Immunity arises directly

from the Executive Vesting Clause. *Id.* at 749-50 (citing U.S. CONST. art. II, § 1). The same, and even elevated, functional considerations support a former President's criminal immunity.

Under Article II, the President is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 750. "Because of the singular importance of the President's duties, diversion of his energies by concern with" criminal prosecution—including years after he left office—"would raise unique risks to the effective functioning of government." *Id.* at 751. "[A] President must concern himself with matters likely to 'arouse the most intense feelings,'" *id.* at 752 (quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967)), so the risk of retaliatory prosecution is high. Yet "it is in precisely such cases that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979)).

"Nor can the sheer prominence of the President's office be ignored…. [T]he President would be an easily identifiable target," *id.* at 752-53, for criminal prosecution after he leaves office, including by any of "the 2,300 district attorneys in this country [who] are responsive to local constituencies, local interests, and local prejudices." *Vance*, 140 S. Ct. at 2428. "This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system." *Fitzgerald*, 457 U.S. at 752.

The threat of *future* prosecution will cripple *current* Presidential decisionmaking. "Among the most persuasive reasons supporting official immunity

is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." *Id.* at 752 n.32. "[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute." *Id.* (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.)). This includes—as in *Fitzgerald*—the threat of personal liability inflicted years after the President leaves office.

Accordingly, *Vance* emphasized that *Fitzgerald*'s "dominant concern" is "the distortion of the Executive's 'decisionmaking process' with respect to official acts that would stem from 'worry as to the possibility of damages.'" 140 S. Ct. at 2426 (quoting *Clinton*, 520 U.S. at 694 n.19). Immunity protects officials' ability to make decisions based on their "own free, unbiased convictions, uninfluenced by any apprehensions." *Filarsky* v. *Delia*, 566 U.S. 377, 383 (2012) (quotations omitted). Presidential "immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability." *Clinton*, 520 U.S. at 692-93.

The threat of future criminal prosecution presents a far greater risk of "distortion," *Vance*, 140 S. Ct. at 2426, to the "bold and unhesitating action" required of an independent Executive. *Fitzgerald*, 457 U.S. at 745. The President's "personal vulnerability," *id.* at 753, to potential criminal charges, trial, judgment, and imprisonment after leaving office would distort "the most sensitive and far-reaching decisions entrusted to any official under our constitutional system," *id.* at 752.

Criminal prosecution carries a far greater stigma and far more severe penalties than civil liability. The government itself, through the DOJ, emphasizes "[t]he greater seriousness of criminal as compared to civil charges," 24 U.S. Op. O.L.C. at 250; "[t]he peculiar public opprobrium and stigma that attach to criminal proceedings," *id.*; "[t]he magnitude of this stigma and suspicion," which "cannot fairly be analogized to that caused by initiation of a private civil action," *id.*; "the unique mental and physical burdens" from "criminal charges," *id.* at 252; and the "overwhelming degree of mental preoccupation" and "personal time and energy" required to defend against criminal charges, *id.* at 254. "These physical and mental burdens imposed by an indictment and criminal prosecution of a sitting President are of an entirely different magnitude than those imposed by the types of judicial process previously upheld by the Court." *Id.*

In short, "a President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President." Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1461 (2009). The same conclusion holds if that criminal investigation is waiting in the wings until he leaves office. The judgment below, if allowed to stand, as it should not be, "deeply wounds the President" by forever undermining his or her independence. *Morrison*, 487 U.S. at 713 (Scalia, J., dissenting).

The D.C. Circuit wrongfully reasoned that the instant prosecution of President Trump is likely to be a historically isolated instance, which in itself points to an unconstitutional, gerrymandered selective prosecution approach. J.A.38. Given that President

Trump is facing not one but *four* simultaneous prosecutions, as well as civil cases that closely resemble criminal prosecutions, this prediction overlooks current realities. Moreover, it contradicts the reasoning of *Fitzgerald*, which noted the prior scarcity of civil cases against the President, yet aptly observed that this scarcity would vanish once the floodgates were opened. 457 U.S. at 753 n.33 ("These dangers are significant even though there is no historical record of numerous suits against the President ….").

The recent history of Presidential impeachment confirms *Fitzgerald*'s reasoning. In 209 years from 1789 to 1998, there was only one impeachment of a President—Andrew Johnson. In the most recent 26 years, there have been three—with a fourth under active consideration by the House of Representatives. In a few decades, Presidential impeachment has transformed into a fixture of inter-branch conflict.

Criminal prosecution of former Presidents will follow this path far more swiftly. Impeachment faces formidable structural hurdles, including support from the majority of the House and a supermajority of the Senate. Criminal prosecution, by contrast, requires only a single enterprising prosecutor and a compliant grand jury. Indeed, if immunity is not recognized, every future President will be forced to grapple with the prospect of possibly being criminally prosecuted after leaving office *every time* he or she makes a politically controversial decision. That would be the end of the Presidency as we know it and would irreparably damage our Republic.

F. Arguments to the Contrary Are Meritless.

The counterarguments against criminal immunity advanced by the Special Counsel and the courts below are meritless.

1. Attempts to Distinguish *Marbury*.

The Special Counsel's and the lower courts' attempts to distinguish *Marbury* and its progeny are meritless.

First, the Special Counsel admits that "a President's official acts are not subject to the injunctive power of Article III courts," but he argues that, under *Marbury*, this immunity vanishes once that President leaves office. Stay Resp. 31. This argument contradicts *Marbury*, which held that a President's official acts can "*never* be examinable by the courts." 5 U.S. at 166 (emphasis added). "Questions … which are, by the constitution and laws, submitted to the executive, can *never* be made in this court." *Id.* at 170 (emphasis added). The argument also contradicts Justice Story, who wrote that, in his official acts, the President "is accountable only to his country, and to his own conscience," and "his discretion … is conclusive." 3 Story, COMMENTARIES § 1563. It contradicts *Martin* v. *Mott*, which held, long after President Madison left office, that "the legality of [his] orders" could not "be passed upon by a jury" or decided based "upon the proofs submitted to a jury." 25 U.S. at 33. Likewise, it is at loggerheads with *Fitzgerald*, which held *former* President Nixon protected by absolute civil immunity years after he left office. 457 U.S. at 756. The requirement for criminal immunity for Presidents is even more urgent than that for civil immunity.

Second, the D.C. Circuit attempted to distinguish *Marbury* by holding that a President has a

"ministerial duty" to comply with "generally applicable criminal laws." J.A.22-23, 26-27. The Special Counsel does not defend this distinction, which contradicts DOJ's previous litigation position, and the distinction is meritless. Stay App. 16-19. The duty to comply with "generally applicable" criminal laws cannot plausibly be described as "ministerial." Rather, it is quintessentially discretionary.

A "ministerial" duty is a "precise course accurately marked out by law, [which] is to be strictly pursued." *Marbury*, 5 U.S. at 158. It is a "simple, definite duty" in "which nothing is left to discretion." *Mississippi*, 71 U.S. at 498; *see also* J.A.24. Criminal laws prohibit broad and many times ill-identified forms of conduct while leaving their subjects with a wide range of discretion in how to behave without violating the prohibition. Thus, the obligation to comply with criminal laws necessarily involves boundless use of discretion. *See Mississippi*, 71 U.S. at 498; *In re Trump*, 958 F.3d at 299-300 (Wilkinson, J., dissenting). In fact, no court has held that the President has any "ministerial" duties, and the President's unique role as Chief Executive is based on discretion mandated by the separation of powers. *See id.*

Third, both the Special Counsel and the D.C. Circuit point out that Article III courts do, in some circumstances, review the legality of the President's official acts as carried out by the Executive Branch. *See* J.A.23. But, as the D.C. Circuit admits, all those cases "exercised jurisdiction only over *subordinate* officers, not the President himself." J.A.25 (emphasis added). "The writ in *Marbury* was brought against the Secretary of State; in *Little* [v. *Barreme*, 6 U.S. (2 Cranch) 170, 177-79 (1804)] against a commander of a

ship of war; in *Kendall* against the postmaster general; in *Youngstown* against the Secretary of Commerce." J.A.25. Thus, none of these cases casts any doubt on the consistent holdings of *Marbury*, *Kendall*, *Martin*, *Mississippi*, *Chicago & Southern Airlines*, and *Fitzgerald*, that Article III courts cannot sit in judgment directly over the President himself in his official acts. Here, as elsewhere, "[t]he President's unique status under the Constitution distinguishes him from other executive officials," *Fitzgerald*, 457 U.S. at 750—a distinction reinforced by over two centuries of history. This Court has "long recognized that the scope of Presidential immunity from judicial process differs significantly from that of Cabinet or inferior officers." *Franklin*, 505 U.S. at 826 (Scalia, J., concurring in part and concurring in the judgment).

"This distinction, in fact, makes all the difference." *In re Trump*, 958 F.3d at 301 (Wilkinson, J., dissenting). "First, more formally, when a federal court enjoins the conduct of a subordinate executive officer, it may frustrate the President's will in a specific instance, but it does not seize the very reins of the executive branch by exercising control over 'the executive department' itself." *Id.* (quoting *Mississippi*, 71 U.S. at 500). "Second, more functionally, the President is 'entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity,' and how he decides to allocate his energies and attentions in an official capacity is itself owed constitutional protection." *Id.* (quoting *Fitzgerald*, 457 U.S. at 750). "By contrast, when the judiciary enjoins subordinate executive officers, … the level of intrusion into the executive branch's fluid operation is far less severe." *Id.* Moreover, "*Youngstown* … underscores the

constitutional necessity of the judiciary separating the President, as chief executive, from his subordinate officers within the executive branch." *Id.*

2. The "Presumption of Regularity."

The Special Counsel relies heavily on the "presumption of regularity" in "[t]he government's actions." Stay Opp. 13; *see also* J.A.37. That "presumption of regularity" has no application here and is fully contradicted by the precedent of not prosecuting Presidents for the first 234 years of our Nation. The Founders recognized that the prosecution of a *President* is inherently political and must be assigned to the political branches under the Impeachment Judgment Clause, and that wisdom endured until last year.

The Founders were keenly aware that politically motivated prosecutions pose a grave threat to republican government. James Madison warned that "new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other." THE FEDERALIST NO. 43 (Madison). Hamilton, likewise, wrote that offenses committed through the President's official acts "are of a nature which may with peculiar propriety be denominated POLITICAL," and thus "[t]he prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused." THE FEDERALIST NO. 65 (Hamilton). "In many cases," such a prosecution "will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the

greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt." *Id.*

Thus, Hamilton reasoned, the trial of "those offenses which proceed from the misconduct of public men" and "from the abuse or violation of some public trust," *id.*, should not proceed in Article III courts. "[T]he Supreme Court would have been an improper substitute for the Senate, as a court of impeachments." *Id.* Among other reasons, Article III courts are ill-equipped to handle and achieve public acceptance for the resolution of such inherently "POLITICAL" disputes: "it is still more to be doubted, whether [Article III courts] would possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives." *Id.*[3]

DOJ likewise recognizes that the prosecution of a President is "necessarily political in a way that criminal proceedings against other civil officers would not be," and "unavoidably political." 24 U.S. Op. O.L.C. at 230. DOJ admits that it would be "incongruous" for a "jury of twelve" to "undertake the

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[3] President Ford's pardon of President Nixon reflects this judgment. *See* Statement of President Ford (Sept. 8, 1974), https://www.fordlibrarymuseum.gov/library/document/0067/1563096.pdf. President Ford stated that former President Nixon could not "hope to obtain a fair trial by jury in any jurisdiction of the United States." *Id.* at 4. President Ford determined that "ugly passions would again be aroused, our people would again be polarized in their opinions, and the credibility of our free institutions of government would again be challenged." *Id.* at 5.

'unavoidably political' task of rendering judgment in a criminal proceeding against the President." *Id.*

"Prosecution or nonprosecution of a President is, in short, inevitably and unavoidably a political act." Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2159 (1998). This observation applies to former Presidents as well—and it applies most of all to a former President who is the leading candidate to replace the incumbent who is prosecuting him.

3. Immunity Does Not Place the President "Above the Law."

Both the Special Counsel and the D.C. Circuit contend that criminal immunity would place the President "above the law." J.A.25. As *Fitzgerald* held, this contention is "rhetorically chilling but wholly unjustified." 457 U.S. at 758 n.41. "The remedy of impeachment demonstrates that the President remains accountable under law for his misdeeds in office." *Id.* "It is simply error to characterize an official as 'above the law' because a particular remedy is not available against him." *Id.* This is even more true here, because the Impeachment Judgment Clause expressly *authorizes* the criminal prosecution of a President, provided that he is first impeached by the House and convicted by the Senate. U.S. CONST. art. I, § 3, cl.7.

Indeed, "[a] rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive." *Fitzgerald*, 457 U.S. at 757. "There remains the constitutional remedy of impeachment." *Id.* "In addition, there are formal and informal checks on Presidential action," including "constant scrutiny by the press" and "[v]igilant oversight by Congress,"

which "make[s] credible the threat of impeachment," among others. *Id.* Thus, "[t]he existence of alternative remedies and deterrents establishes that absolute immunity will not place the President 'above the law.'" *Id.* at 758. Accordingly, the Founders envisioned, and this Court has often emphasized, that the impeachment process and other informal checks would be the exclusive means of deterring Presidential misfeasance. *Supra*, Part I.B.

The Special Counsel objects to these authorities by arguing that, if impeachment and conviction are prerequisites, some Presidents who engage in wrongdoing might escape criminal punishment—such as those who conceal their official crimes until after they leave office, and those for whom the political consensus needed for Senate conviction does not materialize. Nevertheless, as to grave offenses, DOJ itself notes that Presidents who commit grievous wrongdoing—*i.e.*, creating the political consensus for their punishment that the Constitution demands—will face speedy impeachment and conviction in the Senate. 24 U.S. Op. O.L.C. at 256 ("[A] President suspected of the most serious criminal wrongdoing might well face impeachment and removal from office before his term expired, permitting criminal prosecution at that point.").

But even if some level of Presidential malfeasance, not present in this case at all, were to escape punishment, that risk is inherent in the Constitution's design. The Founders viewed protecting the independence of the Presidency as well worth the risk that some Presidents might evade punishment in marginal cases. They were unwilling to burn the Presidency itself to the ground to get at every single alleged malefactor. Indeed, *every*

structural check in the Constitution carries a similar risk of under-enforcement: "While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty." *Morrison*, 487 U.S. at 710 (Scalia, J., dissenting).

II. "Generally Applicable Criminal Laws" Do Not Apply to the President's Official Acts Absent an Exceptionally Clear Statement.

The Court should order the dismissal of the indictment in its entirety under the doctrine of absolute Presidential immunity from criminal prosecution for official acts. If, however, the Court finds necessary to consider the "extent" to which criminal immunity applies here, J.A.237, the Court may hold that criminal immunity presents a grave constitutional question, and that clear-statement rules prevent the charged statutes from being interpreted to apply to the President or his official acts. *See* D.Ct. Doc. 114, at 15-19, 23 (arguing clear-statement rules).

Congress must speak clearly to apply a statute against the President or his official acts. In *Franklin*, this Court held that "[o]ut of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA." *Franklin*, 505 U.S. at 800-01. "We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Id.*

On separation-of-powers issues, this Court is "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils." *Public Citizen*, 491 U.S. at 466. DOJ endorses "the

well-settled principle that statutes that do not expressly apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President's constitutional prerogatives." *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 351, 1995 WL 1767997 (Dec. 18, 1995).

"When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Public Citizen*, 491 U.S. at 465-66 (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)); *see also Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This Court's "reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government." *Public Citizen*, 491 U.S. at 466. In addition, Congress must speak clearly in order to abrogate official immunity doctrines. *Pierson*, 386 U.S. at 554–55; *see also Scheuer* v. *Rhodes*, 416 U.S. 232, 244 (1974) ("[H]ad the Congress intended to abolish the common-law" immunity, "it would have done so specifically.").

This Court applies clear-statement rules to "[f]ar less consequential" issues than the criminal prosecution of a former President. *NFIB*, 595 U.S. at 122 (Gorsuch, J., concurring) (citing *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994)); *see also Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001).

The indictment charges President Trump with violations of 18 U.S.C. §§ 371, 1512(c)(2) and (k),[4] and 241. J.A.180. None of these statutes mentions the President. *Franklin*, 505 U.S. at 800 ("The President is not explicitly excluded from the [statute's] purview, but he is not explicitly included, either."). Each statute must be stretched so far beyond its natural meaning to apply to a President's official acts that the statues become unrecognizable. *See* 18 U.S.C. § 371 ("conspire … to defraud the United States"); 18 U.S.C. § 1512(c)(2) ("otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so"); 18 U.S.C. § 1512(k) (conspiring to violate § 1512(c)(2)); 18 U.S.C. § 241 ("conspire to injure, oppress, threaten, or intimidate any person in any State" in the exercise of voting rights).

For example, "all agree" that the enactment of § 1512(c) "was prompted by" the Enron scandal to "cure[] a conspicuous omission" by criminalizing the destruction of incriminating records. *Yates* v. *United States*, 574 U.S. 528, 535–36 (2015) (plurality op.). The statute contains no clear indication of Congress's intent to criminalize (which would be deeply constitutionally questionable) a President's official actions, such as deliberations about Cabinet-level appointments; Presidential communications with the Vice President, Members of Congress, and state officials about the administration of federal elections; or Presidential public statements on matters of enormous federal concern. J.A.216-17, 219-20; 185-

[4] This Court will consider the interpretation of this statute this Term in *Fischer* v. *United States*, No. 23-5572 (cert. granted Dec. 13, 2023). As that case demonstrates, the statute is stretched far beyond its natural meaning here.

87, 193-95, 196-206, 220-27, 234; 181, 188-92, 195, 197, 202-07, 221-23, 225-32.

Likewise, 18 U.S.C. § 371 forbids citizens "[t]o conspire to defraud the United States," which "means primarily to cheat the government out of property or money." *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924). This statute contains no clear statement that Congress intended to criminalize any official action of the President, that falls squarely within his duties—including Presidential advocacy to Congress or members of state legislators, the President's selection of Cabinet-level officers or his direction of the Department of Justice, public statements by a President on matters of enormous public concern, ensuring and safeguarding proper and fraud-less federal elections, or any other conduct alleged in the indictment. J.A.185-86, 193-95, 196-206; 186-87, 199, 203, 206-07, 215-20; 181, 188-92, 195, 197, 202-07, 221-23, 225-32. The same logic applies to § 241. None of the statutes clearly authorizes the criminalization of the President's official acts, let alone the strained interpretations advanced here. Accordingly, the doctrine of immunity dictates that they cannot be interpreted to apply to the President or his official acts.

III. Four Considerations Should Guide the Court's Assessment, If Necessary, of the Extent to Which Criminal Immunity Exists.

This Court's Question Presented directs the parties to address "to what extent" criminal immunity may apply to a former President. J.A.237 (emphasis added). This Question Presented is apt, because the Special Counsel admitted in the D.C. Circuit that criminal immunity likely applies to at least *some* official acts of the President. J.A.164 (Special Counsel

admitting that President Obama's "drone strike" where U.S. "civilians were killed … might be the kind of place in which the Court would properly recognize some kind of immunity"). Then, he admitted in his stay briefing that the indictment charges President Trump with "the use of official power." Stay Resp. 2. These admissions virtually concede that some level of criminal immunity must exist and must be applied to the charged conduct.

A. Criminal Immunity Should Be Absolute and Extend to the Outer Perimeter of the President's Official Duties.

The scope of criminal immunity should be congruent with the civil immunity recognized in *Fitzgerald*, *i.e.*, (1) absolute immunity that (2) includes all actions within the "outer perimeter" of the President's "official responsibility." 457 U.S. at 756.

Several considerations favor this scope of immunity. First, it matches the immunity that this Court has already adopted for civil liability. *Id.* Likewise, at common law, immunity protected from "a civil suit or indictment" equally. *Spalding*, 161 U.S. at 494; *Johnson*, 383 U.S. at 178 (noting that legislative immunity arose because "successive [British] monarchs utilized the criminal and civil law to suppress and intimidate critical legislators"). Legislative immunity from criminal prosecution is coextensive with legislators' civil immunity—both extend to "legislative acts." *Johnson*, 383 U.S. at 185. In fact, the reasons for recognizing criminal immunity are far more compelling—especially the immunity doctrines that "ensur[e] the independence of" the coordinate branches "in the context of the American system of separation of powers." *Id.* at 179, 182.

Second, absolute immunity for all official acts matches the holdings of *Marbury* and its progeny, discussed above. *Supra*, Part I.A.

Third, immunity encompassing all the President's official acts follows *Fitzgerald*, which rejected a "functional" approach. "In defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes." 457 U.S. at 755. "But the Court has also refused to draw functional lines finer than history and reason would support." *Id.* A "functional" approach that tied immunity to particular Presidential functions would create vexing line-drawing problems, especially in light of the President's "discretionary responsibilities in a broad variety of areas, many of them highly sensitive." *Id.* at 756. "In many cases it would be difficult to determine which of the President's innumerable 'functions' encompassed a particular action." *Id.* Further, an impermissible "inquiry into the President's motives could not be avoided under the … 'functional' theory," which "could be highly intrusive." *Id.* The same logic applies equally to criminal immunity.

Fourth, adopting *Fitzgerald*'s bright-line approach avoids case-by-case adjudication of immunity claims, which would deprive immunity of its *ex ante* certainty and thus most of its value. Likewise, a lesser standard would drag Article III courts into making case-by-case immunity determinations in highly politicized cases, which *Fitzgerald*'s bright-line approach avoids.

In *Clinton*, this Court stated that "if the Framers of the Constitution had thought it necessary to protect the President from the burdens of private litigation,

we think it far more likely that they would have adopted a categorical rule than a rule that required the President to litigate the question whether a specific case belonged in the 'exceptional case' subcategory." 520 U.S. at 706. A case-by-case standard "is more appropriately the subject of the exercise of judicial discretion than an interpretation of the Constitution." *Id.* Likewise, DOJ contends that "a categorical rule against indictment or criminal prosecution is most consistent with the constitutional structure, rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President." 24 U.S. Op. O.L.C. at 254.

Fifth, given the extraordinary breadth of the President's duties, any narrower scope of immunity would be necessarily underinclusive. "The President is the only person who alone composes a branch of government. As a result, there is not always a clear line between his personal and official affairs." *Mazars USA*, 591 U.S. at 868. "[T]he President [is] the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity," including "the most sensitive and far-reaching decisions entrusted to any official under our constitutional system." *Fitzgerald*, 457 U.S. at 751. The President's "duties … are of unrivaled gravity and breadth." *Vance*, 140 S. Ct. at 2425, and he "has vast responsibilities both abroad and at home," *id.* at 2437 (Thomas, J., dissenting). Given "the indispensable role that the Constitution assigns to the Presidency," *id.* at 2444 (Alito, J., dissenting), a narrower scope of immunity would be nearly impossible to fashion, and would

certainly involve impractical line-drawing problems in every application.

B. The Court Should Remand After Finding Criminal Immunity, If Necessary.

The Court should dismiss the indictment under absolute criminal immunity for Presidential official acts. However, if the Court concludes that criminal immunity exists generally, but requires further factfinding as to specifics of this case, it should remand to the lower courts to find any necessary facts and to apply that doctrine in the first instance. No court has yet addressed the application of immunity to the alleged facts of this case, and that question lies outside the Question Presented. J.A.237. For example, no court has addressed whether the various kinds of conduct alleged in the indictment constitute official acts and/or lie within the "outer perimeter" of Presidential duties. *Fitzgerald*, 457 U.S. at 756.

Accordingly, if the indictment is not dismissed, as it should be, the Court should remand the case to the lower courts to apply the doctrine in the first instance. *See, e.g., Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 568 U.S. 189, 201-02 (2012); *Anderson* v. *Creighton*, 483 U.S. 635, 646 (1987). Applying immunity here may require discovery about the specific facts and circumstances of charged conduct. *See, e.g., Blassingame*, 87 F.4th at 5, 29-30; *id.* at 29; *see also, e.g., Anderson*, 483 U.S. at 646 n.6.

C. If It Adopts Qualified Immunity, as It Should Not, the Court Should Emphasize That Doctrine's Fundamental Features.

For the reasons stated above, the Court should recognize absolute criminal immunity for all official acts within the outer perimeter of Presidential

responsibility. *Fitzgerald*, 457 U.S. at 756. But if it considers a narrower standard, the case law discusses two alternatives: (1) a "function-based" approach in which the scope of immunity turns on the nature of the Presidential function; or (2) qualified immunity like that afforded to state governors and subordinate executive officials.

As to the first option, *Fitzgerald* properly rejected a "function"-based analysis of Presidential civil immunity, and its reasons for doing so are compelling. 457 U.S. at 755. *Fitzgerald* recognized that some of the Court's "decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office." *Id.* But, for the President, the Court "refused to draw functional lines finer than history and reason would support." *Id.* Recognizing immunity for *all* of a President's official acts accords with "the special nature of the President's constitutional office and functions." *Id.* at 756. Line-drawing would be impossible or impracticable, as "[i]n many cases it would be difficult to determine which of the President's innumerable 'functions' encompassed a particular action." *Id.*

Even worse, "an inquiry into the President's motives could not be avoided under th[at] kind of 'functional' theory," and "[i]nquiries of this kind could be highly intrusive." *Id.*; *see also Harlow* v. *Fitzgerald*, 457 U.S. 800, 817 & n.28 (1982) (noting that such inquiries into the Executive's subjective motivation "frequently could implicate separation-of-powers concerns"). In a host of cases, this Court has rejected attempts to probe an official's motives or purpose in applying immunity doctrines. *See infra*, Part III.D; *Fitzgerald*, 457 U.S. at 756.

Regarding the other option, qualified immunity: For the reasons discussed above, absolute, not qualified, immunity applies to Presidential acts. But if the Court does adopt some version of qualified immunity here, its holding should incorporate two fundamental features of that doctrine.

First, in applying qualified immunity to high-level executive officials, this Court emphasizes that "the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion"—and, thus, the scope of immunity—"must be comparably broad." *Scheuer*, 416 U.S. at 247. After all, "officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Id.* at 246. "[T]he occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails." *Barr*, 360 U.S. at 573; *see also Moyer* v. *Peabody*, 212 U.S. 78, 84–85 (1909).

Second, qualified immunity requires a violation of "clearly established" law by a defendant, *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009), which in turn requires a high level of clarity in the law. This Court has "repeatedly told courts not to define clearly established law at too high a level of generality." *City of Tahlequa* v. *Bond*, 595 U.S. 9, 12 (2021) (per curiam). "This requires a high 'degree of specificity.'" *District of Columbia* v. *Wesby*, 583 U.S. 48, 63-64 (2018) (citation omitted). "A rule is too general if the

unlawfulness of the officer's conduct 'does not follow immediately from the conclusion that [the rule] was firmly established.'" *Id.* (quoting *Anderson*, 483 U.S. at 641). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 741 (2011).

D. The Court Should Not Create an Unconstitutional Exception to Immunity That Applies to President Trump Alone.

Though it rejected criminal immunity as a "categorical" matter, the D.C. Circuit advanced an alternative, meritless holding to deny immunity in "this case in particular." J.A.21. The D.C. Circuit suggested that a President is not immune from prosecution if the alleged misconduct was motivated by an attempt to stay in office unlawfully beyond his term. J.A.40-43. The Court should reject this gerrymandered approach to immunity for several reasons.

First, this approach contradicts the plain holding of *Marbury* and its progeny. *Marbury* held that a President's official acts can "*never* be examinable by the courts," 5 U.S. at 166 (emphasis added)—*i.e.*, *"never,"* not when they are motivated by an allegedly improper purpose. Rather, the President's "discretion, when exercised, is conclusive." 3 STORY, COMMENTARIES § 1563. The President's official acts cannot "be passed upon by a jury," and a jury cannot determine "the legality of [his] orders." *Martin*, 25 U.S. at 33. "[F]inal orders" that "embody Presidential discretion as to political matters" are "beyond the competence of the courts to adjudicate." *Chicago & S. Air Lines*, 333 U.S. at 114.

Second, the approach contradicts this Court's consistent holding that immunity decisions do not

turn on the defendant's alleged purpose or motive. *Fitzgerald* emphasized that a President's immunity should not require "an inquiry into the President's motives," which "could be highly intrusive." 457 U.S. at 756. Because an improper motive can almost always be alleged, this rule "would subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose." *Id.* Such a doctrine would destroy immunity as a whole.

This Court has often reasserted this principle. *See, e.g., Harlow*, 457 U.S. at 816 (rejecting "the litigation of the subjective good faith of government officials"); *Pierson*, 386 U.S. at 554 ("This immunity applies even when the judge is accused of acting maliciously and corruptly…."); *Barr*, 360 U.S. at 575 ("The claim of an unworthy purpose does not destroy the privilege.") (citation omitted); *Spalding*, 161 U.S. at 498 (1896) (immunity does not turn on "any personal motive that might be alleged to have prompted his action"); *Bradley* v. *Fisher*, 80 U.S. 335, 354 (1871) (holding that immunity "cannot be affected by any consideration of the motives with which the acts are done"); *see also, e.g., Gregoire*, 177 F.2d at 581 (Hand, J.) (immunity applies even where there is a "personal motive not connected with the public good").

Here, the D.C. Circuit's alternative approach rests on the indictment's allegation of improper motive, which was not present. The Court claimed that President Trump's conduct is not immune because "he was … 'determined to remain in power'." J.A.4 (quoting J.A.181); *see also* J.A.183 (¶ 7) (incorrectly alleging that *"[t]he purpose of the conspiracy* was to overturn the legitimate results of the 2020 presidential election…"). President Trump's conduct

allegedly constituted "efforts to overturn the election results," J.A.6, that were supposedly "undertaken" in an attempt "to unlawfully overstay his term as President." J.A.40 (citing J.A.181).

This approach turns on the allegation of improper purpose and motive—*i.e.*, the "determin[ation] to remain in power" and the desire "to unlawfully overstay his term…." J.A.4, 40. In so holding, the D.C. Circuit contradicted *Fitzgerald* and this Court's many cases holding that allegations of unlawful purpose or motive cannot defeat immunity. As DOJ has written, this Court has "emphatically rejected an argument that otherwise-official acts lose immunity if they are motivated by an impermissible purpose," and that "[t]hat logic applies with even greater force to the suggestion that the President should be subject to suit for his official acts whenever those acts are—or are plausibly alleged to have been—motivated by electoral or political considerations." Br. of the United States as *Amicus Curiae in Blassingame* v. *Trump*, Nos. 22-5069, 22-7030, 22-7301 (D.C. Cir. filed March 2, 2023), at 14-15.

Third, this supposedly "narrow" exception would rapidly swallow the rule, because virtually everything that other first-term Presidents do—whether allegedly criminal or not—is, at least, partly, in some way motivated by the desire to remain in office. *See id.* at 13 (DOJ arguing that "a first-term President is, in a sense, always a candidate for office," and that a President's "complex and unremitting" official duties "are not amenable to neat dichotomies") (citation omitted). Many if not all of a President's official acts could plausibly be described as part of an attempt "to unlawfully overstay his term as President and displace his … successor." J.A.40. "This construction

would subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect." *Fitzgerald*, 457 U.S. at 756.

Fourth, for similar reasons, such a rule would draw Article III courts into the vortex of political dispute in every case involving allegations of Presidential misconduct. Such a rule would call upon the courts—ultimately, this Court—to determine whether a President's official conduct *really* was motivated by the improper purpose of staying in power unlawfully. Real-world examples illustrate the difficulty and intrusiveness of such questions. Were President Clinton's military strikes in the Middle East motivated to distract the voting public's attention from the Monica Lewinsky scandal? Were President Bush's representations to Congress about "weapons of mass destruction" motivated by the purpose of looking tough on terror and thus getting re-elected? Is President Biden destroying our southern border and undermining our national security abroad for unlawful electoral purposes? Such politicized inquiries into Presidents' motives would be "highly intrusive," would require intrusive discovery into the President's motivations, and would strain the competence of Article III courts. *Fitzgerald*, 457 U.S. at 756; *Harlow*, 457 U.S. at 816-17.

In sum, the D.C. Circuit's alternative holding is untenable and contradicts this Court's well-established precedent. Perhaps its proponents find the theory attractive because they believe that making immunity turn on "the specific charges in the Indictment," J.A.44, would effectively deny criminal immunity to President Trump only, while leaving all

other Presidents immune. If so, that is not a strength but a fatal defect of the theory.

As DOJ has written, "the constitutional concern is not merely that any particular indictment and criminal prosecution of a sitting President would unduly impinge upon his ability to perform his public duties." 24 U.S. Op. O.L.C. at 258. "A more general concern is that permitting such criminal process … would affect the underlying dynamics of our governmental system in profound and necessarily unpredictable ways, by shifting an awesome power to unelected persons lacking an explicit constitutional role vis-a-vis the President." *Id.*

Thus, the consequences of this Court's holding on Presidential immunity are not confined to President Trump. They will affect the Presidency itself for the rest of our Nation's history. This Court should not adopt a rule that creates the appearance of a President Trump-only gerrymander. That would be the antithesis of the rule of law.

CONCLUSION

The Court should reverse the D.C. Circuit and order the dismissal of the indictment. If the Court finds further fact-finding necessary, it should remand to the district court to apply the doctrine in the first instance.

March 19, 2024

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ADDENDUM:

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF CONTENTS

U.S. CONST. Art. I, §3, cl.7:

> 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.

U.S. CONST. Art. II, §1, cl.1:

> The executive Power shall be vested in a President of the United States of America. …

18 U.S.C. § 241:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--
>
> They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or

imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1512(c)(2):

Whoever corruptly—

…

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.

18 U.S.C. § 1512(k):

Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.