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THE FEARLESS EXECUTIVE, CRIME, AND THE SEPARATION OF POWERS

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Trump v. United States*'s discovery of broad immunity has rendered the presidency more imperial and unaccountable. This Article tackles four questions. First, are the Constitution's grants of specific and distinct privileges and immunities for federal officials illustrative of a broader, if implicit, set of privileges and immunities? Second, what limits, if any, does the Constitution impose on the power of Congress to criminalize the constitutional acts of the President, members of Congress, and the courts? Consider whether a federal judge can be prosecuted for her allegedly corrupt judicial judgment, one meant to satisfy a bribe previously received. Third, even if the Constitution grants immunity for constitutional acts, does it bestow any immunity for statutory acts? The Court held there was at least a presumptive immunity for presidents without pausing to discuss why the* Constitution *would implicitly immunize a branch's exercise of* statutory *authority. Finally, when should we read a generic statute to cover the official acts of*

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constitutional officers? Consider whether federal obstruction statutes should be construed to apply to judges and presidents as they exercise their constitutional powers over trials and prosecutions. As to the first question, the Constitution carefully conveys to each branch a unique and limited set of privileges. It is a mistake to read the Constitution as if it implicitly bestowed further shields. Instead, Congress may choose to bestow additional needful and appropriate safeguards to the three branches. Regarding the second question, Congress can criminalize the following sorts of acts: violations of the separation of powers, corrupt exercises of constitutional authority, and acts that transgress federal statutory law. Hence, a corrupt pardon or a corrupt judicial order can form the basis of a federal crime even though each might seem to be authorized by the Constitution. On the third matter, even if one thought the Constitution immunized certain exercises of constitutional powers, there is little reason to suppose it also immunizes the exercise of statutory powers by constitutional officers. On the final issue, we ought to disfavor reading generic criminal laws as if they apply to exercises of constitutional powers. We should be wary of supposing that Congress sought to police the constitutionally authorized acts of constitutional actors via general prohibitions that principally regulate ordinary persons.

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INTRODUCTION

Commentators have long asserted that Donald Trump committed crimes in his first term.[1] After he left the Oval Office, three prosecutors[2] brought four prosecutions against him.[3] The New York prosecution relates to the supposed falsification of business records.[4] The Florida prosecution, which was dropped after Trump won the 2024 election, alleged that Trump illegally retained and concealed federal records.[5] The

[1] See, e.g., John Cassidy, The Mueller Report Is Clear: Donald Trump Repeatedly Tried to Obstruct Justice, New Yorker (Apr. 18, 2019), https://www.newyorker.com/news/our-columnists/the-mueller-report-couldnt-be-more-clear-donald-trump-repeatedly-tried-to-obstruct-justice; Matt Ford, Did President Trump Obstruct Justice?, The Atlantic (May 16, 2017), https://www.theatlantic.com/politics/archive/2017/05/trump-comey-obstruction-justice/526953; Ryan Goodman, Did Trump Obstruct Justice?, Politico Mag. (May 17, 2017), https://www.politico.com/magazine/story/2017/05/17/did-trump-obstruct-justice-215147 [https://perma.cc/S9V5-C9AL]; Samuel Estreicher & Christopher Owens, Did President Trump Commit the Federal Crime of Bribery?, Verdict (Dec. 3, 2019), https://verdict.justia.com/2019/12/03/did-president-trump-commit-the-federal-crime-of-bribery [https://perma.cc/CT3S-AG3T]; Bob Bauer, The Failures of the Mueller Report's Campaign Finance Analysis, Just Sec. (May 3, 2019), https://www.justsecurity.org/63920/the-failures-of-the-mueller-report-campaign-finance-analysis/ [https://perma.cc/T8SQ-2BKG].

[2] Jack Smith was the prosecutor in both the Florida and Washington, D.C., cases; Fani Willis prosecuted the Fulton County, Georgia, case; and Alvin Bragg prosecuted the case in New York. Donald Trump's Criminal Cases, in One Place, CNN (Jan. 10, 2025), https://www.cnn.com/interactive/2023/07/politics/trump-indictments-criminal-cases/ [https://perma.cc/CW75-L6N2]. Trump's Georgia case is indefinitely paused while the state supreme court considers whether the prosecutor should be disqualified, and the President is currently appealing his New York criminal conviction. See Danny Hakim, Atlanta D.A. Asks Georgia Court to Review Decision Kicking Her Off Trump Case, N.Y. Times (Jan. 8, 2025), https://www.nytimes.com/2025/01/08/us/trump-fani-willis-appeal-georgia.html; Jonah E. Bromwich, As Establishment Warms to Trump, Elite Law Firm Takes on His Appeal, N.Y. Times (Jan. 29, 2025), https://www.nytimes.com/2025/01/29/nyregion/trump-criminal-conviction-appeal.html.

[3] Lawfare has helpfully compiled a page that links to all the documents in the Trump prosecutions. See The Trump Trials, Lawfare, https://www.lawfaremedia.org/current-projects/the-trump-trials [https://perma.cc/3CUL-QWUF] (last visited Oct. 27, 2024). Trump has been prosecuted in the Southern District of Florida; the District of Columbia; Fulton County, Georgia; and New York City. See, e.g., Indictment at 28, 34, 36–40, United States v. Trump, No. 23-cr-80101 (S.D. Fla. June 8, 2023) [hereinafter Florida Indictment]; Indictment at 3, 43–45, United States v. Trump, No. 23-cr-00257 (D.D.C. Aug. 1, 2023) [hereinafter D.C. Indictment]; Indictment at 13, 74, 76–81, 86–88, 95–96, Georgia v. Trump, No. 23SC188947 (Ga. Super. Ct. Fulton Cnty. Aug. 14, 2023) [hereinafter Georgia Indictment]; Indictment at 1–14, New York v. Trump, No. 71543/2023 (N.Y. Sup. Ct. Apr. 4, 2023) [hereinafter New York Indictment].

[4] New York Indictment, supra note 3, at 1–2.

[5] Florida Indictment, supra note 3, at 2–4; see Alanna Durkin Richer, Eric Tucker & Chris Megerian, Special Counsel Moves to Abandon Election Interference and Classified Documents Cases Against Trump, AP News (Nov. 25, 2024, 5:56 PM), https://apnews.com/a

Georgia prosecution, which is indefinitely paused, and Washington, D.C. prosecution, also dropped after the 2024 election, rested on acts that occurred during Donald Trump's first term.[6]

These prosecutions foregrounded a vital separation of powers question that had yet to receive its due: When, if ever, may an apparently constitutionally authorized act form the *actus reus* of a criminal prosecution? For example, could the direction of Justice Department officials, conversations with a Vice President, and (supposedly) official tweets give rise to a prosecution and a guilty verdict?[7] Could a military order to kill a rival result in jail time (or worse) for an ex-President?[8] These are profound questions about the nature of our government.

In *Trump v. United States*, the Supreme Court supplied some answers.[9] With the entire nation watching, the Court displayed little timidity. It held that the President had absolute immunity from prosecution for certain "core" constitutional actions and at least presumptive immunity for all other official acts, whether constitutional or statutory.[10] Given the Court's consistently broad conception of the President's official acts,[11] on display again in *Trump*,[12] this was a bestowal of a capacious immunity. From the penumbras of Article II, the Court conjured up a vast aegis.

The breadth was intentional, for the Court sought to safeguard what it saw as a besieged presidency. Chief executives were meant to be "energetic," "vigorous," "bold," "unhesitating," and "fearless[]," said the Court.[13] But if their bold actions triggered "routine[]" criminal cases, there would be an unremitting "pall of potential prosecution"[14] and beleaguered presidents would not execute their office "fearlessly and

rticle/trump-capitol-riot-justice-department-jack-smith-d6172cf98d8e03e099571c908267456c [https://perma.cc/FDD5-XQWD].

[6] Georgia Indictment, supra note 3, at 14–19; D.C. Indictment, supra note 3, at 1–2; Hakim, supra note 2; Richer et al., supra note 5.

[7] Trump v. United States, 144 S. Ct. 2312, 2324, 2339 (2024).

[8] Id. at 2376 (Jackson, J., dissenting).

[9] Id. at 2347 (majority opinion).

[10] Id.

[11] See Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982) ("In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility.").

[12] *Trump*, 144 S. Ct. at 2329–30.

[13] Id. at 2329 (quoting The Federalist No. 70, at 471–72 (Alexander Hamilton) (Jacob Ernest Cooke ed., 1961)); id. at 2331 (quoting *Fitzgerald*, 457 U.S. at 745); id. at 2346.

[14] Id. at 2331 (quoting McDonnell v. United States, 579 U.S. 550, 575 (2016)).

fairly."[15] The Framers "did not envision such counterproductive burdens on the" executive they wrought.[16] Given what the Framers sought, the Court would not countenance routine prosecutions that "would dampen the ardor of all but the most resolute."[17] Further, immunity must be decided before trial to cut off "the possibility of an extended [and potentially unwarranted] proceeding," for otherwise a President would be "unduly cautious."[18] Hence within the Constitution, the Court belatedly discovered substantial bulwarks against criminal liability *and* prosecution.

The Court's opinion approaches adjudication by adjectives. For older Americans, the plethora of heroic modifiers might recall Captain James T. Kirk, who "boldly" went "where no man has gone before" with the Starship *Enterprise*.[19] For a younger generation, maybe they summon in the mind's eye a Katniss Everdeen.[20] Kirk and Everdeen were bold and energetic. Above all, they were fearless.

Somewhat ironically, the decision's exaltation of a fearless President provoked great fear among three dissenting Justices[21] and, if one reads between the lines, more than a little trepidation in a concurring Justice.[22]

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[15] Id.

[16] Id.

[17] Id. at 2344 (quoting *Fitzgerald*, 457 U.S. at 753 n.32).

[18] Id. (quoting *Fitzgerald*, 457 U.S. at 752 n.32).

[19] See Andrew Delahunty & Sheila Dignen, A Dictionary of Reference and Allusion 52 (3d ed. 2012).

[20] See Katniss Everdeen, Hunger Games Through the Ages Wiki, https://hungergamesthroughtheages.fandom.com/wiki/Katniss_Everdeen [https://perma.cc/9VY3-4RYM] (last visited Oct. 27, 2024) (claiming that Everdeen is "very strong and bold" and that "[s]he doesn't take crap from anybody").

[21] See *Trump*, 142 S. Ct. at 2361 (Sotomayor, J., dissenting) ("Today's Court . . . has replaced a presumption of equality before the law with a presumption that the President is above the law for all of his official acts. . . . Under [the majority's] rule, any use of official power for any purpose, even the most corrupt purpose indicated by objective evidence of the most corrupt motives and intent, remains official and immune. Under the majority's test, if it can be called a test, the category of Presidential action that can be deemed 'unofficial' is destined to be vanishingly small."); id. at 2368 ("The core immunity that the majority creates will insulate a considerably larger sphere of conduct than the narrow core of 'conclusive and preclusive' powers that the Court previously has recognized."); see also id. at 2383 (Jackson, J., dissenting) (arguing that the Court has "senseless[ly]" assumed "risks" that "are intolerable, unwarranted, and plainly antithetical to bedrock constitutional norms").

[22] Id. at 2352 (Barrett, J., concurring in part) ("Properly conceived, the President's constitutional protection from prosecution is narrow. The Court leaves open the possibility that the Constitution forbids prosecuting the President for *any* official conduct, instructing the lower courts to address that question in the first instance. I would have answered it now." (citation omitted)).

The decision has had repercussions for the ongoing prosecutions.[23] Beyond courtrooms, the decision has provoked alarm,[24] especially because immunity might embolden future presidents to act lawlessly.[25]

The adulation, the fury, and the fear that Donald Trump evokes often pervert our judgment and "the better angels of our nature."[26] Nonetheless, this is an opportune moment to consider the question of presidential immunity, as it will arise again in the future. Though it might seem as if the Court has said all that needs to be said, occasionally the Court announces a test and makes a course correction, as it recently did in *Rahimi*.[27] Infrequently, it quickly reverses itself.[28]

As we contemplate these matters, we should consider the other branches. Do their officials also have immunity for their official acts to

[23] For instance, the defense has cited the Supreme Court's opinion as a basis for throwing out the verdict in the New York case. See President Donald J. Trump's Post-Trial Presidential Immunity Motion at 1, New York v. Trump, No. 71543/2023 (N.Y. Sup. Ct. July 10, 2024).

[24] See, e.g., 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/ (arguing that the Court's opinion "turns the Constitution's text and structure inside out and upside down, saying things that are flatly contradicted by the document's unambiguous letter and obvious spirit").

[25] See, e.g., David Cole & Brett Max Kaufman, Supreme Court Grants Trump, Future Presidents a Blank Check to Break the Law, ACLU (July 3, 2024), https://www.aclu.org/news/civil-liberties/supreme-court-grants-trump-future-presidents-a-blank-check-to-break-the-law [https://perma.cc/PVX2-PXMZ]; Joshua Barajas & Erica R. Hendry, What Does the Supreme Court Immunity Ruling Mean for Trump? 6 Questions Answered, PBS (July 1, 2024, 5:01 PM), https://www.pbs.org/newshour/politics/what-does-the-supreme-court-ruling-mean-for-trump-6-questions-answered [https://perma.cc/6R2Y-PUJ6]; Nia Prater, Did the Supreme Court Kill Every Case Against Trump?, N.Y. Mag. (July 8, 2024), https://nymag.com/intelligencer/article/did-the-supreme-court-kill-every-case-against-trump.html [https://perma.cc/XE49-7C6D]; Michael Waldman, The Supreme Court Gives the President the Power of a King, Brennan Ctr. for Just. (July 1, 2024), https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-gives-president-power-king [https://perma.cc/5NSL-CY3B]; Lawrence Hurley, 'Five Alarm Fire': Supreme Court Immunity Ruling Raises Fears About Future Lawless Presidents, NBC News (July 1, 2024, 4:57 PM), https://www.nbcnews.com/politics/supreme-court/supreme-court-immunity-ruling-raises-fears-future-lawless-presidents-rcna159827 [https://perma.cc/2UCV-BBZ5].

[26] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* Abraham Lincoln: Political Writings and Speeches 115, 123 (Terence Ball ed., 2013).

[27] Compare N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022) ("The test that we . . . apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."), with United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024) ("As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.").

[28] E.g., Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

foster energy, vigor, and boldness? One might wonder whether federal judges have (or should have) criminal immunity for their official acts, say, a judgment alleged to be corrupt. Representatives and Senators might claim official immunity for allegedly crooked discussions with constituents or supposedly corrupt votes on the floor. It might seem obvious that the Court's opinion applies only to the President. But in the Nixon tapes case, the Court said that all three branches have an evidentiary privilege rooted in the separation of powers.[29] If the separation of powers creates prosecutorial immunity for presidents, as the Court signaled in *Trump*,[30] perhaps that immunity extends to the other branches.

In thinking about these questions, the Court focused on "core constitutional powers" versus "official acts," a distinction that the Constitution never draws and that is elusive.[31] Further, it spoke of "immunity" and never properly considered whether the supposed immunity could be overcome or defeased. In particular, the Court failed

[29] United States v. Nixon, 418 U.S. 683, 705–06 (1974) ("Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings." (footnote omitted)).

[30] Trump v. United States, 144 S. Ct. 2312, 2331 (2024) ("[W]e conclude that the separation of powers principles explicated in our precedent necessitate at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility.").

[31] Id. at 2327. Every constitutional officer engages in at least two sorts of acts, official and personal, with the latter unrelated to the constitutional office. Though there are many Supreme Court cases discussing "official acts," the dividing line between the two is not always apparent. For instance, is an officer heading to her office engaged in official acts or personal acts? This Article does not attempt to answer such questions, for even as the categories are uncertain, existing doctrine requires some such division. See Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982) (discovering presidential immunity from damages suits for official acts that extend to the "outer perimeter" of presidential responsibilities); Clinton v. Jones, 520 U.S. 681, 692 (1997) (explaining that immunity from damages actions did not extend to suits seeking damages out of President's personal, private conduct).

Furthermore, within the category of official acts, there are at least two subcategories: constitutional acts and statutory acts. Constitutional acts encompass actions grounded in constitutional grants of power, such as the act of vetoing a bill or pardoning a felon. Statutory acts consist of actions that trace back to ordinary federal statutes, such as granting a patent pursuant to a law.

Any constitutional immunity from criminal liability attaches only to the presidency's constitutional powers. Hence the constitutional immunity will broaden (or narrow) depending upon the scope of the presidency's constitutional powers, the extent of which is much contested.

to address the scope of Congress's powers, instead choosing to focus on the presidency and its needs. Most tellingly, the Court never cited the Necessary and Proper Clause or any other Article I authority. But in a case about the separation of powers, the scope of *congressional* powers ought to matter.

A more profitable approach is to consider four questions, each of which considers all three branches. First, are the Constitution's conspicuous grants of narrow privileges and immunities illustrative of a broader, if implicit, set of privileges and immunities? Second, what limits, if any, does the Constitution impose on Congress's ability to criminalize constitutional acts, by the President or otherwise? By "constitutional acts," I mean acts that are apparently constitutionally authorized, as opposed to statutorily authorized. Third, should we read the Constitution as granting an implicit immunity for the statutorily authorized acts of constitutional actors? Lastly, when should we read generic criminal law as applying to the official acts of constitutional actors, for example, judges, presidents, and senators?

The Constitution's text, structure, and early history suggest a different set of conclusions than the ones the Court settled upon. First, save for a guaranteed salary, the presidency has no other privileges or immunities. The other branches likewise have their limited and *enumerated* privileges and immunities. If there are to be additional safeguards, Congress must create them via the Necessary and Proper Clause.[32] Sometimes exceptionally necessary, proper, and indispensable means—like funds, departments, officers, and buildings—are left to the judgment of

[32] Ian Ayres and I have encouraged Congress to adopt one novel structural protection: the Prosecutor Jury. Our innovation would have Congress enact a law that when prosecutors, state or federal, wish to prosecute certain high-level officials or candidates for high-level offices, they must secure the consent of a jury composed of former U.S. Attorneys. The Prosecutor Jury would be a bipartisan, balanced panel of ten U.S. Attorneys appointed by Democratic Presidents and ten U.S. Attorneys appointed by Republican Presidents. If two-thirds agree, i.e., fourteen, then the prosecution can go forward. If fewer sanction the prosecution, the case cannot go to trial. This filtration mechanism is meant to counter the perception, and the reality, that prosecutors might prosecute political rivals for selfish or partisan reasons. If a prosecutor bent on prosecuting a cabinet secretary or a federal judge can get at least four individuals associated with the opposition party to approve a prosecution, the public will be able to conclude that the prosecution has some merit and perhaps does not involve the misuse of prosecutorial resources in the pursuit of partisan or personal ends. For a comprehensive discussion of this proposal, see generally Ian Ayres & Saikrishna Bangalore Prakash, A Bipartisan Approach to Political Prosecutions, 16 J. Legal Analysis 140 (2024). Our proposal has the distinct advantage that it allows Congress to flexibly expand or narrow protections as circumstances warrant.

Congress. That is no less true for official immunity, including presidential immunity from prosecution. Second, any other constitutional protections for the three branches arise from *the absence of congressional power to criminalize certain acts*. This is not an "immunity"—an exemption from the law—as much as the dearth of legislative power. Just as Congress could not make it a crime for a citizen to vote, it may not make it a crime for a President to veto a bill. And yet even though Congress cannot criminally sanction the mere exercise of a constitutional power, it may criminalize the *corrupt* or *wrongful* exercise of powers. The Necessary and Proper Clause, which authorizes Congress to criminalize bribery, treason, and other forms of corruption, also permits Congress to protect the separation of powers.[33] For example, a President who issues a pardon to aid an enemy could be prosecuted for treason, or so I argue. Third, despite what the Court says, the Constitution does not confer any immunity for presidential acts authorized by statute. There is no reason to think that the Constitution dictates that, when Congress grants authority to a constitutional actor, criminal immunity must accompany the statutory grant. Fourth, whatever one thinks of the above arguments, there are reasons to reject the notion that in enacting generic criminal laws, Congress meant to criminalize the official acts of constitutional actors, including the President. The Court ignored this basic question of statutory interpretation.

In sum, my framework is one of (1) narrow constitutional protections for constitutional officers, (2) significant congressional power to grant additional privileges or immunities, (3) meaningful legislative power to sanction wrongful constitutional acts, (4) no constitutional immunity for grants of statutory authority, and (5) a reluctance to read generic statutes as if they regulated the official acts of constitutional officers.

Part I briefly discusses and criticizes *Trump v. United States*. The Court's treatment was unavoidably rushed. This hasty posture made the majority opinion ill-considered in several respects, failing as it does to grapple with difficult questions of first impression.

Part II considers the Court's case for an executive immunity from prosecution. The Court's arguments from the Founding, constitutional structure, and case law are unpersuasive. Indeed, many of these considerations cut against the Court's discovery of immunity.

[33] For a brief discussion of Congress's authority as it relates to the separation of powers, see Saikrishna Bangalore Prakash, Congress as Elephant, 104 Va. L. Rev. 797, 826–31 (2018).

Part III argues that presidents have a narrow protection from federal statutes that criminalize uses of the Executive's constitutional powers. This protection arises because of the absence of legislative power to punish mere uses of executive powers. And yet, Congress retains considerable power to protect the Constitution. Via the Necessary and Proper Clause, Congress can (a) criminalize corrupt exercises of presidential, legislative, and judicial power; (b) penalize executive violations of the separation of powers, and (c) punish the desecration and flouting of congressional laws. Hence, while Congress cannot make it a crime to "grant a pardon," a law more narrowly targeted at the "grant of corrupt pardons" would be necessary and proper to implement the Constitution.

Part IV considers the question of statutory acts. The Constitution does not provide that when Congress grants authority to a constitutional actor, that conferral comes with implied immunity. To hold that the Constitution dictates that every grant of statutory authority must come freighted with some immunity from prosecution is a bridge too far.

Part V shifts to statutory interpretation, arguing that prosecutors and courts should be loath to read generic criminal statutes as if they applied to constitutional acts. Legislators fashion generally applicable criminal laws with the public in mind, not presidents, members of Congress, and judges. This focus ought to matter in discerning the reach of such laws. Relatedly, it seems unlikely that legislators would impinge upon presidential or judicial action via generic criminal laws because it is doubtful that they would hide an elephant—regulation of a President's or judge's *official* acts—in a mousehole of a generic criminal law.[34] Finally, we have good reason to eschew reading such laws as if they applied to constitutional deeds because doing so raises difficult constitutional questions.

Although the Article's focus is on crime, the conclusions apply to non-penal measures. If I am right that Congress can attach criminal sanctions to a judge's official, but corrupt, acts, it can impose lesser burdens, like civil fines. The same logic would apply to legislators and presidents.

Several caveats are necessary. This Article is not about Donald Trump. Hence, it will not address whether he committed any crimes. It focuses on constitutional explication, addressing knotty issues that show no signs of

[34] Cf. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (explaining that respondents could not prevail given their failure to show a clear "textual commitment of authority to the EPA," since Congress does not "hide elephants in mouseholes").

going away. Indeed, they have always been with us, lurking in the background. Nor will this Article address whether sitting presidents may be prosecuted.[35] As this Article goes to print, the question of temporary immunity for sitting chief executives may become a live issue. Trump's reascension to the presidency raises the prospect that state prosecutors may attempt to continue their prosecutions. Finally, this Article is but a part of a vital, long overdue conversation,[36] one that the Court helped further and one where the Court may yet change its mind. Or so I hope.

I. UNPACKING *TRUMP V. UNITED STATES*

In August of 2023, a District of Columbia grand jury indicted Donald Trump on four counts, all related to Trump's contestation of the 2020 election results and his attempts to halt the electoral count on January 6, 2021.[37] In October, Trump filed a motion before the district court to have all the charges dismissed, claiming official immunity.[38] He asserted that presidents have "absolute immunity from criminal prosecution for actions performed within the 'outer perimeter' of [their] official responsibility."[39] The one narrow exception from this immunity turned on impeachment. If the House impeached a President based on official acts and the Senate thereafter convicted and removed, that ousted President could be prosecuted for such acts.[40]

[35] For an argument that a sitting President can be prosecuted, see Saikrishna Bangalore Prakash, Prosecuting and Punishing Our Presidents, 100 Tex. L. Rev. 55, 60 (2021) [hereinafter Prakash, Prosecuting and Punishing Our Presidents] (arguing that a sitting President may be "arrested, indicted, prosecuted, and punished"). The *Trump* Court cited the Department of Justice's conclusion that a sitting President could not be prosecuted. See *Trump*, 144 S. Ct. at 2332 n.2 (citing Brief for United States at 9, *Trump*, 144 S. Ct. 2312 (No. 23-939)). Given the Court's stance toward immunity, it seems quite likely that it would agree with the Department of Justice about prosecuting a sitting president.

[36] I have participated in this and adjacent conversations. See Saikrishna Bangalore Prakash, A Critical Comment on the Constitutionality of Executive Privilege, 83 Minn. L. Rev. 1143, 1145 (1999); Saikrishna Bangalore Prakash, "Not a Single Privilege Is Annexed to His Character": Necessary and Proper Executive Privileges and Immunities, 2020 Sup. Ct. Rev. 229, 232; Prakash, Prosecuting and Punishing Our Presidents, supra note 35, at 60. The principal *Trump* dissent cited the latter article. See *Trump*, 144 S. Ct. at 2358 (Sotomayor, J., dissenting) (citing Prakash, Prosecuting and Punishing Our Presidents, supra note 35, at 69).

[37] D.C. Indictment, supra note 3, at 2–3, 43–45.

[38] Motion to Dismiss Indictment at 8, 10–13, United States v. Trump, 704 F. Supp. 3d 196 (D.D.C. 2023) (No. 23-cr-00257), ECF No. 74.

[39] Id. at 8.

[40] Id. at 11.

In December, the district court dismissed the motion.[41] Judge Tanya Chutkan concluded that "[t]here is no evidence that any of the Constitution's drafters or ratifiers intended or understood former Presidents to be criminally immune unless they had [first] been impeached and convicted."[42] Judge Chutkan further concluded that the considerations that led the Supreme Court to recognize immunity from damages actions did not apply to prosecutions of former presidents.[43]

After the Supreme Court rejected the Special Counsel's motion for certiorari before judgment,[44] the D.C. Circuit rejected Trump's claims, concluding that there was "no structural immunity from the charges in the Indictment."[45] The Supreme Court then granted certiorari[46] and eventually endorsed a broad presidential immunity.[47]

Before dissecting the Court's opinion, some preliminary remarks are in order. First, even though the D.C. Circuit said there was no official immunity for the President's official acts, every single Justice agreed that some of the President's constitutional acts could not be criminalized.[48] Second, the government itself had conceded this point, a concession that put it in the awkward position of differing with the D.C. Circuit.[49] Third, every Justice agreed that presidents enjoy no immunity for their private, i.e., non-official, acts.[50]

Beyond these points of consensus, there were sharp disagreements about the scope of the immunity and whether immunity should be decided at the outset with interlocutory review afterward. Five Justices endorsed a broad immunity from prosecution and held out the possibility of expanding that immunity.[51] One Justice wished to cabin the possibility of

[41] *Trump*, 704 F. Supp. 3d at 230.

[42] Id. at 203, 209.

[43] Id. at 211–14, 228.

[44] See Petition for a Writ of Certiorari Before Judgment, United States v. Trump, 144 S. Ct. 539 (2023) (No. 23-624) (mem.).

[45] United States v. Trump, 91 F.4th 1173, 1192, 1208 (D.C. Cir. 2024) (per curiam).

[46] 144 S. Ct. 1027, 1027 (2024).

[47] Trump v. United States, 144 S. Ct. 2312, 2331 (2024) ("[W]e conclude that the separation of powers principles explicated in our precedent necessitate at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility.").

[48] See id. at 2352 (Barrett, J., concurring); *Trump*, 91 F.4th at 1194, 1200.

[49] *Trump*, 114 S. Ct. at 2342–43.

[50] See id. at 2361 (Sotomayor, J., dissenting) ("No one has questioned the ability to prosecute a former President for unofficial . . . acts.").

[51] Id. at 2327 (majority opinion).

future immunity.[52] And three Justices believed that, while presidents might raise a constitutional defense or immunity, any such defense or immunity did not encompass any of the acts in the indictment before the Court.[53]

The majority opinion had a curious structure. Borrowing from Justice Robert Jackson's *Youngstown* concurrence, the Court concluded that where executive powers were "conclusive and preclusive," Congress could not interfere.[54] It further held that its cases had already established that certain powers were conclusive and preclusive.[55] Specifically, the Court cited its cases related to pardons, removal, and recognition.[56] According to the Court, these cases established a swath of congressional incapacity over pardons, recognition, etc.[57] Hence, Congress could not make the exercise of such powers a crime.[58] The Court labeled these "core constitutional powers" because they were conclusive and preclusive.[59] The Court seemed to assume that prior cases had established that criminalization of these acts would be unconstitutional.

The majority went on to discuss "official acts," a category that included exercises of all other presidential powers, namely other constitutional powers and statutorily granted powers.[60] Here, the Court delved into the Framers' desiderata for the presidency, a back-of-the-envelope public policy analysis,[61] and their prior privilege and immunity cases. The Court noted that the executive is the only branch where constitutional powers reside in the hands of one person.[62] Further, citing Justice Breyer, the Court observed that the Framers "sought to encourage energetic,

[52] Id. at 2352 (Barrett, J., concurring).

[53] Id. at 2367–69 (Sotomayor, J., dissenting). Justice Sotomayor's dissenting opinion was joined by Justices Kagan and Jackson.

[54] Id. at 2327 (majority opinion) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J., concurring)).

[55] Id. at 2327–28.

[56] Id. (first citing *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring); then citing Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2218 (2020); then citing Myers v. United States, 272 U.S. 52, 106, 176 (1926); and then citing Zivotofsky v. Kerry, 576 U.S. 1, 32 (2015)).

[57] Id. at 2328.

[58] Id.

[59] Id. at 2327, 2347.

[60] Id. at 2328.

[61] While the Court did not use the phrase "public policy," it is found in the cases they cited, and the Court engaged in a balancing of interests to reach its conclusion. See id. at 2329–30; Nixon v. Fitzgerald, 457 U.S. 731, 744–45, 747–48 (1982).

[62] *Trump*, 144 S. Ct. at 2329 (quoting Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2034 (2020)).

vigorous, decisive, and speedy execution of the laws" by the President.[63] In recognition of this unique structure and the Framers' desire for power to rest in one person's hands, the Court had previously created immunities from damages actions and an evidentiary privilege.[64] The immunity rested on a sense that presidents would avoid taking certain actions out of a reasonable fear that such conduct would trigger a damages action.[65] To avoid this distortion, absolute immunity from damages actions was necessary. Or at least that is how the Court characterized *Nixon v. Fitzgerald*.[66] The evidentiary privilege was necessary, said the Court, to foster confidential and frank discussions where aides could advise the President without fear of the glare of disclosure.[67] The Court then used these two lines of cases to argue for criminal immunity: as compared to the risk posed by damages actions and the danger of exposing confidences, the menace of criminal prosecution was much higher in the sense that potential criminal prosecution would more likely trigger a timidity on their part and hence greatly distort presidential decision-making.[68]

To ensure that a President is capable of "bold and unhesitating action," "at least" a presumptive immunity was necessary for all official acts.[69] To overcome the presumption, the government must "show that applying a criminal prohibition to that [official] act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'"[70] The Court also expressly left open the possibility that courts might extend absolute immunity to encompass more acts.[71] One suspects it had constitutional acts topmost in mind, but the Court did not seem to rule out absolute immunity for statutory acts.[72]

The Court then applied its novel framework.[73] It quickly concluded that in directing the Department of Justice and threatening to fire an official,

[63] Id. (quoting Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment)).
[64] Id. at 2329–30 (citing *Fitzgerald*, 457 U.S. at 749).
[65] Id. at 2330–31 (citing *Fitzgerald*, 457 U.S. at 745).
[66] See id. at 2330–32.
[67] Id. at 2330 (quoting United States v. Nixon, 418 U.S. 683, 705–06, 708 (1974)).
[68] Id. at 2330–31.
[69] Id. (citing *Fitzgerald*, 457 U.S. at 745).
[70] Id. at 2331–32 (quoting *Fitzgerald*, 457 U.S. at 754).
[71] See id. at 2332.
[72] Id.
[73] See id. at 2333–40.

President Trump was absolutely immune.[74] These were exclusive and preclusive and, as such, they were "core constitutional powers."[75] As for the other acts at issue in the indictment, the Court held that some of them were official acts (e.g., speaking to the Vice President about the latter's duties)[76] while others might be official acts (e.g., speaking to state officials about state administration of federal elections),[77] and noted that the government might be able to overcome the presumptive immunity in the district court.[78] The Court declined to say that any of the underlying actions were non-official and therefore bereft of any immunity.[79] Instead, it left many questions for the district court, content to make some general remarks about the allegations in the indictment.[80]

At the end of its opinion, addressing the principal dissent, the Court made express what had been to that point implicit.[81] The Court evidently feared that, without some kind of immunity, it would be open season on the presidency.[82] If prosecutors could charge erstwhile presidents willy-nilly and proceed to trial, there would be a cycle of retribution where new administrations and state prosecutors would put former presidents in the dock. Although one cannot say with certainty, the Court was perhaps describing its sense of the Special Counsel's two cases and the two brought by state attorneys. It seems likely that the Court believed that one or more of these prosecutions were dubious, even partisan, a sense that heightened its fear that further politicized prosecutions of presidents were just around the corner. At a minimum, the Court likely knew that many had criticized the New York prosecution and had done so after its success in securing a guilty verdict.[83]

[74] Id. at 2334–35.
[75] Id. at 2335, 2347.
[76] Id. at 2336–37.
[77] Id. at 2337–40.
[78] Id. at 2337.
[79] Id. at 2339–40.
[80] See id. at 2333–40.
[81] See id. at 2346.
[82] Id.
[83] Criticism of the New York state prosecution came from both sides of the aisle, before and after the verdict. See generally Miranda Nazzaro, Cuomo: Trump NY Hush Money Case 'Should Have Never Been Brought,' The Hill (June 22, 2024, 11:58 AM), https://thehill.com/regulation/court-battles/4734858-andrew-cuomo-donald-trump-alvin-bragg-hush-money-case-new-york/ [https://perma.cc/5ZFX-AGX3] (describing former Governor Cuomo's criticism of the New York prosecution as being motivated by Trump's notoriety and impending presidential bid); Mary Clare Jalonick, Republican Lawmakers React with Fury and Rally to His Defense, Associated Press (May 30, 2024, 9:23 PM), https://apnews.com/arti

In her concurrence, Justice Barrett framed the case as involving statutory and constitutional questions.[84] Should the statutes be read to apply to the President's acts, and if so, were the acts immune from criminal prosecution?[85] Curiously, the Court had said little about the statutes, from their elements to their scope. It did observe that one was "broadly worded" and predicted that if there was no immunity, that statute might be wielded against a future President who had been insufficiently vigorous in enforcing federal statutes, e.g., immigration or drug laws.[86]

The principal dissent, written by Justice Sotomayor, pointed out that there is no express immunity for the President in the Constitution.[87] She further described many a Founding Father who asserted that the President could be prosecuted for crimes.[88] Additionally, her dissent not only opposed the presumptive immunity applicable to official acts, but it also read the Court's discussion of "core" powers broadly and thus greatly minimized the area of mere "presumptive" immunity.[89] Sotomayor said that because the core was so broad, the presumption was more of a fiction. Finally, she painted a dark picture of a lawless presidency, one "above the law."[90]

And yet, as noted earlier, Justice Sotomayor conceded that some constitutional powers—the exclusive and preclusive ones—were off limits in terms of prosecutions.[91] She cited pardons and recognition as being immune from prosecution.[92] The concession did not matter to the case because the actions before the Court were outside of the rather narrow constitutional immunity. In sum, the dissenters conceded a "core" immunity and merely argued for a narrower ambit for it.[93]

We can learn much from these opinions. Each has truths within it. The majority is right that Congress cannot declare that "it shall be a crime to

cle/trump-verdict-republicans-guilty-reaction-congress-election-c8193404866565c55b093086890cbef8 [https://perma.cc/6WUB-58BN] (describing the "immediate fury" from Republican lawmakers in response to the New York jury's guilty verdict).

[84] *Trump*, 144 S. Ct. at 2352–53 (Barrett, J., concurring in part).

[85] Id. at 2352.

[86] Id. at 2346 (majority opinion).

[87] See id. at 2358 (Sotomayor, J., dissenting).

[88] Id. at 2358–59.

[89] Id. at 2368–70.

[90] Id. at 2355, 2361.

[91] Id. at 2368.

[92] Id. (first citing United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872); and then citing Zivotofsky v. Kerry, 576 U.S. 1, 32 (2015)).

[93] See id. at 2367–68.

grant a pardon" or it shall "be a felony to remove" an officer.[94] Justice Barrett is correct to focus on whether federal statutes should be read to extend to a President's official acts.[95] Justices Sotomayor and Jackson are spot-on when they decry the far-reaching immunity that the Court discovers in the Constitution.[96]

As I discuss in the rest of the Article, constitutional actors do not have a host of implied privileges and immunities. Instead, it is for Congress to create the immunities that the Court mistakenly discovered. Relatedly, any additional "immunities" from prosecution arise not from Article II, but from *the absence of congressional power to criminalize certain acts*. This is not an immunity as much as it is a dearth of congressional power. Furthermore, there is no categorical protection for pardons, removal, or recognition, or so I argue. Additionally, despite what the Court says, the Constitution grants no immunity for the President's statutory acts. Finally, there are many reasons to question the idea that, in enacting generic criminal laws, Congress meant to criminalize the official acts of constitutional actors, including the President, judges, and legislators.

II. THE PRESIDENCY LACKS A PRIVILEGES AND IMMUNITIES CLAUSE

It might seem that there are not two clauses involving privileges and immunities,[97] but three—two for citizens and one for the presidency. Over the past half-century, the Executive and the Court have constructed a vast and formidable edifice of privileges and immunities, rendering the most powerful office in the world even more potent. The increased clout and vigor have come at the cost of responsibility, for the Executive is far less accountable than at any time in our nation's history. It seems that with great power comes faint responsibility.

In the Nixon tapes case,[98] the Court first recognized a "Presidential privilege" for presidential communications.[99] An oak tree emerged from this acorn, for we now have a host of related privileges. Several years later, in another case involving President Richard Nixon, the Court found that former presidents may invoke an executive privilege to shield the

[94] See id. at 2327–28 (majority opinion).
[95] See id. at 2353–54 (Barrett, J., concurring in part).
[96] See id. at 2368–69 (Sotomayor, J., dissenting); id. at 2372 (Jackson, J., dissenting).
[97] U.S. Const. art. IV, § 2, cl. 1; id. amend. XIV, § 1.
[98] United States v. Nixon, 418 U.S. 683, 688 (1974).
[99] Id. at 705 n.16; id. at 706 ("The President's need for complete candor and objectivity from advisers calls for great deference from the courts.").

confidences and documents of their erstwhile administrations.[100] Building upon these foundations, the Executive has invoked or claimed a host of supposedly included or related privileges: deliberative process,[101] attorney-client,[102] national security,[103] law enforcement,[104] and testimonial immunity before Congress.[105] Recently, the Court granted a sitting President extra protections vis-à-vis Congress for his indisputably *private* papers, creating what one might call the "executive's *unofficial* privilege."[106] I omit claims that seem to have been abandoned, such as President Bill Clinton's "protective function" privilege.[107] If the past is the prologue, we can expect that the number of claimed executive privileges will continue to multiply.

Immunity has grown too, although in less dramatic ways, at least until recently. *Nixon v. Fitzgerald* is thought to have established that the President cannot be sued for damages arising out of his official acts.[108] The Court adopted an expansive sense of presidential power, for the immunity extends to the "'outer perimeter' of his official responsibility."[109] And after *Trump*, the President can never be prosecuted for some of his constitutional acts, and there is a strong presumption of immunity that shields all other official acts, whether constitutional or not.[110] Again, like executive privilege, this immunity extends to former

[100] See Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 439 (1977).

[101] See Assertion of Exec. Privilege Over Deliberative Materials Generated in Response to Cong. Investigation into Operation Fast and Furious, 36 Op. O.L.C. 1, 2 (2012).

[102] See Protective Assertion of Exec. Privilege Regarding White House Couns.'s Off. Documents, 20 Op. O.L.C. 2, 2–3 (1996).

[103] *Nixon*, 418 U.S. at 706–07 (suggesting that "sensitive national security secrets" would be privileged).

[104] See Assertion of Exec. Privilege in Response to Cong. Demands for L. Enf't Files, 6 Op. O.L.C. 31, 32 (1982).

[105] See Testimonial Immunity Before Cong. of the Assistant to the President & Senior Couns. to the President, 43 Op. O.L.C. 1, 1–2 (2019).

[106] See Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2034–35 (2020).

[107] This privilege was meant to prevent members of the Secret Service from testifying about President Clinton's activities, presumably his trysts with women. See In re Sealed Case, 148 F.3d 1073, 1075 (D.C. Cir. 1998).

[108] 457 U.S. 731, 749 (1982).

[109] Id. at 756.

[110] Trump v. United States, 144 S. Ct. 2312, 2327 (2024) ("We conclude that under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity.").

presidents. And, as with immunity from damages actions, the Court does not limit the immunity to a narrow compass. The "outer perimeter" is a deliberately vague and spacious concept, for no one quite knows where its frontiers are located.

The White House has become an impenetrable redoubt, bristling with defenses—moats, barbicans, portcullises—all for the benefit of the incumbent. And some of these defenses shield *former* presidents. As far as I am aware, presidents are the only officials who enjoy a host of constitutional privileges and immunities after they leave office.[111]

The Court's argument for the newest fortification—criminal immunity—is as weak as its earlier justifications. In some respects, the arguments are weaker. In *Trump*, the Court relied upon the Founders, considerations of constitutional structure, some features of the modern presidency, and its cases.[112] But the Court's arguments are less than persuasive. The Founders emphasized presidential accountability, repeatedly mentioning the possibility of prosecution. Further, constitutional structure is, and always has been, a misbegotten grounding for privileges and immunities. The metastasizing of the modern presidency is a factor favoring *fewer* privileges and immunities, not more. Finally, the Court's previous cases never intimated a criminal immunity.

A. The Founders

It is telling that the Court could cite no one, either at the Founding or otherwise, who said that an erstwhile President should have some kind of immunity from prosecution for official acts or otherwise.[113] So far as I am aware, there is no early discussion in the *Federalist Papers* or elsewhere even hinting that a former President should be immune from criminal prosecution. To the contrary, the Framers repeatedly said that the President would be accountable in his official capacity and accountable

[111] Of course, members of Congress enjoy a privilege for what they say on the floor, a privilege that extends forever. But this privilege is express and does not wholly immunize them from prosecution. See Gravel v. United States, 408 U.S. 606, 624–25 (1972). If a legislator in their home district or state slanders or libels someone, they can be sued civilly.

[112] *Trump*, 144 S. Ct. at 2329 ("To resolve the matter, therefore, we look primarily to the Framers' design of the Presidency within the separation of powers, our precedent on Presidential immunity in the civil context, and our criminal cases where a President resisted prosecutorial demands for documents.").

[113] See id. at 2329–30 (discussing the "Framers' design of the Presidency").

personally, especially for crimes.[114] Indeed, the many discussions of accountability are principally about the *President's* amenability to prosecution. Consider what Hamilton said about responsibility: post-impeachment, a President could "forfeit[]" his "life and estate."[115]

Relatedly, many said the President had no privileges or immunities whatsoever, saying that he was no better situated than ordinary Americans. James Wilson said that "not a single privilege is annexed to his character."[116] He also asked the following: "Does even the first magistrate of the United States draw to himself a single privilege or security that does not extend to every person . . . ? Is there a single distinction attached to him, in this system, more than there is to the lowest officer in the republic?"[117] Similarly, a Marylander wrote that significant executive authority was vested in "a single man, the representative of the people, chosen once in four years, and enjoying no privilege, as an individual, more than his fellow-citizens."[118]

Tench Coxe said that the President would have less protection than federal legislators: "His person is not so much protected as that of a member of the House of Representatives; for he may be proceeded against like any other man in the ordinary course of law."[119] The presence of certain privileges and immunities for members of Congress and the absence of them for the President led to his conclusion. In North Carolina, James Iredell assured that:

> If the President does a single act by which the people are prejudiced, he is punishable himself, and no other man merely to screen him. If he commits any misdemeanor in office, he is impeachable, removable

[114] See Prakash, Prosecuting and Punishing Our Presidents, supra note 35, at 68–75 (surveying Founding Era history regarding presidential immunity from criminal prosecution).

[115] The Federalist No. 77, at 372, 376 (Alexander Hamilton) (Terence Ball ed., 2003).

[116] 1 James Wilson, Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States (Nov. 26, 1787), *in* Collected Works of James Wilson 178, 236 (Kermit L. Hall & Mark David Hall eds., 2007) (emphasis omitted).

[117] Debates in the Convention of the State of Pennsylvania, *in* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 412, 523 (Jonathan Elliot ed., Phila., J. B. Lippincott Co., 2d ed. 1901) (1836) [hereinafter Constitutional Debates in State Conventions] (statement of James Wilson).

[118] An Annapolitan, Annapolis Md. Gazette (Jan. 31, 1788), *reprinted in* 11 The Documentary History of the Ratification of the Constitution 218, 220 (John P. Kaminski et al. eds., 2009).

[119] An American Citizen I, On the Federal Government, Indep. Gazetteer (Phila.) (Sept. 26–29, 1787), *reprinted in* 2 The Documentary History of the Ratification of the Constitution 138, 141 (Merrill Jensen et al. eds., 1976) (emphasis omitted).

> from office, and incapacitated to hold any office of honor, trust, or profit. If he commits any crime, he is punishable by the laws of his country, and in capital cases may be deprived of his life.[120]

Again, presidents were thought to be subject to criminal prosecution, with no hint of immunity. There were no screens, shields, privileges or immunities.

In sum, Federalists repeatedly described the presidency as lacking privileges or immunities. Although Anti-Federalists regarded the presidency as a monarchy in disguise, not one of them insisted that the Constitution bestowed a host of privileges and immunities upon chief executives.[121] Indeed, some agreed that the presidency lacked implied protections. For example, the Federal Farmer observed that presidents would have "no rights, but in common with the people."[122]

This has long been the consensus, I would hazard to say.[123] But the Court sidestepped such assertions, arguing that to declare that the President could be criminally prosecutable—as many Founders did—does nothing to refute the Court's assertion that the President enjoys an official immunity from prosecution. After all, the Founders might have supposed that the President would be prosecutable only for his *private*, *non-official acts*, or so the Court claimed.[124] But the Court's argument is a dodge. The Founders' statements about criminal amenability contain no qualifications, and it is hard to see why we should read them as incorporating an implied immunity for official acts. Moreover, one might equally say that the Founders never definitively ruled out an immunity that extends *only* to private acts, leaving official acts wholly subject to prosecution. To contend that the Founders left open the possibility of an

[120] Debates in the Convention of the State of North Carolina, *in* 4 Constitutional Debates in State Conventions, supra note 117, at 1, 109 (statement of James Iredell); see also Marcus III, Norfolk & Portsmouth J. (Mar. 5, 1788), *reprinted in* 16 The Documentary History of the Ratification of the Constitution, supra note 118, at 322, 322 ("[H]e is not exempt from a trial, if he should be guilty, or supposed guilty, of [treason] or any other offence."). "Marcus" was a pseudonym for James Iredell. James Iredell, Encyc. Britannica, https://www.britannica.com/biography/James-Iredell [https://perma.cc/5BU4-8T3S] (last visited Oct. 27, 2024).

[121] Prakash, Prosecuting and Punishing Our Presidents, supra note 35, at 73–74.

[122] Federal Farmer, Letter XIV (Jan. 17, 1788), *reprinted in* 17 The Documentary History of the Ratification of the Constitution 325, 332 (John P. Kaminski et al. eds., 1995).

[123] William Rawle said similar things in 1829. William Rawle, A View of the Constitution of the United States 169–70 (William S. Hein & Co., 2d ed. 2003) (1829) ("All its officers, whether high or low, are but agents, to whom . . . no immunity is conferred . . . no other officer of government is entitled to the same immunity in any respect.").

[124] Trump v. United States, 144 S. Ct. 2312, 2345 (2024).

immunity that extended only to private acts would be a silly argument, of course. Yet such an argument is not much weaker than the Court's actual assertion.

Furthermore, the context of these various statements casts doubt about the Court's argument. For instance, the *Federalist Papers* primarily focused on official acts—what the three branches may do in the lawful exercise of their powers.[125] The *Federalist Papers* on the presidency are likewise focused on his official powers, duties, and constraints—what the President may do domestically, in foreign affairs, and the like.[126] To discuss a President's "necessary responsibility" in this context and to also mention *prosecution*[127] is to boast that the Constitution makes the President liable for his private misdeeds *but especially his official ones*. Hamilton, and others, promised criminal amenability for official acts. The Court's discovery of ambiguity in these statements is hard to credit.

B. Constitutional Structure

The Court's structural argument fares no better. The Court claimed that America must have a "vigorous" and "energetic" President, capable of "bold and unhesitating action" and able to "boldly and fearlessly carry out his duties."[128] The Constitution "vests in him sweeping powers and duties" and the Constitution anticipated that he must be able to "exercise those powers forcefully."[129]

[125] See, e.g., The Federalist No. 41, supra note 115, at 195–98, 200–02 (James Madison); The Federalist No. 42, supra note 115, at 202 (James Madison); The Federalist No. 67, supra note 115, at 328 (Alexander Hamilton); The Federalist No. 69, supra note 115, at 335–38 (Alexander Hamilton); The Federalist No. 80, supra note 115, at 388 (Alexander Hamilton); The Federalist No. 81, supra note 115, at 392 (Alexander Hamilton); The Federalist No. 82, supra note 115, at 401–02 (Alexander Hamilton).

[126] See, e.g., The Federalist No. 67, supra note 115, at 328–29 (Alexander Hamilton); The Federalist No. 69, supra note 115, at 335–38 (Alexander Hamilton); The Federalist No. 70, supra note 115, at 346–47 (Alexander Hamilton); The Federalist No. 74, supra note 115, at 362 (Alexander Hamilton); The Federalist No. 75, supra note 115, at 364–65 (Alexander Hamilton); The Federalist No. 76, supra note 115, at 368–69 (Alexander Hamilton); The Federalist No. 77, supra note 115, at 373–74 (Alexander Hamilton).

[127] See The Federalist No. 69, supra note 115, at 335 (Alexander Hamilton); The Federalist No. 70, supra note 115, at 342 (Alexander Hamilton); The Federalist No. 77, supra note 115, at 376 (Alexander Hamilton).

[128] *Trump*, 144 S. Ct. at 2329, 2331, 2346 (first quoting Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment); and then quoting Nixon v. Fitzgerald, 457 U.S. 731, 745 (1982)).

[129] Id. at 2346.

Boldness, fearlessness, and forcefulness are virtues, in moderation. But the presidency was not meant to be an instinctive, unflinching, and fearless juggernaut, heedlessly crushing all in its wake. The "energetic executive" was also meant to think and introspect and, ultimately, be held responsible. In the very Paper promoting an energetic executive, Federalist No. 70, Hamilton also observed that in America "*every* magistrate ought to be personally responsible for his behaviour in office."[130] That was a promise of *official* responsibility. Moreover, that personal accountability extended to the highest office, for the Constitution "intended . . . [the] necessary responsibility of the chief magistrate himself."[131] Lavishing attention on and attaching great weight to one desideratum—energy—and wholly ignoring another—responsibility—is no way to argue from constitutional structure.

Elsewhere, Hamilton said that the President could be impeached and prosecuted for his offenses, never suggesting that official offenses were off limits.[132] Hamilton stated: "In this delicate and important circumstance . . . [of] personal responsibility, the President of confederated America would stand upon no better ground than a Governor of New-York, and upon worse ground than the Governors of Virginia and Delaware."[133] His statement is worth unpacking. First, in those two states, impeachment paralleled the British system, meaning that impeachment was a means of criminally punishing sitting officials.[134] In light of this fact, Hamilton was pointing out that these governors had a narrow and temporary criminal immunity, namely immunity from impeachment by the legislature while in office. Second, and more importantly, he was saying that the President had *less* immunity than these governors. His comparison arguably implies that presidents could be prosecuted while *in office*, not to mention after they depart office.[135]

[130] The Federalist No. 70, supra note 115, at 346 (Alexander Hamilton) (emphasis added).

[131] Id.

[132] See The Federalist No. 65, supra note 115, at 317 (Alexander Hamilton) (detailing that the Senate's impeachment jurisdiction "are those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust," and then later indicating that the President could be impeached); The Federalist No. 69, supra note 115, at 335 (Alexander Hamilton).

[133] The Federalist No. 69, supra note 115, at 335 (Alexander Hamilton).

[134] Prakash, Prosecuting and Punishing Our Presidents, supra note 35, at 69–70.

[135] I made this point in Prakash, Prosecuting and Punishing Our Presidents, supra note 35, at 69–70. The Court majority not only ignored the intertextual distinctions between the two executive-protective constitutions, Delaware and Virginia, and the less protective U.S. Constitution, but they also may have been unaware of Hamilton's reference to this difference.

Finally, I am aware of no one who supposed that, outside of Delaware and Virginia, any state chief executive had criminal immunity, partial or otherwise. Surely, this apparent pattern of state executive amenability to criminal prosecutions matters in thinking about how to decipher the structure of the federal Constitution.

Further, the Court failed to engage with what Hamilton actually said about the building blocks of an energetic executive: "The ingredients, which constitute energy in the executive, are first unity, secondly duration, thirdly an adequate provision for its support, fourthly competent powers."[136] The "adequate provision for its support," said Hamilton, was the guaranteed salary.[137] Congress could not subvert the President's judgment by withholding a salary should he disappoint or anger Congress. Hamilton never suggested any other "adequate provision." He did not discuss evidentiary privileges or any criminal immunity. On the contrary, he said that a safe executive requires "due responsibility" on its part.[138] And that responsibility rests on its amenability to impeachment and prosecution. And remember Hamilton said that the presidency had less immunity—was more personally responsible—than the Delaware and Virginia governors.[139]

Hamilton's statement suggests that the Constitution marries ample power with meaningful responsibility—an accountability that extends to the possibility of prosecution for official acts. That is what he said in Federalist No. 70, after all. That is what he declared elsewhere. There is no hint from Hamilton that some presidential acts are shielded by any sort of prosecutorial immunity.

Turning to more relevant signals of structure, what do they suggest? The place to start is with what the Constitution actually says about privileges and immunities. Judges have a useful privilege—they must have a salary and cannot have it decreased.[140] Hence, they will not feel the need to bow to Congress to secure a salary. Relatedly, presidents

[136] The Federalist No. 70, supra note 115, at 342 (Alexander Hamilton).

[137] See The Federalist No. 73, supra note 115, at 356–57 (Alexander Hamilton) ("The Legislature on the appointment of a President is once for all to declare what shall be the compensation for his services during the time for which he shall have been elected. This done, they will have no power to alter it either by increase or diminution, till a new period of service by a new election commences.").

[138] The Federalist No. 70, supra note 115, at 342 (Alexander Hamilton).

[139] See The Federalist No. 69, supra note 115, at 335 (Alexander Hamilton).

[140] See U.S. Const. art. III, § 1 ("The Judges . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

cannot be swayed by potential decreases or increases in their salary, which is also guaranteed.[141] In contrast, Senators and Representatives have a broader array of shields and safeguards. They are entitled to salaries from Congress.[142] They enjoy prosecutorial immunity for what they say on the floor. They have a limited arrest immunity when in session and when they are going to or coming from Congress.[143] Clearly, they enjoy more privileges and immunities than do other branches.

Given this carefully crafted array of privileges and immunities, it is a mistake to infer still more immunities and privileges for the President. Unlike constitutional rights, there is no reason to suppose that these privileges and immunities are not meant to be exhaustive. There is no statement declaring that the enumeration of certain privileges and immunities in no way denies or disparages the existence of others.[144] Whereas individual rights are not exhaustively enumerated, there is a strong reason to suppose that privileges and immunities are.

Finally, there is one other vital and unassailable structural point that the Court wholly missed. The Constitution, and our practices, suppose that Congress provides the means of executing legislative, executive, and judicial powers. The Necessary and Proper Clause provides as much—Congress may "carry[] into Execution . . . all other Powers vested by this Constitution . . . ."[145] The implication is that Congress must supply the means of carrying executive powers into execution.[146]

The Founders keenly appreciated that the President would depend upon congressional legislation to help implement his Article II powers.[147] Relatedly, they understood that presidents lacked a constitutional right to all useful, or even absolutely necessary, means of executing their powers. Congress would supply the funds and create the officers and departments, notwithstanding the centrality of these means to the executive branch's operations.

[141] See id. art. II, § 1, cl. 7.
[142] See id. art. I, § 6, cl. 1.
[143] Id.
[144] But cf. id. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").
[145] Id. art. I, § 8, cl. 18.
[146] See William W. Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and the Federal Courts: A Comment on the Horizontal Effect of The Sweeping Clause, 40 Law & Contemp. Probs. 102, 108 (1976).
[147] See id.

Without ample funds, the President cannot meet his constitutional obligations or meaningfully exercise most of his executive powers. Congress controls the purse strings and determines the executive budget, deciding the funding for officers, departments, and various programs.[148] The President is only entitled to his salary,[149] not a minimum executive budget.[150]

The near-absolute congressional control of the fisc means that a President cannot raid the Treasury unilaterally to secure funds to execute his constitutional powers. Rather, every cent taken out of the Treasury must be pursuant to a legislative appropriation, for "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[151]

Many Founders recognized the bedrock principle that Congress would control the all-important purse.[152] Others emphasized the necessary implications for the President and other branches attempting to bypass the appropriations process. For example, James Wilson insisted that the Senate and President could not conspire to corrupt the judges they appointed by using the lure of money because the House was necessary to pass an appropriation.[153] Given the text, it is not surprising that legislative control of the purse strings was so well understood.

The dependency extended to personnel. Without the assistance of cabinet secretaries, and millions of others, the chief executive would be

[148] See U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

[149] See id. art. II, § 1, cl. 7.

[150] See Saikrishna B. Prakash, Fragmented Features of the Constitution's Unitary Executive, 45 Willamette L. Rev. 701, 703–04 (2009) (discussing the "civil list" annuity of the Crown and how the President lacks such an annuity under the Constitution).

[151] U.S. Const. art. I, § 9, cl. 7.

[152] See, e.g., The Federalist No. 78, supra note 115, at 378 (Alexander Hamilton) (discussing legislative control of the purse); The Federalist No. 58, supra note 115, at 284–85 (James Madison) (commenting on the House's central role over the purse); Oliver Ellsworth Defends the Taxing Power and Comments on Dual Sovereignties and Judicial Review (Jan. 7, 1788), *in* 1 The Debate on the Constitution 877, 877 (Bernard Bailyn ed., 1993) (remarks of Oliver Ellsworth) (observing that Congress has purse and sword, as must all governments); Robert R. Livingston, Melancton Smith, and John Jay Debate Aristocracy, Representation, and Corruption (June 23, 1788), *in* 2 The Debate on the Constitution, supra, at 776, 780–81 (Robert Livingston contending the same).

[153] James Wilson's Summation and Final Rebuttal (Dec. 11, 1787), *in* 1 The Debate on the Constitution, supra note 152, at 832, 852 (remarks of James Wilson) (debating at the Pennsylvania ratifying convention).

unable to exercise most executive powers. The President's power to execute the law is hollow without a bureaucracy to help take care that the laws are executed.[154] As George Washington recognized, this is not a task for one man alone.[155] One could examine other powers (like the pardon and the veto) and come to the same conclusion: The President requires executive assistants to help carry into execution his constitutional powers. Without such subordinates, the presidency is but a shadow of the office we recognize today.

Despite the absolute necessity of executive officers, the Necessary and Proper Clause suggests that Congress plays a crucial role in staffing the Executive.[156] Congress decides whether there will be an increase in the number of revenue agents to help the President enforce our tax laws. Congress resolves whether the Consumer Financial Protection Bureau will be headed by one official or by a multimember body. Congress determines if it should create the Defense Department and its officers to help the President defend the nation. The Constitution never requires the creation of an army or a navy, much less the massive military force we have today.

As with funds, the necessary implication is that the President cannot create offices on his whim. With but one exception,[157] that power is left

[154] See Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 593–94 (1994) (discussing the need for the President to have Congress-appointed executive officers to effectively execute the law).

[155] Letter from George Washington to the Acting Secretary for Foreign Affairs (June 8, 1789), *in* 30 The Writings of George Washington, 1788–1790, at 343, 343–44 (John C. Fitzpatrick ed., 1939) (observing that the President cannot perform all his tasks without executive assistants).

[156] See U.S. Const. art. I, § 8, cl. 18 (providing that the Congress shall "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"); see also Calabresi & Prakash, supra note 154, at 592–93 (discussing Congress's textual authority to create executive offices "[t]o help effectuate the President's 'executive Power' ").

[157] The exception is diplomats. See Saikrishna Bangalore Prakash, Imperial from the Beginning: The Constitution of the Original Executive 121–22 (2015) [hereinafter Prakash, Imperial from the Beginning]; U.S. Const. art. II, § 2, cl. 2 (stating that the President "shall appoint Ambassadors, other public Ministers and Consuls"); see also Ambassadors & Other Pub. Ministers of the U.S., 7 Op. Att'y Gen. 186, 186 (1855) ("Hence, the President has power by the Constitution to appoint diplomatic agents of the United States of any rank, at any place, and at any time, in his discretion, subject always to the constitutional conditions of relation to the Senate. The power to make such appointments is not derived from, and cannot be limited by, any act of Congress, except in so far as appropriations of money are necessary to provide means for defraying the expense of this as of any other business of the Government.").

to Congress under the Necessary and Proper Clause.[158] And even if the President could create offices, the chief executive generally cannot make unilateral appointments. The default rule is that the Senate must confirm all appointments.[159] Thus, the Constitution not only implicitly forbids the presidential creation of offices, but it also (largely) bars presidents from filling legislatively created offices.

Concerning funding and officers, the President could make incontrovertible arguments that expending funds and creating assistants are necessary and proper to carry into execution her constitutional authorities. She might even point out that the presidency was meant to wield its powers "boldly and fearlessly" and be "energetic."[160] Regardless, our President completely depends upon Congress for these means.[161] The President cannot resort to self-help to obtain such means

[158] Some in the Founding Era understood that the Sweeping Clause had a horizontal component. For instance, Alexander Hamilton commented on the ability of Congress to use the Necessary and Proper Clause to assist the President. See The Federalist No. 29, supra note 115, at 133 (Alexander Hamilton) ("It would be as absurd to doubt that a right to pass all laws *necessary* and *proper* to execute its declared powers would include that of requiring the assistance of the citizens to the officers who may be entrusted with the execution of those laws . . . ."). The Anti-Federalist Brutus observed that the interaction of the Necessary and Proper Clause and the judicial power would enable Congress to enact laws providing for the execution of a judgment against a state. See Brutus XIII (Feb. 21, 1788), *in* 2 The Debate on the Constitution, supra note 152, at 222, 225 ("I presume the last paragraph of the 8th section of article I, gives the Congress express power to pass any laws they may judge proper and necessary for carrying into execution the power vested in the judicial department.").

[159] U.S. Const. art. II, § 2, cl. 2 (stating that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law"). Acting together, however, both chambers may cede away the Senate's rights with respect to "inferior" officers. See id. ("[B]ut the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

[160] Trump v. United States, 144 S. Ct. 2312, 2329, 2346 (2024) (quoting Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring)).

[161] None of the above denies the President's unquestionable right to take personal steps to carry into execution his constitutional powers. The President retains the right to veto laws even if Congress does not provide legal assistance. See U.S. Const. art. I, § 7, cl. 2. The President may still pardon individuals. See id. art. II, § 2, cl. 1. He may even make assuredly feckless attempts to enforce federal law all by himself. The discussion above, however, relates to whether the President is entitled to legislation that helps carry into execution his constitutional powers and whether the President may resort to constitutional self-help in the absence of such legislation.

because Congress must judge when, and subject to what conditions, the President will receive funding and executive assistants.[162]

Given these constitutional realities, how can we suppose that the President has either an inherent or a penumbral right to a far less consequential criminal immunity? Unless there are powerful textual, structural, and historical arguments to the contrary, it should be the case that Congress not only controls the more essential means but the far more *marginal* means of execution as well.[163] It would be incongruous to conclude that though the President lacks an implied right to create or fund officers, he nonetheless enjoys an implied constitutional right to immunity from criminal prosecution. Just as in the case of funding and offices, Congress must act under the Necessary and Proper Clause before the President enjoys immunity from prosecution.[164] Until Congress acts, "the first magistrate of the United States" has the same privileges as "every person."[165] The special office comes with no special immunities.

C. The Modern Presidency

At times, the Court discussed not the presidency of the Founders, but what the presidency has become. Modern understandings of the presidency inform the Court's conception of the President's official powers and duties, for the *Trump* Court discussed a host of powers that have little relationship to the text or its original understanding. For example, the Court described the Vice President as an executive assistant to the President,[166] something only possible if one has a modern conception of the Vice President as an ally.[167] Likewise, the Court

[162] See id. art. I, § 8, cls. 1, 12–13, 18 (enumerating Congress's powers to tax and spend, raise an army and navy, and enact laws necessary and proper to execute its powers).

[163] Strictly speaking, this is not a "greater power includes the lesser power" argument. In particular, I am not asserting that funding and creating officers, etc., is a greater power that includes the ability to grant or withhold an executive privilege. I am merely claiming that, given Congress's almost complete control of the means of executing the President's Article II powers, we might be inclined to discount suggestions that the Constitution cedes a less important and more ancillary executive privilege.

[164] See U.S. Const. art. I, § 8, cl. 18.

[165] Debates in the Convention of the State of Pennsylvania, supra note 117, at 523.

[166] Trump v. United States, 144 S. Ct. 2312, 2336 (2024) ("As the President's second in command, the Vice President has historically performed important functions 'at the will and as the representative of the President.'" (quoting Participation of the Vice President in the Affs. of the Exec. Branch, 1 Supp. Op. O.L.C. 214, 220 (1961))).

[167] At the Founding, the Vice President was seen as a rival because the person with the second-most votes for President was chosen as Vice President. See U.S. Const. art. II, § 1,

discussed the President's "power" to speak to the American people,[168] something that better reflects the rise of technology, his modern status as party leader and policy innovator, and the reliance on state popular votes to select presidential electors. The Constitution's text no more endorses this power to speak to the American people than it does the Supreme Court's power to address the nation. The State of the Union Clause is not to the contrary, for it does not require a speech, nor does it require the President to address the nation. The Clause speaks of information sharing with *Congress* and not the American people.

In any event, if we are to consider what the presidency has become, as opposed to what it was, the arguments for the absence of criminal immunity remain strong. There is one justification for criminal immunity, namely the modern tendency and eagerness to attack presidents for political reasons.[169] Opponents are apt to harass them with innuendo, invective, and lawfare.[170] Such tactics decrease the standing of presidents

cl. 3 (providing that electors vote twice for two persons and that the person with the second greatest number of votes will be the Vice President). Even after the Twelfth Amendment reformed presidential and vice-presidential elections, requiring electors to vote separately for the two offices, the Vice President is neither subordinate, nor answerable to, the President. See U.S. Const. amend. XII. After all, the Vice President is not an executive officer, so any power to remove via the Article II Vesting Clause would not encompass the Vice President. The close connection between the two distinct offices is a function of politics and not law. If a Vice President ever disparaged the person and program of a President, the President could not formally sanction the Vice President. But the criticism might stymie the Vice President's efforts to become the President.

[168] *Trump*, 144 S. Ct. at 2339–40 ("The President possesses 'extraordinary power to speak to his fellow citizens and on their behalf.'" (quoting Trump v. Hawaii, 585 U.S. 667, 701 (2018))).

[169] See, e.g., Prakash, Prosecuting and Punishing Our Presidents, supra note 35, at 56–57 (highlighting various criminal accusations against Trump during his term); Christopher Cadelago & Eugene Daniels, Republicans Ramp Up Attacks on Biden on . . . Everything, Politico (June 28, 2021, 4:30 AM), https://www.politico.com/news/2021/06/28/spray-and-pray-biden-republicans-496660 [https://perma.cc/F6NY-GYLP] (discussing Republican strategy to attack President Biden); Myah Ward & Megan Messerly, Trump's Attacks Haven't Changed Since 2016. Democrats Are Trying a New Defense., Politico (Aug. 2, 2024, 5:00 AM), https://www.politico.com/news/2024/08/02/trump-harris-race-attacks-00172423 [https://perma.cc/LWM4-R2VN] (describing Democrat strategy to respond to Trump's attacks); Jared Mitovich, Harris Escalates Criticism of Trump, Calling Conviction 'Disqualifying,' Politico (June 8, 2024, 7:27 PM), https://www.politico.com/news/2024/06/08/kamala-harris-trump-conviction-00162403 [https://perma.cc/PC3D-DUU5] (quoting Vice President Harris's attacks on Trump); *Trump*, 144 S. Ct. at 2326 (noting that "[t]his case is the first criminal prosecution in our Nation's history of a former President for actions taken during his Presidency").

[170] See supra note 169.

and weaken their reelection chances. No one familiar with the modern office could deny that these points (slightly) favor immunity.

But on the other side of the balance is an array of arguments and practical realities that overwhelms it. The presidency has become far more powerful, in the sense that the panoply of powers it exercises extends far beyond the frontiers established at the Founding. Presidents can declare war, legislate via rulemaking, and wield unmatched power over the military and foreign affairs.[171] The vast expansion of presidential power suggests the need for a greater counterweight. Yet its most powerful rival, Congress, is now plagued by sclerosis and internal divisions. Indeed, a portion of Congress, consisting of co-partisans, views the incumbent as the leader of their political party; they are apt to support many presidential power grabs and legal stretches or perhaps stay silent.[172] Furthermore, modern presidents are now less attached to the Constitution, particularly to traditional or static conceptions of the presidential office.[173] Moreover, as the head of a political party and a seeker of a legacy and reelection, presidents feel a deep need to fulfill both their campaign agendas and party platforms.[174] This causes them to stretch and strain for greater unilateral authority, for Congress does not always oblige. Finally, a Senate conviction following a House impeachment is a phantom menace. Paradoxically, partisanship makes it easy to impeach, far easier than at any other time.[175] But partisanship makes it far harder to convict because

[171] See Saikrishna Bangalore Prakash, The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers 7, 50 (2020) [hereinafter Prakash, The Living Presidency] (listing acquired powers and detailing how "a modern president must be a law reformer and must exhibit the zeal, impulse, and energy of a crusader for renovation and transformation" instead of being "a law enforcer"); id. at 162 (noting that President Truman "concluded that he did not need Congress's approval for the Korean War"); Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 186–88 (1980). But cf. Prakash, Imperial from the Beginning, supra note 157, at 145–49 (presenting historical support for the proposition that the decision to wage war lay with Congress).

[172] See Prakash, The Living Presidency, supra note 171, at 82–84. See generally Lester G. Seligman, The Presidential Office and the President as Party Leader, 21 Law & Contemp. Probs. 724 (1956) (describing the modern President's increased role as a party leader).

[173] See Prakash, The Living Presidency, supra note 171, at 114–29.

[174] Id. at 50 ("[The President] must promote an ambitious policy agenda . . . . If candidates lack a laundry list of promises, they will get taken to the cleaners come election time.").

[175] See, e.g., Nicholas Fandos & Michael D. Shear, Trump Impeached for Abuse of Power and Obstruction of Congress, N.Y. Times (Feb. 10, 2021), https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html; Nicholas Fandos, Trump Impeached for Inciting Insurrection, N.Y. Times (Apr. 22, 2021), https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html; H.R. Res. 503, 118th Cong. (2023) (seeking to impeach President Biden).

of the two-thirds rule.[176] Hence the impeachment mechanism does little work in curbing the presidency; indeed, some presidents may come to welcome being impeached, as they can claim to be the victims of a partisan witch hunt.

If we consider what the modern presidency has become, the case for prosecutorial immunity of any sort is weaker than it was in the eighteenth century. Presidents are more apt to misuse their authority, to strain for greater power, and to evade constitutional mechanisms of accountability, such as impeachment. Presidential power has waxed and checks and balances on it have waned. If there was no immunity in the eighteenth century, and if the case for immunity is weaker in light of the modern, grasping presidency, there is little to be said for immunity now.

D. Case Law

The *Trump* Court's final argument for immunity rested on its case law.[177] Its cases certainly evince a desire for a powerful executive branch. They also reject the idea that privileges and immunities must be express.[178] Seeking to refute the structural inference above—that the enumeration of certain privileges and immunities casts doubt on the existence of others—the Court observed that its previous cases rejected that argument.[179]

Yet the presidency does not have a criminal law immunity merely because the Court has found lesser immunity and privileges in other contexts. Nothing the Court had said earlier could be read to suggest that the President had any criminal immunity for his official acts. This was a case of first impression. The Court also failed to consider whether its prior cases were correct. The Court often considers whether previous cases

[176] See U.S. Const. art. I, § 3, cl. 6 ("[N]o Person shall be convicted without the Concurrence of two thirds of the Members present.").

[177] Trump v. United States, 144 S. Ct. 2312, 2329–30 (2024) (first discussing Nixon v. Fitzgerald, 457 U.S. 731, 749–52 (1982); then discussing United States v. Burr, 25 F. Cas. 30, 34, 37 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,692d); and then discussing United States v. Nixon, 418 U.S. 683, 703, 706–08, 711 (1974)).

[178] Id. ("[W]e have recognized Presidential immunities and privileges 'rooted in the constitutional tradition of the separation of powers and supported by our history.'" (quoting *Fitzgerald*, 457 U.S. at 749)).

[179] Id. at 2344 ("[A] specific textual basis has not been considered a prerequisite to the recognition of immunity." (alteration in original) (quoting *Fitzgerald*, 457 U.S. at 750 n.31)).

were mistaken, for if it concludes that they were mistaken, it generally will not compound the error by extending the misbegotten line of cases.[180]

The Court also failed to grapple with what those cases said and did. To begin with, the Court gave insufficient weight to the government's interest in criminal prosecutions. The Court admitted, in a cursory fashion, that the government's interest in prosecuting crimes is stronger than the private interest in bringing damages actions.[181] It likewise said that the interest is higher than when the government merely seeks evidence of wrongdoing from the Executive.[182] In previous cases, the interest in vindicating the criminal law—"the fair administration of criminal justice"—was sufficient to trump executive privilege.[183] Here, however, the need to deter and punish criminality on the part of the President was outweighed by the need to avoid chilling the President's decision-making.[184]

Furthermore, the Court wholly misread *Nixon v. Fitzgerald*.[185] The *Trump* Court said that the case rendered the President immune from damages actions for his official acts.[186] But that is wrong. *Fitzgerald* said that the President enjoyed immunity from damages actions *where Congress had not sought to render him liable for such actions*.[187] In *Fitzgerald*, there was no statute authorizing damages actions against the President; instead, lower courts had inferred causes of action from the Constitution and two other statutes.[188] In a footnote, the *Fitzgerald* Court

[180] One example of this practice is *Flood v. Kuhn*, 407 U.S. 258, 273–80, 284 (1972), where the Supreme Court noted inconsistencies within its antitrust doctrine, as baseball fell outside the Sherman Act based on the Court's prior precedents in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922) and *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), while boxing, basketball, and football were all arguably indistinguishable from baseball yet fell within the scope of the Sherman Act. See *Flood*, 407 U.S. at 284 (noting that "any inconsistency" between professional sporting leagues "is to be remedied by the Congress and not by this Court").

[181] *Trump*, 144 S. Ct. at 2331 ("Federal criminal laws seek to redress 'a wrong to the public' as a whole, not just 'a wrong to the individual.' There is therefore a compelling 'public interest in fair and effective law enforcement.'" (first quoting Huntington v. Attrill, 146 U.S. 657, 668 (1892); and then quoting Trump v. Vance, 140 S. Ct. 2412, 2430 (2020))).

[182] Id.

[183] United States v. Nixon, 418 U.S. 683, 713 (1974).

[184] See *Trump*, 144 S. Ct. at 2331 ("Potential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decisionmaking than the potential payment of civil damages.").

[185] 457 U.S. 731 (1982).

[186] *Trump*, 144 S. Ct. at 2329 (quoting *Fitzgerald*, 457 U.S. at 749).

[187] *Fitzgerald*, 457 U.S. at 748 n.27.

[188] Id.

expressly reserved the question of whether the President had immunity where Congress had explicitly authorized a cause of action.[189] That way of putting the point made it clear that the Court was not deciding whether the Constitution granted the President *absolute* immunity from damages actions arising out of his official acts.[190] All the Court decided was that the President enjoyed absolute immunity in a context where Congress had not sought to make the President liable for his official acts.

By reading this limit out of *Fitzgerald*, the Court portrayed the *Fitzgerald* immunity as far more consequential than it was. It then used that more sweeping (but mistaken) reading as a toehold for a broad expansion of immunities in *Trump*. Unlike in *Fitzgerald*, however, the question posed in *Trump* was more akin to the reserved question discussed in *Fitzgerald*'s footnote because here there were criminal statutes passed by Congress.[191] Hence, *Fitzgerald* had no bearing on the question of whether Congress could provide that a President may be prosecuted for his official acts.

* * *

The Court's case for presidential immunity flies in the face of text, structure, and history. Although *Trump* is not exactly inconsistent with its previous cases, those cases hardly compelled the creation of an additional, highly consequential immunity from prosecution. The Court is right that not every constitutional feature is to be found in the text.[192] It was correct when it said that the separation of powers is "carved" into the text.[193] But no one can possibly think that presidential privileges and immunities—particularly an immunity from prosecution—are similarly etched into the text. Whereas the separation of powers is immanent in the grants of powers to some branches and the conspicuous failure to grant those powers to others, extratextual privileges and immunities are not similarly situated. The grant of power to some and the implicit denial to others is what creates the separation of powers. Likewise, the grant of narrow and

[189] Id. ("[W]e need not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States.").

[190] Id.

[191] See 18 U.S.C. §§ 241, 371, 1512(c)(2), 1512(k); see also *Trump*, 144 S. Ct. at 2325 (noting charges under these four statutes). The Court could have denied that Congress meant to cover the presidency. But by eschewing statutory avoidance techniques, the Court faced the constitutional question head on.

[192] See *Trump*, 144 S. Ct. at 2344.

[193] Id.

peculiar privileges and immunities, with each branch's set of privileges being distinct, is what creates the inescapable sense that the President's express salary privilege is not silently accompanied by a host of implied privileges and immunities, including a more far-reaching immunity against criminal prosecution. If there are to be additional privileges and immunities for presidents, judges, and legislators, Congress must enact them into law.

III. LEGISLATIVE POWER OVER CONSTITUTIONAL TRANSGRESSIONS

Everything I have said so far signals that, other than a guaranteed salary, the President lacks privileges and immunities. The Constitution does not grant the presidency exemptions, textual or structural, from criminal law or civil law. But even in the absence of formal immunity, the presidency can be *protected* from the application of some laws.

How could the President be protected despite lacking any exemptive immunities? Where Congress lacks legislative power over some constitutional actions, there is something like a practical immunity. Imagine a counterfactual world where Congress cannot make any federal crimes. In that world, the President (along with everybody else) could be said to enjoy a (federal) criminal immunity. Likewise, if Congress cannot create damages actions, the President (and everyone else) would enjoy something like a (federal) immunity against damages actions. Call this type of protection, for lack of a better phrase, an "ersatz immunity." It is ersatz because it is not a genuine exemption.

A. The Case for a Narrow Ersatz Immunity

Does the President enjoy an ersatz immunity? As the above discussion perhaps makes clear, the answer to that question does not turn on Article II as much as it turns on Article I. Indeed, whatever Article II might say about the President, Article I might override it. Imagine that Article II declared that the President had "an immunity from the application of criminal law." Further suppose that Article I had a provision that said, "Notwithstanding any grant of powers, privileges, or immunities to the President, Congress may modify or abridge said powers, privileges, or immunities." The Article I provision would render all presidential powers, privileges, and immunities as default or defeasible, including the immunity formerly granted.

In my view, the President (and other constitutional actors) enjoys a limited ersatz immunity. As compared to the Court's discussion in *Trump*, the contours of that immunity are broader in some ways and narrower in other ways. Recall that the Court said that certain powers (e.g., recognition and pardon) were conclusive and preclusive and could not be the subject of criminal prosecution at all. Other powers were potentially subject to criminal prosecution, where the prosecution would not jeopardize the functioning of the presidency.

In my view, an ersatz immunity emerges from the *absence of congressional power*. The Necessary and Proper Clause, the power behind many federal crimes involving the use of governmental authority, has limits arising out of its very terms. Congress cannot make it a crime to pardon or veto. More precisely, Congress could not make the simple exercise of constitutional power, without more, a crime. Such a statute would not be "necessary and proper" for carrying into execution any federal power. In fact, any such act would serve to obstruct the exercise of federal powers and hence not be authorized by the Clause. Because such a law would lack a grounding in any other federal legislative power, Congress cannot enact it. Just as Congress cannot pass a law making it a crime for citizens to vote in House elections, so too Congress cannot pass a law imposing criminal penalties on the mere act of removal or the mere act of recognizing a foreign nation. In either case, Congress lacks subject matter authority to enact the criminal prohibition. So too for the other executive powers, including the appointment power and the treaty negotiation power. This aspect of my claim makes it broader than the Court's vision, for I think the absence of legislative power implicitly "protects" all the President's constitutional powers.

But my claim is narrower in that I see a role for Congress to play, even concerning powers the Court (and the principal dissent) believes are conclusive and preclusive. As I argue below, the Necessary and Proper Clause could be used to constrain the *ultra vires* use of an executive authority. For example, I believe the Constitution bars the use of constitutional powers for self-enrichment. If that is so, the President cannot pardon someone in return for a payment, meaning that the Pardon Clause does not authorize the action in the first instance. If that reading of the Constitution is correct, then under my view of the Necessary and Proper Clause, Congress can penalize the grant of a pardon in return for payment. Specifically, such a law would be necessary and proper to implement the Constitution. Likewise, if the Constitution bars the use of

constitutional powers to violate the separation of powers, Congress can use the Necessary and Proper Clause to penalize exercises of constitutional powers that transgress upon that separation.

The Court never paused to consider any of this. Instead, the Court's opinion is focused like a laser beam on its perception of the needs of the Executive. This single-mindedness led the Court to two errors. First, the Court never considered whether there are implicit limits on the uses of executive powers. Are certain pardons or vetoes unconstitutional? Obviously, the Constitution does not expressly say as much. But like the separation of powers, might these constraints be no less "carved"[194] into the Constitution? If the Constitution contains implied limits on the scope of executive powers, as I suppose it does, that conclusion would have implications for whether certain supposed pardons or recognition decisions can be subject to prosecution. Congress might have the authority to implement or buttress these implied constraints. More on these implied limits below.

Second, and just as important, the Court never pauses to consider the scope of congressional authority. Again, if the Constitution authorizes Congress to regulate all presidential powers, then the Court's opinion would be wrong because there simply would be no powers that were both conclusive *and* preclusive. A presidential power might be exclusive, in the sense that only presidents could wield it, but it would not be *preclusive* because that power would not bar congressional intrusion in some way. Without discussing congressional powers in any meaningful fashion, it is impossible to say that *any executive power is preclusive*.

The Court's discussion of congressional power is practically nonexistent. The statutes at issue were enacted by Congress and yet there is no discussion of why Congress might believe that it can regulate some exercises of a President's constitutional powers. Relatedly, the Court does not cite the Necessary and Proper Clause, which is the most likely source of any authority to regulate official conduct by constitutional officers. That Clause says that Congress may enact laws that are necessary and proper to carry into execution federal powers. Further, the Constitution, read holistically, implies that Congress can police the (sometimes) implicit constraints on federal power, including acts akin to bribery and treason. Surely the alleged source of any power to criminalize executive actions should be the subject of *some* consideration and thought,

[194] See id.

particularly when the entire case turns on the interplay of executive and congressional power. Without engaging with difficult questions of congressional authority, how could we possibly know that some powers are absolutely immune from congressional interference and others are presumptively immune?

Remarkably, the dissents do not engage with congressional power either. By essentially ignoring congressional power, the dissents played into the majority's hands, making the arguments on their turf. Compare the dissents in *Trump*, neither of which meaningfully discuss congressional power, with the discussions of congressional power in *Seila Law LLC v. CFPB*[195] and *Collins v. Yellen*.[196] *Trump v. United States* could be styled *The Case of the Missing Clause and the Missing Branch*.

B. Protecting the Constitution from Official Assaults

Let's turn to the central question: To what extent may Congress criminalize constitutional acts? I do not believe that Congress has generic power to regulate presidential powers because I do not suppose that the Necessary and Proper Clause, or any other provision, authorizes Congress to defease every presidential power. The grants of power are not defaults that Congress may depart from or supersede. Unlike Britain at the Founding, the American Constitution does not establish legislative supremacy over the allocation of powers or otherwise. Unlike many state constitutions at the Founding, the Constitution does not say that executive, judicial, or legislative powers may be regulated by ordinary law. This means that Congress cannot rewrite the separation of powers to create an allocation more to its liking.

But that does not mean that Congress is wholly impotent. In particular, I believe that Congress can police the constraints on each branch and that each branch faces implied constraints. To take but one example, federal judges have an implied duty to decide cases according to the law. Even though there is no Article III equivalent to the Faithful Execution Clause, Article III requires faithful execution, subject to Article III constraints. If a party made a legal argument about the meaning of a law that the court believed was sound, but the court nonetheless ignored the law, that court would have violated the Constitution. Some obligations are implicit

[195] 140 S. Ct. 2183 (2020).
[196] 141 S. Ct. 1761 (2021).

though unexpressed, and this particular obligation has the effect of regulating the judicial power to decide cases.

This example is just one of many constitutional obligations that are implicit. Below, I discuss other implicit constitutional duties and how statutes might seek to enforce those obligations. In particular, I address: (1) laws that criminalize violations of the separation of powers; (2) laws that prohibit police corruption and self-dealing; and (3) laws that help implement the constitutional powers of Congress. The first two groupings are similar, as they are instances of Congress attempting to carry into execution constitutional prohibitions, both express and implied. The last category is an example of Congress putting teeth behind its constitutional enactments to ensure that presidents and courts honor those laws. In all three cases, Congress enacts necessary and proper laws for implementing the powers of the federal government. As is obvious, Congress has the power to implement the Constitution, or as the Necessary and Proper Clause puts it, to "carry[] into Execution" all powers of the federal government.[197] This Clause allows Congress to criminalize wrongful exercises of powers.

1. Safeguarding the Separation of Powers

Can Congress implement the Constitution's rules? Congress's very first act was the Oath Act, a statute that prescribed a constitutional oath of support for legislators, judges, and executives, both federal and state.[198] While the Constitution requires these officers to take an "oath" to "support" the Constitution,[199] there is no specific congressional power to prescribe the oath's precise terms. Given the absence of express constitutional sanction, how did Congress enact this law? Specifically, what must have the members of the first Congress, and the first President, been thinking?

I think they supposed that Congress could implement the oath requirement of Article VI by fleshing out its details and by (modestly) adding to it. They perhaps believed that Congress could enact the Oath Act under the Necessary and Proper Clause. Congress could suppose that it was highly beneficial for officers, federal and state, to take a uniform

[197] U.S. Const. art. I, § 8, cl. 18.

[198] Act of June 1, 1789, ch. 1, 1 Stat. 23; The Oath Act of 1789—The First Act of the First Congress, Statutes & Stories (Dec. 27, 2017), https://www.statutesandstories.com/blog_html/the-oath-act-of-1789-the-first-act-of-the-first-congress/ [https://perma.cc/7KED-XE8A].

[199] U.S. Const. art. VI, cl. 3.

oath[200] and to specify who might administer it.[201] Congress could provide that executive and judicial officers would have to take the oath before assuming office.[202] The Constitution's Oath Clause[203] imposes a duty and Congress may insist that one must satisfy the duty before the exercise of federal and state powers.[204]

Congress's implementation of constitutional rules did not end with the first federal law. From time to time, early Congresses acted to prevent interference with the exercise of federal powers. The Logan Act polices individuals interfering with the proper exercise of foreign affairs authority.[205] The 1790 Crimes Act criminalized falsifying judicial records and writs.[206] The 1794 Neutrality Act safeguarded legislative power over war and executive authority to make peace treaties.[207] Each of these early acts sought to preserve the separation of powers in the sense that no individual or clique ought to be able to undermine, invade, or encroach upon the rightful authority of the three federal branches. A person or clique has no right to usurp legislative, executive, or judicial authority from those charged by "We the People" to exercise constitutional powers.

This congressional authority to protect the separation of powers extends to criminalizing *interbranch* encroachments. Interbranch intrusions damage the separation of powers because they are violations of the constitutional scheme. We have a few such statutes. The Antideficiency Act makes it a crime to expend or obligate funds without a congressional appropriation.[208] The Act seeks to safeguard Congress's monopoly on expenditures. Under the Constitution, Congress (and not the

[200] Act of June 1, 1789, ch. 1, §§ 1, 3–4, 1 Stat. 23, 23–24.

[201] Id. § 1 (stating that the Senate President and House Speaker must issue oaths to members); see also United States v. Hall, 131 U.S. 50, 53 (1889) (holding that public notaries could not administer an oath of office because Congress had not specifically authorized them to administer it); United States v. Morehead, 243 U.S. 607, 616–17 (1917) (noting that oaths administered by individuals with express authority from Congress are subject to penalties).

[202] Act of June 1, 1789, ch. 1, §§ 3–4, 1 Stat. 23, 23–24.

[203] U.S. Const. art. VI, cl. 3.

[204] There are, of course, limits to the oaths that Congress can prescribe. See Cole v. Richardson, 405 U.S. 676, 680–81 (1972) (prohibiting conditioning employment on an oath that impinges on constitutionally guaranteed rights).

[205] Act of Jan. 30, 1799, ch. 1, 1 Stat. 613 (codified at 18 U.S.C. § 953).

[206] Act of Apr. 30, 1790, ch. 9, § 14, 1 Stat. 112, 115.

[207] Act of June 5, 1794, ch. 50, §§ 5, 7–8, 1 Stat. 381, 384.

[208] 31 U.S.C. § 1341(a)(1)(A).

courts or the Executive) must decide not only the sources of federal funds[209] but also how best to deploy those monies for national purposes.[210]

The Antideficiency Act has ancient forebears. Section 8 of the Treasury Act of 1789 made it a crime for Treasury officials to "take . . . any emolument or gain for . . . transacting any business in the said department, other than what shall be allowed by law."[211] Among other things, this meant that officials could not misappropriate funds intended for the Treasury. This statute enforced an implicit but vital constitutional rule: all monies gathered by the government must go into the figurative treasury. Professor Kate Stith has called this idea the "Principle of the Public Fisc."[212] Without such an implicit rule, the Treasury Clause[213] has no bite. After all, if federal funds are never placed *in* the Treasury, they would not be subject to the rule that all funds in the Treasury may be withdrawn only under congressional appropriations.[214]

Because I believe that Congress has the power to police and protect the separation of powers, I suppose that Congress can create several other civil and criminal prohibitions designed to safeguard the Constitution's allocations of authority. For instance, Congress could enact an Anti-War Act, which would make it a crime for the Executive, or anyone else, to start wars with foreign nations without congressional declarations. We do not want powerful interests, within the government or otherwise, to foment wars or to use force against foreign nations. An Anti-War Act would have echoes in the 1794 Neutrality Act,[215] except this Act could make clear that it applies to all executive officers. Likewise, Congress could enact an Anti-Recess Appointments Abuse Act that enforced the constraints in the Appointments Clause as they relate to recess appointments, with a criminal prohibition on recess appointments that transgressed constitutional limitations.

[209] U.S. Const. art. I, § 9, cl. 7 (providing that "[n]o Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law").

[210] Id. § 8, cl. 1 (providing that Congress may spend "for the common Defence and general Welfare").

[211] Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67.

[212] Kate Stith, Congress' Power of the Purse, 97 Yale L.J. 1343, 1345 (1988).

[213] U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").

[214] Id.

[215] See Act of June 5, 1794, ch. 50, § 5, 1 Stat. 381, 384 (making it illegal for Americans to wage war against foreign nations with whom we are at peace).

Some might find such hypothetical statutes troubling because they criminalize executive behaviors, some of which may be remarkably common in the modern era. In mentioning these possibilities, I do not mean to endorse any one of them. I mean only to suggest possibilities. The constitutionality of such acts will turn on the underlying constitutional theories that these acts reflect and reify. These statutes would be constitutional only if Congress, in enacting such criminal laws, enforced *genuine* constitutional constraints on the Executive's conduct. If one supposes that presidents have the constitutional power to start wars, then an Anti-War Act that regulates presidential warmaking cannot be justified on the grounds that it merely helps carry into execution the Constitution's separation of powers.

Some policy concerns with criminalizing violations of the separation of powers can be met by reducing the severity of the sanction. While Antideficiency Act violations are punishable with jail time,[216] perhaps Congress will choose to make Anti-War Act violations merely punishable with a criminal fine. It may be that a finding of culpability is a strong deterrent, whatever the penalty. A President may wish to avoid an adverse judgment even when an insignificant fine is at stake because the disgrace might damage her reputation. Relatedly, Congress might judge that a civil fine is sufficient. Once we conclude that Congress may deploy the Necessary and Proper Clause to criminalize some actions that undermine the separation of powers, it follows that Congress can use the Clause to impose lesser means of deterring individuals, including civil fines and the like. Further, Congress can create qui tams to encourage private enforcement of civil fines, thereby virtually ensuring that private parties will be able to secure a judicial resolution of the underlying constitutional, statutory, and factual questions.

If a President's official acts may be criminalized (or civilly sanctioned), the same is true for federal judges. If judges were to usurp legislative power, that would be a violation of the separation of powers no less than a President who exercised the congressional war power. The Antideficiency Act applies to court personnel, perhaps including federal judges.[217] If an Article III judge expends funds without a lawful

[216] 31 U.S.C. § 1350.
[217] See id. § 1341 (explaining the Act's scope).

appropriation, she has arguably violated that Act no less than an executive officer would in the same situation.[218]

Similarly, if Congress can criminalize presidential encroachments on the separation of powers, then perhaps it can likewise criminalize certain transgressions by Senators or Representatives. Though the Antideficiency Act does not seem to apply to legislators,[219] Congress could extend it to the actions of legislators that take place off the floors of the chambers, say when an individual legislator tries to obligate federal funds.

The overarching point is that Congress has legislative power to preserve the Constitution's separation of powers, including via the enactment of prohibitions. How best to exercise that congressional power to preserve the constitutional separation of powers is a political question to be decided by the chambers and the incumbent President who will sign (or veto) any such bills.

2. Deterring Corruption

The Constitution's Preamble[220] suggests that the Constitution grants constitutional powers to be exercised for the benefit of the people of the United States. The Constitution was not "ordained and established" to enrich politicos. Some scholars have argued that the Constitution establishes something of a trust relationship, with officials obliged to act as trustees for the people, the nation, and the states.[221] When officers exercise their constitutional powers to advance their private ends—when they breach this fiduciary bond—they act contrary to the Constitution.

This is perhaps most clear for presidents, each of whom takes an oath requiring "faithful" execution of the office.[222] Faithfulness brings to mind a legal trust, where duties of care and loyalty come to bear. A trustee or agent is not faithful to her beneficiaries or principals when she pursues personal ends. When presidents advance their private aims as they wield their constitutional powers, they are not "faithfully executing" the presidency as the Constitution requires. Indeed, there would be little point

[218] As discussed in Part V, there is a question about how to read statutes that do not expressly regulate the actions of constitutional actors.

[219] See 31 U.S.C. § 1341(a)(1) (stating that the statute applies to "[a]n officer or employee of the United States Government").

[220] U.S. Const. pmbl.

[221] Gary Lawson & Guy Seidman, "A Great Power of Attorney": Understanding the Fiduciary Constitution 50–51 (2017); Robert G. Natelson, The Constitution and the Public Trust, 52 Buff. L. Rev. 1077, 1088–89 (2004).

[222] U.S. Const. art. II, § 1, cl. 8.

in demanding the *faithful* execution of a public office if the trust instrument (the Constitution) silently permitted the officer to single-mindedly pursue her selfish ends. There is no need to admonish people to faithfully advance *personal* interests. In the absence of moral or legal constraints, they will tend to do that anyway.

What is true for the presidency is no less true for other federal officials because the duty of faithfulness is implicit for all officials.[223] Every federal officer must act faithfully. No judge or legislator can execute her office as a means of advancing her narrow interest. Treating any federal post solely as a means of self-enrichment is contrary to the text and spirit of the Constitution.

This perspective helps explain why the Constitution execrates bribery.[224] The Constitution does not explicitly proscribe bribery or establish a criminal sanction. Yet the Constitution makes clear that bribery may lead to ouster from office.[225] If the Constitution permitted officers to use their high stations, elected or otherwise, to pursue their private ends, then it is not clear why bribery should be an impeachable offense. In the private sphere, using one's assets and position to further one's personal ends is perfectly permissible.

Under the Constitution, however, government service is meant to be different. A public office is not the officeholder's personal asset.[226] Again, public service is to be undertaken for the benefit of the "general welfare," however amorphous that concept may be and however contestable which actions genuinely further it. The Constitution makes bribery an impeachable offense because bribe-taking officials exploit their offices to advance selfish ends rather than serving as honest agents of the nation. Similar concerns apply to treason, which is also impeachable.[227] Officials aiding an enemy are not faithfully serving the United States but rather undermining it.

The point is generalizable. When legislators, executives, or judges exploit their positions to pursue private ends, they misuse their office and abuse the Constitution. Rather than "support[ing]" the Constitution,[228] they damage the Constitution and the government it creates.

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[223] Saikrishna Bangalore Prakash, Faithless Execution, 133 Harv. L. Rev. F. 94, 96 (2020).
[224] U.S. Const. art. II, § 4.
[225] Id. (listing bribery as a basis for impeachment).
[226] Taylor v. Beckham, 178 U.S. 548, 576–77 (1900).
[227] U.S. Const. art. II, § 4.
[228] Id. art. VI, cl. 3.

Whenever officials exercise their constitutional powers for unconstitutional reasons, at least one of two consequences is possible. On the one hand, we might say that the attempted exercise of constitutional power for improper reasons is void. For instance, when a facially neutral law that creates a disparate impact across the races is motivated by unconstitutional racial animus, the courts may declare the law in violation of equal protection principles, and thus unenforceable.[229] In that case, unconstitutional motivation may help render the supposed law a nullity. On the other hand, one might say that though the exercise of constitutional powers for wrongful reasons is unconstitutional, the exercises are nonetheless valid. For example, if a President pardons a criminal because he might later donate to her reelection, that is a constitutionally illegitimate reason for a pardon.[230] Nonetheless, some might suppose that the pardon is valid despite the improper motive.[231]

We do not need to resolve this matter, either on a macro level or on a clause-by-clause basis. What seems clear is that whatever one's views about the efficacy of certain acts motivated by constitutionally wrongful ends, the illegitimate motivations underlying the acts render those acts unconstitutional. Whether a corrupt pardon has any efficacy, a President's issuance of it violates the Constitution because, again, the pardon power is not the private tool of presidents, to be exercised in a way that advances their personal interests. Even if the recipient never pleads the pardon as a defense to a prosecution, a President's corrupt issuance of it is unconstitutional.

Congress can create pains and penalties to enforce this duty of faithfulness—the principle that government power is to be exercised for the public weal and not for private gain. Let's return to bribery. Again, the Constitution never makes bribery a crime. Nor is there an express power to criminalize bribery. Nonetheless, Congress can criminalize

[229] Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–66 (1977).

[230] This scenario recalls President Bill Clinton's midnight pardons of several individuals who might prove useful in a future Senate campaign for his wife, Hillary Clinton. See Nick Anderson, Hasidic Clemency Case Entangles Hillary Clinton, L.A. Times (Feb. 24, 2001, 12:00 AM), https://www.latimes.com/archives/la-xpm-2001-feb-24-mn-29756-story.html [https://perma.cc/DQ5N-JEU6]; Josh Gerstein, Clinton Pardon Records Offer Fuel for Hillary's Foes, Politico (Jan. 28, 2016, 4:11 PM), https://www.politico.com/story/2016/01/hillary-clinton-pardon-record-218331 [https://perma.cc/3H2L-AZFE].

[231] To say that the Constitution's text conveys the pardon power without very many express limits is not the same thing as saying that the President can pardon for any reason under the sun, including corrupt reasons. Again, the absence of express restrictions does not prove that the pardon power is not subject to implied constraints.

bribery because it is necessary and proper for a well-functioning federal government to prohibit certain corrupt bargains. Congress can act to ensure that officials do not wield their power for self-enrichment.

The original federal bribery statute criminalized any exchange of gifts or money for official acts, an exchange that is corrupt because the exploitation of public offices for private gain is constitutionally wrongful.[232] The modern statute expressly includes corruption as an element. "Whoever . . . being a public official . . . corruptly demands, seeks, receives, [or] accepts . . . anything of value . . . in return for being influenced in the performance of any official act" is guilty of the crime.[233] Both statutes bar certain activities that evince a corrupt, meaning wrongful, exercise of constitutional and statutory powers.

Much the same can be said for treason. Though the Constitution defines the offense at length,[234] it never makes treason a crime. I believe that the first Congress criminalized treason via the Necessary and Proper Clause.[235] Making treason a crime is necessary and proper to ensure that federal powers continue to be carried into execution. Failure to disincentivize and punish treason makes it more likely that federal powers will not be implemented because it increases the probability that rebels or invaders will defeat the lawful government and overthrow the Constitution.

I think Congress can punish the treasonable acts of federal officials, even when the underlying acts are official ones. Despite defining treason at length, the Constitution contains no hint that official acts, constitutional or otherwise, cannot be treasonous. It never says that treason consists of giving aid and comfort to the enemy, save for when one furnishes aid via the exercise of some constitutional power.[236] Indeed, since constitutional powers are often extremely potent (declaring war, commanding the armies, vetoing legislation), it would make little sense to exempt constitutional powers from the set of acts that might constitute giving aid and comfort to the enemy.

If a President conspired with foreign invaders to weaken the nation, that would be treason, even if she used her constitutional powers to do so.

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[232] Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46–47 (repealed 1790).

[233] 18 U.S.C. § 201(b)(2)(A).

[234] U.S. Const. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.").

[235] Act of Apr. 30, 1790, ch. 9, § 1, 1 Stat. 112, 112.

[236] U.S. Const. art. III, § 3, cl. 1.

While the Constitution does not authorize Congress to criminalize all military orders by the chief executive, an order that all military units must "stand down and hold your fire" and meekly watch as an invader surges into the United States could form the basis of a treason prosecution. The President might have given "[a]id and [c]omfort" to the enemy.[237] Likewise, if the President vetoes a bill meant to bolster the nation's defenses during wartime and does so to "[a]id" the enemy, he would have committed treason and, in my view, can be prosecuted.

Similar reasoning applies to other branches. Congress can expressly provide that the political acts of legislators can form the basis of a treason prosecution, at least when they occur off the floors of the legislative chambers.[238] Certainly, a legislator who gave aid and comfort to our enemies could be tried for treason no less than an ordinary citizen. Finally, a judge who issued judgments meant to hamstring the executive and legislative branches in order to aid a rebellion would have given aid to the enemy. The use of constitutional and statutory powers, by any constitutional actor, does not generate an impenetrable shield against the application of criminal law.

Treason and bribery are easy cases because many of us sense that the Constitution implicitly forbids both, even if there were no federal statutes barring either. The Impeachment Clause of Article II may suggest as much, seeing as it makes both impeachable offenses.[239] Again, an official violates the Constitution when he accepts a bribe or commits treason, without regard to whether a law makes either act a crime and without regard to whether he is ever impeached and removed following a Senate conviction. When we move beyond these acts, the questions about corrupt acts become a bit more challenging.

Consider obstruction of justice. Stripped down to its essentials, obstruction of justice consists of corruptly influencing an investigation, prosecution, or trial.[240] It is important to note two things about obstruction of justice, so conceived. To begin with, it is unconstitutional for officials to exercise their offices to corruptly influence an investigation,

[237] Id.

[238] The Speech or Debate Clause supplies immunity for certain statements. See id. art. I, § 6, cl. 1.

[239] Id. art. II, § 4.

[240] See, e.g., 18 U.S.C. § 1510; id. § 1503(a) ("Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States . . . .").

prosecution, or trial because, again, their constitutional powers are granted for *public* purposes. To take official action based on selfish reasons is to misuse those powers. Official acts driven by personal motives are corrupt because they pervert the exercise of governmental powers to serve narrow, private ends. The exercise of official powers for personal ends is akin to misappropriating funds or property for private enjoyment. The Constitution implicitly forbids both.

Because Congress can punish the pursuit of personal ends, it can make it a crime for officials to obstruct justice so long as there is an element requiring proof of corrupt motive. It can do so because legislators can reasonably conclude that criminalizing such obstruction is necessary and proper for carrying into execution federal powers, particularly Congress's power to legislate and the Executive's duty to faithfully execute the laws, including investigating and prosecuting crimes. Hence, contrary to what the Court said in *Trump*, Congress could make it illegal for the President to have certain discussions with Justice Department officials. While Congress cannot make mere presidential control or involvement a crime, it can make it a crime for presidents, judges, or legislators to corruptly influence an investigation, prosecution, trial, sentencing, and punishment.

Now let's move on to more adventurous hypotheticals. Ponder a statute that makes it a crime to issue a pardon for corrupt reasons. The Supreme Court has said that the pardon power "is not subject to legislative control. Congress can neither limit the effect of [the President's] pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."[241] The first two points seem true. Congress cannot limit the effect of a pardon because doing so would not seem to be necessary and proper to *implement* federal powers. Rather, it would be in *derogation* of executive powers. For the same reason, Congress cannot exclude any federal offenders from the reach of a pardon. But must the "prerogative of mercy" be left wholly unfettered? I think not, at least in one sense. Because presidents have no constitutional power to act for corrupt reasons, they have no power to pardon for corrupt motivations. Furthermore, if there are implicit constitutional limits on the pardon power, I believe that Congress can criminalize the grant of pardons in violations of those constraints because the criminal bar seems necessary and proper for the proper operation of federal powers.

[241] Ex parte Garland, 71 U.S. (4 Wall.) 333, 380 (1866).

Summing up, when scholars or pundits suggest that Congress cannot make it a crime for the President to pardon someone, they are right in a way.[242] Congress could not enact a law providing that "any President who pardons will, upon conviction for the same, be subject to imprisonment." Such a law is unconstitutional because Congress lacks a general power to regulate, impede, or withdraw that constitutional power and because a blanket bar on pardons is not necessary and proper to carry into execution any federal power. Rather than implementing federal powers, a law barring pardons would serve to obstruct the pardon power.

But should Congress enact a targeted law—one focused on corrupt motives—that law would be constitutional. *If applying the bribery or treason statutes to a President's official acts is constitutional*, then applying other statutes requiring proof of corrupt motive to the presidency would likewise be constitutional. In all such cases, the criminalization of official acts taken for corrupt purposes helps implement federal powers and advances the interest in a government *for the people* rather than a government *for the officials*.

If these arguments hold water, Congress could pass a statute called "The Obstruction of Legislation Law." The law would make it illegal to corruptly influence the passage of legislation, including by vetoing bills. It might pass a "Corrupt Vote Act" making it illegal to corruptly influence a congressional vote.[243] Similarly, Congress might enact a "Tainted Judgment Act," whereby judges could be jailed for issuing corrupt judgments, that is, judgments driven by personal motives. Finally, Congress might pass an "Anti-Corruption Act" that applies to *all* official acts of federal officers, even when those acts stem from the exercise of constitutional powers. The act would make it illegal for officials to act on

[242] Cf. Charlie Savage, Can Trump Pre-emptively Pardon Allies or Himself? Clemency Power, Explained, N.Y. Times (Jan. 20, 2021), https://www.nytimes.com/article/trump-pardons.html ("The Constitution does not create any explicit exception that invalidates pardons that were granted under dubious circumstances."); Jeff Neal, All the President's Pardons, Harvard L. Today (Dec. 1, 2020), https://today.law.harvard.edu/all-the-presidents-pardons [https://perma.cc/U5GA-6FPH] (recording statement of Professor Mark Tushnet that "[a]buses of the pardon power can be dealt with through public disapproval . . . and through impeachment").

[243] Cf. 18 U.S.C. § 201(b) (establishing criminal sanctions for an individual who "directly or indirectly . . . gives, offers or promises anything of value to any public official"). For instance, off the floor of Congress, a member of Congress may seek to influence another member's vote to advance the first member's private fortune. Whether there is an exchange of value (or even an attempt), the first member's lobbying is contrary to the Constitution when he seeks to corruptly influence the passage of legislation for his own benefit.

corrupt motives and thus might subsume (render redundant) some existing laws.

Some might blanch at these congressional possibilities, particularly because the entire inquiry turns on identifying the motivations of officials, a notoriously difficult undertaking. No one could deny that officeholders often have mixed motives. A chief executive may believe that some act is lawful, in the national interest, and serendipitously advances her private interests. A judge may suppose that her decision in a case reflects the true meaning of the law and coincidentally furthers her peculiar conception of justice or morality. In 1864, Abraham Lincoln gave Union soldiers generous leave to give them a chance to vote, knowing that most soldiers were likely to vote for him.[244] The capacity for conflating personal interests with the law is quite high, perhaps especially in our highest public servants. High offices perhaps come with a great capacity for self-delusion.

Of course, this problem of mixed or delusional motives is ubiquitous.[245] For instance, sometimes a legislature creates strict liability. It might be that there is a strict prohibition on the receipt of cash or property in exchange for official acts.[246] A subordinate executive officer can never receive money from a constituent even if he accepts it with the purest of motives. The officer cannot say in his defense that "I was planning on using the money to advance the long-term interests of the United States." This strict liability avoids questions of motive.

Other times, when faced with the problem of mixed motives, the legislature (or courts) draw upon an array of familiar tests. Andrew Verstein helpfully discusses the possibilities. Sometimes we impose or find liability or culpability only when the wrongful motive was the sole motive.[247] Sometimes, the impulse must be the primary motive.[248] A third situation supposes that a but-for motive is sufficient.[249] Finally,

[244] Josh Blackman, Trump Acts Like a Politician. That's Not an Impeachable Offense., N.Y. Times (Jan. 23, 2020), https://www.nytimes.com/2020/01/23/opinion/trump-impeachment-defense.html.

[245] See Andrew Verstein, The Jurisprudence of Mixed Motives, 127 Yale L.J. 1106, 1112 (2018) (categorizing "the law's many motive tests, rationales, and policies").

[246] 18 U.S.C. § 201(b)–(c).

[247] Verstein, supra note 245, at 1139–41.

[248] Id. at 1134–36.

[249] Id. at 1137–39.

sometimes if the impulse was merely a motivating factor, of whatever strength, that is sufficient for liability or culpability.[250]

Congress and the courts must decide how to handle mixed motives when it comes to corruption. Admittedly, these problems multiply the more that the law regulates corrupt exercises of power. Though the difficulties will increase, they are the familiar sort that one sees in all areas where motive matters. It is not a problem that should cast any doubt on whether Congress can legislate against corruption. As one might expect, Congress may handle corruption by drawing upon the array of possibilities, for members might suppose that standards should diverge in different contexts.

3. Carrying into Execution the Laws of Congress

Per the Constitution, Congress has considerable legislative powers, some of which are not express. Congress obviously can create post offices and post roads and may set up a postal delivery service.[251] Because it can create laws designed to deliver mail, it can make interference with those mails a federal crime.[252] Likewise, because it has the power to lay taxes, Congress can require tax collectors to keep and maintain records to ensure that there is no defalcation.[253] In all these situations, Congress has helped carry into execution the federal government's powers.

The more general principle is that when Congress has the power to regulate some activity, it can choose to attach criminal penalties for the failure to honor congressional rules related to the activity. Early laws reflect such understandings. Because Congress could limit commerce with the Indian tribes, it could attach sanctions to the violation of those limits.[254] Because Congress could impose punishments for certain offenses, it could criminalize the use of force to liberate convicts.[255]

These principles apply no less to acts that regulate the branches. If Congress can require the safeguarding and maintenance of presidential records, as the Supreme Court held in *Nixon v. Administrator of General*

[250] Id. at 1141–43, 1159 (defining a "motivating factor" as "Any Motive").

[251] U.S. Const. art. I, § 8, cl. 7.

[252] 18 U.S.C. § 1701; see also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819) (inferring from the implied power to carry mail from one post office to another "the right to punish those who steal letters from the post office, or rob the mail").

[253] 42 C.F.R. § 513.430(c) (2021) (requiring Most Favored Nations to maintain records for six years in case of "audit, evaluation, inspection, or investigation").

[254] See Indian Trade and Intercourse Act of 1790, ch. 33, § 3, 1 Stat. 137, 137–38.

[255] See Act of Apr. 30, 1790, ch. 9, § 23, 1 Stat. 112, 117.

Services,[256] it can impose criminal penalties on those who violate the requirements, including upon presidents who violate the Presidential Records Act. If, to honor the law of nations, Congress can safeguard foreign ambassadors and thereby prevent suits and prosecutions against them,[257] it can make it a crime to sue or prosecute an emissary. Finally, if Congress can require the Executive to transmit all international agreements to the Senate,[258] it can penalize failures to honor that duty.[259]

The constitutionality of the criminal penalty turns on the constitutionality of the underlying requirement or prohibition. If, consistent with the Constitution, Congress could enact a rule that pardons must be in writing because it supposed that such a condition would be useful,[260] it could make the violation of this rule a crime. Likewise, if Congress may impose anti-bias rules on the courts, it can penalize a judicial failure to adhere to such rules.[261] If, however, one reads the Constitution to say that Congress cannot require pardons to be in writing or impose anti-bias rules on federal judges, Congress obviously cannot pass criminal statutes meant to put teeth into what would be an unconstitutional rule of conduct for the other branches.

Because we know that Congress can divest presidents of appointment authority over inferior officers,[262] it can criminalize presidential acts that purport to appoint to such offices. The criminal prohibition helps enforce (carry into execution) a lawful exercise of Congress's constitutional discretion over the appointment of inferior officers. Likewise, Congress could penalize the President's obstinate refusal to grant a patent to an inventor because Congress (and not the President) has the patent power and can compel the issuance of a patent.[263] But because Congress likely

[256] 433 U.S. 425, 483 (1977).

[257] See Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a–254e.

[258] See Case-Zablocki Act of 1972, 1 U.S.C. § 112b(a).

[259] For a discussion of the failures of the existing regime, see Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis, 134 Harv. L. Rev. 629, 657–91 (2020).

[260] See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 356 (1819) (discussing how Congress can enact useful statutes).

[261] Although judges have a judicial immunity vis-à-vis private lawsuits brought against them, that does not absolve them of criminal responsibility for any acts, even when taken in their judicial capacity. See, e.g., United States v. Claiborne, 727 F.2d 842, 847–48 (9th Cir. 1984); United States v. Hastings, 681 F.2d 706, 710–11 (11th Cir. 1982); United States v. Isaacs, 493 F.2d 1124, 1140–44 (7th Cir. 1974).

[262] U.S. Const. art. II, § 2, cl. 2.

[263] Id. art. I, § 8, cl. 8.

cannot command the President to pardon an individual or group,[264] it cannot criminalize a President's unwillingness to pardon individuals identified in a congressional statute. Similarly, Congress could not criminalize a court's sincere decision that some individual was innocent of some crime, because Congress cannot pass a statute commanding a guilty verdict in a case.[265] Relatedly, because Congress cannot compel a court to render a judgment for a particular party,[266] it cannot penalize a court's failure to honor a statutory command to grant a particular judgment.

C. Chilling Effects and the Separation of Powers

Some have insisted that the criminalization of executive acts will disincentivize exercises of executive power. Some have argued that the application of the obstruction of justice statutes to the presidency will hobble a President's ability to supervise prosecutions and issue pardons.[267] For this reason, they have suggested that the application of the obstruction statutes to the President would be constitutionally problematic.[268] On this account, a chilling effect renders the statute unconstitutional, at least as applied to the President.[269]

The Court in *Trump* was fearful about the *in terrorem* effects of prosecutions of presidents where the *actus reus* is an official act. Presidents need to be fearless. But they would be fearful if their official acts, including exercises of constitutional powers, could be the subject of prosecutions.

Such arguments have their appeal. Yet if a law's chilling effect on exercises of executive power renders that law unconstitutional, as applied, we are in a quandary. After all, there is a chilling effect that arises from *any statute* that reaches the official acts of constitutional officers. As far as I am aware, no one denies that laws criminalizing bribery can be

[264] See Ex parte Garland, 71 U.S. (4 Wall.) 333, 380 (1866) (holding that the President's power of pardon is "not subject to legislative control").

[265] Any such statute would be a "Bill of Attainder." See U.S. Const. art. I, § 9, cl. 3.

[266] See, e.g., United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1871).

[267] See, e.g., Memorandum from Bill Barr to Rod Rosenstein, Deputy Att'y Gen. & Steven Engel, Assistant Att'y Gen., Mueller's "Obstruction" Theory 9 (June 8, 2018) [hereinafter Barr Memorandum], https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf [https://perma.cc/EMZ2-LTCG].

[268] Id.

[269] Id. at 10.

constitutionally applied to the President.[270] Yet a bribery statute may make presidents reluctant to take certain official acts that could be construed as aiding a supporter. A President may wish to sign a law that aids a prominent donor but may hesitate if she supposes that she (eventually) may be investigated, charged, and prosecuted for bribery. Likewise, to my knowledge, no one denies that a treason statute could apply to at least some of a President's official acts. Yet no one should doubt that this law could curb or influence the President's willingness to take certain actions.

The point is that any law that criminalizes certain official acts runs the risk of chilling constitutionally appropriate acts because presidents, judges, and legislators know that their partisan detractors will tend to see nefarious purposes behind discussions and actions. Legislators can be accused of bribery whenever they receive campaign donations. Presidents can be called a traitor whenever they negotiate with an enemy. But the fact that such accusations are possible and that such charges will have a chilling effect does not, by itself, render the criminal laws against bribery and treason unconstitutional as applied to constitutional acts. What is true for these two crimes is likewise true for other sorts of crimes and civil sanctions.

If the idea of a chilling effect is to play any role, it must be on the margins. Though Congress can apply bribery statutes to constitutional actors, perhaps it cannot water them down in a manner that makes bribery easy to prove because doing so would hamper, or even paralyze, those actors. Perhaps Congress could not declare that a legislator's receipt of any campaign contribution from a member of the public automatically constitutes bribery or attempted bribery. Likewise, Congress could not say that any dialogue with the enemy constitutes giving aid and comfort because the President must be able to negotiate treaties with nations. Of course, many negotiations in times of war give something like aid and

[270] The Court majority adverted to the possibility of a bribery prosecution in a footnote. Trump v. United States, 144 S. Ct. 2312, 2341 n.3 (2024). Justice Barrett discussed the notion in the text. Id. at 2354–55 (Barrett, J., concurring in part). For discussion within the executive branch, see, e.g., Memorandum from Laurence H. Silberman, Deputy Att'y Gen., to Richard T. Burress, Off. of the President, Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President Under the Twenty-Fifth Amendment to the Constitution 2, 5 (Aug. 28, 1974) (concluding that bribery laws apply to the President's official acts while also insisting that the conflict of interest rules should not apply to President because it would "disempower him from performing some of the functions prescribed [by] . . . the Constitution").

comfort to the enemy because they lay out the prospect of ending warfare or establishing a positive relationship, both of which may relieve, even hearten, the enemy.[271]

* * *

In laying out these many possibilities, many of which go beyond the current body of federal law, I do not endorse any of them. Rather, the goal is to tease out the scope of congressional power over the acts of constitutional officers. This is about elucidation and not advocacy.

Perhaps Congress will elect not to criminalize some or all of the actions mentioned in this Part. It may be that Congress focuses on a few and ignores the other permutations. Or Congress may decide that resorting to the criminal law is overkill and that civil sanctions are enough. Legislators may suppose that the moral opprobrium that stems from violating a criminal law is too chilling or unwarranted. That may be well and good, for even as this Article envisions somewhat broad congressional power over the wrongful conduct of federal officials, I do not downplay legitimate concerns about chilling the constitutional acts of such officers. A prudent Congress should think long and hard about applying a slew of new statutes to the actions of the President, federal judges, and members of Congress.

IV. CRIMINALIZING STATUTORY ACTS

Recall that in *Trump v. United States*, the Court held that the President had an absolute immunity that encompassed a constitutional core (e.g., pardons, removal, direction of the Department of Justice, recognition of foreign states). For other official acts, whether constitutional or statutory, the President had at least a presumptive immunity and perhaps an absolute immunity.[272] It appears that the Court does not quite know where it is going and wanted the lower courts to grapple with such issues. Perhaps in future cases, those courts might extend the absolute immunity to vetoes,

[271] For example, I do not believe that President James Madison committed treason by negotiating with the British less than a week after Congress declared war against Great Britain in 1812. See Donald R. Hickey, The War of 1812: A Forgotten Conflict 283–86 (1989). Nonetheless, no one should doubt that peace talks might have heartened the British, as such discussions might have suggested that the President's heart was not in the war and that he was perhaps desperate to make peace. For a general discussion of these negotiations and the federal power to make peace, see Avery C. Rasmussen & Saikrishna Bangalore Prakash, The Peace Powers: How to End a War, 170 U. Pa. L. Rev. 717, 740–43 (2022).

[272] *Trump*, 144 S. Ct. at 2331–32.

treaty-making, and appointments. Furthermore, the Court could be read as suggesting that there might be absolute immunity for some *statutory* actions.

Let's focus on a President's actions taken under statute, particularly the Court's claim that the Constitution mandates presumptive immunity for such acts. The Court ignored careful limits discussed in a previous case. Its public policy discussion downplayed the government's interests in prosecution. And the Court said remarkably little to bolster its conclusion that the Constitution granted a presumptive immunity to acts authorized by statute.

As noted earlier, *Nixon v. Fitzgerald* said that the President enjoyed immunity from damages actions *where Congress had not sought to render him liable for such actions*.[273] In a footnote, the *Fitzgerald* Court expressly reserved the question of whether the President had immunity where Congress had explicitly authorized a cause of action.[274] By ignoring this important limit, the Court mistakenly broadened its previous narrow grant of immunity.

In creating a presumptive immunity for statutory actions, the Court implicitly focused on public policy concerns, concluding that any liability may derange presidential decision-making.[275] To be sure, risk-averse presidents might be fearful when their fortunes or personal liberty is at stake. And, of course, criminal punishments are the most fearsome sanctions, especially where incarceration is a possibility.

Yet in the public policy calculus, the Court conflated the constitutional and statutory questions. Surely the statutory powers of the presidency are less significant than the office's constitutional powers, suggesting that it does not make sense to consider them jointly when deciding whether the President should enjoy a presumptive immunity. Considered in isolation, the case for a presumptive immunity for statutory powers seems weak when compared to the government's interest in vindicating the criminal law. Indeed, the Court acknowledged that the government's interest in prosecuting crimes is stronger than the private interests that undergird civil actions or the government's interest when it seeks mere evidence of wrongdoing.[276] In fact, in the Nixon tapes case, the interest in "the fair

[273] 457 U.S. 731, 748 n.27, 756.
[274] Id. at 748 n.27.
[275] *Trump*, 144 S. Ct. at 2331.
[276] Id.

administration of criminal justice"[277] trumped executive privilege. Yet in the case before it, the Court subordinated the weighty interest in deterring criminality in the exercise of statutory powers to the relatively insubstantial interest in avoiding the chilling of presidential decision-making under statutory powers. Had the Court taken the government's interest more seriously and treated the constitutional and statutory questions separately, the public policy considerations would have militated against any immunity for statutory actions.

Furthermore, as a matter of constitutional first principles, it makes more sense to suppose in cases of *statutory* authority that, because Congress has affirmatively conferred that power upon the President, it may also decide whether punishments are necessary to keep the President within the lawful bounds of the authority that it conveys. If Congress grants the President the power to expend funds "to build a bridge," and the President misappropriates those funds for personal use—say by siphoning them off to a Swiss bank account—why can Congress not provide for criminal sanctions without any presumption of immunity? The ordinary rule is that officers take statutory grants of power subject to the terms and conditions attached. Why would we read the Constitution as granting an implied presumptive immunity for the benefit of one officer, the President, for the potential misuse or abuse of statutory powers?

Obviously, if the Constitution declared that the President could not be put in jail or enjoyed presumptive immunity for official acts, there would be an express exemption to the ordinary rule of taking statutory grants subject to their conditions. But as discussed earlier, there is nothing in the Constitution conveying any immunity to the President, and hence there is no sound basis for a departure from the ordinary rule of responsible officers taking statutory authority subject to the terms attached by the grantor, Congress.

All in all, the Court's claim, that statutory conferrals of power come with a presumptive immunity, is an extraordinary assertion. I would say that it is not borne of a deep engagement with constitutional principles, including the separation of powers. Rather, I think the Court was too focused on its perception of the several prosecutions against Trump. Despite insisting that courts should not be focused on the needs of the

[277] United States v. Nixon, 418 U.S. 683, 713 (1974).

moment,[278] the Court seemed to fear that Trump was facing retributive and partisan prosecutions. Credible allegations of partisanship have been lodged against at least one prosecutor.[279] With that perception in mind, and a legitimate fear that the future portended a vicious cycle of retribution,[280] the Court chose to infer (manufacture) a broad principle of presumptive immunity.

V. INTERPRETING CRIMINAL LAWS

Though I have argued that Congress has constitutional authority, via the Necessary and Proper Clause, to criminalize official acts of constitutional actors, including presidents and judges, I do not imagine that Congress has done so in a thoroughgoing way. There are three reasons to avoid reading generic federal laws as if they applied to official acts: (1) statutes that principally focus on private conduct should not automatically be construed to apply to the acts of constitutional entities; (2) the canon of constitutional avoidance suggests that we should eschew readings of federal laws that require us to confront and answer constitutional questions; (3) the canon of presidential avoidance counsels that, out of respect for the presidency, we should not lightly conclude that broadly worded laws apply to the President's official acts. In making these three claims, I suppose that textualists[281] and intentionalists[282] have good reason to endorse them.

[278] *Trump*, 144 S. Ct. at 2347 (citing John Marshall, A Friend of the Constitution No. V, Alexandria Gazette (July 5, 1819), *reprinted in* John Marshall's Defense of *McCulloch v. Maryland* 184, 190–91 (Gerald Gunther ed., 1969)).

[279] See Nazzaro, supra note 83.

[280] *Trump*, 144 S. Ct. at 2346.

[281] See Antonin Scalia, Common-Law Courts in a Civil-Law System, *in* A Matter of Interpretation: Federal Courts and the Law 3, 23–29 (Amy Gutmann ed., 1997) (discussing the harms of reading statutes as "less or more than what they fairly say"); see also Caleb Nelson, Avoiding Constitutional Questions Versus Avoiding Unconstitutionality, 128 Harv. L. Rev. F. 331, 333–34 (2015) (noting textualists "favor principles of interpretation that will promote successful communication from the legislature to the courts").

[282] See Caleb Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 351–52 (2005) (noting that "intentionalists call upon courts to try to enforce the directives that members of the enacting legislature understood themselves to be adopting"); see also Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 Nw. U. L. Rev. 226, 232 (1988) ("[A] statutory obligation does not emanate from the mere words of the provision but from the act of legislation . . . . Legal obligations arise because we recognize law-making authority vested in certain human beings. It is to that exercise of human will in making the relevant law that we refer in statutory construction." (emphasis omitted) (footnote omitted)).

When a law overtly references a constitutional entity (say the President) or a power that is evidently presidential (say vetoes) or judicial (court orders), we know that Congress means for the law to cover the entity or those acts. In such contexts, we can proceed to consider the various constitutional questions the federal law raises.

But when a law does not expressly reference the presidency or judges, or a constitutional or statutory power peculiar to federal constitutional offices, there is a question of whether to read that law as covering these official acts. If a statute says "any person who commits" the offense can be punished, one might be tempted to quickly conclude that it covers the President's official acts. But the courts regularly and properly decline to give statutes what might seem their natural reading when doing so contradicts an inferred purpose or intent of Congress.[283] A statute that says, without more, that an official "may be removed from office only by the President"[284] should never be construed as precluding *Senate* removal upon an impeachment trial. The statute is best read to mean that no other *executive* official can remove the relevant officer, for one should not lightly read a law of Congress as if it constituted an attempt to constrain the impeachment powers of the Senate.

Likewise, a law that says "anyone jumping over the palisade surrounding the White House grounds shall be guilty of a felony"[285] probably should not be read to cover a sitting President who, as a lark, scales that fence. The statute is meant to keep snoops, interlopers, and even worse out*;* almost certainly, the law was not designed to suppress the fence-climbing frolics of chief executives.

The principle is generalizable. It is a mistake to casually read broad statutes as if they plainly covered the official acts of presidents, judges, and legislators. Indeed, sometimes generic statutes that apply to the public should not be read to apply to the official acts of our highest officials. The

[283] See, e.g., United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (footnote omitted) (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922))); see also Comm'r v. Sternberger's Est., 348 U.S. 187, 206 (1955) (Reed, J., dissenting) ("[I]n interpreting statutes when isolated provisions would produce results 'plainly at variance with the policy of the legislation as a whole,' we follow the purpose rather than the literal words." (quoting *Am. Trucking*, 310 U.S. at 543)).

[284] 50 U.S.C. § 3033(c)(4) (Supp. II 2015).

[285] Cf. 18 U.S.C. § 1752(c)(1)(A) (defining the White House or its grounds as "restricted buildings or grounds").

first Congress declared that "if any person or persons shall by force set at liberty, or rescue any person who shall be found guilty of treason, murder, or any other capital crime[s] . . . every person so offending, and being thereof convicted, shall suffer death."[286] But surely this statute did not apply to the President. For instance, if a President ordered his assistants, say U.S. marshals, to use force to free a pardoned prisoner because the warden refused to honor the pardon, the President would not have run afoul of the law. The context suggests that the law applies primarily to private citizens, and there is good reason to suppose that it did not apply to the President's exercise of official powers.

For similar reasons, we should be hesitant to read generic statutes criminalizing corruptly influencing criminal investigations as if they applied to official acts of federal personnel. Congress's generic obstruction of justice statute applies if someone attempts to corruptly influence an investigation or trial.[287] In passing these provisions, Congress likely had in mind ordinary citizens and not official acts. By the nature of their offices, prosecutors, presidents, and judges are in the business of influencing governmental investigations and prosecutions in the sense that they are the ones who conduct, supervise, and adjudicate inquiries and trials. Influencing investigations and trials is simply what *they are meant to do*. If we read a broadly worded obstruction statute to cover the official acts of such officers, as many have, the only question left in all such cases is whether the officers acted with a corrupt motive.

Of course, one can readily allege a nefarious motive for any official act. Of the prosecutor or the attorney general, one can allege a plan to run for higher office, say the Senate or the gubernatorial chair.[288] Regarding the judge, one can claim a desire for a more prestigious office, judicial or otherwise.[289] And of the President, one can assert that her involvement is meant to help her reelection campaign or to shower gratitude upon a generous donor. Given the ease of alleging corrupt motives, I would not

[286] Act of Apr. 30, 1790, ch. 9, § 23, 1 Stat. 112, 117.

[287] 18 U.S.C. § 1503(a). There are other obstruction statutes that are more particularized. See, e.g., id. § 1510.

[288] Cf. Neal Devins & Saikrishna Bangalore Prakash, Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend, 124 Yale L.J. 2100, 2144 (2015) (noting that state attorneys general are often referred to as "Aspiring Governor[s]").

[289] See Ryan C. Black & Ryan J. Owens, Courting the President: How Circuit Court Judges Alter Their Behavior for Promotion to the Supreme Court, 60 Am. J. Pol. Sci. 30, 32–33 (2016) (arguing that when a vacancy exists on the Supreme Court, judges are more likely to attempt to signal alignment with the presidential agenda).

lightly infer that Congress meant to subject every prosecutor, judge, and President to a potentially endless number of federal obstruction inquiries.

To be clear, I do not imagine that the Constitution bars Congress from applying the concept of obstruction of justice to the official acts of prosecutors, judges, and presidents. After all, the "corruptly" element would make such a law constitutional. Instead, my point is that it is doubtful that Congress *meant* to cover such officials because doing so would make it easy to allege that officials have violated the law whenever they "influenced" an investigation. A disgruntled citizen could always allege a corrupt motive, for as noted earlier no one doubts that some officers take some actions with at least an eye toward how it will affect them.[290]

Thus far, I have said nothing about the canon of constitutional avoidance.[291] The canon has played a role in questions about whether generic statutes apply to presidents.[292] The Office of Legal Counsel has adhered to a clear statement rule: "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."[293] The avoidance canon came up concerning whether the obstruction statutes should be read to apply to a President's official acts. Bill Barr, as a private citizen, said they should not.[294] Robert Mueller, the special counsel, concluded otherwise.[295]

Under the modern version of the constitutional avoidance canon, if a law is susceptible to more than one reasonable construction, courts should select a plausible interpretation that avoids raising constitutional

[290] Cf. Blackman, supra note 244 (observing that presidents act in ways that seem to advance their electoral interests and citing examples of Abraham Lincoln and Lyndon Johnson).

[291] For discussions of avoidance, see Neal Kumar Katyal & Thomas P. Schmidt, Active Avoidance: The Modern Supreme Court and Legal Change, 128 Harv. L. Rev. 2109, 2110–29 (2015); Adrian Vermeule, Saving Constructions, 85 Geo. L.J. 1945, 1949 (1997).

[292] See Application of 28 U.S.C. § 458 to Presidential Appointments of Fed. Judges, 19 Op. O.L.C. 350, 352 (1995).

[293] Id. at 351.

[294] See Barr Memorandum, supra note 267, at 4–8 (discussing whether interpreters should avoid reading statutes to apply to the President absent a "clear statement" to that effect).

[295] 2 Robert S. Mueller, III, Report on the Investigation into Russian Interference in the 2016 Presidential Election 169–72 (2019); see also Daniel J. Hemel & Eric A. Posner, The President Is Still Subject to Generally Applicable Criminal Laws: A Response to Barr and Goldsmith, Lawfare (Jan. 8, 2019, 10:00 AM), https://www.lawfaremedia.org/article/president-still-subject-generally-applicable-criminal-laws-response-barr-and-goldsmith [https://perma.cc/JV5W-MPDL] (arguing that presidential immunity from obstruction liability is inconsistent with the language of obstruction statutes).

questions.[296] Given this avoidance canon, it would seem that any criminal statute that could be read to apply to the constitutional acts of the President should not be so read unless that reading is unavoidable. This evades the constitutional questions explored in Part III.

To return to the obstruction statutes, one can read them as not applying to a President's official acts. One merely must assert that we can avoid constitutional questions if we construe such laws as not covering the official acts of constitutional officers, like judges and presidents. As the Supreme Court said in *Franklin v. Massachusetts*,[297] where the question was whether the Administrative Procedure Act ("APA") covered presidential actions, "[t]he President is not explicitly excluded from the APA's purview, but he is not explicitly included, either."[298] The same could be said for the obstruction statutes. Because these acts do not "explicitly" cover the official acts of presidents and judges, we should not construe them to apply to presidential and judicial acts because doing so raises constitutional questions. This would leave intact the commonsense view that obstruction laws apply to the private acts of presidents and judges.

There is a related (but narrower) canon, one worth exploring. In *Franklin*, the Court did not evade a *constitutional* question. It merely avoided the application of an APA abuse-of-discretion standard to presidential action. As the Court put it: "Out of respect for the separation of powers and the unique constitutional position of the President, ... [w]e 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."[299] Call this stance "presidential avoidance." If applied generally, presidential avoidance might suggest that courts ought to eschew reading a general law as if it encompassed a President's official acts, *even where the application of the law to the acts would not raise any sort of constitutional question*.

In response to citations to *Franklin v. Massachusetts*, some have argued that a canon of presidential avoidance might lead to the absurd result that federal bribery laws do not apply to presidents, for none of those laws mention the presidency explicitly.[300] I agree that bribery

[296] Edmond v. United States, 520 U.S. 651, 658 (1997).
[297] 505 U.S. 788 (1992).
[298] Id. at 800.
[299] Id. at 800–01.
[300] Hemel & Posner, supra note 295.

prohibitions ought to apply to presidents, both to their private and official acts. And I agree that existing bribery statutes[301] do apply to presidential acts. But if we take *Franklin* at face value, it may well be that the Supreme Court would not read existing bribery law to apply to a President's official acts out of respect for the presidency's unique constitutional status. This seems odd.

Perhaps the best way to make sense of *Franklin* is to conclude that presidential avoidance is not a hard-and-fast rule but is instead a factor to consider when construing laws that do not mention the presidency. So understood, perhaps the canon of presidential avoidance is not potent enough to avoid the application of a bribery statute, even if it is powerful enough to sidestep the application of the APA and generic obstruction of justice statutes. Respect for the "unique constitutional position" of the Executive only goes so far.[302] One might suppose that bribery laws are meant to apply to officials. After all, every act of bribery involves official action (or at least exchanges meant to yield official action). Yet one cannot say the same of laws criminalizing obstruction of justice. The vast majority of obstructionists are ordinary citizens, and they can satisfy the elements of the offense without any official involvement or connivance whatsoever. Given this context, it is harder to suppose that Congress meant its obstruction laws to apply to the official acts of prosecutors, presidents, and judges with the only question being whether their motives were corrupt.

In sum, we have sound reasons to avoid reading generic laws as if they covered presidential acts. As a matter of common sense, laws that predominantly focus on the conduct of private persons generally should not be read to cover judicial or presidential acts. Further, we ought to shun readings that raise constitutional questions when alternative readings are available. This would partially shield judges and presidents. Finally, with due regard for the presidency's importance, we should not casually conclude that generic laws apply to presidential acts.

Yet where a statute is tailored to apply to the President, because the law mentions the presidency or because the law expressly covers a power associated with the office, then the courts must confront the constitutional questions and eschew slippery reasoning to avoid the clear import of the law. The same would be true for rules and statutes that mention federal

[301] 18 U.S.C. § 201 (prohibiting "[b]ribery of public officials and witnesses"); id. § 211 (prohibiting "[a]cceptance or solicitation to obtain appointive public office").

[302] *Franklin*, 505 U.S. at 800.

judges or the distinct features of their job, say issuing injunctions or holding litigants in contempt of court.[303]

In between these extremes are the hard cases. When a criminal law clearly covers federal officialdom, the impulse to avoid reading it to cover presidential acts or judicial acts must be considered in conjunction with other factors related to the question of whether the law ought to be read to cover a constitutional actor's official acts. That sort of multifactor analysis yields no easy answers. Sometimes prosecutors and courts will read laws covering the official acts of federal personnel to cover presidential and judicial acts. Other times prosecutors and courts will regard laws as implicitly excluding the official acts of presidents and judges.[304] That is as it should be.

CONCLUSION

In its quest to foster a fearless executive, *Trump v. United States* went too far, for it conjured up immunities to protect the presidency from prosecutors. But though the Constitution creates an energetic executive, it does not constitute an unaccountable one. The Constitution's text and structure signal that presidents do not enjoy a host of implicit privileges and immunities. The Framers created a responsible executive and were correct when they observed that presidents could be prosecuted, for their official acts and otherwise.

Having said all this, I believe that constitutional actors enjoy a narrow ersatz immunity from criminal prosecution. When the Constitution grants a branch power, Congress cannot criminalize the simple exercise of such powers. This practical immunity arises not because constitutional actors enjoy immunity as such. Rather, it arises because Congress lacks legislative power to impose sanctions, criminal or otherwise, for the exercise of constitutional powers. Neither the Necessary and Proper Clause nor any other legislative power authorizes criminal penalties in this context.

Yet Congress can punish *wrongful* exercises of power. Constitutional offices—Representative, Senator, the presidency, and judgeships—come with powers. These powers come with limits, express and implied. To

[303] Fed. R. Civ. P. 65(a)(1) ("The court may issue a preliminary injunction . . . ."); 18 U.S.C. § 401 ("A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority . . . .").

[304] Cf. *Franklin*, 505 U.S. at 800–01 (concluding that although the APA covered governmental actors, it did not regulate the presidency).

punish or disincentivize wrongful exercises of constitutional powers, Congress can enact necessary and proper laws. In particular, Congress can act to protect the separation of powers, curb corruption, and ensure that its laws are carried into execution.

Despite my conclusion that Congress has some constitutional power to regulate constitutional actors, I would not read generic federal laws as if they reflected a desire on the part of federal lawmakers to reach the official acts of our constitutional actors. There are sound reasons of interpretation to eschew maximalist readings of federal law, ones that raise constitutional questions and ones that entangle federal officials in myriad investigations and potential prosecutions.

In furtherance of an intrepid, forceful, and unflinching executive, the Court ignored certain lessons of text, structure, and history. In time, the Court's fearless executive may trigger great fears in millions, for they will behold a regal office with vast powers coupled with diminished responsibility. Sometimes a little fear on the part of our presidents is a good thing.