

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP,)
)
) Petitioner,)
)
) v.) No. 23-939
)
) UNITED STATES,)
)
) Respondent.)

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DONALD J. TRUMP,)

Petitioner,)

v.) No. 23-939

UNITED STATES,)

Respondent.)

- - - - -

Washington, D.C.

Thursday, April 25, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

D. JOHN SAUER, ESQUIRE, St. Louis, Missouri; on behalf of the Petitioner.

MICHAEL R. DREEBEN, Counselor to the Special Counsel, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 23-939, Trump versus United States.

Mr. Sauer.

ORAL ARGUMENT OF D. JOHN SAUER

ON BEHALF OF THE PETITIONER

MR. SAUER: Mr. Chief Justice, and may it please the Court:

Without presidential immunity from criminal prosecution, there can be no presidency as we know it. For 234 years of American history, no president was ever prosecuted for his official acts. The Framers of our Constitution viewed an energetic executive as essential to securing liberty.

If a president can be charged, put on trial, and imprisoned for his most controversial decisions as soon as he leaves office, that looming threat will distort the president's decision-making precisely when bold and fearless action is most needed. Every current president will face de facto blackmail and extortion by his political rivals while he is still in

1 office.

2 The implications of the Court's
3 decision here extend far beyond the facts of
4 this case. Could President George W. Bush have
5 been sent to prison for obstructing an official
6 proceeding or allegedly lying to Congress to
7 induce war in Iraq? Could President Obama be
8 charged with murder for killing U.S. citizens
9 abroad by drone strike? Could President Biden
10 someday be charged with unlawfully inducing
11 immigrants to enter the country illegally for
12 his border policies?

13 The answer to all these questions is
14 no. Prosecuting the president for his official
15 acts is an innovation with no foothold in
16 history or tradition and incompatible with our
17 constitutional structure. The original meaning
18 of the Executive Vesting Clause, the Framers'
19 understanding and intent, an unbroken historical
20 tradition spanning 200 years, and policy
21 considerations rooted in the separation of
22 powers all counsel against it.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: Mr. Sauer, to your
25 last point, could you be more precise as to the

1 source of this immunity?

2 MR. SAUER: The source of the immunity
3 is principally rooted in the Executive Vesting
4 Clause of Article II, Section 1.

5 JUSTICE THOMAS: And how does that
6 happen?

7 MR. SAUER: That -- the source of it,
8 Justice Thomas, I think is, as you described in
9 your separate opinion in *Zivotofsky*, for
10 example, that the Executive Vesting Clause does
11 not include only executive powers laid out
12 explicitly therein but encompasses all the
13 powers that were originally understood to be
14 included therein.

15 And *Marbury* against Madison itself
16 provides strong evidence of this kind of
17 immunity, a broad principle of immunity that
18 protects the president's official acts from
19 scrutiny, direct -- sitting in judgment, so to
20 speak, of the Article III courts, that that
21 matches the original understanding of the
22 Executive --

23 JUSTICE THOMAS: So how --

24 MR. SAUER: -- Vesting Clause.

25 JUSTICE THOMAS: -- how exactly would

1 we determine what the -- what an official act
2 is?

3 MR. SAUER: I'd say -- I'd point the
4 Court to two cases for that. Obviously,
5 Fitzgerald against Nixon is the best guidance
6 that the Court gives where it -- of course, the
7 Court adopted the outer perimeter test, and this
8 Court engaged in analysis there that's very
9 instructive here, where it looked at the level
10 of specificity at which the acts are described,
11 in -- in -- in that case, a civil case. Here,
12 it would be the indictment. And --

13 CHIEF JUSTICE ROBERTS: Well, what if
14 you have -- let's say the official act is
15 appointing ambassadors, and the president
16 appoints a particular individual to a country,
17 but it's in exchange for a bribe. Somebody
18 says, I'll give you a million dollars if I'm
19 made the ambassador to whatever.

20 How do you analyze that?

21 MR. SAUER: That, I think, would fall
22 under this Court's discussion in Brewster, where
23 the Court held with respect to legislative acts
24 that bribery is not an official act, which also
25 matches the common law background.

1 So the way that this Court in Brewster
2 kind of sliced at the joint was to say accepting
3 the bribe and the agreement to accept the bribe
4 are not official acts. That's private conduct
5 --

6 CHIEF JUSTICE ROBERTS: Okay. It's
7 not --

8 MR. SAUER: -- where a subsequent
9 appointment would not be -- would be essentially
10 an unrestrictable power of this Court that
11 Congress couldn't directly regulate.

12 CHIEF JUSTICE ROBERTS: It's not --
13 accepting a bribe isn't an official act, but
14 appointing an ambassador is certainly within the
15 official responsibilities of the president.

16 So how could you -- how -- how does
17 your official acts or the official acts border,
18 boundary come into play when it's going to be
19 official, assuming that the president is
20 innocent, but the whole question is whether he's
21 going to be found innocent or guilty?

22 MR. SAUER: Again, I think Brewster
23 and Johnson do address that or very persuasively
24 at least in a slightly different context.
25 Brewster and Johnson say the indictment has to

1 be expunged of all the immune official acts, so
2 there has to be a determination what's official,
3 what's not official, and --

4 CHIEF JUSTICE ROBERTS: Well, you
5 expunge the official. You say, okay, we're
6 prosecuting you because you accepted a million
7 dollars. They're supposed to say -- not say
8 what it's for because the what's for part is
9 within the president's official duties?

10 MR. SAUER: There has to be, we would
11 say, an independent source of evidence for that.
12 And keep in mind that this indictment charges
13 what this Court has described as unrestrictable
14 powers of the president. So the premise, the
15 logical premise, of this indictment is that
16 Congress, by passing vague and general criminal
17 statutes, has purported to directly regulate the
18 president's exercise of things like the exercise
19 of the employment and removal power, things like
20 his ability to speak directly to the American
21 public, core exercises of his authority under
22 the Recommendations Clause to recommend to
23 Congress, members of Congress, the measures he
24 thinks necessary and expedient.

25 So you have a indictment in this case

1 that goes right to the heartland of the
2 president's powers, that alleges a whole series
3 of official acts and tries to tie them together
4 by saying, well, there's a private aim or a
5 private purpose in that case. And that's a
6 situation which, of course, could be alleged in
7 virtually any indictment.

8 JUSTICE SOTOMAYOR: Counsel, it can be
9 alleged, but it has to be proven. Malum in se
10 is a concept long viewed as appropriate in law,
11 that there are some things that are so
12 fundamentally evil that they have to be
13 protected against.

14 Now I think -- and -- and your answer
15 below, I'm going to give you a chance to say if
16 you stay by it. If the president decides that
17 his rival is a corrupt person and he orders the
18 military or orders someone to assassinate him,
19 is that within his official acts for which he
20 can get immunity?

21 MR. SAUER: It would depend on the
22 hypothetical. We can see that could well be an
23 official act.

24 JUSTICE SOTOMAYOR: It could, and why?
25 Because he's doing it for personal reasons.

1 He's not doing it, like President Obama is
2 alleged to have done it, to protect the country
3 from a terrorist. He's doing it for personal
4 gain. And isn't that the nature of the
5 allegations here, that he's not doing them --
6 doing these acts in furtherance of an official
7 responsibility; he's doing it for personal gain?

8 MR. SAUER: I -- I agree with that
9 characterization of the indictment. And that
10 confirms immunity because the characterization
11 is that there's a series of official acts that
12 were done for an unlawful or improper --

13 JUSTICE SOTOMAYOR: No, because --

14 MR. SAUER: -- purpose.

15 JUSTICE SOTOMAYOR: -- immunity says,
16 even if you did it for personal gain, we won't
17 hold you responsible. What do you -- how could
18 that be?

19 MR. SAUER: That's an extremely strong
20 doctrine in this Court's case law in cases like
21 Fitzgerald, the heartland, Johnson and supports
22 --

23 JUSTICE SOTOMAYOR: Well, we go back
24 to Justice Thomas's question, which was, where
25 does that come from?

1 There are amici here who tell us that
2 the Founders actually talked about whether to
3 grant immunity to the president. And, in fact,
4 they had state constitutions that granted some
5 criminal immunity to governors.

6 And yet they didn't take it up.
7 Instead, they find -- they pass an impeachment
8 clause that basically says you can't remove the
9 president from office except by a trial in the
10 Senate, but you can impeach him after. So -- or
11 you can impose criminal liability.

12 We would be creating a situation in
13 which we would be saying is -- this is what
14 you're asking us to say -- which is that a
15 president is entitled not to make a mistake but
16 more than that. A president is entitled for
17 total personal gain to use the trappings of his
18 office -- that's what you're trying to get us to
19 hold -- without facing criminal liability.

20 MR. SAUER: Your Honor, I would say
21 three things in response to that.

22 First, the doctrine that immunity does
23 not turn on the allegedly improper motivation or
24 purpose is something that this Court has
25 reaffirmed in at least nine or ten cases.

1 JUSTICE SOTOMAYOR: That's absolute
2 immunity. But qualified immunity does say that
3 whatever act you take has to be within what a
4 reasonable person would do. I'm having a hard
5 time thinking that creating false documents,
6 that submitting false documents, that ordering
7 the assassination of a rival, that accepting a
8 bribe, and countless other laws that could be
9 broken for personal gain, that anyone would say
10 that it would be reasonable for a president or
11 any public official to do that.

12 MR. SAUER: Your Honor, as this Court
13 said very persuasively in Fitzgerald, the
14 allegation that this particular act would be
15 done for an unlawful purpose or was unlawful
16 could be made in every case, and, therefore, if
17 that were the doctrine, that the allegation of
18 improper purpose is what deprives the objective
19 acts of their immunity, then the immunity would
20 have no purchase. And that's reflected in many
21 of the Court's cases.

22 JUSTICE SOTOMAYOR: So --

23 JUSTICE JACKSON: Isn't -- isn't the
24 work, though, of the improper motive at least in
25 the absolute immunity context to tell us what

1 are official acts and what are not? I mean, I
2 had understood that even in the -- first of all,
3 your ask is absolute immunity, isn't it? I
4 mean, that's --

5 MR. SAUER: That's our principal
6 position, yes.

7 JUSTICE JACKSON: -- that's your --
8 your position is you want the same kind of
9 doctrine that we've applied in other contexts
10 when we say an official has absolute immunity.

11 And my understanding is that when we
12 say that, we mean for their official acts. Is
13 that right?

14 MR. SAUER: Yes.

15 JUSTICE JACKSON: Okay. So any
16 official acts. But then, in that world, the
17 real decision-making from the Court's standpoint
18 is whether or not something is an official act
19 or not, correct?

20 MR. SAUER: That is an important
21 determination by all means.

22 JUSTICE JACKSON: I mean, that's the
23 determination in the absolute immunity world
24 because, if you determine that it's an official
25 act, then the principle is that you get immunity

1 for it, correct?

2 MR. SAUER: That is correct.

3 JUSTICE JACKSON: All right. So my
4 question -- and I think the Chief Justice may
5 have asked this at the beginning -- is how do
6 you determine what -- or maybe Justice Thomas --
7 how do you determine what is an official act?

8 And when we're talking about the kinds
9 of scenarios that Justice Sotomayor brought up,
10 one could say that when the president is using
11 the trappings of his office to achieve a
12 personal gain, then he's actually not acting
13 officially, even if the doctrine was absolute
14 immunity. So what do you say about that?

15 MR. SAUER: Two things in response to
16 that.

17 First, to the last point, that
18 allegation that this was really motivated by an
19 improper private purpose could be made in every
20 single case.

21 JUSTICE JACKSON: No, I understand
22 that, but -- but -- but it would have to be made
23 -- I'm -- I'm just trying to assess. Even if we
24 had the Doctrine of Absolute Immunity, that same
25 allegation and the facts related to it would

1 come in because the person would be arguing that
2 he was not acting in his official capacity. He
3 wasn't doing something official. He was doing
4 it personal, correct?

5 MR. SAUER: If he -- I agree, the --
6 the objective -- or I'm not sure I agree, but --
7 but the point I would make in response to that
8 is, in Fitzgerald against Nixon, this Court
9 emphasized that that would result in an
10 intrusive discussion or determination of the
11 president's personal motives for every official
12 act. And, again, this is not just in the case
13 of the presidency. It's for purposes of
14 governing.

15 JUSTICE JACKSON: All right. Can I
16 just ask you another -- another quick question
17 before my colleagues take it over here?

18 At the beginning of your analysis,
19 when you were giving your opening statements,
20 you were talking about, you know -- you -- you
21 suggested that the lack of immunity and the
22 possibility of prosecution in the presidential
23 context is like an innovation.

24 And I understood it to be the status
25 quo. I mean, I understood that every president

1 from the beginning of time essentially has
2 understood that there was a threat of
3 prosecution if for no other reason than the --
4 the Constitution suggests that they can be
5 prosecuted after impeachment, that, you know,
6 the Office of Legal Counsel has said forever
7 that presidents are amenable to a threat of
8 prosecution and they have continued to function
9 and do their jobs and do all the things that
10 presidents do.

11 So it seems to me that you are asking
12 now for a change in what the law is related to
13 immunity.

14 MR. SAUER: I would quote from what
15 Benjamin Franklin said at the Constitutional
16 Convention, which I think reflects best the
17 Founders' original understanding and intent
18 here, which is, at the Constitutional
19 Convention, Benjamin Franklin said: History
20 provides one example only of a chief magistrate
21 who is subject to public justice, criminal
22 prosecution. And everybody cried out against
23 that as a violation.

24 JUSTICE JACKSON: No, I understand.
25 But, since Benjamin Franklin, everybody has

1 thought, including the presidents who have held
2 the office, that they were taking this office
3 subject to potential criminal prosecution, no?

4 MR. SAUER: I don't -- I see the
5 opposite. I see all the evidence going the
6 other way. Marbury against Madison, Mississippi
7 against Johnson discussed this broad immunity
8 principle that naturally extends to the --

9 JUSTICE JACKSON: So what -- what was
10 up with the pardon -- what was up with the
11 pardon for President Nixon?

12 MR. SAUER: I think that --

13 JUSTICE JACKSON: I mean, if everybody
14 thought that presidents couldn't be prosecuted,
15 then what -- what was that about?

16 MR. SAUER: Well, he was under
17 investigation for both private and public
18 conduct at the time, official acts and private
19 conduct.

20 I think everyone has properly
21 understood that the president -- since, like,
22 President Grant's carriage-riding incident,
23 everyone has understood that the president could
24 be prosecuted at least for things like private
25 conduct.

1 JUSTICE GORSUCH: Counsel, on -- on --
2 on that score, you -- there does seem to be some
3 common ground between the -- you and your
4 colleague on the other side that no man's above
5 the law and that the president can be prosecuted
6 after he leaves office for his private conduct.

7 Is that right?

8 MR. SAUER: We agree with that.

9 JUSTICE GORSUCH: And then the
10 question becomes, as we've been exploring here
11 today a little bit, about how to segregate
12 private from official conduct that may or may
13 not enjoy some immunity, and we -- I'm sure
14 we're going to spend a lot of time exploring
15 that.

16 But the D.C. Circuit in *Blassingame*,
17 the chief judge there, joined by the panel,
18 expressed some views about how to segregate
19 private conduct for which no man is above the
20 law from official acts.

21 Do you have any thoughts about the
22 test that they came up with there?

23 MR. SAUER: Yes. We think, in the
24 main, that test, especially if it's understood
25 through the lens of Judge Katsas' separate

1 opinion, is a very persuasive test. It would be
2 a great source for this Court to rely on in
3 drawing this line. And it emphasizes the
4 breadth of that test.

5 It talks about how actions that are,
6 you know, plausibly connected to the president's
7 official duties are official acts. And it also
8 emphasizes that if it's a close case or it
9 appears there's considerations on the other
10 side, that also should be treated as immune.

11 Those are the -- the aspects of that
12 that we'd emphasize as potentially guiding the
13 Court's discretion.

14 JUSTICE GORSUCH: And that left open
15 in that case the possibility of further
16 proceedings and trial.

17 MR. SAUER: Exactly right. And -- and
18 that would be a very natural course for this
19 Court to take. In this place, the Court can and
20 should reverse the categorical holding of the
21 D.C. Circuit that there's no such thing as
22 official acts, especially when it comes to --

23 JUSTICE GORSUCH: But you'd agree
24 further proceedings would be required?

25 MR. SAUER: That is correct. There

1 would have to be -- and I would point the Court
2 to Anderson against Creighton, where the Court
3 said there would be kind of two stages of these
4 further proceedings. There's looking at the
5 indictment itself or, in that case, it was a --
6 you -- you know, a complaint, but look at the
7 charging document itself and see whether on the
8 face of it this is alleging official acts. And
9 if not or it can't be determined, then there
10 would be a factual proceeding.

11 And all of that under Mitchell against
12 Forsyth and so forth would have to occur before
13 any other proceedings in the District.

14 JUSTICE KAVANAUGH: Can you --

15 JUSTICE BARRETT: Counsel, speaking of
16 --

17 JUSTICE KAVANAUGH: -- you tell us --

18 JUSTICE ALITO: Mr. Sauer, you --

19 JUSTICE KAVANAUGH: -- what the -- go
20 ahead.

21 JUSTICE ALITO: Mr. Sauer, you began
22 by explaining why you believe that immunity from
23 criminal prosecution is essential for the proper
24 functioning of the presidency.

25 But my question is whether the very

1 robust form of immunity that you're advocating
2 is really necessary in order to achieve that
3 result. So just to take one possible
4 alternative, suppose the rule were that a former
5 president cannot be prosecuted for official acts
6 unless no plausible justification could be
7 imagined for what the president did, taking into
8 account history and legal precedent and the
9 information that was provided to the president
10 at the time when the act was taken.

11 Would that be sufficient? Or, if it
12 is insufficient, why would it be insufficient?

13 MR. SAUER: That might be a much
14 better rule than what emerged in the lower
15 courts here. We think it would be insufficient
16 because, again, that long line of cases talking
17 about using the president's motives and the
18 intrusive sort of consideration of the
19 president's motives as transforming acts to
20 official and unofficial would be -- would come
21 into play.

22 And, of course, once you can make that
23 allegation, all of a sudden you've opened the
24 door. You no longer have a per se clear
25 bright-line rule. You have a -- a determination

1 in every single case, a case by case.

2 JUSTICE ALITO: But what if it were
3 not -- what if it did not involve any subjective
4 element, it was purely objective? You would
5 look objectively at the various relevant
6 factors?

7 MR. SAUER: That sounds to me a lot
8 like Blassingame and especially viewed through
9 the lens of Judge Katsas' separate opinion, and
10 that may not be different than what we're
11 proposing to the Court today.

12 JUSTICE ALITO: Well, Blassingame had
13 to do with the difference between official
14 conduct and private conduct, right?

15 MR. SAUER: That's correct. I -- I
16 understood the Court to be asking that.

17 JUSTICE ALITO: No. This -- this
18 would apply -- and it's just a possibility. I
19 don't know whether it's a good idea or a bad
20 idea or whether it can be derived from the
21 structure of the Constitution or the Vesting
22 Clause or any other source. But this would be
23 applied in a purely objective -- on purely
24 objective grounds when the president invokes an
25 official power in taking the action that is at

1 issue?

2 MR. SAUER: Yes, I believe -- the
3 reason I think of Blassingame is because it
4 talks about an objective context-specific
5 determination to winnow out what's official and
6 what is purely private conduct, and, again, in a
7 -- with a strong degree of deference to what --

8 JUSTICE SOTOMAYOR: I -- I'm sorry.
9 If I understood Justice Alito, he's suggesting
10 not that. He's suggesting whether -- even if it
11 is an official act, whether you still grant
12 immunity if that act is not plausibly viewed as
13 within the realm of law, of -- he can correct me
14 if I'm wrong. He's not --

15 JUSTICE ALITO: No, that's -- that was
16 the question.

17 MR. SAUER: That, I think, would be a
18 superior rule than what -- than the categorical
19 denial that emerged in the trial court here. I
20 do think it would kind of be --

21 JUSTICE SOTOMAYOR: I'm not -- I'm not
22 quite sure why he used the word "plausible,"
23 because that seems to negate -- might as well
24 give absolute if you're saying plausible because
25 anybody could argue plausibility. We don't even

1 require plausible. We require reasonable in
2 qualified immunity. So --

3 JUSTICE ALITO: Well, I mean, one
4 might argue that it isn't plausibly legal to
5 order SEAL Team 6 -- and I -- I -- I -- I don't
6 want to slander SEAL Team 6 --

7 (Laughter.)

8 JUSTICE ALITO: -- because they're --
9 no, seriously, they're honorable. They're
10 honorable officers, and they are bound by the
11 Uniform Code of Military Justice not to obey
12 unlawful orders.

13 But no one -- I think one could say
14 it's not plausible that that is legal, that that
15 action would be legal. And -- and I'm sure
16 you've thought -- I've thought of lots of
17 hypotheticals, I'm sure you've thought of lots
18 of hypotheticals, where a president could say,
19 I'm using an official power, and yet the
20 president uses it in an absolutely outrageous
21 manner.

22 MR. SAUER: That, if it were an
23 objective determination, may well be a -- an
24 interesting approach to take in this case.

25 JUSTICE SOTOMAYOR: So apply it to the

1 allegations here. What is plausible about the
2 president insisting and creating a -- a
3 fraudulent slate of electoral candidates?
4 Assuming you accept the facts of the complaint
5 on their face, is that plausible that that would
6 be within his right to do?

7 MR. SAUER: Absolutely, Your Honor.
8 We have the historical precedent we cite in the
9 lower courts of President Grant sending federal
10 troops to Louisiana and Mississippi in 1876 to
11 make sure that the Republican electors got
12 certified in those two cases, which delivered
13 the election to Rutherford B. Hayes. The notion
14 that it's completely implausible I think just
15 can't be supported based on the face of this
16 indictment or even really --

17 JUSTICE SOTOMAYOR: Knowing that the
18 slate is fake? Knowing that the slate is fake,
19 that they weren't actually elected, that they
20 weren't certified by the state, he knows all
21 those things?

22 MR. SAUER: The indictment itself
23 alleges -- I dispute that characterization. The
24 -- the indictment affixes the word -- label to
25 the so-called fraudulent electors -- it affixes

1 the word "fraudulent." But that's a complete
2 mischaracterization. On the face of the
3 indictment, it appears that there was no deceit
4 about who had emerged from the relevant state
5 conventions, and this was being done as an
6 alternative basis.

7 But I want to address a more
8 higher-level point, a fundamental point, which
9 is that, as Justice Alito's question indicated,
10 there's a whole series of structural checks
11 other than criminal prosecution that are
12 designed to deter these kind of, you know,
13 outlandish scenarios or extraordinarily
14 obviously illegal things, and that's been viewed
15 in this Court's opinions going all the way back
16 to at least Martin against Mott.

17 JUSTICE KAVANAUGH: Where -- where do
18 you think the D.C. Circuit went wrong in how it
19 determined what was official versus what's
20 personal?

21 MR. SAUER: Well, I read -- I read the
22 opinion below in this particular case as
23 adopting a categorical view. It does not
24 matter, is the logic of their -- their opinion
25 because there is no immunity for official acts

1 and, therefore, you know, that's the end of the
2 story.

3 I don't really think they went wrong
4 in Blassingame in the civil context when they
5 engaged in the same determination with respect
6 to what's official and what isn't official.
7 There, we agree with most of what that opinion
8 said.

9 JUSTICE KAVANAUGH: And for some
10 official acts that are not within the Article II
11 exclusive power, okay, so official acts but not
12 within the Article II exclusive power, even for
13 those, I assume you would think that a clear
14 statement has to be required, a clear statement
15 in the statute covering the president, if the
16 president's official acts are going to be
17 criminalized?

18 MR. SAUER: Absolutely. Obviously,
19 the issue is, you know, at the highest possible
20 level when it comes to the unrestrictable powers
21 like, as in this indictment, the allegation
22 about the performance clause.

23 JUSTICE KAVANAUGH: Well, I'm assuming
24 the exclusive powers are walled off and can't be
25 prosecuted before -- there's a lot of official

1 powers that are not exclusive to the president
2 under his Article II authority, but for those, I
3 understood you to be saying, at a minimum, there
4 would need to be a clear statement in the
5 statute referencing the president so that the
6 president's on notice and can conduct himself or
7 herself accordingly.

8 MR. SAUER: That's absolutely correct,
9 and that would be consistent both with Franklin
10 and Public Citizen and cases -- a long series of
11 other clear statement rule cases.

12 JUSTICE JACKSON: Can I follow up on
13 that because I --

14 JUSTICE BARRETT: Can I ask you -- go
15 ahead.

16 JUSTICE JACKSON: Go ahead.

17 JUSTICE BARRETT: So you concede that
18 private acts don't get immunity?

19 MR. SAUER: We do.

20 JUSTICE BARRETT: Okay. So, in the
21 Special Counsel's brief on pages 46 and 47, he
22 urges us, even if we assume that there was --
23 even if we were to decide or assume that there
24 was some sort of immunity for official acts,
25 that there were sufficient private acts in the

1 indictment for the trial to go -- for the case
2 to go back and the trial to begin immediately.

3 And I want to know if you agree or
4 disagree about the characterization of these
5 acts as private. Petitioner turned to a private
6 attorney who was willing to spread knowingly
7 false claims of election fraud to spearhead his
8 challenges to the election results. Private?

9 MR. SAUER: As alleged. I mean, we
10 dispute the allegation, but --

11 JUSTICE BARRETT: Of course.

12 MR. SAUER: -- that sounds private to
13 me.

14 JUSTICE BARRETT: Sounds private?

15 Petitioner conspired with another
16 private attorney who caused the filing in court
17 of a verification signed by Petitioner that
18 contained false allegations to support a
19 challenge. Private?

20 MR. SAUER: That also sounds private.

21 JUSTICE BARRETT: Three private
22 actors, two attorneys, including those mentioned
23 above, and a political consultant helped
24 implement a plan to submit fraudulent slates of
25 presidential electors to obstruct the

1 certification proceeding, and Petitioner and a
2 co-conspirator attorney directed that effort.

3 MR. SAUER: You read it quickly. I
4 believe --

5 JUSTICE BARRETT: Yeah.

6 MR. SAUER: -- that's private. I
7 don't want to --

8 JUSTICE BARRETT: So those acts, you
9 would not dispute those were private, and you
10 wouldn't raise a claim that they were official?

11 MR. SAUER: As characterized. We
12 would say -- Your Honor, if I may?

13 CHIEF JUSTICE ROBERTS: Sure.

14 MR. SAUER: What we would say is
15 official is things like meeting with the
16 Department of Justice to deliberate about who's
17 going to be the acting attorney general of the
18 United States.

19 JUSTICE BARRETT: Sure.

20 MR. SAUER: Communicating with the
21 American public, communicating with Congress
22 about matters of enormous federal concern.

23 JUSTICE BARRETT: Thank you. Thank
24 you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 And what is the consequence in terms
3 of going forward with your acknowledgment that
4 those are private acts as opposed to official
5 acts?

6 MR. SAUER: If you look at the -- if
7 you look at the -- the indictment here, there's
8 a bunch of acts that we think are just clearly
9 official. There may be allegations that mostly
10 relate to what the government has described here
11 as private aim or private end. And the Court
12 should remand or -- or address itself but remand
13 for a Brewster-like determination, which is
14 what's official and what's private. The
15 official stuff has to be expunged completely
16 from the indictment before the case can go
17 forward, and there has to be a determination at
18 least on remand of what's official -- a
19 two-stage determination of what's official and
20 what's private.

21 CHIEF JUSTICE ROBERTS: Well, if you
22 expunge the official part from the indictment,
23 how do you -- I mean, that's like a -- a -- a
24 one-legged stool, right? I mean, giving
25 somebody money isn't bribery unless you get

1 something in exchange, and if what you get in
2 exchange is to become the ambassador to a
3 particular country, that is official, the
4 appointment. It's within the president's
5 prerogative. The unofficial part is I'm going
6 to get a million dollars for it.

7 So, if you say you have to expunge the
8 official part, how does that go forward?

9 MR. SAUER: In this particular
10 indictment, where we say virtually all the overt
11 conduct is official, we don't believe it would
12 be able to go forward. I mean, there could be a
13 case where it would, but if you look at -- even
14 the government's brief in this case divides up
15 the indictment into things that, other than the
16 electors allegations, don't really -- are --
17 they haven't disputed that they are official
18 acts. But what they do is say, well, we tie it
19 all together by characterizing it as done -- and
20 these are the allegations that the Court just
21 referred to -- by an improper private aim or
22 private end. Again, that's their words.

23 And that just runs loggerheads, you
24 know, dead-set against this Court's case law
25 saying you don't look at, with immunity

1 determinations, the -- the -- the motive --
2 improper motivation or purpose.

3 CHIEF JUSTICE ROBERTS: Thank you.
4 Justice Thomas?

5 JUSTICE THOMAS: Mr. Sauer, in
6 assessing the official acts of a president, do
7 you differentiate between the president acting
8 as president and the president acting as
9 candidate?

10 MR. SAUER: Yes, we do. And we don't
11 dispute essentially the Blassingame discussion
12 of that.

13 JUSTICE THOMAS: Okay. Now --

14 MR. SAUER: But, of course, that has
15 to be done by objective determinations, not by
16 looking at what was the purpose of what you did
17 this, and that's the most important point there.

18 JUSTICE THOMAS: Did you, in this
19 litigation, challenge the appointment of special
20 counsel?

21 MR. SAUER: Not directly. We have
22 done so in the Southern District of Florida
23 case, and we totally agree with the analysis
24 provided by Attorney General Meese and Attorney
25 General Mukasey. And -- and it points to a very

1 important issue here because one of their
2 arguments is, of course, that, you know, we
3 should have this presumption of regularity.
4 That runs into the reality that we have here an
5 extraordinary prosecutorial power being
6 exercised by someone who was never nominated by
7 the president or -- or -- or confirmed by the
8 Senate at any time.

9 So we agree with that position. We --
10 we hadn't raised it yet in this case when this
11 case went up on appeal.

12 CHIEF JUSTICE ROBERTS: Justice Alito?

13 JUSTICE ALITO: When you say that the
14 official acts should be expunged from the
15 indictment, that in itself would not achieve
16 very much unless evidence of those official acts
17 were precluded at trial.

18 So is that what you're saying, that
19 the prosecution should not be permitted at trial
20 to prove the official acts as part of the
21 conspiracies that are alleged?

22 MR. SAUER: Absolutely. And we think
23 that's just the clear implications of Brewster
24 and Johnson and their discussion of this in a
25 very analogous context.

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

4 JUSTICE SOTOMAYOR: I'm a little bit
5 confused by that. If you have a scheme to
6 defraud or a scheme to accept bribery, there's
7 evidence from which you can infer that scheme,
8 and one of it is that the appointment actually
9 happened. It's an official act.

10 You wouldn't expunge that as evidence.
11 You would instruct the jury that there's no
12 liability for the actual appointment, that the
13 liability is for accepting the bribe.

14 Similarly here, I don't think the
15 indictment is charging that the obstruction
16 occurred solely because of conversations with
17 the Justice Department. They're saying you look
18 at all of the private acts and you look in the
19 context of some of the public acts and you can
20 infer the intent, the private intent, from them.

21 So I'm not sure that I understand why
22 your problems couldn't be taken care of at trial
23 with an instruction if we believe -- if the
24 Court were to find -- I'm not even sure how they
25 could -- but if it were to find that some public

1 acts could not be the basis of criminal
2 liability.

3 MR. SAUER: I think the best thing I
4 can say to that is -- and I think this ties into
5 the Chief Justice's question about a one-legged
6 stool. Brewster and Johnson and subsequent
7 cases like Helstoski versus Meanor essentially
8 say that, that this is a one-legged stool
9 problem. It will be difficult for some of these
10 prosecutions to proceed. And that is the
11 implications of official immunity, which is
12 dictated in the Constitution here by the
13 Executive Vesting Clause.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 JUSTICE KAGAN: Can I continue on
16 in -- in Justice Barrett's vein a little bit and
17 ask you about some of the allegations of the
18 indictment and whether they're official acts or
19 not in your view.

20 So the defendant signed a verification
21 affirming false election fraud allegations made
22 on his behalf and a lawsuit filed in his name
23 against the Georgia government -- governor.

24 MR. SAUER: I don't think we've
25 disputed that that's official. I'm sorry, that

1 that is unofficial.

2 JUSTICE KAGAN: That that's
3 unofficial.

4 Same for the defendant called the
5 chairwoman of the Republican National Committee,
6 asked her to gather electors, and targeted
7 states falsely represented to her that such
8 electors' votes would be used only if ongoing
9 litigation in one of the states changed the
10 results in the defendant's favor.

11 MR. SAUER: We have taken the position
12 that that is official.

13 JUSTICE KAGAN: That's official?

14 MR. SAUER: Yes.

15 JUSTICE KAGAN: Why would that be
16 official?

17 MR. SAUER: Because the organization
18 of alternate slates of electors is based on, for
19 example, the historical example of President
20 Grant as something that was done pursuant to and
21 ancillary and preparatory to the exercise of the
22 core Recommendation Clause power.

23 So, when President Trump was --

24 JUSTICE KAGAN: Couldn't -- couldn't
25 he have taken this action just in the status of

1 a candidate?

2 MR. SAUER: The fact that he could
3 have done so doesn't demonstrate that he did do
4 so in this case. And based on the allegations,
5 we think it's clear he did not, that this was
6 done in an official capacity.

7 JUSTICE KAGAN: The defendant asked
8 the Arizona house speaker to call the
9 legislature into session to hold a hearing based
10 on their claims of election fraud.

11 MR. SAUER: Absolutely an official act
12 for the president to communicate with state
13 officials on a matter of enormous federal
14 interest and concern, attempting to defend the
15 -- the integrity of a federal election, to
16 communicate with state officials and urge them
17 to view what he views as their job, under state
18 law and federal law, that's an official act.

19 JUSTICE KAGAN: Well, attempting to
20 defend the integrity of the election, I mean,
21 that's the defense. The allegation is that he
22 was attempting to overthrow an election.

23 MR. SAUER: Essentially exactly right.
24 And neither allegation of what the purpose is
25 should make a determination -- should make a

1 difference as to whether it's immune. That is
2 extremely strong precedent from this Court.

3 JUSTICE KAGAN: Does it -- does it
4 strike you as odd that your understanding of
5 immunity goes way beyond what OLC has ever
6 claimed for a former president?

7 MR. SAUER: I view the OLC opinions
8 here as strongly supporting us because anytime a
9 congressional statute basically got anywhere
10 near touching the president's prerogatives,
11 they've said, oh, we're going to interpret the
12 statute narrowly to avoid that. So we have --

13 JUSTICE KAGAN: Well, that's a
14 different question. I mean, what OLC has always
15 said is that sitting presidents get immunity,
16 but former presidents? No.

17 Now there might be a different
18 argument made about whether a statute or whether
19 a statute as applied to particular conduct is --
20 is -- is properly available against the
21 president, but that's a very different argument
22 than the immunity claim that you're making here,
23 which OLC has definitively not supported.

24 MR. SAUER: I don't -- I don't know if
25 I'd put it that way. I don't recall an opinion

1 directly addressing it, but more fundamental to
2 us, Your Honor, is, in fact, the language of
3 cases like Marbury and statements like made by
4 Benjamin Franklin at the Constitutional
5 Convention, statements of George Washington
6 talking about the massive risk of factional
7 strife and how that could destroy the Republic
8 and erect a new government on the ruins of
9 public liberty.

10 That's what we rely on principally
11 here. I cite the OLC opinions because, of
12 course, what you see there is a very strong
13 trend that if there's any statute that might
14 trench in any way on the president's
15 prerogatives, which they -- they adopt -- they
16 interpret it to avoid that.

17 JUSTICE KAGAN: If a president sells
18 nuclear secrets to a foreign adversary, is that
19 immune?

20 MR. SAUER: That sounds like, similar
21 to the bribery example, likely not immune. Now,
22 if it's structured as an official act, he would
23 have to be impeached and convicted first
24 before --

25 JUSTICE KAGAN: What does that mean,

1 if it's structured as an official act?

2 MR. SAUER: Well, I don't know in the
3 hypothetical whether or not that would be an
4 official act. You'd probably have to have more
5 details to apply the Blassingame analysis or
6 even the Fitzgerald analysis that we've been
7 talking about.

8 JUSTICE KAGAN: How about if a
9 president orders the military to stage a coup?

10 MR. SAUER: I think that, as the Chief
11 Justice pointed out earlier, where there's a
12 whole series of, you know, sort of guidelines
13 against that, so to speak, like the UCMJ
14 prohibits the military from following a
15 plainly unlawful act, if one adopted Justice
16 Alito's test, that would fall outside.

17 Now, if one adopts, for example, the
18 Fitzgerald test that we advance, that might well
19 be an official act and he would have to be, as
20 I'll say in response to all these kinds of
21 hypotheticals, has to be impeached and convicted
22 before he can be criminally prosecuted.

23 But I emphasize to the Court that --

24 JUSTICE KAGAN: Well, he's gone.
25 Let's say this president who ordered the

1 military to stage a coup, he's no longer
2 president, he wasn't impeached, he couldn't be
3 impeached. But -- but he ordered the military
4 to stage a coup. And you're saying that's an
5 official act?

6 MR. SAUER: I think it would depend on
7 --

8 JUSTICE KAGAN: That's immune?

9 MR. SAUER: I think it would depend on
10 the circumstances whether it was an official
11 act. If it were an official act, again, he
12 would have to be impeached and convicted.

13 JUSTICE KAGAN: Well, what does that
14 mean, depend on the circumstances? He was the
15 president. He is the commander in chief. He
16 talks to his generals all the time. And he told
17 the generals: I don't feel like leaving office,
18 I want to stage a coup.

19 Is -- is -- is that immune?

20 MR. SAUER: If -- if it's an official
21 act, there needs to be impeachment and
22 conviction beforehand because the Framers viewed
23 the risk -- that -- that kind of very low risk
24 --

25 JUSTICE KAGAN: If it's an official

1 act, is it an official act?

2 MR. SAUER: If it's an official act,
3 it's impeaching --

4 JUSTICE KAGAN: Is it an official act?

5 MR. SAUER: On -- on the way you
6 described that hypothetical, it could well be.
7 I -- I just don't know. You'd have to -- again,
8 it's a fact-specific, context-specific
9 determination that it's contemplating.

10 JUSTICE KAGAN: That answer sounds to
11 me as though it's like, yeah, under my test,
12 it's an official act, but that sure sounds bad,
13 doesn't it?

14 MR. SAUER: Well, it certainly sounds
15 very bad, and that's why the Framers have -- and
16 that's why the Framers have a whole series of
17 structural checks that have successfully for the
18 last 234 years prevented that very kind of
19 extreme hypothetical.

20 And that is the wisdom of the Framers.
21 What they viewed as the risk that needed to be
22 guarded against was not the fact -- the notion
23 that the president might escape, you know,
24 criminal prosecution for something, you know,
25 sort of very, very unlikely in these unlikely

1 scenarios. They viewed much more likely and
2 much more destructive to the Republic the risk
3 of factional strife discussed by George
4 Washington --

5 JUSTICE KAGAN: The Framers did not
6 put an immunity clause into the Constitution.
7 They knew how to. There were immunity clauses
8 in some state constitutions. They knew how to
9 give legislative immunity. They didn't provide
10 immunity to the president.

11 And, you know, not so surprising, they
12 were reacting against a monarch who claimed to
13 be above the law. Wasn't the whole point that
14 the president was not a monarch and the
15 president was not supposed to be above the law?

16 MR. SAUER: I would say two things in
17 response to that. Immunity -- they did put an
18 immunity clause in in a sense. They put in the
19 Executive Vesting Clause, which was originally
20 understood to -- to adopt a broad immunity
21 principle that's set forth in the very broad
22 language of Marbury against Madison.

23 And also, they did discuss and
24 consider what would be the checks on the
25 presidency. And they did not say, oh, we need

1 to have criminal prosecution. Right there at
2 the Constitutional Convention, Benjamin Franklin
3 says, we don't have that. That's not an option.
4 Everybody cried out against that as
5 unconstitutional. The structural check we're
6 adopting is impeachment. And they're very clear
7 on that in pages 64 to 69 of the second volume
8 of Farent.

9 JUSTICE KAGAN: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 JUSTICE GORSUCH: Just returning to
13 the Chief Justice's hypothetical about the
14 ambassador sale and bribery, Congress has a
15 statute that specifically names the president
16 and says he can be criminally prosecuted for
17 bribery, presumably after he leaves office.

18 Outside the core areas that -- that
19 Justice Kavanaugh was talking about, when
20 Congress speaks clearly, couldn't a statute like
21 that -- Congress provide a statute like that
22 that would allow all manner of evidence to come
23 in to prove the case?

24 MR. SAUER: I think our position is
25 that would have to be an unofficial act, purely

1 private conduct, for that prosecution to go
2 forward.

3 JUSTICE GORSUCH: All right. But
4 outside the core areas of executive power, if
5 there is a clear statement from Congress that
6 something is unlawful and it applies to the
7 president, I'm struggling to see why in that
8 case perhaps the evidence could come in.

9 MR. SAUER: The strongest possible
10 case in our view is what you've described as
11 kind of the core executive powers, the
12 unrestrictable powers within the meaning of
13 Seila Law. But, again, the holding of, for
14 example, Brewster and Johnson that we've relied
15 on doesn't turn on how central it is of a
16 legislative act. It just says, if it's an
17 official act, which, here, we would say is --
18 applies basically the outer perimeter test of
19 Fitzgerald against Nixon. That doesn't come in.

20 JUSTICE GORSUCH: What would happen if
21 presidents were under fear -- fear that their
22 successors would criminally prosecute them for
23 their acts in office, whether it's -- whether
24 they've engaged in drone strikes -- all the
25 hypotheticals. I'm not going to go through

1 them. It seems to me like one of the incentives
2 that might be created is for presidents to try
3 to pardon themselves.

4 Do you have any thoughts about that?

5 MR. SAUER: That is -- I didn't think
6 of that until Your Honor asked it. That is
7 certainly one incentive that might be created.
8 What we think is most important is --

9 JUSTICE GORSUCH: I mean, we've never
10 answered whether a president can do that.
11 Happily --

12 MR. SAUER: And the --

13 JUSTICE GORSUCH: Happily, it's never
14 been presented to us.

15 MR. SAUER: And if -- if the doctrine
16 of immunity remains in place, that's likely to
17 remain the case for those very issues. As
18 Fitzgerald, I think, very powerfully emphasized,
19 the real concern here is, is there going to be
20 bold and fearless action? Is the president
21 going to have to make a controversial decision
22 where his political opponents are going to come
23 after him the minute he leaves office? Is that
24 going to unduly deter, is that going to dampen
25 the ardor of that president to do what our

1 constitutional structure demands of him or her,
2 which is bold and fearless action in the face of
3 controversy?

4 JUSTICE GORSUCH: And perhaps, if he
5 feels he has to, he'll pardon himself every --
6 every four years from now on.

7 MR. SAUER: But that, as the Court
8 pointed out, wouldn't provide the security
9 because the legality of that is something that's
10 never been addressed.

11 JUSTICE GORSUCH: Now one of the
12 checks and balances in addition to impeachment
13 that you've discussed is subordinate liability.

14 You don't contest that everybody
15 following an unlawful order beneath the
16 president of the United States can be
17 immediately prosecuted, do you?

18 MR. SAUER: I'm sorry. If -- the
19 Court is asking whether they could be --

20 JUSTICE GORSUCH: If the president
21 gives an unlawful order, call in the troops, all
22 the examples we've heard, every subordinate
23 beneath him faces criminal prosecution, don't
24 they?

25 MR. SAUER: That is what Gouverneur

1 Morris said explicitly at the Constitutional
2 Convention, that his co-agitators could be
3 prosecuted. There is an important caveat
4 because, of course, there would have to be a --
5 a statute that would govern that for them to be
6 prosecuted to that extent.

7 JUSTICE GORSUCH: Oh, we've got lots
8 of statutes. The criminal law books are -- are
9 replete. But, I mean, do you agree, is that one
10 check that's available?

11 MR. SAUER: Absolutely. And, again,
12 the only caveat that I was making is, if that
13 statute was doing what Marbury says you can't
14 do, which is going after the subordinates to
15 restrict, for example, a core executive
16 function, the Franklin clear statement rule
17 might be triggered, and you might not be able to
18 go after that president.

19 So I don't think Congress can say,
20 well, we can't go after the president directly,
21 but we're going to criminalize the way that the
22 president speaks to Congress under the exercise
23 of the Recommendations Clause, and, therefore,
24 we're going to put in a criminal statute that
25 says, if you provide false information to

1 Congress in -- in carrying out the president's
2 recommendation powers, you -- you can be
3 immediately prosecuted. That would at least be
4 a very difficult question.

5 But the fundamental point of drawing
6 that distinction between the president himself
7 and his co-agitators, in the word of Gouverneur
8 Morris at the Constitutional Convention, is an
9 excellent distinction.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 JUSTICE KAVANAUGH: Just to follow up
13 on the OLC opinions question, as you read them
14 and I think I read them, they articulate a clear
15 statement rule, as do this Court's cases for
16 covering official acts. And your point, I
17 think, but I just want to underscore this, is
18 that none of the statutes alleged here or cited
19 here have a clear statement covering the
20 president, therefore, meaning that the president
21 can't be charged for any official acts under
22 this -- under these statutes.

23 MR. SAUER: That's absolutely correct.
24 They're extended way beyond. I mean, this is --

25 JUSTICE KAVANAUGH: Now that's

1 separate from the question of what's official
2 versus what's personal. But, for that bucket
3 that is official, there's no clear statement,
4 period?

5 MR. SAUER: That's right. And as to
6 purely private conduct, we don't think the clear
7 statement rule would be invoked. But, as to
8 official acts, these statutes, the ones charged
9 in the indictment, are just way far afield from
10 purporting to criminalize in clear terms the
11 president's official acts.

12 JUSTICE KAVANAUGH: And then your --
13 just to clarify this, the -- the president's not
14 above the law, the president's not a king, the
15 Founders thought that. I think your point in
16 response to that is the president is subject to
17 prosecution for all personal acts, just like
18 every other American for personal acts. The
19 question is acts taken in an official capacity.

20 MR. SAUER: That's correct. And even
21 those, of course, if there was impeachment and
22 conviction, could be prosecuted on our view.
23 And we'd emphasize the whole series of
24 structural checks in addition to that which
25 deter those kind -- and have successfully

1 deterred presidential misfeasance for 234 years.

2 JUSTICE KAVANAUGH: Then, on the
3 source of immunity, it's not explicit in the
4 Constitution, but also executive privilege is
5 not explicit in the Constitution, yet in United
6 States versus Nixon, the Court unanimously said
7 that the Article II executive power in the
8 Constitution encompassed executive privilege.
9 And the same principle presumably would apply to
10 executive immunity being encompassed within that
11 executive power as historically understood.

12 MR. SAUER: That's absolutely correct.
13 And there's a very telling passage in Free
14 Enterprise Fund where this Court talked about
15 how there's a letter from James Madison to
16 Thomas Jefferson at the time of the founding
17 where Madison said, hey, as to the removal
18 power, they did not expressly take this away, so
19 the 1789 Congress understood that it was left in
20 place.

21 So, if the original understanding of
22 the Executive Vesting Clause is broad enough to
23 encompass that, it would have to be expressly
24 taken away, which is the opposite of the
25 presumption that they're advancing here.

1 JUSTICE KAVANAUGH: And then, lastly,
2 I think you've acknowledged in response to
3 others' questions that some of the acts in the
4 indictment are private and your view is that
5 some are official. Is it your position then
6 that that analysis of which is which should be
7 undertaken in the first instance by the D.C.
8 Circuit or the district court?

9 MR. SAUER: Most likely the district
10 court under the logic of Anderson.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 JUSTICE BARRETT: So, Mr. Sauer,
15 you've argued that the Impeachment Clause
16 suggests or requires impeachment to be a gateway
17 to criminal prosecution, right?

18 MR. SAUER: Yes. I think that's the
19 plain meaning of that second phrase in the
20 clause.

21 JUSTICE BARRETT: Okay. So there are
22 many other people who are subject to
23 impeachment, including the nine sitting on this
24 bench, and I don't think anyone has ever
25 suggested that impeachment would have to be the

1 gateway to criminal prosecution for any of the
2 many other officers subject to impeachment.

3 So why is the president different when
4 the Impeachment Clause doesn't say so?

5 MR. SAUER: Someone very important has
6 made the opposite suggestion as to the president
7 himself, which is Solicitor General Bork, which
8 is reaffirmed in the OLC opinions on this, where
9 the -- where Solicitor General Bork, in 1973, as
10 to the issue of the vice president, reviewed the
11 historical materials, and he said the sequence
12 is mandatory only as to the president.

13 That is DOJ's view of the original
14 understanding of the Impeachment Judgment
15 Clause, which is exactly our position. The
16 sequence is mandatory only as to the president.
17 Keep in mind that the criminal prosecution of a
18 president -- president prior to impeachment
19 contradicts, in our view, the plain language of
20 the Constitution but also hundreds of years of
21 history and what DOJ admits is the Framers'
22 intent.

23 And so we say that that practice,
24 whatever its validity, should not be extended to
25 this novel context, where it clashes with the

1 constitutional structure.

2 JUSTICE BARRETT: What if the criminal
3 conduct isn't discovered until after the
4 president is out of office, so there was no
5 opportunity for impeachment?

6 MR. SAUER: We say the Framers assumed
7 the risk that -- of under-enforcement by
8 adopting these very structural checks. As
9 Justice Scalia said in Morrison against Olson,
10 the separation of powers prevents us from
11 righting every wrong, but it does so that we do
12 not lose liberty.

13 JUSTICE BARRETT: Okay. And the
14 Special Counsel makes a point that I think is a
15 pretty compelling one. You admit that if the
16 president were successfully impeached that he
17 could be criminally prosecuted after
18 impeachment, right?

19 MR. SAUER: Assuming the prosecution
20 was for the same conduct of which he was
21 convicted, not impeached. He must be convicted.
22 That word "conviction" is right there in the
23 clause.

24 JUSTICE BARRETT: Okay. Okay.
25 Granted. But you also say that these criminal

1 statutes, unless they explicitly mention the
2 president, don't apply to him. So how can you
3 say that he would be subject to prosecution
4 after impeachment while at the same time saying
5 that he's exempt from these criminal statutes?

6 MR. SAUER: Well, there are statutes,
7 as they concede, where a president -- Congress
8 has purported to do so.

9 JUSTICE BARRETT: A few. Two or
10 three.

11 MR. SAUER: They haven't done a
12 comprehensive review. I think it looks like all
13 they did was text search for "president" in 18
14 U.S. Code. Again, under Franklin, that's a very
15 telling indication that the word "president" is
16 not in the statute isn't necessarily a -- a -- a
17 magic word requirement, so to speak.

18 But more fundamentally than that --
19 more fundamentally than that, they concede there
20 are statutes that exist. In addition to that,
21 much impeachment could occur as a result of
22 private conduct.

23 So the Impeachment Judgment Clause
24 does do significant work by authorizing the
25 subsequent prosecution of a president there

1 because of what the Framers, if you look at what
2 they're discussing in the thing, is -- or in the
3 Constitutional Convention, is principally
4 concerns about private conduct, which, of
5 course, we concede are not immune.

6 JUSTICE BARRETT: Okay. So just to
7 pick up Justice Kagan's example of a president
8 who orders a coup, let's imagine that he is
9 impeached and convicted for ordering that coup.
10 And let's just accept for the sake of argument
11 your position that that was official conduct.

12 You're saying that he couldn't be
13 prosecuted for that, even after a conviction and
14 impeachment proceeding, if there was not a
15 statute that expressly referenced the president
16 and made it criminal for the president?

17 MR. SAUER: There would have to be
18 a -- a statute that made a clear statement that
19 Congress purported to regulate the president's
20 conduct.

21 JUSTICE BARRETT: Okay. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: So I think I now
25 understand better your position. In -- in your

1 discussions with Justice Kavanaugh, it became
2 clear that you are saying that for the private
3 acts of a president, there's no immunity, but
4 for the official acts of the president, there is
5 immunity.

6 Is that your position?

7 MR. SAUER: I agree with that.

8 JUSTICE JACKSON: All right. So one
9 thing that occurs to me is that this sort of
10 difficult line-drawing problem that we're having
11 with all of these hypotheticals, is this a
12 private act or a public act, is being
13 necessitated by that assumption, because, of
14 course, if official acts didn't get absolute
15 immunity, then it wouldn't matter. We wouldn't
16 have to identify which are private and which are
17 public, correct?

18 MR. SAUER: That, in fact, is the
19 approach of the D.C. Circuit. There's no
20 determination that needs to be made essentially.

21 JUSTICE JACKSON: Right. But I'm
22 just -- I'm just making -- so, to the extent
23 we're worried about, like, how do we figure out
24 whether it's private or public, we have to -- we
25 have to understand that we're only doing that

1 because of an underlying assumption that the
2 public acts get immunity. So let me explore
3 that assumption.

4 Why is it as a matter of theory -- and
5 I'm hoping you can sort of zoom way out here --
6 that the president would not be required to
7 follow the law when he is performing his
8 official acts?

9 Everyone else -- everyone else, there
10 are lots of folks who have very high-powered
11 jobs, who make a lot of consequential decisions,
12 and they do so against the backdrop of potential
13 criminal prosecution if they should break the
14 law in that capacity.

15 And we understand and we know as a
16 matter of fact that the president of the United
17 States has the best lawyers in the world. When
18 he's making a decision, he can consult with
19 pretty much anybody as to whether or not this
20 thing is criminal or not.

21 So why would we have a situation in
22 which we would say that the president should be
23 making official acts without any responsibility
24 for following the law?

25 MR. SAUER: I respectfully disagree

1 with that characterization. The president
2 absolutely does have responsibility. He
3 absolutely is required to follow the law in all
4 of his official acts, but the remedy for that is
5 the question, could he be subject to personal
6 vulnerability, sent to prison --

7 JUSTICE JACKSON: But --

8 MR. SAUER: -- for making a bad
9 decision after he leaves office.

10 JUSTICE JACKSON: But -- but other
11 people who have consequential jobs and who are
12 required to follow the law make those
13 determinations against the backdrop of that same
14 kind of risk. So what is it about the president
15 -- I mean, I've heard you say it's because the
16 president has to be able to act boldly, do --
17 you know, make kind of consequential decisions.

18 I mean, sure, but, again, there are
19 lots of people who have to make life-and-death
20 kinds of decisions and yet they still have to
21 follow the law, and if they don't, they could be
22 sent to prison, et cetera, et cetera. So --

23 MR. SAUER: I'd say two things in
24 response to that --

25 JUSTICE JACKSON: Yes.

1 MR. SAUER: -- both from Fitzgerald.
2 That's the very sort of inference or reasoning
3 that this Court rejected in Fitzgerald.

4 JUSTICE JACKSON: No, but let me just
5 -- Fitzgerald was a civil situation in which the
6 president actually was in a different position
7 than other people because of the nature of his
8 job, the high-profile nature and the fact that
9 he touches so many different things, when you're
10 talking about private civil liability, you know,
11 anybody on the street can sue him, we could see
12 that the president was sort of different than
13 the ordinary person when you say should he be
14 immune from civil liability from anybody who
15 wants to sue him.

16 But, when we're talking about criminal
17 liability, I don't understand how the president
18 stands in any different position with respect to
19 the need to follow the law as he is doing his
20 job than anyone else.

21 MR. SAUER: He -- he is required to
22 follow the law. And what Fitzgerald said is
23 that the --

24 JUSTICE JACKSON: But he's not if
25 there's no criminal -- if there's no threat of

1 criminal prosecution, what prevents the
2 president from just doing whatever he wants?

3 MR. SAUER: All the structural checks
4 that are identified in Fitzgerald and a whole
5 series of this Court's cases that go back to
6 Martin against Mott, for example, impeachment,
7 oversight by Congress, public oversight.
8 There's a long series.

9 And Fitzgerald directly addresses this
10 in the civil context, and we think --

11 JUSTICE JACKSON: Well, I'm not sure
12 --

13 MR. SAUER: -- that language naturally
14 imports to the criminal context.

15 JUSTICE JACKSON: -- I'm not sure
16 that's -- that that's much of a backstop. And
17 what I'm, I guess, more worried about, you seem
18 to be worried about the president being chilled.

19 I think that we would have a really
20 significant opposite problem if the president
21 wasn't chilled. If someone with those kinds of
22 powers, the most powerful person in the world
23 with the greatest amount of authority could go
24 into office knowing that there would be no
25 potential penalty for committing crimes, I'm

1 trying to understand what the disincentive is
2 from turning the Oval Office into, you know, the
3 -- the -- the -- the seat of criminal activity
4 in this country.

5 MR. SAUER: I don't think there's any
6 allegation of that in this case. And what
7 George Washington said is -- what Benjamin
8 Franklin said is we view the prosecution of a
9 chief executive as something that everybody
10 cried out against as unconstitutional.

11 And what George Washington said is
12 we're worried about factional strife which
13 will bring the Republic --

14 JUSTICE JACKSON: No. I'm -- so let
15 me -- let me -- let me put this worry on the
16 table. If the potential for criminal liability
17 is taken off the table, wouldn't there be a
18 significant risk that future presidents would be
19 emboldened to commit crimes with abandon while
20 they're in office?

21 It's right now the fact that we're
22 having this debate because OLC has said that
23 presidents might be prosecuted. Presidents from
24 the beginning of time have understood that
25 that's a possibility. That might be what has

1 kept this office from turning into the kind of
2 crime center that I'm envisioning.

3 But, once we say no criminal
4 liability, Mr. President, you can do whatever
5 you want, I'm worried that we would have a worse
6 problem than the problem of the president
7 feeling constrained to follow the law while he's
8 in office.

9 MR. SAUER: I respectfully disagree
10 with that because the -- the regime you've
11 described is the regime we've operated under for
12 234 years. There has not been an expectation
13 based on 234 years of unbroken political --

14 JUSTICE JACKSON: All right. Let me
15 ask you another question that --

16 MR. SAUER: -- or legal tradition that
17 that might occur.

18 JUSTICE JACKSON: -- let me ask you
19 another question about this clear statement line
20 of questioning.

21 First of all, I -- I didn't see you
22 argue that below. I don't know -- I understand
23 that you had that set of in your briefs here,
24 but did you argue before the D.C. Circuit
25 something about a clear statement with respect

1 to the statutes?

2 MR. SAUER: Yes. In our separately
3 filed motion for -- motion to dismiss based on
4 statutory grounds, we extensively argued not
5 just this clear statement rule but a whole
6 panoply of --

7 JUSTICE JACKSON: Right. But that's
8 not -- that's not the question presented in this
9 case. The question presented in this case comes
10 out of your motion for immunity. So, to bring
11 in now an argument that you didn't raise below,
12 it seems to me you forfeited it, no?

13 MR. SAUER: I believe it's fairly
14 included within the question presented,
15 especially --

16 JUSTICE JACKSON: Why?

17 MR. SAUER: Especially because the
18 Court expanded the question presented from what
19 either of the parties submitted to discuss here.

20 JUSTICE JACKSON: But not to statutory
21 interpretation. I mean, that -- that argument
22 goes to statutory avoidance, you know,
23 constitutional avoidance, statutory
24 interpretation. You asked for immunity, which
25 is a totally different thing.

1 MR. SAUER: I think they're very
2 closely related logically. The question is --
3 is does immunity exist and to what extent does
4 it. And the argument is immunity at least
5 exists to the extent that it raises a grave
6 constitutional question, and that triggers the
7 clear statement rule. That's a really tight
8 logical relationship.

9 JUSTICE JACKSON: But that's totally
10 circular. You're -- you -- you -- you use that
11 argument to avoid constitutional questions. You
12 are asking us a constitutional question here.
13 So it doesn't even make sense to talk about
14 clear statement in -- rule the way that it's
15 come up in the context of an immunity question.

16 But let me just -- let me ask you this
17 about it. I had one more question. Yeah. So
18 what -- what is the argument that the president
19 of the United States, who you say is bound by
20 the law, is not on notice that he has to do his
21 job consistent with the law?

22 I mean, to the extent that the clear
23 statement rule comes in at all, it's about the
24 person not being on notice. So I -- I guess I
25 don't understand why Congress in every criminal

1 statute would have to say and the president is
2 included. I thought that was the sort of
3 background understanding that if they're
4 enacting a generally applicable criminal
5 statute, it applies to the president just like
6 everyone else.

7 So -- so what is the clear statement
8 that would have to be made in this context?

9 MR. SAUER: Under Franklin and under
10 Public Citizen, Congress has to speak clearly
11 before it interferes with the president's
12 powers, and we have here an indictment that
13 seeks to criminalize objective conduct that
14 falls within the heartland of core executive
15 authority.

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Dreeben.

20 ORAL ARGUMENT OF MICHAEL R. DREEBEN
21 ON BEHALF OF THE RESPONDENT

22 MR. DREEBEN: Mr. Chief Justice, and
23 may it please the Court:

24 This Court has never recognized
25 absolute criminal immunity for any public

1 official. Petitioner, however, claims that a
2 former president has permanent criminal immunity
3 for his official acts, unless he was first
4 impeached and convicted. His novel theory would
5 immunize former presidents from criminal
6 liability for bribery, treason, sedition,
7 murder, and, here, conspiring to use fraud to
8 overturn the results of an election and
9 perpetuate himself in power.

10 Such presidential immunity has no
11 foundation in the Constitution. The Framers
12 knew too well the dangers of a king who could do
13 no wrong. They therefore devised a system to
14 check abuses of power, especially the use of
15 official power for private gain.

16 Here, the executive branch is
17 enforcing congressional statutes and seeking
18 accountability for Petitioner's alleged misuse
19 of official power to subvert democracy. That is
20 a compelling public interest.

21 In response, Petitioner raises
22 concerns about potential abuses. But
23 established legal safeguards provide layers of
24 protections, with the Article III courts
25 providing the ultimate check. The existing

1 system is a carefully balanced framework. It
2 protects the president but not at the high
3 constitutional cost of blanket criminal
4 immunity.

5 That has been the understanding of
6 every president from the framing through
7 Watergate and up to today. This Court should
8 preserve it.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Mr. Dreeben, does the
11 president have immunity, or are you saying that
12 there's no immunity, presidential immunity, even
13 for official acts?

14 MR. DREEBEN: Yes, Justice Thomas, but
15 I think that it's important to put in
16 perspective the position that we are offering
17 the Court today. The president, as the head of
18 the Article II branch, can assert as-applied
19 Article II objections to criminal laws that
20 interfere with an exclusive power possessed by
21 the president or that prevent the president from
22 accomplishing his constitutionally assigned
23 functions.

24 That is the constitutional doctrine
25 that currently governs the separation of powers.

1 What Petitioner is asking for is a broad blanket
2 immunity that would protect the president, a
3 former president, from any criminal exposure
4 absent impeachment and conviction, which has
5 never happened in our history.

6 And we submit that is not necessary in
7 order to assure that the president can perform
8 all of the important tasks that the Constitution
9 reposes in him.

10 JUSTICE THOMAS: Over -- in the not so
11 distant past, the presidents or certain
12 presidents have engaged in various activity,
13 coups or operations like Operation Mongoose when
14 I was a teenager, and yet there were no
15 prosecutions.

16 MR. DREEBEN: Yeah.

17 JUSTICE THOMAS: Why? If you -- if
18 what you're saying is right, it would seem that
19 that would have been ripe for criminal
20 prosecution of someone.

21 MR. DREEBEN: So, Justice Thomas, I
22 think this is a central question. The reason
23 why there have not been prior criminal
24 prosecutions is that there were not crimes. And
25 I want to explain why there are layers of

1 safeguards that assure that former presidents do
2 not have to lightly assume criminal liability
3 for any of their official acts.

4 At the outset, there is a statutory
5 construction principle that is applicable here.
6 It arises when there is a serious constitutional
7 question about applying a criminal statute to
8 the president's acts. It is not -- and I'm sure
9 that we will discuss this -- that no statute can
10 apply to the president in his official capacity
11 absent a designation of the president in it.
12 But there is a principle that if there is a
13 serious constitutional question, courts will
14 strive to construe the statute so that it does
15 not apply to the president.

16 In addition to that, the president, I
17 think has been mentioned earlier, has access to
18 advice from the attorney general. And it would
19 be a due process problem to prosecute a
20 president who received advice from the attorney
21 general that his actions were lawful absent the
22 kind of collusion or conspiracy that itself
23 represented a criminal violation, which I don't
24 really see as being a --

25 JUSTICE THOMAS: Well --

1 MR. DREEBEN: -- realistic option.

2 And then, if I could say one more
3 thing, because you raised the question about
4 potential overseas taking of life, and the
5 Office of Legal Counsel has addressed this quite
6 specifically.

7 There is a background principle of
8 criminal law called the public authority
9 exception to liability, and it is read into
10 federal law unless Congress takes specific
11 action to oust it, which it never has done as
12 far as I am aware.

13 And in a case in which the president
14 sought to engage in overseas activity that would
15 result in the taking of life, OLC did not say
16 the federal murder statute doesn't apply. That
17 would be the -- the thrust of my friend's
18 argument on clear statement.

19 Instead, OLC went through an extensive
20 analysis on why the public authority defense
21 would prevent it from being considered a
22 violation of law to go after a terrorist, for
23 example.

24 CHIEF JUSTICE ROBERTS: Counsel --

25 JUSTICE ALITO: Well, Mr. -- I'm

1 sorry.

2 CHIEF JUSTICE ROBERTS: -- the court
3 of appeals below, whose decision we're
4 reviewing, said: "A former president can be
5 prosecuted for his official acts because the
6 fact of the prosecution means that the former
7 president has allegedly acted in defiance of the
8 laws."

9 Do you agree with that statement?

10 MR. DREEBEN: Well, I think it sounds
11 tautologically true, but I -- I want to
12 underscore that the obligation of a president is
13 to take care that the laws are faithfully
14 executed.

15 CHIEF JUSTICE ROBERTS: Well, the -- I
16 think it sounds tautologically true as well, and
17 that, I think, is the clearest statement of the
18 court's holding, which is why it concerns me.

19 As I read it, it says simply a former
20 president can be prosecuted because he's being
21 prosecuted.

22 MR. DREEBEN: Well, I -- I would not
23 suggest that that's either the proper approach
24 in this case or certainly not the government's
25 approach. A prosecution does, of course, invoke

1 federal criminal law. The allegations have to
2 be presented to a grand jury, which votes upon
3 the indictment.

4 CHIEF JUSTICE ROBERTS: Well, that's
5 what I -- I mean, shortly after that statement
6 in the court, that -- court's opinion, that's
7 what they said, but there's no reason to worry
8 because the prosecutor will act in good faith
9 and there's no reason to worry because a grand
10 jury will have returned the indictment.

11 Now you know how easy it is in many
12 cases for a prosecutor to get a grand jury to
13 bring an indictment, and reliance on the faith
14 -- good faith of the prosecutor may not be
15 enough in the -- some cases. I'm not suggesting
16 here.

17 So, if it's tautological and those are
18 the only protections that the court of appeals
19 below gave and that is no longer your position,
20 you're not defending that position, why
21 shouldn't we either send it back to the court of
22 appeals or issue an opinion making clear that
23 that's not the law?

24 MR. DREEBEN: Well, I -- I am
25 defending the court of appeals' judgment. And I

1 do think that there are layered safeguards that
2 the Court can take into account that will
3 ameliorate concerns about unduly chilling
4 presidential conduct.

5 That concerns us. We are not
6 endorsing a regime that we think would expose
7 former presidents to criminal prosecution in bad
8 faith, for political animus, without adequate
9 evidence. A politically driven prosecution
10 would violate the Constitution under *Wayte*
11 versus United States.

12 It's not something within the arsenal
13 of prosecutors to do. Prosecutors take an oath.
14 The attorney general takes an oath. So --

15 CHIEF JUSTICE ROBERTS: Well --

16 MR. DREEBEN: -- I -- I don't want to
17 overstate Your Honor's concern with potentially
18 relying solely on good faith, but that's an
19 ingredient. And then the courts stand ready to
20 adjudicate motions based on selective
21 prosecution, political animus. This Court
22 relied on those very protections in --

23 CHIEF JUSTICE ROBERTS: Right.

24 MR. DREEBEN: -- the Vance case just
25 two years ago.

1 JUSTICE KAVANAUGH: What's the test --

2 CHIEF JUSTICE ROBERTS: But -- but
3 what -- what concerns me is, as you know, the
4 court of appeals did not get into a focused
5 consideration of what acts we're talking about
6 --

7 MR. DREEBEN: Mm-hmm.

8 CHIEF JUSTICE ROBERTS: -- or what
9 documents we're talking about because of its
10 adoption of what you termed, and I agreed quite
11 correctly, is a tautological statement. Because
12 the fact of prosecution was enough, enough to
13 take away any official immunity, the fact of
14 prosecution, they had no need to look at what
15 courts normally look at when you're talking
16 about a privilege or immunity question.

17 MR. DREEBEN: Well, I -- I think I
18 would take issue, Mr. Chief Justice, with the
19 idea of taking away immunity. There is no
20 immunity that is in the Constitution, unless
21 this Court creates it today. There certainly is
22 no textual immunity. We do not submit that
23 that's the end of the story. United States
24 versus Nixon wasn't a textually-based case.
25 Neither was Nixon versus Fitzgerald. We endorse

1 both of those holdings.

2 But what is important is that no
3 public official has ever had the kind of
4 absolute criminal immunity that my friend speaks
5 of, even with respect to the Speech or Debate
6 Clause. It's very narrow. It's focused on
7 legislative acts. It's not focused on
8 everything that a Congressman does.

9 And it responds to a very specific
10 historical circumstance that basically involved
11 the two other branches potentially harassing
12 legislators and preventing them from doing their
13 jobs. That's why it ended up in the
14 Constitution.

15 Nothing like that ended up in -- in
16 the Constitution for the presidents, and that's
17 because one of the chief concerns of the Framers
18 was the risk of presidential misconduct. They
19 labored over this. They adopted an impeachment
20 structure that separated removal from office as
21 a political remedy from criminal prosecution.

22 This departed from the British model.
23 The British model was you get impeached and
24 criminally prosecuted and convicted in the same
25 proceeding. The Framers did not want that.

1 They wanted a political remedy in case a
2 president was engaging in conduct that
3 endangered the nation. He could be removed.

4 He can't be prosecuted while he's a
5 sitting president. That's been the longstanding
6 Justice Department position.

7 JUSTICE ALITO: Mr. Dreeben, you
8 dispute the proposition that a former president
9 has some form of immunity.

10 MR. DREEBEN: Mm-hmm.

11 JUSTICE ALITO: But, as I understand
12 your argument, you do recognize that a former
13 president has a form of special protection,
14 namely, that statutes that are applicable to
15 everybody must be interpreted differently under
16 some circumstances when they are applied to a
17 former president.

18 Isn't that true?

19 MR. DREEBEN: It is true because,
20 Justice Alito, of the general principle that
21 courts construe statutes to avoid serious
22 constitutional questions. And that has been the
23 longstanding practice of the Office of Legal
24 Counsel in the Department of Justice.

25 JUSTICE ALITO: All right. So this is

1 more, I think, than just a -- a quarrel about
2 terminology, whether what the former president
3 gets is some form of immunity or some form of
4 special protection, because it involves this
5 difference which I'm sure you're very well aware
6 of.

7 If it's just a form of special
8 protection, in other words, statutes will be
9 interpreted differently as applied to a former
10 president, then that is something that has to be
11 litigated at trial. The -- the former president
12 can make a motion to dismiss and may cite OLC
13 opinions, and the district court may say: Well,
14 that's fine, I'm not bound by OLC and I
15 interpret it differently, so let's go to trial.

16 And then there has to be a trial, and
17 that may involve great expense and it may take
18 up a lot of time, and during the trial, the --
19 the former president may be unable to engage in
20 other activities that the former president would
21 want to engage in. And then the outcome is
22 dependent on the jury, the instructions to the
23 jury and how the jury returns a verdict, and
24 then it has to be taken up on appeal.

25 So the protection is greatly diluted

1 if you take the form -- if it takes the form
2 that you have proposed. Now why is that better?

3 MR. DREEBEN: It's better because it's
4 more balanced. The -- the blanket immunity that
5 Petitioner is arguing for just means that
6 criminal prosecution is off the table, unless he
7 says that impeachment and conviction have
8 occurred.

9 Those are political remedies that are
10 extremely difficult to achieve. In a case where
11 the conduct, misconduct, occurs close to the end
12 of a president's term, Congress is unlikely to
13 crank up the machinery to do it, and if the
14 impeachment trial has to occur after the
15 president has left office, there's an open
16 question about whether that can happen at all.

17 So --

18 JUSTICE ALITO: You're arguing against
19 the most far-reaching --

20 MR. DREEBEN: Correct.

21 JUSTICE ALITO: -- aspects of -- of
22 Mr. Sauer's argument, right?

23 MR. DREEBEN: That -- that is -- that
24 is correct. And -- and let me turn then to why
25 we --

1 JUSTICE KAVANAUGH: Well, what about,
2 to unpack it a little more, do you agree that
3 there's some aspects of Article II presidential
4 power that are exclusive and that Congress
5 cannot regulate and therefore cannot
6 criminalize?

7 MR. DREEBEN: Absolutely.

8 JUSTICE KAVANAUGH: Okay. For other
9 official acts that the president may take that
10 are not within that exclusive power, assume for
11 the sake of argument this question that there's
12 not blanket immunity for those official acts but
13 that to preserve the separation of powers, to
14 provide fair notice, to make sure Congress has
15 thought about this, that Congress has to speak
16 clearly to criminalize official acts of the
17 president by a specific reference.

18 That seems to be what the OLC opinions
19 suggest -- I know you have a little bit of a
20 disagreement with that -- and what this Court's
21 cases also suggest.

22 MR. DREEBEN: So, Justice Kavanaugh,
23 I'd like -- like to take all of those in turn
24 because I don't think this Court's cases speak
25 that broadly. I definitely don't think that the

1 Office of Legal Counsel opinions stand for this
2 broad proposition that unless the president is
3 specifically named, he's not in -- in the
4 statute. And I don't think that that's
5 necessary in order to afford adequate protection
6 for the president's valid Article II functions.

7 JUSTICE KAVANAUGH: Well, you said
8 unless -- I'm sorry to interrupt, but I want to
9 just get this out and you can incorporate it in
10 the answer. You said unless there's a serious
11 constitutional question.

12 MR. DREEBEN: Correct.

13 JUSTICE KAVANAUGH: Well, it's --
14 isn't -- it's a serious constitutional question
15 whether a statute can be applied to the
16 president's official acts. So wouldn't you
17 always interpret the statute not to apply to the
18 president, even under your formulation, unless
19 Congress had spoken with some clarity?

20 MR. DREEBEN: I don't think -- I don't
21 think across the board that a serious
22 constitutional question exists on applying any
23 criminal statute to the president.

24 JUSTICE KAVANAUGH: The problem is the
25 vague statute, you know, obstruction and 371,

1 conspiracy to defraud the United States, can be
2 used against a lot of presidential activities
3 historically with a -- a creative prosecutor who
4 wants to go after a president.

5 MR. DREEBEN: Well, let me try to
6 backtrack a little bit to the --

7 JUSTICE KAVANAUGH: That's the --
8 that's the -- that's what we're talking about
9 historically, is the risk that -- and -- and
10 going forward the -- the risk. So you can take
11 all of that.

12 MR. DREEBEN: I think that the -- the
13 question about the risk is very serious, and,
14 obviously, it is a question that this Court has
15 to evaluate.

16 For the executive branch, our view is
17 that there is a -- a balanced protection that
18 better serves the interests of the Constitution
19 that incorporates both accountability and
20 protection for the president. And I want to go
21 through the protections that do exist, but
22 perhaps it's worth returning at the outset to
23 the statutory construction question that you
24 raised.

25 The Office of Legal Counsel has said

1 the offense of bribery, of course, applies to
2 the president. It does not name the president,
3 Justice Gorsuch. Section 201 does not
4 specifically name the president.

5 JUSTICE KAVANAUGH: Right. Well,
6 assume that's personal. So that's --

7 MR. DREEBEN: Well, I think that
8 it's -- it's --

9 JUSTICE KAVANAUGH: -- that's what
10 Brewster said.

11 MR. DREEBEN: It --

12 JUSTICE GORSUCH: The bribe -- bribery
13 statute in 607 says the president. I've got it
14 in front of me. And so there is -- there is
15 that.

16 MR. DREEBEN: Well, Section --

17 JUSTICE GORSUCH: Let -- let me just
18 back up, though, just --

19 MR. DREEBEN: Okay.

20 JUSTICE GORSUCH: -- a second to what
21 was a quick exchange with Justice Kavanaugh that
22 I just want to make sure I understand.

23 MR. DREEBEN: Yeah.

24 JUSTICE GORSUCH: Did you agree that
25 there are some core functions of the executive

1 that a president conduct that Congress cannot
2 criminalize?

3 MR. DREEBEN: Yes. We --

4 JUSTICE GORSUCH: So is -- is that a
5 form -- I mean, we can call it immunity or you
6 can call it they can't do it. But what's the
7 difference?

8 MR. DREEBEN: We call it an as-applied
9 Article II challenge that we think --

10 JUSTICE GORSUCH: Okay, okay.

11 MR. DREEBEN: -- fits within --

12 JUSTICE GORSUCH: Can we call it
13 immunity just for shorthand's sake so we -- so I
14 think we are kind of narrowing the ground of
15 dispute here. It seems to me there is some --
16 some area you -- you concede that on official
17 acts that Congress cannot criminalize, and now
18 we're just talking about the scope.

19 MR. DREEBEN: Well, I don't think it's
20 a "just," but I think it's a very significant
21 gap between any official act and the small core
22 of exclusive official acts.

23 JUSTICE GORSUCH: No, I -- I -- I got
24 that, but I want to explore that, okay?

25 MR. DREEBEN: Okay.

1 JUSTICE GORSUCH: So, for example,
2 let's say a president leads a mostly peaceful
3 protest sit-in in front of Congress because he
4 objects to a -- a piece of legislation that's
5 going through.

6 MR. DREEBEN: Mm-hmm.

7 JUSTICE GORSUCH: And it, in fact,
8 delays the proceedings in Congress.

9 Now, under 1512(c)(2), that might be
10 corruptly impeding a proceeding, an official
11 proceeding. Could -- is that core and therefore
12 immunized or whatever word, euphemism you want
13 to use for that?

14 MR. DREEBEN: So --

15 JUSTICE GORSUCH: Or is that not core
16 and therefore prosecutable --

17 MR. DREEBEN: Well, it's --

18 JUSTICE GORSUCH: -- without a clear
19 statement that applies to the president?

20 MR. DREEBEN: It's not -- it's not
21 core. The core kinds of activities that the
22 Court has acknowledged are the things that I
23 would run through the Youngstown analysis. And
24 it's a pretty small set, but things like the
25 pardon power, the power to recognize foreign

1 nations, the power to veto legislation, the
2 power to make appointments, these are things
3 that the Constitution specifically allocates to
4 the president.

5 Once you get out --

6 JUSTICE GORSUCH: So a president then
7 could be prosecuted for the conduct I described
8 after he leaves office?

9 MR. DREEBEN: Probably not, but I want
10 to explain the framework --

11 JUSTICE GORSUCH: Why?

12 MR. DREEBEN: -- of -- of why I don't
13 think that that would be prosecution that would
14 be valid.

15 First, I think you need to run through
16 all of the sort of normal categories of
17 analysis. Is there a serious constitutional
18 question that's posed by applying that statute
19 to the president? If so, then you may well
20 default to it does not apply at least on that
21 fact pattern.

22 JUSTICE GORSUCH: Well, I thought you
23 said it -- that was my question.

24 MR. DREEBEN: Yes. I understand.

25 JUSTICE GORSUCH: And you said it --

1 it fell outside that core, we'll call it
2 immunity for simplicity's sake.

3 MR. DREEBEN: Yes, I understand.

4 JUSTICE GORSUCH: But --

5 MR. DREEBEN: There's a -- there's a
6 separate --

7 JUSTICE GORSUCH: So they couldn't --

8 MR. DREEBEN: -- category of --

9 JUSTICE GORSUCH: Okay. So why
10 couldn't he be prosecuted for leading a civil
11 rights protest in front of the Capitol that --
12 that delays a vote on a piece of important
13 legislation?

14 MR. DREEBEN: So I think what you need
15 to do is run through all of the very
16 president-specific protective layers of
17 analysis. So one of them is whether the statute
18 would be construed not to apply to his conduct,
19 even if it's not part of that small core of
20 things that Congress can't regulate at all.

21 If it operates to prevent the
22 president from fulfilling his Article II --

23 JUSTICE GORSUCH: Well, he -- he could
24 have given speeches against it. He did.

25 MR. DREEBEN: Yes.

1 JUSTICE GORSUCH: But he left -- he --
2 he -- he did something more, and it -- and it
3 corruptly impeded and sought to influence an
4 official proceeding.

5 MR. DREEBEN: Well, so I -- I don't
6 know -- we're -- we're starting with the layers,
7 I think, of protection. And we're now down
8 through whether the statute would be construed
9 to apply to him. Then there would be a question
10 of whether --

11 JUSTICE GORSUCH: Assume it does.

12 MR. DREEBEN: I will assume it. Then
13 -- then there's the question of whether he has
14 the state of mind necessary --

15 JUSTICE GORSUCH: Assume he does.

16 MR. DREEBEN: -- to violate it.

17 JUSTICE GORSUCH: Corrupt --

18 MR. DREEBEN: Okay.

19 JUSTICE GORSUCH: Nobody knows what
20 corrupt intent means? We've been around that
21 tree --

22 MR. DREEBEN: I think we will probably
23 --

24 JUSTICE GORSUCH: -- twice already.

25 MR. DREEBEN: -- find out.

1 JUSTICE GORSUCH: And maybe it means
2 that he knows that he was doing wrong, is what
3 --

4 MR. DREEBEN: Perhaps.

5 JUSTICE GORSUCH: -- the government
6 told us.

7 MR. DREEBEN: Right.

8 JUSTICE GORSUCH: He knows he's doing
9 wrong. He knows he shouldn't be out there
10 blocking congressmen from going to vote.

11 MR. DREEBEN: Well, let me get to the
12 next layer then, which is that the president
13 does have access to the attorney general to
14 provide legal advice and regularly gets legal
15 advice from the attorney general on the lawful
16 scope of the president's activities.

17 We could go down two tracks here. One
18 is that the attorney general advises him that,
19 as an incident of his Article II authority and
20 in carrying out the functions of the presidency,
21 he can lawfully participate in that protest.
22 It's kind of the First Amendment analogue to the
23 president's official powers, which the Court is
24 exploring in other cases.

25 Alternatively, the attorney general

1 could advise him, I'm sorry, Mr. President,
2 there's nothing in the language of this statute
3 that carves you out. I don't see a serious
4 constitutional question in it --

5 JUSTICE GORSUCH: I got it.

6 MR. DREEBEN: -- because you don't
7 have to do that, and I would advise you not to
8 --

9 JUSTICE GORSUCH: And then --

10 JUSTICE SOTOMAYOR: Mr. Dreeben --

11 MR. DREEBEN: -- violate criminal law.

12 JUSTICE GORSUCH: -- and then he could
13 be prosecuted?

14 MR. DREEBEN: No.

15 JUSTICE GORSUCH: No? If he gets a
16 negative opinion from the attorney general, he
17 still couldn't be prosecuted?

18 MR. DREEBEN: I'm going to assume that
19 most presidents are not going to take --

20 JUSTICE GORSUCH: Well, but if he gets
21 one and does it anyway, then he could be
22 prosecuted?

23 MR. DREEBEN: Well, so then, if we are
24 down at that level, I think what we are really
25 asking is whether the president is subject to

1 the criminal law.

2 JUSTICE GORSUCH: And your answer?

3 MR. DREEBEN: And our answer is yes --

4 JUSTICE GORSUCH: Yeah. Okay.

5 MR. DREEBEN: -- he is subject to the
6 criminal law, but --

7 JUSTICE SOTOMAYOR: Mr. Dreeben, can
8 we go back to the bribery statute? I, like you,
9 understand that the only thing that is covered
10 by that is the president is barred from
11 soliciting or receiving funds in any room or
12 building in the United States.

13 MR. DREEBEN: That is -- that is
14 correct. And it's an extremely --

15 JUSTICE SOTOMAYOR: Official building.
16 It's a very limited --

17 MR. DREEBEN: Yes.

18 JUSTICE SOTOMAYOR: -- mention of the
19 president.

20 MR. DREEBEN: And, really, I think
21 others --

22 JUSTICE SOTOMAYOR: Can -- can -- so,
23 as I understand this, there's two very limited
24 provisions mentioning the president as included.

25 MR. DREEBEN: That's right.

1 JUSTICE SOTOMAYOR: There's a whole
2 number of provisions that exclude the president,
3 many, many, many more that exclude the
4 president, correct?

5 MR. DREEBEN: It's a kind of small
6 number on both --

7 JUSTICE SOTOMAYOR: All right. Now --

8 MR. DREEBEN: -- sides of the
9 question, Justice Sotomayor.

10 JUSTICE SOTOMAYOR: -- Justice Barrett
11 made the point that if we say a president can't
12 be included in a criminal law unless explicitly
13 named, then that would bar the Senate from
14 impeaching him for high crimes or misdemeanor
15 because that means that he's not subject to the
16 law at all. Correct?

17 MR. DREEBEN: So I -- I think, Justice
18 --

19 JUSTICE SOTOMAYOR: That's a tautology
20 you can't escape.

21 MR. DREEBEN: Justice Sotomayor, what
22 I think that Justice Barrett was saying -- and
23 we would agree with it -- is that under my
24 friend's position, after impeachment, he could
25 be prosecuted, but under his statutory

1 construction approach, there would be nothing to
2 prosecute him for.

3 JUSTICE SOTOMAYOR: Exactly. That's
4 the point.

5 MR. DREEBEN: Exactly.

6 JUSTICE SOTOMAYOR: Which is, if he's
7 not covered by the criminal law, he can't be
8 impeached for it.

9 MR. DREEBEN: Yes.

10 JUSTICE SOTOMAYOR: For violating it.
11 All right. Now could we go further on this
12 clear statement rule? The situations -- and you
13 mentioned it earlier -- in which we have looked
14 to see if the president is covered is
15 contextual, correct?

16 MR. DREEBEN: Correct.

17 JUSTICE SOTOMAYOR: And what are the
18 factors that generally we'll look at? I -- I'm
19 thinking specifically about whether the APA
20 covers the president.

21 MR. DREEBEN: Correct.

22 JUSTICE SOTOMAYOR: And what we did
23 there was analyze what powers were being given
24 to -- in the lawsuit and -- et cetera. We
25 looked at words. We looked at structure. We

1 looked at separation-of-powers issues relating
2 to our case law that said you can't direct the
3 president to do anything and this would have
4 been a subterfuge for that, correct?

5 MR. DREEBEN: All correct.

6 JUSTICE SOTOMAYOR: All right. So I
7 don't know why, two of my colleagues, how they
8 would fashion a clear statement rule that would
9 say when a law says any person can't accept a
10 bribe, that that permits the president to do it.

11 MR. DREEBEN: So I agree, Justice
12 Sotomayor, that the -- that the way that this
13 Court has interpreted statutes that do carve out
14 the president -- Justice Kavanaugh asked about
15 this -- was very context-specific. The Franklin
16 case basically involved a holding that we are
17 highly unlikely to say that the president is an
18 agency, something that the government said would
19 be a peculiar understanding of agency, when the
20 effect of it would be that we would review the
21 president's decisions under statutes for abuse
22 of discretion, which is a very extraordinary
23 thing to do.

24 I think even going back to Marbury --
25 this is perhaps a point on which I agree with my

1 friend. Marbury says discretionary acts of the
2 president are not the kind of thing that the
3 Court reviews.

4 JUSTICE SOTOMAYOR: All right. Could
5 I go back to your brief and -- and going back to
6 what some of my colleagues have asked you.
7 There appears to be some narrowing principles to
8 the concept that the president is subject to all
9 criminal laws in all situations.

10 MR. DREEBEN: Correct.

11 JUSTICE SOTOMAYOR: Do you agree that
12 if it affects core powers, then he would not be
13 subject to any laws that attempted to limit
14 those core powers, correct?

15 MR. DREEBEN: That is right.

16 JUSTICE SOTOMAYOR: You're defining
17 core powers as those specified by Article II?

18 MR. DREEBEN: That is essentially
19 correct, yes.

20 JUSTICE SOTOMAYOR: All right. And
21 the only words in the Constitution is -- that --
22 that have to do with the president and law is
23 that he shall "take care that the law be
24 faithfully executed," correct?

25 MR. DREEBEN: That is right.

1 JUSTICE SOTOMAYOR: Hard to imagine
2 that a president who breaks the law is
3 faithfully executing the law, correct?

4 MR. DREEBEN: He has to execute all of
5 the laws.

6 JUSTICE SOTOMAYOR: All right.

7 JUSTICE BARRETT: Counsel --

8 JUSTICE ALITO: Well, Mr. Dreeben --

9 JUSTICE BARRETT: Oh.

10 JUSTICE ALITO: -- do you really -- I
11 mean, presidents have to make a lot of tough
12 decisions about enforcing the law, and they have
13 to make decisions about questions that are
14 unsettled, and they have to make decisions based
15 on the information that's available. Do you
16 really -- did I understand you to say, well, you
17 know, if he makes a mistake, he makes a mistake;
18 he's subject to the criminal laws just like
19 anybody else?

20 MR. DREEBEN: Well, I --

21 JUSTICE ALITO: You don't think he's
22 in a special -- a peculiarly precarious
23 position?

24 MR. DREEBEN: He's in a special
25 position for a number of reasons. One is that

1 he has access to legal advice about everything
2 that he does. He's under a constitutional
3 obligation to -- he's supposed to be faithful to
4 the laws of the United States and the
5 Constitution of the United States.

6 And making a mistake is not what lands
7 you in a criminal prosecution. There's been
8 some talk about the statutes that are at issue
9 in this case. I think they are fairly described
10 as malum in se statutes, engaging in
11 conspiracies to defraud the United States with
12 respect to one of the most important functions,
13 namely, the certification of the next president.

14 JUSTICE ALITO: Well, I -- I don't
15 want to dispute the particular application of --
16 of that, of 371, conspiracy to defraud the
17 United States, to the particular facts here, but
18 would you not agree that that is a peculiarly
19 open-ended statutory prohibition in that -- that
20 fraud under that provision, unlike under most
21 other fraud provisions, does not have to do --
22 doesn't require any impairment of a property
23 interest?

24 MR. DREEBEN: It's designed to protect
25 the functions of the United States Government.

1 And it's difficult to think of a more critical
2 function than the certification of who won the
3 election.

4 JUSTICE ALITO: Yeah, I'm not -- as I
5 said, I'm not discussing the particular facts of
6 this case, but it applies to any fraud that
7 interferes seriously with any government
8 operation, right?

9 MR. DREEBEN: So what -- what the
10 government needs to show is an intent to impede,
11 interfere, or defeat a lawful government
12 function by deception, and it has to be done
13 with scienter.

14 These are not the kinds of activities
15 that I think any of us would think a president
16 needs to engage in in order to fulfill his
17 Article II duties and particularly in a case
18 like this one.

19 I -- I want to pick up on something
20 that the Court said earlier about the
21 distinction between a public official acting to
22 achieve public ends and a public official acting
23 to achieve private ends.

24 As applied to this case, the president
25 has no functions with respect to the

1 certification of the winner of the presidential
2 election. It seems likely that the Framers
3 designed the Constitution that way because, at
4 the time of the founding, presidents had no
5 two-term limit. They could run again and again
6 and were expected potentially to want to do
7 that.

8 So the potential for self-interest
9 would explain why the states conduct the
10 elections. They send electors to certify who
11 won those elections and to provide votes. And
12 then Congress in a joint -- extraordinary joint
13 session certifies the vote.

14 And the president doesn't have an
15 official role in that proceeding. So it's
16 difficult for me to understand how there could
17 be a serious constitutional question about
18 saying you can't use fraud to defeat that
19 function. You can't obstruct it through
20 deception. You can't deprive millions of voters
21 of their right to have their vote counted for
22 the candidate who they chose.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 Justice Alito?

2 JUSTICE ALITO: Could we just briefly
3 review the layers of protection that you think
4 exists? And I'm going to start with what the
5 D.C. Circuit said.

6 So the first layer of protection is
7 that attorneys general and other Justice
8 Department attorneys can be trusted to act in a
9 professional and ethical manner, right?

10 MR. DREEBEN: Yes.

11 JUSTICE ALITO: How robust is that
12 protection? I mean, most of the -- the vast
13 majority of attorneys general and Justice
14 Department attorneys -- and we both served in
15 the Justice Department for a long time -- are
16 honorable people and they take their
17 professional ethical responsibilities seriously,
18 but there have been exceptions, right, both
19 among attorneys general and among federal
20 prosecutors?

21 MR. DREEBEN: There have been rare
22 exceptions, Justice Alito, but when we're
23 talking about layers of protection, I do think
24 this is the -- the starting point. And if the
25 Court has concerns about the robustness of it,

1 I -- I would suggest looking at the charges in
2 this case. They involve --

3 JUSTICE ALITO: Well, I want to talk
4 about this in -- in the abstract because what is
5 before us, of course, does involve this
6 particular case, which is immensely important,
7 but whatever we decide is going to apply to all
8 future presidents.

9 So, as for attorneys general, there
10 have been two who were convicted of criminal
11 offenses while in office. There were others, A.
12 Mitchell Palmer is one that comes to mind, who
13 is widely regarded as having abused the power of
14 his office.

15 Would you agree with that?

16 MR. DREEBEN: I would, but they are
17 two officials in a long line of attorneys
18 generals who did not and in Departments of
19 Justice that are staffed by multiple people who
20 do adhere to their office. And, Justice Alito,
21 if I could just -- the point that I wanted to
22 make about this case does go to the general
23 proposition.

24 The allegations about the misuse of
25 the Department of Justice to perpetuate election

1 fraud show exactly how the Department of Justice
2 functions in the way that it is supposed to.
3 Petitioner is alleged to have tried to get the
4 Department of Justice to send fraudulent letters
5 to the states to get them to reverse electoral
6 results. The Department of --

7 JUSTICE ALITO: Yeah, I --

8 MR. DREEBEN: -- Justice pushed --

9 JUSTICE ALITO: -- I -- I understand
10 -- I understand -- I understand that, Mr.
11 Dreeben, but as I said, this case will have
12 effects that go far beyond this particular
13 prosecution.

14 So moving on to the second level of
15 protection that the D.C. Circuit cited, federal
16 grand injuries will shield former presidents
17 from unwarranted indictments.

18 How much protection is that?

19 MR. DREEBEN: Well, it -- it affords
20 two levels of protection. One is the probable
21 cause finding requires evidence. I think some
22 of the fears about groundless prosecutions
23 aren't supported by evidence, and they're not
24 going to get out of the starting gate.

25 JUSTICE ALITO: I mean, there --

1 there's the old saw about indicting a ham
2 sandwich.

3 MR. DREEBEN: Yes, but I think,
4 Justice Alito --

5 JUSTICE ALITO: I mean, you -- you
6 have a lot of experience in the Justice
7 Department. Do you come across a lot of cases
8 where the -- the -- the U.S. attorney or another
9 federal prosecutor really wanted to indict a
10 case and the grand jury refused to do so?

11 MR. DREEBEN: There are such cases.

12 JUSTICE ALITO: Are there? Yeah?

13 MR. DREEBEN: Yes. But I think that
14 the other --

15 JUSTICE ALITO: Every once in a while
16 there's an eclipse too.

17 (Laughter.)

18 MR. DREEBEN: Well, I think that
19 that's for the most reason is prosecutors have
20 no incentive to bring a case to a grand jury and
21 secure an indictment when they don't have
22 evidence to prove guilt beyond a reasonable
23 doubt. It's self-defeating.

24 JUSTICE ALITO: All right. Then the
25 third level is that former presidents enjoy all

1 the protections afforded all criminal
2 defendants, right?

3 I mean, we've discussed that. And
4 that may be true at the end of the day, but a
5 lot can happen between the time when an
6 indictment is returned and the time when the
7 former president finally gets vindication
8 perhaps on appeal.

9 Isn't that correct?

10 MR. DREEBEN: It is correct, Justice
11 Alito, but I think that we should also consider
12 the history of this country. As -- as members
13 of the Court have observed, it's baked into the
14 Constitution that any president knows that they
15 are exposed to potential criminal prosecution.
16 My friend says after impeachment and conviction.
17 We don't read the Impeachment Judgment Clause
18 that way, but we are -- it's common ground that
19 all former presidents have known that they could
20 be indicted and convicted.

21 And Watergate cemented that
22 understanding. The Watergate smoking gun tape
23 involved President Nixon and H.R. Haldeman
24 talking about and then deciding to use the CIA
25 to give a bogus story to the FBI to shut down a

1 criminal investigation.

2 JUSTICE ALITO: I mean, Mr. Sauer and
3 others have identified events in the past where
4 presidents have engaged in conduct that might
5 have been charged as a federal crime, and you --
6 you say, well, no, that's not really true. This
7 is page 42 of your brief.

8 So what about President Franklin
9 D. Roosevelt's decision to intern Japanese
10 Americans during World War II? Couldn't that
11 have been charged under 18 U.S.C. 241,
12 conspiracy against civil rights?

13 MR. DREEBEN: Today, yes. Given this
14 Court's decision in Trump versus United States
15 in which the -- you know, Trump versus Hawaii,
16 excuse me, where the Court said Korematsu is
17 overruled. I mean, President Roosevelt made
18 that decision with the advice of his attorney
19 general. That's a layer of safeguard.

20 JUSTICE ALITO: Is that really true?
21 I thought -- I thought Attorney General Biddle
22 thought that there was really no threat of
23 sabotage, as did J. Edgar Hoover.

24 MR. DREEBEN: So I think that there is
25 a lot of historical controversy, but it

1 underscores that that occurred during wartime.
2 It implicates potential commander in chief
3 concerns, concerns about the exigencies of
4 national defense that might provide an
5 as-applied Article II challenge at the time.
6 I'm not suggesting today.

7 But the idea that a decision that was
8 made and ultimately endorsed by this Court,
9 perhaps wrongly in the Korematsu case, would
10 support criminal prosecution under 241, which
11 requires under United States versus Lanier that
12 the right had been made specific so that there
13 is notice to the president, I don't think that
14 would have been satisfied.

15 JUSTICE ALITO: All right. Well, we
16 can go through other historical examples. I
17 won't do that. Let me just touch briefly on a
18 couple of other things.

19 One is the relevance of advice of
20 counsel, and I wasn't clear what your answer is.
21 So, if the president gets advice from the
22 attorney general that something is lawful, is
23 that an absolute defense?

24 MR. DREEBEN: Yes, I -- I think that
25 it is. Under the principle of entrapment by

1 estoppel, this is a due process doctrine that we
2 referred to in our brief or reply brief in
3 Garland versus Cargill this term at page 19
4 where we cited authority of this Court that if a
5 authorized government representative tells you
6 that what you are about to do is lawful, it
7 would be a root violation of due process to
8 prosecute you for that.

9 JUSTICE ALITO: Well, will that --
10 won't that give presidents an incentive to be
11 sure to pick an attorney general who can -- who
12 will reliably tell the president that it is
13 lawful to do whatever the president wants to do
14 if there's any possibly conceivable argument in
15 favor of it?

16 MR. DREEBEN: So I think the
17 constitutional structure protects against that
18 risk. The president nominates the attorney
19 general and the Senate provides advice and
20 consent. These are the sort of structural
21 checks that have operated for 200 years to
22 prevent the kind of abuses that my friend fears
23 going forward as a result of this
24 once-in-history prosecution.

25 JUSTICE ALITO: On the question of

1 whether a president has the authority to pardon
2 himself, which came up earlier in the argument,
3 what's the answer to that question?

4 MR. DREEBEN: I don't believe the
5 Department of Justice has taken a position. The
6 only authority that I'm aware of is a member of
7 the Office of Legal Counsel wrote on a
8 memorandum that there is no self-pardon
9 authority. As far as I know, the Department has
10 not addressed it further. And, of course, this
11 Court had not addressed it either.

12 JUSTICE ALITO: Well, when you
13 addressed that question before us, are you
14 speaking in your capacity solely as a member of
15 the Special Counsel's team, or are you speaking
16 on behalf of the Justice Department, which has
17 special institutional responsibilities?

18 MR. DREEBEN: I am speaking on behalf
19 of the Justice Department, representing the
20 United States.

21 JUSTICE ALITO: Now how -- don't you
22 think we need to know the answer to -- at least
23 to the Justice Department's position on that
24 issue in order to decide this case?

25 Because, if a president has the

1 authority to pardon himself before leaving
2 office and the D.C. Circuit is right that there
3 is no immunity from prosecution, won't the --
4 the predictable result be that presidents on the
5 last couple of days of office are going to
6 pardon themselves from anything that they might
7 have been conceivably charged with committing?

8 MR. DREEBEN: I -- I really doubt
9 that, Justice Alito. I mean, it sort of
10 presupposes a regime that we have never had
11 except for President Nixon and as alleged in the
12 indictment here, presidents who are conscious of
13 having engaged in wrongdoing and seeking to
14 shield themselves.

15 I think the political consequences of
16 a president who asserted a right of self-pardon
17 that has never been recognized, that seems to
18 contradict a bedrock principle of our law that
19 no person shall be the judge in their own case.
20 Those are adequate deterrents, I think, so that
21 this kind of dystopian regime is not going to
22 evolve.

23 JUSTICE ALITO: All right. Let me end
24 -- end with just a question about what is
25 required for the functioning of a stable

1 democratic society, which is something that we
2 all want. I'm sure you would agree with me that
3 a stable democratic society requires that a
4 candidate who loses an election, even a close
5 one, even a hotly contested one, leave office
6 peacefully if that candidate is -- is the
7 incumbent.

8 MR. DREEBEN: Of course.

9 JUSTICE ALITO: All right. Now, if a
10 -- an incumbent who loses a very close, hotly
11 contested election knows that a real possibility
12 after leaving office is not that the president
13 is going to be able to go off into a peaceful
14 retirement but that the president may be
15 criminally prosecuted by a bitter political
16 opponent, will that not lead us into a cycle
17 that destabilizes the functioning of our country
18 as a democracy?

19 And we can look around the world and
20 find countries where we have seen this process,
21 where the loser gets thrown in jail.

22 MR. DREEBEN: So I think it's exactly
23 the opposite, Justice Alito. There are lawful
24 mechanisms to contest the results in an
25 election. And outside the record but I think of

1 public knowledge, Petitioner and his allies
2 filed dozens of electoral challenges and, in my
3 understanding, has lost all but one that was not
4 outcome determinative in any respect. There
5 were judges that -- that said, in order to
6 sustain substantial claims of fraud that would
7 overturn an election result that's certified by
8 a state, you need evidence, you need proof. And
9 none of those things were manifested.

10 So there is an appropriate way to
11 challenge things through the courts with
12 evidence. If you lose, you accept the results.
13 That has been the nation's experience. I think
14 the Court is well familiar with that.

15 JUSTICE ALITO: All right. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 JUSTICE SOTOMAYOR: A stable
19 democratic society needs the good faith of its
20 public officials, correct?

21 MR. DREEBEN: Absolutely.

22 JUSTICE SOTOMAYOR: And that good
23 faith assumes that they will follow the law?

24 MR. DREEBEN: Correct.

25 JUSTICE SOTOMAYOR: Now, putting that

1 aside, there is no fail-safe system of
2 government, meaning we have a judicial system
3 that has layers and layers and layers of
4 protection for accused defendants in the hopes
5 that the innocent will go free. We fail
6 routinely, but we succeed more often than not.
7 In the vast majority of cases, the innocent do
8 go free. Sometimes they don't, and we have some
9 post-conviction remedies for that. But we still
10 fail. We've executed innocent people.

11 Having said that, Justice Alito went
12 through step by step all of the mechanisms that
13 could potentially fail. In the end, if it fails
14 completely, it's because we destroyed our
15 democracy on our own, isn't it?

16 MR. DREEBEN: It is, Justice
17 Sotomayor, and I also think that there are
18 additional checks in the system. Of course, the
19 constitutional Framers designed a separated
20 powers system in order to limit abuses. I think
21 one of the ways in which abuses are limited is
22 accountability under the criminal law for
23 criminal violations. But the ultimate check is
24 the goodwill and faith in democracy.

25 And crimes that are alleged in this

1 case that are the antithesis of democracy, that
2 subvert it --

3 JUSTICE SOTOMAYOR: An encouragement
4 --

5 MR. DREEBEN: -- undermine that.

6 JUSTICE SOTOMAYOR: An encouragement
7 to believe words have been somewhat put into
8 suspicion here, that no man is above the law
9 either in his official or private acts?

10 MR. DREEBEN: I think that is an
11 assumption of the Constitution.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: Mr. Dreeben, I want to
14 go through your framework and make sure I
15 understand it.

16 So, first, on the small category of
17 things that you say have absolute protection --

18 MR. DREEBEN: Yes.

19 JUSTICE KAGAN: -- that they are core
20 executive functions --

21 MR. DREEBEN: Yes.

22 JUSTICE KAGAN: -- what are those
23 small categories?

24 MR. DREEBEN: Pardon power.

25 JUSTICE KAGAN: Pardon. Veto?

1 MR. DREEBEN: Veto, foreign
2 recognition, appointments. Congress cannot say
3 you can't appoint a federal judge who hasn't
4 received, you know, a certain diploma, hasn't
5 achieved a certain age. There are a few other
6 powers in the Constitution.

7 JUSTICE KAGAN: Is commander in chief?

8 MR. DREEBEN: Commander in chief is --
9 is on the list, but I want to add to my answer
10 on that that Congress has substantial authority
11 in the national security realm. Congress
12 declares war. It raises armies. It has power
13 over the purse. That's more of a --

14 JUSTICE KAGAN: So that may be viewed
15 as not really in that core set of functions
16 which nobody has any power but the president
17 over?

18 MR. DREEBEN: Yes. I think that there
19 may be some aspects like directing troops on the
20 field in which the president's power is
21 completely unreviewable.

22 JUSTICE KAGAN: Okay. Now, in -- in
23 -- in -- in the next category, where you --
24 where -- where we've left the core set behind --

25 MR. DREEBEN: Yes.

1 JUSTICE KAGAN: -- but we're still in
2 the world of official actions --

3 MR. DREEBEN: Mm-hmm.

4 JUSTICE KAGAN: -- and that's where
5 you say there are various statutory construction
6 rules that might come into play.

7 MR. DREEBEN: Correct.

8 JUSTICE KAGAN: But you have
9 characterized those as something different from
10 just saying, oh, look, the statute doesn't say
11 the president; therefore, it doesn't apply to
12 the president.

13 MR. DREEBEN: That is right.

14 JUSTICE KAGAN: So I wanted to give
15 you an opportunity to say, you know, how that
16 would look, how that analysis would look in a
17 given case. And -- and in the course of
18 responding to that, you know, I'm sort of
19 thinking of something like the OLC opinion --

20 MR. DREEBEN: Mm-hmm.

21 JUSTICE KAGAN: -- which says
22 bribery --

23 MR. DREEBEN: Mm-hmm.

24 JUSTICE KAGAN: -- the president can
25 be tried and convicted of bribery, even in the

1 part of the bribery statutes that do not say the
2 president.

3 MR. DREEBEN: Mm-hmm.

4 JUSTICE KAGAN: Why is that true?

5 MR. DREEBEN: That is true because
6 there is no serious constitutional question that
7 the president needs to engage in bribery in
8 order to carry out his constitutional functions,
9 and the Office of Legal Counsel pointed out that
10 bribery is enumerated in the Impeachment Clause.
11 So it falls outside of anything that could be
12 viewed as inherent in the need of Article II to
13 function.

14 JUSTICE KAGAN: Do you think the
15 premise of that OLC opinion was that the bribery
16 was simply not official?

17 MR. DREEBEN: No.

18 JUSTICE KAGAN: Or is the premise that
19 the bribery was official and -- and still the
20 president could be prosecuted for it?

21 MR. DREEBEN: I think that bribery is
22 -- is the kind of hybrid that illustrates the
23 abuse of public office for private gain that we
24 think is paradigmatic of the kinds of things
25 that should be not held to be immune.

1 In a bribery case, the public official
2 cannot extract the bribe without the official
3 power to offer as the quid or the pro. I guess
4 the quo actually. So it really is a crime that
5 can only be committed by public officials who
6 misuse their power, and it was one of the things
7 that was most mistrusted.

8 Many of the acts that are charged in
9 this indictment or that would violate federal
10 criminal law similarly involve the misuse of
11 official power for private gain.

12 JUSTICE KAGAN: So, if you were to
13 say, like, what the line is in this category,
14 like, when it is that the statute should be
15 understood as precluding presidential
16 prosecution and when it is that the statute
17 should be understood as allowing it, what
18 general principles should guide?

19 MR. DREEBEN: So the -- the general
20 principles, I think, kind of emerge from looking
21 at what the Office of Legal Counsel has done.
22 So, for example, with respect to a federal
23 statute that prohibited appointments to courts
24 of people within certain degrees of
25 consanguinity, the Office of Legal Counsel said

1 this infringes on a very important appointment
2 power of the president, the power to appoint
3 federal judges. It cannot be presumed that
4 Congress intended to do that because it would
5 raise a very serious constitutional question.
6 The president is out.

7 Then there are categories of statutes
8 where the president is in, like, for example,
9 the grassroots lobbying statute. The Office of
10 Legal Counsel wrote an opinion about that, and
11 it said for the president or other public
12 officials to go out into the world and to
13 promote their programs, that can't be what
14 Congress intended to prohibit.

15 What it did intend to prohibit is
16 using federal funds to gin up -- gin up an
17 artificial grassroots campaign that gave the
18 appearance of emerging from the people, but it
19 was really top-down. And the Office of Legal
20 Counsel said the president and officials who
21 carry out the president's mandates are subject
22 to that statute. So that's a more nuanced one.

23 And then the third example that I will
24 give you is the statute that would permit
25 prosecution for contempt of Congress. The

1 Office of Legal Counsel concluded that a
2 good-faith assertion of executive privilege as a
3 reason for not providing information to Congress
4 would preclude prosecution because Congress
5 cannot be deemed to have altered the separation
6 of powers in such a manner.

7 I think OLC probably would have gone
8 on to say, if Congress tried to do it, it would
9 be deemed unconstitutional. But, again, this
10 was a statute that did not specifically name the
11 president. There are only two that do that.

12 So the entire corpus of federal
13 criminal law, including bribery offenses,
14 sedition, murder, would all be off limits if it
15 were taken to the -- to the -- to the extent
16 that some of the questions have suggested and
17 for the general principle, does it raise a
18 serious constitutional question, and, if so, to
19 what extent? Can it be carved out individually?

20 And there may be some instances where
21 the statutes here could be carved out and a
22 particular act could be found to be protected.
23 Or does the statute across the board, in such a
24 wide range of applications, somewhat analogous
25 to overbreadth analysis, infringe on the

1 president's power so that we're going to say
2 that -- that the president is just out?

3 JUSTICE KAGAN: Now that set of
4 issues, they seem important and may occasionally
5 be difficult.

6 MR. DREEBEN: Mm-hmm.

7 JUSTICE KAGAN: They also seem not
8 really before us in the way Justice Jackson
9 suggested earlier.

10 MR. DREEBEN: Mm-hmm.

11 JUSTICE KAGAN: What do you -- I mean,
12 do you think they are before us, we should just
13 clear it up, here it is, we have a case?
14 What -- what else could we do? How should we
15 deal with this, that there are these --

16 MR. DREEBEN: Yes. Yes.

17 JUSTICE KAGAN: -- lingering issues
18 that go beyond the question of whether there's
19 the kind of absolute immunity that the former
20 president is invoking?

21 MR. DREEBEN: SO I think the Court has
22 discretion to reach that issue even though
23 Justice Jackson is totally right, it was not
24 raised in the district court and it was not
25 raised in the court of appeals.

1 And the -- the analysis that I would
2 use to get there is a fusion of a couple of
3 principles. One is the Court has often resolved
4 threshold questions that are a prerequisite to
5 an intelligent resolution of the question
6 presented.

7 So, in a case like United States
8 versus Grubbs, for example, the Court reached
9 out to decide whether anticipatory warrants are
10 valid under the Fourth Amendment before turning
11 to the question whether the triggering condition
12 for an anticipatory warrant had to be in the
13 warrant. So that's one principle.

14 And then a -- a precedent that bears
15 some analogy to this is Vermont Natural
16 Resources Agency versus United States ex rel
17 Stevens. It was a qui tam case, and the first
18 question was whether a state agency was a person
19 within the meaning of the False Claims Act, and
20 the second question was whether, if the state
21 agency was, Eleventh Amendment immunity kicked
22 in.

23 And the Court wrote an analysis of why
24 it could reach both questions. The reaching the
25 person question didn't expand the Court's

1 jurisdiction, and it made sense as a matter of
2 constitutional avoidance to do that.

3 There are some considerations that cut
4 against this. And I -- I want to be clear that
5 for overall government equities, we are not wild
6 about parties who raise a -- an immunity case
7 that can be presented to a court on an
8 interlocutory appeal and then smuggling in other
9 issues. So we would want to guide the Court not
10 to have an expansive approach to that issue.

11 But the final thing that I would say
12 about this is part of our submission to this
13 Court is that the Article I branch and the
14 Article II branches are aligned in believing
15 that this prosecution is an appropriate way to
16 enforce the law, Congress by making the law, the
17 current executive by deciding to bring it.

18 And since a building block of that
19 submission is that Congress actually did apply
20 these criminal laws to official conduct, the
21 Court may wish to exercise its discretion to
22 resolve that issue.

23 JUSTICE KAGAN: Okay. I have one last
24 set of questions, which has to do with the
25 official/unofficial line.

1 MR. DREEBEN: Yes.

2 JUSTICE KAGAN: And you heard Mr.
3 Sauer's responses to both Justice Barrett's
4 questions and my questions about what he thinks
5 counts as official here and what he thinks
6 counts as unofficial here.

7 And I'm just wondering what you took
8 from his responses and also how you would
9 characterize what is official and what is not
10 official in this indictment.

11 MR. DREEBEN: So I -- I think
12 Petitioner conceded that there are acts that are
13 not official that are alleged in the indictment.
14 And we agree with him on all of that.

15 I think I disagree with him on
16 everything else that he said about what is
17 official and what is not. Organizing fraudulent
18 slates of electors, creating false documentation
19 that says I'm an elector, I was appointed
20 properly, I'm going to send a vote off to
21 Congress that reflects that Petitioner won
22 rather than the candidate that actually got the
23 most votes and who was ascertained by the
24 governor and whose electors were appointed to
25 cast votes, that is not official conduct. That

1 is campaign conduct.

2 And I think that the D.C. Circuit in
3 the Blassingame case did draw an appropriate
4 distinction. A first-term president who's
5 running for re-election can act in the capacity
6 as office-seeker or office-holder.

7 And when working with private lawyers
8 and a private public relations advisor to gin up
9 fraudulent slates of electors, that is not any
10 part of a president's job. So --

11 JUSTICE KAGAN: There's -- I'm sorry,
12 there's an allegation in the indictment that has
13 to do with the removal of a Justice Department
14 official. Would -- would -- is that core
15 protected conduct?

16 MR. DREEBEN: We don't think that
17 that's core protected conduct. I don't think
18 that -- that I would characterize that episode
19 quite that way.

20 We do agree that the Department of
21 Justice allegations were a use of the
22 president's official power. In many ways, we
23 think that aggravates the nature of this
24 offense.

25 Seeking as a candidate to oust the

1 lawful winner of the election and have oneself
2 certified with private actors is a private
3 scheme to achieve a private end, and many of the
4 co-conspirators alleged in the indictment are
5 private.

6 But for an incumbent president to then
7 use his presidential powers to try to enhance
8 the likelihood that it succeeds makes the crime
9 in our view worse. So -- and the Department of
10 Justice episode occurs very late in the election
11 cycle, after many other schemes had failed.

12 And at that point, the -- the
13 Petitioner is alleged to have tried to pressure
14 the Department of Justice to send false letters
15 to the states claiming that there were serious
16 election irregularities and that they should
17 investigate who they certified as the president.
18 None of this was true.

19 The Department of Justice officials
20 all said this is not true. We are not going to
21 do that. And at that point, Petitioner is
22 alleged to have threatened to remove the
23 Department of Justice officials who were
24 standing by their oath and replace them with
25 another person who would carry it out.

1 We're not seeking to impose criminal
2 liability on the president for exercising or
3 talking about exercising the appointment and
4 removal power. No. What we're seeking to
5 impose criminal liability for is a conspiracy to
6 use fraud to subvert the election, one means of
7 which was to try to get the Justice Department
8 to be complicit in this.

9 The case would have been no different
10 if Petitioner were successful and he had
11 actually exercised the appointment and removal
12 power and it had gone through and those
13 fraudulent letters were sent. It would have
14 made the scheme more dangerous, but it would not
15 have changed the crime.

16 JUSTICE KAGAN: And how do we think
17 about things like conversations with the vice
18 president? In other words, things that if you
19 say it that way, it's clear that they would fall
20 under executive privilege.

21 MR. DREEBEN: Mm-hmm.

22 JUSTICE KAGAN: But how does that
23 relate to the question that we're asking here?

24 MR. DREEBEN: So this is one of the
25 most difficult questions for the Department of

1 Justice, and I -- I want to explain why that is.

2 If we are operating under a Fitzgerald
3 versus Nixon lens and looking at this the way
4 that we look at things when there is a private
5 lawsuit filed against the president, we take a
6 very broad view of what the outer perimeter of
7 official presidential action is in order to be
8 as protective of the president against private
9 lawsuits that, as this Court explained in Nixon
10 versus Fitzgerald, can be very deleterious to
11 the president's conduct of business.

12 So, if we were putting this under a
13 Fitzgerald lens, we would then have to answer
14 the question: Was he acting in the capacity as
15 office-seeker, or was he acting in the capacity
16 as office-holder?

17 And if you run through the indictment,
18 you can find support for those two
19 characterizations, and the Department of Justice
20 has not yet had to come to grips with how we
21 would analyze that set of interactions.

22 JUSTICE KAGAN: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: If you did, though,

1 I just wanted to confirm, I thought I heard you
2 thought that the Blassingame framework was the
3 appropriate one.

4 Is that right?

5 MR. DREEBEN: Largely yes, Justice
6 Gorsuch. We -- we agree with the idea of the
7 distinction between office-holder and
8 office-seeker.

9 We also agree that if it's objectively
10 reasonable to view the activities as those of
11 office-holder, then the Fitzgerald immunity
12 kicks in. I think we would look more at the
13 content of the actual interaction in order to
14 make that determination than Blassingame
15 suggested at least on the facts of that case
16 might be appropriate.

17 JUSTICE GORSUCH: Can you give me an
18 example of what you have in mind? I'm just
19 trying to understand what nuance you're
20 suggesting.

21 MR. DREEBEN: So -- so -- so
22 Blassingame adopted a, you know, generally very
23 favorable, pro-government framework that we
24 endorse in tried civil cases.

25 JUSTICE GORSUCH: I would have

1 thought, yeah.

2 MR. DREEBEN: Okay. Not here, because
3 we don't think that Fitzgerald applies in the
4 criminal context.

5 JUSTICE GORSUCH: Well, I understand
6 that.

7 MR. DREEBEN: Okay.

8 JUSTICE GORSUCH: But -- but -- but --
9 but -- but putting that aside, the distinction
10 between official act and private
11 office-seeker --

12 MR. DREEBEN: Yes.

13 JUSTICE GORSUCH: -- their test is,
14 you think, good enough for government work?

15 MR. DREEBEN: I -- on -- on this one,
16 the Department hasn't taken a next step since
17 the Blassingame decision, but let me offer a few
18 thoughts that, Justice Gorsuch, I think might
19 clarify it.

20 The Blassingame decision focused on
21 objective contextual indications to try to see
22 whether the president was acting as a campaigner
23 as opposed to --

24 JUSTICE GORSUCH: Yeah.

25 MR. DREEBEN: -- a -- you know, an

1 office-holder.

2 JUSTICE GORSUCH: President, yeah.

3 MR. DREEBEN: I think that -- that
4 that decision can also be made by looking at
5 what the president actually said. And let me
6 illustrate that with an allegation that I think
7 my friend --

8 JUSTICE GORSUCH: Briefly.

9 MR. DREEBEN: -- talked -- briefly.
10 That in one of the interactions between
11 Petitioner and a state official, Petitioner is
12 alleged to have said: All I need you to do is
13 to find me 11,000 votes and change.

14 I think, if you look at that -- that
15 content, it's pretty clear that Petitioner is
16 acting in the capacity as office-seeker, not as
17 president. And we would look at that content.

18 JUSTICE GORSUCH: Okay. Okay. But
19 the test -- I'm just focused on the legal test.

20 MR. DREEBEN: Right.

21 JUSTICE GORSUCH: I'm not hearing any
22 objections to it.

23 MR. DREEBEN: Other than I think that
24 the D.C. Circuit placed more content
25 consideration off limits than I would.

1 JUSTICE GORSUCH: Okay. All right.
2 And then I wanted to understand, on the core
3 immunity or whatever word we use, that -- that
4 it seems to me that we're narrowing the ground
5 of dispute here considerably, do -- do we look
6 at motives, the president's motives for his
7 actions?

8 I mean, the -- for example, he has
9 lots of war powers, as we discussed, but he
10 might use them in order to enhance his election,
11 his personal interests. Is that a relevant
12 consideration when we're looking at core powers?

13 MR. DREEBEN: So I -- I -- I am
14 thinking of this more as looking at the
15 objective of the activity as opposed to the kind
16 of subjective motive in the sense that Your
17 Honor is talking about. I think that there is a
18 lot of concern about saying an electoral motive
19 to be reelected as such --

20 JUSTICE GORSUCH: Right.

21 MR. DREEBEN: -- is covered.

22 JUSTICE GORSUCH: I mean, every
23 first-term president --

24 MR. DREEBEN: Yes.

25 JUSTICE GORSUCH: -- everything he

1 does can be seen through the prism, by critics
2 at least, of his personal interest in
3 re-election.

4 MR. DREEBEN: Yes.

5 JUSTICE GORSUCH: And so you wouldn't
6 want that -- I -- I think you would say personal
7 motivations off limits with respect to the core
8 powers.

9 MR. DREEBEN: Probably -- well, with
10 respect to the core powers, we think those are
11 just things that can't be regulated at all, like
12 the pardon power and veto.

13 JUSTICE GORSUCH: Right.

14 MR. DREEBEN: Can't --

15 JUSTICE GORSUCH: Regardless of
16 motive?

17 MR. DREEBEN: Correct.

18 JUSTICE GORSUCH: Regardless of
19 motive?

20 MR. DREEBEN: That is right.

21 JUSTICE GORSUCH: Okay.

22 MR. DREEBEN: That is right.

23 JUSTICE GORSUCH: All right. So then
24 we're in the non-core powers --

25 MR. DREEBEN: Right.

1 JUSTICE GORSUCH: -- where we're
2 fighting over. What role do motives play there?
3 I mean, one could remove an -- an appointee that
4 -- well, first of all, is -- maybe ask this
5 first -- is removing an appointee, a
6 presidential appointee, a core power or a
7 non-core power in your world?

8 MR. DREEBEN: So, here, I might need
9 to differentiate between the principal officers
10 that this Court in cases like Myers and Seila
11 Law has regarded as having constitutional status
12 of being removable at will from inferior
13 officers, where Congress does have some
14 regulatory latitude to impose restrictions on
15 removal.

16 JUSTICE GORSUCH: Sure.

17 MR. DREEBEN: And -- and a restriction
18 --

19 JUSTICE GORSUCH: Put -- put that
20 aside. Yeah, I -- I understand that.

21 MR. DREEBEN: All right. Putting --
22 putting that aside, yes, appointing a principal
23 officer is a core power. I am not prepared to
24 say that there is no potential criminal
25 regulation to say you can't do it for corrupt

1 purposes, to enrich yourself, for example.

2 JUSTICE GORSUCH: Well, bribery, all
3 right.

4 MR. DREEBEN: Yes.

5 JUSTICE GORSUCH: But -- but that's
6 what I was wondering. Do motives come into the
7 core power analysis or not? And now I'm hearing
8 -- I thought I heard no, and now I'm hearing
9 maybe.

10 MR. DREEBEN: I think "maybe" might be
11 a little bit more appropriate because it's not
12 involved in this case. The Department has not
13 had to take a position on exactly how these core
14 powers would be resolved under an as-applied
15 constitutional analysis. None is involved in
16 this case.

17 JUSTICE GORSUCH: And I guess I'm
18 wondering -- and I'm not concerned about this
19 case so much as future ones too --

20 MR. DREEBEN: Yes.

21 JUSTICE GORSUCH: -- but these
22 non-core powers, and maybe --

23 MR. DREEBEN: Yes.

24 JUSTICE GORSUCH: -- core powers where
25 a president is acting with, at least in part, a

1 personal interest in getting re-elected.

2 Everything he does --

3 MR. DREEBEN: Yeah.

4 JUSTICE GORSUCH: -- he wants to get
5 reelected. And if you're -- if you're allowing
6 in motive to color that, I -- I -- I'm wondering
7 how much is left of -- of either the core or
8 non-core powers under your view?

9 MR. DREEBEN: So I -- I would be fine
10 with carving that out and deeming that to be
11 something that's intrinsic in our electoral
12 system. We're not talking about applying
13 criminal law to somebody who makes an
14 announcement that this program will be good for
15 the United States, and somebody could come along
16 and say, well, you really did it to get
17 re-elected.

18 Leaving aside whether any of that
19 violates a criminal law -- I know that the next
20 question is assume that it does -- I'm doubtful
21 that it, in fact, does because I don't think
22 criminal laws generally operate on motives as
23 opposed to objectives and purposes. But --

24 JUSTICE GORSUCH: Well, all right --

25 MR. DREEBEN: -- that -- that's --

1 JUSTICE GORSUCH: -- intentions. I
2 mean, you --

3 MR. DREEBEN: Yeah.

4 JUSTICE GORSUCH: -- you can frame a
5 motive as an intention and an intention as a
6 motive, as you well know, every day of the week.

7 MR. DREEBEN: Yes.

8 JUSTICE GORSUCH: So let's put that
9 aside too.

10 MR. DREEBEN: I understand. Well,
11 putting -- putting that aside, that really to me
12 falls in a very different category. And it is
13 also possible --

14 JUSTICE GORSUCH: So there are some
15 motives or intents that -- that are cognizable
16 and others that aren't? I mean, it's -- it's
17 awkward, right, when we look back at, like, the
18 injunction, back to Marbury and the early cases,
19 you can't enjoin a president.

20 MR. DREEBEN: Yeah.

21 JUSTICE GORSUCH: Also meant --

22 MR. DREEBEN: A sitting president.

23 JUSTICE GORSUCH: -- you couldn't hold
24 him in contempt, right?

25 MR. DREEBEN: A sitting -- a sitting

1 president.

2 JUSTICE GORSUCH: For sure. For sure.

3 MR. DREEBEN: Justice Gorsuch, could I
4 try one more time --

5 JUSTICE GORSUCH: Well, let me just --

6 MR. DREEBEN: -- to clarify?

7 JUSTICE GORSUCH: -- spin this -- spin
8 this out just a second, right?

9 MR. DREEBEN: Okay.

10 JUSTICE GORSUCH: And -- and -- and it
11 didn't matter what the president's motives were.
12 We're not going to look behind it.

13 MR. DREEBEN: Right. Right.

14 JUSTICE GORSUCH: And -- and same
15 thing in Nixon. We said, gosh, in Nixon versus
16 Fitzgerald, that's something courts shouldn't
17 get engaged in because presidents have all
18 manner of motives. And, again, I'm not
19 concerned about this case, but I am concerned
20 about future uses of the criminal law to target
21 political opponents based on accusations about
22 their motives.

23 MR. DREEBEN: Mm-hmm.

24 JUSTICE GORSUCH: Whether it's
25 re-election or who knows what "corrupt" means in

1 1512, right? We -- we don't know what that
2 means. Maybe we'll find out sometime soon.

3 But the -- the dangerousness of
4 accusing your political opponent of having bad
5 motives.

6 MR. DREEBEN: Mm-hmm.

7 JUSTICE GORSUCH: And -- and if that's
8 enough to overcome your core powers or any other
9 limits. Reactions, thoughts?

10 MR. DREEBEN: Yeah. So -- so I -- I
11 think that you're raising a very difficult
12 question about --

13 JUSTICE GORSUCH: That's the idea,
14 right? I mean --

15 MR. DREEBEN: That is the idea. And
16 --

17 JUSTICE GORSUCH: -- testing --
18 testing the limits of both sides' arguments.

19 MR. DREEBEN: And -- and I'm going to
20 say something that I don't normally say, which
21 is that's really not involved in this case. We
22 don't have --

23 (Laughter.)

24 MR. DREEBEN: We don't have bad
25 political motive in that sense. I would start

1 --

2 JUSTICE GORSUCH: I -- I -- I
3 understand that. I appreciate that, but you
4 also appreciate that we're --

5 MR. DREEBEN: Yes.

6 JUSTICE GORSUCH: -- writing a rule
7 for --

8 MR. DREEBEN: Yes.

9 JUSTICE GORSUCH: -- for the ages.

10 MR. DREEBEN: Yes. And -- and I think
11 I would start by looking at the statutes and --
12 and seeing what restrictions they do place on
13 the president's conduct.

14 And, for example, the statute that
15 prohibits fraud to defeat the lawful functions
16 of the United States, the statute defines what
17 the purpose is that the defendant has to have in
18 mind. It has to be to defeat something that the
19 United States is doing and it has to be by
20 deception.

21 I don't think that that gets us into
22 the realm of motive hunting in the area where we
23 are as concerned, I think, as the Court would
24 be, about doing something that would undermine
25 the presidency and the executive branch.

1 And 1512(c)(2), we may have different
2 views on the clarity and the scope of that
3 statute. I think, if the Court does interpret
4 "corruptly" as involving a consciousness of
5 wrongdoing and elevates that to consciousness of
6 illegality, then we're in a different realm.
7 Wanting to get re-elected is not an illegal
8 motive, and you don't have to worry about
9 prosecuting presidents for that.

10 JUSTICE GORSUCH: Yeah. Okay. Thank
11 you, Mr. Dreeben.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh?

14 JUSTICE KAVANAUGH: As you've
15 indicated, this case has huge implications for
16 the presidency, for the future of the
17 presidency, for the future of the country in my
18 view.

19 You've referred to the Department a
20 few times as having supported the position. Who
21 in the Department? Is it the president, the
22 attorney general?

23 MR. DREEBEN: The Solicitor General of
24 the United States. Part of the way in which the
25 special counsel functions is as a component of

1 the Department of Justice. The regulations
2 envision that we reach out and consult. And on
3 a question of this magnitude, that involves
4 equities that are far beyond this prosecution,
5 as the questions of the Court have --

6 JUSTICE KAVANAUGH: So it's the
7 solicitor general?

8 MR. DREEBEN: Yes.

9 JUSTICE KAVANAUGH: Okay. Second,
10 like Justice Gorsuch, I'm not focused on the
11 here and now of this case. I'm very concerned
12 about the future. And I think one of the
13 Court's biggest mistakes was Morrison versus
14 Olson.

15 MR. DREEBEN: Mm-hmm.

16 JUSTICE KAVANAUGH: I think that was a
17 terrible decision for the presidency and for the
18 country and not because there were bad people
19 who were independent counsels, but President
20 Reagan's administration, President Bush's
21 administration, President Clinton's
22 administration were really hampered --

23 MR. DREEBEN: Yes.

24 JUSTICE KAVANAUGH: -- in their
25 view --

1 MR. DREEBEN: Mm-hmm.

2 JUSTICE KAVANAUGH: -- all three, by
3 the independent counsel structure. And what I'm
4 worried about here is that that was kind of
5 let's relax Article II a bit for the needs of
6 the moment. And I'm worried about a similar
7 kind of situation applying here.

8 That was a prosecutor investigating a
9 president in each of those circumstances and
10 someone picked from the opposite party, the
11 current president, and -- usually --

12 MR. DREEBEN: Mm-hmm.

13 JUSTICE KAVANAUGH: -- was how it
14 worked. And -- and Justice Scalia wrote that
15 the -- the fairness of a process must be
16 adjudged on the basis of what it permits to
17 happen --

18 MR. DREEBEN: Mm-hmm.

19 JUSTICE KAVANAUGH: -- not what it
20 produced in a particular case. You've
21 emphasized many times regularity, the Department
22 of Justice.

23 And he said -- and I think this
24 applied to the independent counsel system, and
25 it could apply if presidents are routinely

1 subject to investigation going forward. "One
2 thing is certain, however. It involves
3 investigating and perhaps prosecuting a
4 particular individual. Can one imagine a less
5 equitable manner of fulfilling the executive
6 responsibility to investigate and prosecute?
7 What would the reaction be if, in an area not
8 covered by this statute, the Justice Department
9 posted a public notice inviting applicants to
10 assist in an investigation and possible
11 prosecution of a certain prominent person? Does
12 this not invite what Justice Jackson described
13 as picking the man and then searching the law
14 books or putting investigators to work to pin
15 some offense on him? To be sure, the
16 investigation must relate to the area of
17 criminal offense" specified by the statute, but
18 "that has often been and nothing prevents it
19 from being very broad." I paraphrased at the
20 end because it was referring to the judges.

21 MR. DREEBEN: Mm-hmm. Yes.

22 JUSTICE KAVANAUGH: That's the concern
23 going forward, is that the -- the system will --
24 when former presidents are subject to
25 prosecution and the history of Morrison versus

1 Olson tells us it's not going to stop, it's
2 going to -- it's going to cycle back and be used
3 against the current president or the next
4 president or -- and the next president and the
5 next president after that.

6 All that, I want you to try to allay
7 that concern. Why is this not Morrison v. Olson
8 redux if we agree with you?

9 MR. DREEBEN: Well, first of all, the
10 independent counsel regime did have many
11 structural features that emphasized independence
12 at the expense of accountability. We don't have
13 that regime now. But, even under that regime,
14 Justice Kavanaugh, I think, if you look at
15 Lawrence Walsh's report on Iran/Contra, I think
16 this goes to a very fundamental point for the
17 Court to consider.

18 Judge Walsh said: I investigated
19 these matters. The proof did not nearly come
20 close to establishing criminal violations. So
21 we've lived from Watergate through the present,
22 through the independent counsel era with all of
23 its flaws, without these prosecutions having
24 gone off on a runaway train. We --

25 JUSTICE KAVANAUGH: Well, I think

1 President Reagan, President Bush, and President
2 Clinton, whether rightly or wrongly, thought
3 opposite, thought contrary to what you just
4 said.

5 MR. DREEBEN: I think nobody likes
6 being investigated for a crime, but it didn't
7 result in the kind of vindictive prosecutions
8 that I think Your Honor is -- is raising as a
9 possibility.

10 JUSTICE KAVANAUGH: Yeah.

11 MR. DREEBEN: We -- we have a
12 different system now. I think there was a
13 consensus throughout Washington that there were
14 flaws in the independent counsel system. It
15 lapsed.

16 We now are inside the Justice
17 Department with full accountability resting with
18 the attorney general, so the special counsel
19 regulations now don't operate the way that the
20 independent counsel regulations do.

21 And this Court would have something to
22 say about it, I think, if the independent
23 counsel statute were revived. I'm not sure that
24 anybody is in favor of that.

25 JUSTICE KAVANAUGH: Right. No, I was

1 just saying this is kind of the mirror image of
2 that, is one way someone could perceive it, but
3 I take your point about the different structural
4 protections internally.

5 And like Justice Scalia said, let me
6 -- I do not mean to suggest anything of the sort
7 in the present case. I'm not talking about the
8 present case. So I'm talking about the future.

9 Second, another point, you said
10 talking about the criminal statutes, it's very
11 easy to characterize presidential actions as
12 false or misleading under vague statutes. So
13 President Lyndon Johnson, statements about the
14 Vietnam War --

15 MR. DREEBEN: Mm-hmm.

16 JUSTICE KAVANAUGH: -- say something's
17 false, turns out to be false that he says about
18 the Vietnam War, 371 prosecution --

19 MR. DREEBEN: So --

20 JUSTICE KAVANAUGH: -- after he leaves
21 office?

22 MR. DREEBEN: -- I think not, but when
23 you -- this is an area that I do think that
24 merits some serious and nuanced consideration.
25 Statements that are made by a president to the

1 public are not really coming within the realm of
2 criminal statutes. They've never been
3 prosecuted.

4 I realize that the Court can say:
5 Well, what if they were? And then I think you
6 get to what I would regard as a hard
7 constitutional question that I would probably
8 guide the Court away from trying to resolve
9 today, although I do think it's very different
10 from our case and distinguishable in important
11 ways, but you're dealing here with two branches
12 of government that have a paramount interest in
13 the integrity and freedom of their interactions
14 with each other.

15 On the one hand, the president, of
16 course, should be very free to send, usually,
17 his cabinet officials and sub-cabinet officials
18 to testify to Congress to provide them with the
19 information needed to enact legislation and to
20 make national policy. And we're very concerned
21 about anything that would trammel that.

22 On the other side of the equation,
23 Congress has a compelling interest in receiving
24 accurate information and at the very least --

25 JUSTICE KAVANAUGH: I -- I agree.

1 MR. DREEBEN: -- not information that
2 is intentionally and knowingly false.

3 JUSTICE KAVANAUGH: Right.

4 MR. DREEBEN: That would pollute the
5 legislative process.

6 JUSTICE KAVANAUGH: How about, I think
7 it came up before, President Ford's pardon?

8 MR. DREEBEN: Mm-hmm.

9 JUSTICE KAVANAUGH: Very controversial
10 in the moment.

11 MR. DREEBEN: Yes.

12 JUSTICE KAVANAUGH: Hugely unpopular,
13 probably why he lost in '76.

14 MR. DREEBEN: Yes.

15 JUSTICE KAVANAUGH: Now looked upon as
16 one of the better decisions in presidential
17 history, I think, by most people. If he's
18 thinking about, well, if I grant this pardon to
19 Richard Nixon, could I be investigated myself
20 for obstruction of justice on the theory that
21 I'm interfering with the investigation of
22 Richard Nixon?

23 MR. DREEBEN: So this would fall into
24 that small core area that I mentioned to Justice
25 Kagan and Justice Gorsuch of presidential

1 responsibilities that Congress cannot regulate.

2 JUSTICE KAVANAUGH: How about
3 President Obama's drone strikes?

4 MR. DREEBEN: So the -- the Office of
5 Legal Counsel looked at this very carefully and
6 determined that, number one, the federal murder
7 statute does apply to the executive branch. The
8 president wasn't personally carrying out the
9 strike, but the aiding and abetting laws are
10 broad, and it determined that a public authority
11 exception that's built into statutes and that
12 applied particularly to the murder statute,
13 because it talks about unlawful killing, did not
14 apply to the drone strike.

15 So this is actually the way that the
16 system should function. The Department of
17 Justice takes criminal law very seriously. It
18 runs it through the analysis very carefully with
19 established principles. It documents them. It
20 explains them. And then the president can go
21 forward in accordance with it. And there is no
22 risk of prosecution for that course of activity.

23 JUSTICE KAVANAUGH: Thank you for your
24 answers.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: Mr. Dreeben, I want
3 to pick up with that public authority defense.
4 So I'm looking at the OLC memo that David Barron
5 wrote that you cited in your briefs, and he
6 describes the public authority defense citing
7 the model penal code. There are a few different
8 definitions, but I'll just highlight this one:
9 Justifying conduct which is required or
10 authorized by the law defining the duties or
11 functions of a public officer, the law governing
12 the armed services or lawful conduct of war, or
13 any other provision of law imposing a public
14 duty.

15 That sounds a lot like dividing a line
16 between official and private conduct. I think
17 it's narrower, and I recognize it's a defense,
18 not an immunity, but when we look at -- when you
19 look at the definition of it, are you acting
20 within the scope of authority conferred by law
21 or discharging a duty conferred by law?

22 I think it's narrower than
23 Blassingame, narrower than Nixon versus
24 Fitzgerald. But that's what it sounds like to
25 me. Do you agree or disagree?

1 MR. DREEBEN: You know, Justice
2 Barrett, I certainly understand the intuition
3 that when you act outside of your lawful
4 authority, you've kind of gone on a frolic and
5 detour, you're no longer carrying it out. I
6 don't really think that that quite works for
7 presidential activity.

8 The only way that he could have
9 implemented the orders is by exercising his
10 commander-in-chief authority over the armed
11 forces or his authority to supervise the
12 executive branch. Those seem like core
13 executive acts to me. There is such a
14 possibility as an unlawful executive act.

15 JUSTICE BARRETT: I'm not sure that I
16 understand your answer. I mean, I was thinking,
17 it seemed to me that in your briefs and today,
18 when you referred to the public authority
19 defense --

20 MR. DREEBEN: Yes.

21 JUSTICE BARRETT: -- you said that's
22 one of the built-in protections and --

23 MR. DREEBEN: Yes.

24 JUSTICE BARRETT: -- why immunity is
25 not necessary --

1 MR. DREEBEN: Yes.

2 JUSTICE BARRETT: -- because, in some
3 of these instances, when the president takes
4 such actions that, you know, the courts have
5 been asking you might this result in criminal
6 prosecution, you say: Well, he could raise this
7 public authority defense.

8 And so I'm saying isn't this public
9 authority defense, if raised, doesn't it sound
10 like a defense that says: Well, I had -- I was
11 authorized by law to discharge this function?

12 MR. DREEBEN: And, therefore, I acted
13 lawfully?

14 JUSTICE BARRETT: Therefore, I acted
15 lawfully --

16 MR. DREEBEN: Yes.

17 JUSTICE BARRETT: -- and am not
18 criminally liable?

19 MR. DREEBEN: Correct.

20 JUSTICE BARRETT: Does that involve a
21 look into motives? Kind of this gets to what
22 Justice Gorsuch was asking you. Could you say I
23 was acting within the scope of my authority by
24 granting a pardon, removing a cabinet officer,
25 but then the public authority defense might not

1 apply because you had a bad motive in doing so?

2 MR. DREEBEN: No, I -- I don't think
3 so, Justice Barrett. I think that it operates
4 based on objective facts disclosed to counsel.
5 Counsel then provides the advice, in this case
6 the Department of Justice, and it -- it's an
7 objectively valid defense. It's a complete
8 defense to prosecution.

9 JUSTICE BARRETT: So what would be so
10 bad -- I mean, one thing that strikes me as
11 different -- well, one thing that's obviously
12 different between a public authority defense and
13 immunity is an interlocutory appeal and having
14 it resolved at the outset.

15 MR. DREEBEN: Mm-hmm.

16 JUSTICE BARRETT: What would be so bad
17 about having a question like that resolved at
18 the threshold, having it be an immunity, the
19 same kind of question that could be brought up
20 as a defense later, but have it be brought up at
21 the threshold as an immunity, and then an
22 interlocutory appeal would be available --

23 MR. DREEBEN: Mm-hmm.

24 JUSTICE BARRETT: -- and it would be a
25 freedom from standing trial but not a -- a jet

1 -- not a get-out-of-jail-free card?

2 MR. DREEBEN: Yes, I -- I understand
3 that, and I think that if the Court believed
4 that that was the appropriate way to craft
5 presidential protections, it has the authority
6 to craft procedural rules that implement its
7 Article II concerns.

8 That said, public authority is --
9 we're calling it a defense, but under many
10 statutes, it's actually an exception to
11 liability itself. And what you're really
12 talking about is trying the general issue.

13 And, generally, in criminal cases,
14 even cases that involve First Amendment issues,
15 like threat statutes, the jury is the
16 determinant of the facts. And I have a little
17 bit of difficulty with the idea of trying the
18 whole public authority issue separately to the
19 judge and having that go up on interlocutory
20 appeal with review of facts before you could
21 ever get it forward into a criminal case.

22 That said, if -- I would prefer a
23 regime in which the Court altered some of the
24 procedural rules surrounding the president than
25 a total absolute blanket immunity that takes

1 away the possibility of criminal prosecution,
2 even if it was a core violation of the statute
3 in the teeth of attorney general advice and has
4 no overriding public purpose.

5 JUSTICE BARRETT: You think it has to
6 be a jury question? And, I -- I mean, I --
7 let's see. I wasn't necessarily proposing
8 actually treating it as a defense that was done
9 at the outset --

10 MR. DREEBEN: Mm-hmm.

11 JUSTICE BARRETT: -- and then subject
12 to interlocutory appeal. I was proposing what
13 about an immunity doctrine that drew from the
14 public authority defense that the Department of
15 Justice thinks would otherwise apply. So just
16 -- just go with me on that for a minute.

17 MR. DREEBEN: Okay.

18 JUSTICE BARRETT: Why would it be so
19 bad for it not to be a jury question? I mean,
20 it seems to me that some of these Article II
21 concerns would be exacerbated by having it go to
22 a jury rather than a judge.

23 MR. DREEBEN: So I think some of them
24 are judge questions that could be resolved on
25 the face of the indictment. If the Department

1 of Justice ever returned an indictment that said
2 the issuance of this pardon or this series of
3 pardons constituted obstruction of justice, I
4 have a little difficulty hypothesizing it, but a
5 motion could be made on the face of the
6 indictment that says Article II precludes
7 Congress from regulating these activities; the
8 indictment needs to be dismissed.

9 And if the Court wished to attach to
10 that kind of a rule interlocutory appeal, then
11 that -- that would be a -- a lesser safeguard
12 than the -- the one that my friend is proposing
13 here.

14 Other kinds of defenses, though,
15 really do intersect with the general issue. And
16 for those, I have a much greater time seeing how
17 the Court could implement that. And would there
18 be costs in going to trial? Yes. There is no
19 perfect system here. We are trying to design a
20 system that preserves the effective functioning
21 of the presidency and the accountability of a
22 former president under the rule of law.

23 And the perfect system that calibrates
24 all of those values probably has not been
25 devised. I think that the system that we have

1 works pretty well. Maybe it needs a few
2 ancillary rules. It is different from the
3 radical proposal of my friend.

4 JUSTICE BARRETT: Oh, I -- I agree.
5 Let me ask you about state prosecutions --

6 MR. DREEBEN: Mm-hmm.

7 JUSTICE BARRETT: -- because, if the
8 president has some kind of immunity that's
9 implicit in Article II --

10 MR. DREEBEN: Mm-hmm.

11 JUSTICE BARRETT: -- then that
12 immunity would protect him in -- from state
13 prosecutions --

14 MR. DREEBEN: Of course.

15 JUSTICE BARRETT: -- as well. A lot
16 of the protections that you're talking about are
17 internal protections that the federal government
18 has, protections in the Department of Justice,
19 which obviously are not applicable at the many,
20 many, many, many state and local jurisdictions
21 across the country.

22 What do you have to say to that?

23 MR. DREEBEN: So that raises a
24 Supremacy Clause issue, and the Court would run
25 a Supremacy Clause analysis that would probably

1 start with basic principles like McCulloch
2 versus Maryland. The states do not have the
3 authority to burden federal functions and would
4 then kind of move through In re Neagle, where
5 the Court said that a state murder prosecution
6 of a federal official guarding a Supreme Court
7 Justice and who fired a shot was not
8 permissible.

9 If the Court thought that you needed a
10 more categorical rule for the states, I think
11 the Supremacy Clause certainly leaves it within
12 the Court's prerogative to determine that the
13 president, unlike all other officials, deserves
14 more of a robust federal defense than what I
15 have just described.

16 JUSTICE BARRETT: But it would still
17 be a defense in -- in the states? It wouldn't
18 be -- I mean --

19 MR. DREEBEN: Well, any --

20 JUSTICE BARRETT: -- because that --
21 that's my point. Like, you know, it's one thing
22 to say, well, the president -- there are not
23 going to be these prosecutions that are
24 politically motivated, the things that Justice
25 Kavanaugh was referring to that might be the

1 danger of -- of this system, one thing that we
2 have to worry about, that might not carry the
3 day, but, you know, that's a concern.

4 It's totally different when you take
5 it outside of the Department of Justice and its
6 structures and then you throw it out elsewhere,
7 the idea across -- across the states, the idea
8 of an immunity, I think, has a lot more purchase
9 if you're talking about something that protects
10 the former president from standing trial and the
11 stake in state and local level.

12 MR. DREEBEN: So I -- I don't know
13 that you would have to design a system in which
14 the president would have to stand trial at the
15 state and local level. It's certainly within
16 the Court's authority as a matter of Supremacy
17 Clause law to find an immunity. But we -- we
18 have been talking here about -- at some length
19 on the distinction between official acts and
20 private acts.

21 JUSTICE BARRETT: Yeah.

22 MR. DREEBEN: That will have to be
23 determined by some sort of a process. Any
24 immunity defense that the Court announces can
25 still be met by a state assertion that we're

1 prosecuting private conduct. You're going to
2 have to have some process.

3 I think having some legal process is
4 not a reason to cast aside a nuanced system that
5 actually looks at what protections are necessary
6 as opposed to what would provide the absolute
7 maximum insulation for former presidents even if
8 we acknowledge that it's highly prophylactic.

9 JUSTICE BARRETT: Totally agree, and I
10 wasn't actually contrasting the absolute
11 immunity rule. I was saying that --

12 MR. DREEBEN: Yes.

13 JUSTICE BARRETT: -- if there was some
14 sort of official private -- there are
15 consequences --

16 MR. DREEBEN: Yes.

17 JUSTICE BARRETT: -- towards -- about
18 making immunity. Okay.

19 And since you bring up the private
20 acts, this is my last question. So I had asked
21 Mr. Sauer about, on page 46 and 47 of your
22 brief --

23 MR. DREEBEN: Yes.

24 JUSTICE BARRETT: -- you say, even if
25 the Court were inclined to recognize some

1 immunity for a former president's official acts,
2 it should remand for trial because the
3 indictment alleges substantial private conduct.

4 MR. DREEBEN: Yes.

5 JUSTICE BARRETT: And you said that
6 the private conduct would be sufficient.

7 MR. DREEBEN: Yes.

8 JUSTICE BARRETT: The Special Counsel
9 has expressed some concern for speed and wanting
10 to move forward. So, you know, the normal
11 process, what Mr. Sauer asked, would be for us
12 to remand if we decided that there were --

13 MR. DREEBEN: Mm-hmm.

14 JUSTICE BARRETT: -- some official
15 acts immunity and to let that be sorted out
16 below.

17 Is another option for the Special
18 Counsel to just proceed based on the private
19 conduct and drop the official conduct?

20 MR. DREEBEN: Well, two things on
21 that, Justice Barrett.

22 First -- first of all, there's really
23 an integrated conspiracy here that had different
24 components as alleged in the indictment, working
25 with -- with private lawyers to achieve the

1 goals of the fraud and, as I said before, the --
2 the Petitioner reaching for his official powers
3 to try to make the conspiracies more likely to
4 succeed. We would like to present that as an
5 integrated picture to the jury so that it sees
6 the sequence and the gravity of the conduct and
7 why each step occurred.

8 That said, if the Court were to say
9 that the fraudulent elector scheme is private,
10 reaching out to state officials as a candidate
11 is private, trying to exploit the violence after
12 January 6th by calling senators and saying
13 please delay the certification proceeding, is
14 private campaign activity, we still think,
15 contrary to what my friend said, that we could
16 introduce the interactions with the Justice
17 Department, the efforts to pressure the vice
18 president, for their evidentiary value as
19 showing the defendant's knowledge and intent.
20 And we would take a jury instruction that would
21 say you may not impose criminal culpability for
22 the actions that he took. However, you may
23 consider it insofar as it bears on knowledge and
24 intent.

25 That's the usual rule with protected

1 speech, for example, under Wisconsin versus
2 Mitchell. My friend analogizes this to the
3 Speech or Debate Clause, but we don't think the
4 Speech or Debate Clause has any applicability
5 here. It's a very explicit constitutional
6 protection that says senators and
7 representatives shall not be questioned in any
8 other place. So it carries an evidentiary
9 component that's above and beyond whatever
10 official act immunity he is seeking.

11 And the last thing I would say on this
12 is we think that the concerns about the use of
13 evidence of presidential conduct that might
14 otherwise be official and subject to executive
15 privilege is already taken care of by United
16 States versus Nixon. That balances the
17 president's interests in confidentiality against
18 the need of the judicial system for all
19 available facts to get to the truth.

20 And once that has been overcome, we
21 submit that evidence can be used even if
22 culpability can't rest on it.

23 JUSTICE BARRETT: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

1 JUSTICE JACKSON: Just to pick up
2 where Justice Barrett left off, I -- I think I
3 heard you say that even if we decide here
4 something -- a rule that's not the rule that you
5 prefer that is somehow separating out private
6 from official acts and saying that that should
7 apply here, there's sufficient allegations in
8 the indictment in the government's view that
9 fall into the private acts bucket that the case
10 should be allowed to proceed?

11 MR. DREEBEN: Correct.

12 JUSTICE JACKSON: Because, in an
13 ordinary case, it wouldn't be stopped just
14 because some of the acts are allegedly
15 immunized, even if people agree that some are
16 immunized, if there are other acts that aren't,
17 the case would go forward?

18 MR. DREEBEN: That is right.

19 JUSTICE JACKSON: All right. Going
20 back to the clear statement argument, I -- I --
21 I'm struggling with that argument because my
22 understanding was that when a charged criminal
23 statute is read narrowly in the presidential
24 context to not apply to the president, a
25 constitutional question is being avoided, so

1 you're doing that to avoid having to deal with
2 the constitutional question.

3 So what is the constitutional question
4 that is being avoided in those kinds of
5 situations?

6 MR. DREEBEN: A serious one. This is
7 just an application of this Court's ordinary
8 construction of criminal statutes that if there
9 is an available interpretation that would avoid
10 a serious constitutional question, the Court's
11 preference is to --

12 JUSTICE JACKSON: Right.

13 MR. DREEBEN: -- go in that way.

14 JUSTICE JACKSON: And the nature -- I
15 guess I'm going at what is -- what is -- my
16 understanding is that what is being avoided in
17 that situation is the question of whether a
18 former president or, you know, can be held
19 criminally liable for doing the alleged act that
20 is being asserted in that statute, consistent
21 with the Constitution.

22 So we look at the statute. It's got
23 some elements in it. And we are saying, well,
24 geez, if this statute and those elements apply
25 to the president's conduct in this situation,

1 we'd have to answer the question can the
2 president be held liable, consistent with the
3 Constitution, for that behavior, is that right?

4 MR. DREEBEN: So the first step in
5 that analysis, I just want to --

6 JUSTICE JACKSON: Yes, please.

7 MR. DREEBEN: Yes, but the first step
8 is, is there ambiguity.

9 JUSTICE JACKSON: Okay. Right.

10 MR. DREEBEN: And these statutes apply
11 to any person. They apply to whoever. There's
12 no ambiguity in those phrases. This Court in
13 Nardone versus United States concluded that
14 similar words, "any person" --

15 JUSTICE JACKSON: Yes.

16 MR. DREEBEN: -- apply to government
17 officials.

18 JUSTICE JACKSON: All right. Well,
19 assume -- let's just assume that we -- I guess
20 I'm just trying to get at we're avoiding a
21 constitutional question if we do that in -- in
22 the ordinary case, and -- and what's confusing
23 to me about this case is that we're not being
24 asked to avoid the constitutional question.

25 In fact, the question of whether or

1 not the president can be held liable consistent
2 with the Constitution or does he have immunity
3 is the question that's being presented to us.

4 So I don't understand how the clear
5 statement kind of analysis even works. It seems
6 completely tautological to me for us to hold
7 that presidents cannot be prosecuted under any
8 criminal statute without a clear statement from
9 Congress to avoid the question of whether or not
10 the Constitution allows them to be prosecuted.

11 We'd have to have a reason, right? I
12 mean, we'd have -- we'd have to have a rationale
13 for applying the clear statement rule.

14 MR. DREEBEN: I -- I think the Court
15 would have to have some rationale that's not
16 evident in either the existing doctrine or the
17 text. And just one data point for the Court in
18 thinking about how the clear statement rule
19 works.

20 In *United States versus Sun-Diamond*, a
21 case about gratuities that the Court is probably
22 familiar with, Justice Scalia wrote an opinion
23 for a unanimous Court in which he used a
24 hypothetical about what would happen if the
25 president received a sports replica jersey at a

1 typical White House event. Would that violate
2 Section 201(c)? And the Court offered a
3 construction that it had to be for or because an
4 official act to avoid that problem.

5 I think, if there was such a
6 well-received understanding that presidents are
7 not included in general federal criminal law
8 unless the president is specifically named,
9 which he is not in Section 201, Justice Scalia
10 would have thought of that and some member of
11 the Court would have reacted, and none did.

12 JUSTICE JACKSON: All right. Let me
13 go on to ask about what you take the
14 Petitioner's position to be in this case because
15 we've had a lot of talk about drawing the lines.
16 Justice Kavanaugh, Justice Gorsuch suggested
17 that we should be thinking about Blassingame and
18 that within the -- first, we have private versus
19 official and then within official now we have
20 something about core acts versus other acts as
21 we try to figure out, you know, at what level
22 the president is going to have immunity.

23 But I took the Petitioner's argument
24 in this case not to be inviting us to engage in
25 that kind of analysis. I thought he was arguing

1 that all official acts get immunity. And so I
2 didn't understand us to be having to drill down
3 on which official acts do.

4 And so my question is, why isn't it
5 enough for the purposes of this case, given what
6 the Petitioner has argued, to just answer the
7 question of whether all official acts get
8 immunity?

9 MR. DREEBEN: That -- that is enough.
10 And if the Court answers that question the way
11 that the government has submitted, that resolves
12 the case.

13 I want to make a clarification that I
14 may have left the Court with some uncertainty
15 about. The official act analysis that my friend
16 is talking about is the Fitzgerald versus Nixon
17 outer perimeter test, which is extremely
18 protective of the president. It's not looking
19 at core versus ancillary. It's saying
20 everything the president does is a target for
21 private civil lawsuits. That is not a great
22 thing. And, therefore, they are all cut off.

23 JUSTICE JACKSON: That's an absolute
24 immunity kind of concept, right?

25 MR. DREEBEN: Correct. That's right.

1 JUSTICE JACKSON: Anything that's
2 official in the outer perimeter is not subject
3 to liability.

4 MR. DREEBEN: That is right.

5 JUSTICE JACKSON: And so we don't have
6 to then go, well, okay, we have the bucket of
7 official, now let's figure out which within that
8 might be subject to liability. Not on the
9 theory of absolute immunity, correct?

10 MR. DREEBEN: Neither on the theory of
11 absolute immunity or on our theory. On his
12 theory, everything's protected. On our theory,
13 there is no immunity, but this is where I would
14 draw the distinction.

15 There are as-applied constitutional
16 challenges that you run through the Youngstown
17 framework and this Court's customary method of
18 analysis, and you determine whether there's a
19 infringement of Article II.

20 JUSTICE JACKSON: So what you're
21 saying is, even if we reject the absolute
22 immunity theory, it's not as though the
23 president is -- you know, doesn't have the
24 opportunity to make the kinds of arguments that
25 arise as -- at the level of, you know, this

1 particular act or this particular statute has a
2 problem in retrospect.

3 I think I hear you saying we should
4 not be trying to, in the abstract, set up those
5 boundaries ahead of time. As a function of sort
6 of blanket immunity, allow each allegation to be
7 brought and then we would decide in that
8 context.

9 MR. DREEBEN: Yes, with -- with the
10 additional note that Petitioner has never made
11 that argument. And I think it would be up to a
12 district court to decide whether to go that
13 route. At this point in the litigation, he's
14 put all of his eggs in the absolute immunity
15 basket.

16 JUSTICE JACKSON: All right. And if
17 we -- if we invite -- you know, if we see the
18 question presented as broader than that and we
19 do say let's engage in the core official versus
20 not core and try to figure out the line, is this
21 the right vehicle to hammer out that test?

22 I mean, I had understood that the --
23 most, if not all, but most of the allegations
24 here, there's really no plausible argument that
25 they would fall into core versus not such that

1 they are immune.

2 MR. DREEBEN: We don't think there are
3 any core acts that have been alleged in the
4 indictments that would be off limits as a matter
5 of Article II.

6 JUSTICE JACKSON: So, if we were going
7 to do this kind of analysis, try to figure out
8 what the line is, we should probably wait for a
9 vehicle that actually presents it in a way that
10 allows us to test the different sides of the --
11 the standard that we'd be creating, right?

12 MR. DREEBEN: I don't see any need in
13 this case for the Court to embark on that
14 analysis.

15 JUSTICE JACKSON: All right. The
16 final sort of set of questions that I have have
17 to do with what I do take as a very legitimate
18 concern about prosecutorial abuse, about future
19 presidents being targeted for things that they
20 have done in office.

21 I -- I take that concern. I think
22 it's a real thing. But I wonder whether some of
23 it might also be mitigated by the fact that
24 existing administrations have a self-interest in
25 protecting the presidency, that they understand

1 that if they go after the former guy, soon
2 they're going to be the former guy and they will
3 have created precedent that will be problematic.

4 So I wonder if you might comment on
5 whether some of the caution from the Justice
6 Department and the prosecutors and whatnot comes
7 from an understanding that they will soon be
8 former presidents as well.

9 MR. DREEBEN: I think, absolutely.
10 And -- and I would locate this as a structural
11 argument that's built into the Constitution
12 itself. The executive branch, I think, as this
13 Court knows, has executive branch interests that
14 it at times asserts in opposition to Congress so
15 that the proper functioning of the president is
16 protected. And I believe that that value would
17 be operative and is operative in anything as
18 momentous as charging a former president with a
19 crime.

20 JUSTICE JACKSON: And I would also
21 say, I think, and ask you to comment on, you
22 know, presidents are concerned about being
23 investigated and prosecuted, and it chills to
24 some extent their, you know, ability to do what
25 they want in office.

1 And that's a concern on one side. But
2 can -- can you comment on the concern about
3 having a president unbounded while in office, a
4 president who knows that he does not have to
5 ultimately follow the law because there is
6 really nothing more than, say, political
7 accountability in terms of -- of impeachment?

8 I mean, we have amicus briefs here
9 from Professor Lederman, for example, who says,
10 you know, a president would not be prohibited by
11 statute from perjuring himself under oath about
12 official matters, from corruptly altering,
13 destroying, or concealing documents to prevent
14 them from being used in an official proceeding,
15 from suborning others to commit perjury, from
16 bribing witnesses or public officials. And he
17 goes on and on and on about the things that a
18 president in office with the knowledge that they
19 have no criminal accountability would do.

20 I see that as a concern that is at
21 least equal to the president being worried -- so
22 worried about criminal prosecution that he, you
23 know, is a little bit limited in his ability to
24 function.

25 So can you talk about those competing

1 concerns?

2 MR. DREEBEN: So, Justice Jackson, I
3 think it would be a sea change to announce a
4 sweeping rule of immunity that no president has
5 had or has needed. I think we have also had a
6 perfectly functioning system that has seen
7 occasional episodes of presidential misconduct.
8 The Nixon era is the paradigmatic one. The
9 indictment in this case alleges another.

10 For the most part, I believe that the
11 legal regime and the constitutional regime that
12 we have works, and to alter it poses more risks.

13 JUSTICE JACKSON: Thank you.

14 MR. DREEBEN: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Rebuttal, Mr. Sauer?

18 MR. SAUER: I have nothing further,
19 Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Counsel.

23 The case is submitted.

24 (Whereupon, at 12:40 p.m., the case
25 was submitted.)

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