

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.)

Pages: 1 through 177
Place: Washington, D.C.
Date: April 25, 2024

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
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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 substantive
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. So
16 how could you -- how -- how does your official
17 acts or the official acts border, boundary come
18 into play when it's going to be official,
19 assuming that the president is innocent? But
20 the whole question is whether he's going to be
21 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 and 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, Heartland Johnson supports --

22 JUSTICE SOTOMAYOR: Well, we go back
23 to Justice Thomas's question, which was, where
24 does that come from? There are amici here who
25 tell us that the Founders actually talked about

1 whether to grant immunity to the president.

2 And, in fact, they had state
3 constitutions that granted some criminal
4 immunity to governors. And yet they didn't take
5 it up. Instead, they -- they passed an
6 impeachment clause that basically says you can't
7 remove the president from office except by a
8 trial in the Senate, but you can impeach him
9 after. So -- or you can -- can impose criminal
10 liability.

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

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

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

25 JUSTICE SOTOMAYOR: That's absolute

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

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

21 JUSTICE SOTOMAYOR: So --

22 JUSTICE JACKSON: Isn't -- isn't the
23 work, though, of the improper motive at least in
24 the absolute immunity context to tell us what
25 are official acts and what are not? I mean, I

1 had understood that even in the -- first of all,
2 your ask is absolute immunity, isn't it? I
3 mean, that's --

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

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

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

13 MR. SAUER: Yes.

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

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

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

1 MR. SAUER: That is correct.

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

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

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

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

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

1 he was not acting in his official capacity. He
2 wasn't doing something official. He was doing
3 it personal, correct?

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

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

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

23 And I understood it to be the status
24 quo. I mean, I -- I understood that every
25 president from the beginning of time essentially

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

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

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

23 JUSTICE JACKSON: No, I understand.
24 But, since Benjamin Franklin, everybody has
25 thought, including the presidents who have held

1 the office, that they were taking this office
2 subject to potential criminal prosecution, no?

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

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

11 MR. SAUER: I think that --

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

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

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

25 JUSTICE GORSUCH: Counsel, on -- on --

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

6 Is that right?

7 MR. SAUER: We agree with that.

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

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

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

22 MR. SAUER: Yes. We think, in the
23 main, that test, especially if it's understood
24 through the lens of Judge Katsas' separate
25 opinion, is a very persuasive test. It would be

1 a great source for this Court to rely on in
2 drawing this line. And it emphasizes the
3 breadth of that test.

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

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

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

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

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

24 MR. SAUER: That is correct. There
25 would have to be -- and I would point the Court

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

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

13 JUSTICE KAVANAUGH: Can you --

14 JUSTICE BARRETT: Counsel, speaking of
15 --

16 JUSTICE KAVANAUGH: -- you tell us --

17 JUSTICE ALITO: Mr. Sauer, you --

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

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

24 But my question is whether the very
25 robust form of immunity that you're advocating

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

10 Would that be sufficient, or, if it is
11 insufficient, why would it be insufficient?

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

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

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

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

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

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

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

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

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

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

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

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

1 qualified immunity. So --

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

6 (Laughter.)

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

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

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

24 JUSTICE SOTOMAYOR: So apply it to the
25 allegations here. What is plausible about the

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

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

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

21 MR. SAUER: The indictment itself
22 alleges -- I dispute that characterization. The
23 indictment affixes the word -- label to the
24 so-called fraudulent electors -- it affixes the
25 word "fraudulent." But that's a complete

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

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

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

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

1 story.

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

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

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

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

1 under his Article II authority, but for those, I
2 understood you to be saying at a minimum, there
3 would need to be a clear statement in the
4 statute referencing the president so that the
5 president's on notice and can conduct himself or
6 herself accordingly.

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

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

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

15 JUSTICE JACKSON: Go ahead.

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

18 MR. SAUER: We do.

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

1 to go back and the trial to begin immediately.

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

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

10 JUSTICE BARRETT: Of course.

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

13 JUSTICE BARRETT: Sounds private?

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

19 MR. SAUER: That also sounds private.

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

1 co-conspirator attorney directed that effort.

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

4 JUSTICE BARRETT: Yeah.

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

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

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

12 CHIEF JUSTICE ROBERTS: Sure.

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

18 JUSTICE BARRETT: Sure.

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

22 JUSTICE BARRETT: Thank you. Thank
23 you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

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

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

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

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

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

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

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

1 improper motivation or purpose.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas?

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

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

12 JUSTICE THOMAS: Okay.

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

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

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

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

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

11 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

25 JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

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

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

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

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

1 liability.

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

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

1 JUSTICE KAGAN: That that's
2 unofficial.

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

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

12 JUSTICE KAGAN: That's official?

13 MR. SAUER: Yes.

14 JUSTICE KAGAN: Why would that be
15 official?

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

22 So, when President Trump was --

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

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

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

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

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

22 MR. SAUER: Essentially exactly right.
23 And neither allegation of what the purpose is
24 should make a determination -- should make a
25 difference as to whether it's immune. That is

1 extremely strong precedent from this Court.

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

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

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

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

23 MR. SAUER: I don't -- I don't know if
24 I'd put it that way. I don't recall an opinion
25 directly addressing it, but more fundamental to

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

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

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

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

24 JUSTICE KAGAN: What does that mean,
25 if it's structured as an official act?

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

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

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

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

22 But I emphasize to the Court that --

23 JUSTICE KAGAN: Well, he's gone.
24 Let's say this president who ordered the
25 military to stage a coup, he's no longer

1 president, he wasn't impeached, he couldn't be
2 impeached. But -- but he ordered the military
3 to stage a coup. And you're saying that's an
4 official act?

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

7 JUSTICE KAGAN: That's immune?

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

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

18 Is -- is -- is that immune?

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

24 JUSTICE KAGAN: If it's an official
25 act, is it an official act?

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

3 JUSTICE KAGAN: Is it an official act?

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

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

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

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

1 much more destructive to the Republic the risk
2 of factional strife discussed by George
3 Washington --

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

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

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

22 And also, they did discuss and
23 consider what would be the checks on the
24 presidency. And they did not say, oh, we need
25 to have criminal prosecution. Right there at

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

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

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

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

23 MR. SAUER: I think our position is
24 that would have to be an unofficial act, purely
25 private conduct, for that prosecution to go

1 forward.

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

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

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

1 that might be created is for presidents to try
2 to pardon themselves.

3 Do you have any thoughts about that?

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

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

11 MR. SAUER: And the --

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

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

1 which is bold and fearless action in the face of
2 controversy?

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

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

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

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

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

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

24 MR. SAUER: That is what Gouverneur
25 Morris said explicitly at the Constitutional

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

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

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

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

1 recommendation powers, you -- you can be
2 immediately prosecuted. That would at least be
3 a very difficult question.

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

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

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

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

24 JUSTICE KAVANAUGH: Now that's
25 separate from the question of what's official

1 versus what's personal. But, for that bucket
2 that is official, there's no clear statement,
3 period?

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

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

19 MR. SAUER: That's correct. And even
20 those, of course, if there was impeachment and
21 conviction, could be prosecuted on our view.
22 And we'd emphasize the whole series of
23 structural checks in addition to that which
24 deter those kind -- and have successfully
25 deterred presidential misfeasance for 234 years.

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

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

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

25 JUSTICE KAVANAUGH: And then, lastly,

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

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

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

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

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

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

1 many other officers subject to impeachment.

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

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

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

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

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

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

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

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

23 JUSTICE BARRETT: Okay. Okay.
24 Granted. But you also say that these criminal
25 statutes, unless they explicitly mention the

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

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

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

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

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

22 So the Impeachment Judgment Clause
23 does do significant work by authorizing the
24 subsequent prosecution of a president there
25 because of what the Framers, if you look at what

1 they're discussing in the thing, is -- or in the
2 Constitutional Convention, is principally
3 concerns about private conduct, which, of
4 course, we concede are not immune.

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

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

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

20 JUSTICE BARRETT: Okay. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Jackson?

23 JUSTICE JACKSON: So I think I now
24 understand better your position. In -- in your
25 discussions with Justice Kavanaugh, it became

1 clear that you are saying that for the private
2 acts of a president, there's no immunity, but
3 for the official acts of the president, there is
4 immunity.

5 Is that your position?

6 MR. SAUER: I agree with that.

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

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

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

1 public acts get immunity. So let me explore
2 that assumption.

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

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

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

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

24 MR. SAUER: I respectfully disagree
25 with that characterization. The president

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

6 JUSTICE JACKSON: But --

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

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

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

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

24 JUSTICE JACKSON: Yes.

25 MR. SAUER: -- both from Fitzgerald.

1 That's the very sort of inference or reasoning
2 that this Court rejected in Fitzgerald.

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

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

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

23 JUSTICE JACKSON: But he's not if
24 there's no criminal -- if there's no threat of
25 criminal prosecution, what prevents the

1 president from just doing whatever he wants?

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

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

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

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

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

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

1 from turning the Oval Office into, you know, the
2 -- the -- the -- the seat of criminal activity
3 in this country.

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

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

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

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

1 crime center that I'm envisioning.

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

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

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

15 MR. SAUER: -- or legal prohibition
16 that that might occur.

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

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

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

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

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

15 JUSTICE JACKSON: Why?

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

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

25 MR. SAUER: I think they're very

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

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

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

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

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

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

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

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Dreeben.

19 ORAL ARGUMENT OF MICHAEL R. DREEBEN

20 ON BEHALF OF THE RESPONDENT

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

23 This Court has never recognized
24 absolute criminal immunity for any public
25 official. Petitioner, however, claims that a

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

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

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

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

1 protects the president but not at the high
2 constitutional cost of blanket criminal
3 immunity.

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

8 I welcome the Court's questions.

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

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

23 That is the constitutional doctrine
24 that currently governs the separation of powers.
25 What Petitioner is asking for is a broad blanket

1 immunity that would protect the president, a
2 former president, from any criminal exposure
3 absent impeachment and conviction, which has
4 never happened in our history.

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

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

15 MR. DREEBEN: Yeah.

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

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

1 not have to lightly assume criminal liability
2 for any of their official acts.

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

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

24 JUSTICE THOMAS: Well --

25 MR. DREEBEN: -- realistic option.

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Counsel --
24 JUSTICE ALITO: Well, Mr. -- I'm
25 sorry.

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

8 Do you agree with that statement?

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

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

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

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

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

4 CHIEF JUSTICE ROBERTS: Well, that's
5 what I -- I mean, shortly after that statement
6 in the court -- court's opinion, that's what
7 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 what --
3 what concerns me is, as you know, the court of
4 appeals did not get into a focused consideration
5 of what acts we're talking about --

6 MR. DREEBEN: Mm-hmm.

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

16 MR. DREEBEN: Well, I -- I think I
17 would take issue, Mr. Chief Justice, with the
18 idea of taking away immunity. There is no
19 immunity that is in the Constitution, unless
20 this Court creates it today. There certainly is
21 no textual immunity. We do not submit that
22 that's the end of the story.

23 United States versus Nixon wasn't a
24 textually-based case. Neither was Nixon versus
25 Fitzgerald. We endorse both of those holdings.

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

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

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

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

1 president was engaging in conduct that
2 endangered the nation. He could be removed.

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

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

9 MR. DREEBEN: Mm-hmm.

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

17 Isn't that true?

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

24 JUSTICE ALITO: All right. So this is
25 more, I think, than just a -- a quarrel about

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

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

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

24 So the protection is greatly diluted
25 if you take the form -- if it takes the form

1 that you have proposed. Now why is that better?

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

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

16 So --

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

19 MR. DREEBEN: Correct.

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

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

25 JUSTICE KAVANAUGH: Well, what about,

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

6 MR. DREEBEN: Absolutely.

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

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

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

1 broad proposition that unless the president is
2 specifically named, he's not in -- in the
3 statute.

4 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 --

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 fell

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

3 MR. DREEBEN: Yes, I understand.

4 JUSTICE GORSUCH: But --

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

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

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

19 If it operates to prevent the
20 president from fulfilling his Article II --

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

23 MR. DREEBEN: Yes.

24 JUSTICE GORSUCH: But he left -- he --
25 he -- he did something more, and it -- and it

1 corruptly impeded and sought to influence an
2 official proceeding.

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

9 JUSTICE GORSUCH: Assume it does.

10 MR. DREEBEN: I will assume it. Then
11 -- then there's the question of whether he has
12 the state of mind necessarily --

13 JUSTICE GORSUCH: Assume he does.

14 MR. DREEBEN: -- to violate it.

15 JUSTICE GORSUCH: Corrupt --

16 MR. DREEBEN: Okay.

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

20 MR. DREEBEN: We would probably --

21 JUSTICE GORSUCH: -- twice already.

22 MR. DREEBEN: -- find out.

23 JUSTICE GORSUCH: And maybe it means
24 that he knows that he was doing is wrong, is
25 what the --

1 MR. DREEBEN: Perhaps.

2 JUSTICE GORSUCH: -- the government
3 told us.

4 MR. DREEBEN: Right.

5 JUSTICE GORSUCH: He knows he's doing
6 wrong. He knows he shouldn't be out there
7 blocking a congressman from going to vote.

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

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

22 Alternatively, the Attorney General
23 could advise him, I'm sorry, Mr. President,
24 there's nothing in the language of this statute
25 that carves you out. I don't see a serious

1 constitutional question in it --

2 JUSTICE GORSUCH: I got you.

3 MR. DREEBEN: -- because you don't
4 have to do that, and I would advise you not to
5 --

6 JUSTICE GORSUCH: And then --

7 MR. DREEBEN: -- violate criminal law
8 --

9 JUSTICE GORSUCH: And then he could be
10 prosecuted?

11 MR. DREEBEN: No.

12 JUSTICE GORSUCH: No? If he gets a
13 negative opinion from the attorney general, he
14 still wouldn't be prosecuted?

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

17 JUSTICE GORSUCH: Well, but if he gets
18 one and does it anyway, then he could be
19 prosecuted?

20 MR. DREEBEN: Well, so then if we are
21 down at that level, I think what we are really
22 asking is whether the president is subject to
23 the criminal law.

24 JUSTICE GORSUCH: And that's --

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

1 JUSTICE GORSUCH: Yeah. Okay.

2 MR. DREEBEN: -- he is subject to the
3 criminal law, but --

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

10 MR. DREEBEN: That is -- that is
11 correct. And it's an extremely --

12 JUSTICE SOTOMAYOR: Official building.
13 It's a very limited --

14 MR. DREEBEN: Yes.

15 JUSTICE SOTOMAYOR: -- mention of --

16 MR. DREEBEN: And really I think --

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

20 MR. DREEBEN: That's right.

21 JUSTICE SOTOMAYOR: There's a whole
22 number of provisions that exclude the president,
23 many, many, many more that exclude the
24 president. Correct?

25 MR. DREEBEN: It's a kind of small

1 number on both --

2 JUSTICE SOTOMAYOR: All right. Now --

3 MR. DREEBEN: -- sides of the
4 question, Justice Sotomayor.

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

12 MR. DREEBEN: So I -- I think, Justice
13 --

14 JUSTICE SOTOMAYOR: That's a tautology
15 you can't escape.

16 MR. DREEBEN: Justice Sotomayor, what
17 I think that Justice Barrett was saying, and we
18 would agree with it, is that under my friend's
19 position, after impeachment, he could be
20 prosecuted, but under his statutory construction
21 approach, there would be nothing to prosecute
22 him for.

23 JUSTICE SOTOMAYOR: Exactly. That's
24 the point.

25 MR. DREEBEN: Exactly.

1 JUSTICE SOTOMAYOR: Which is, if he's
2 not covered by the criminal law, he can't be
3 impeached for it.

4 MR. DREEBEN: Yes.

5 JUSTICE SOTOMAYOR: For violating it.
6 All right. Now, could we go further on this
7 clear statement rule? The situations, and you
8 mentioned it earlier, in which we have looked to
9 see if the president is covered is contextual,
10 correct?

11 MR. DREEBEN: Correct.

12 JUSTICE SOTOMAYOR: And what are the
13 factors that generally we'll look at? I -- I'm
14 thinking specifically about whether the APA
15 covers the president.

16 MR. DREEBEN: Correct.

17 JUSTICE SOTOMAYOR: And what we did
18 there was analyze what powers were being given
19 to -- in the lawsuit and -- et cetera. We
20 looked at words. We looked at structure. We
21 looked at separation-of-powers issues relating
22 to our case law that said you can't direct the
23 president to do anything and this would have
24 been a subterfuge for that, correct?

25 MR. DREEBEN: All correct.

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

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

19 I think even going back to Marbury --
20 this is perhaps a point on which I agree with my
21 friend. Marbury says discretionary acts of the
22 president are not the kind of thing that the
23 Court reviews.

24 JUSTICE SOTOMAYOR: All right. Could
25 I go back to your brief and -- and going back to

1 what some of my colleagues have asked you.
2 There appears to be some narrowing principles to
3 the concept that the president is subject to all
4 criminal laws in all situations.

5 MR. DREEBEN: Correct.

6 JUSTICE SOTOMAYOR: Do you agree that
7 if it affects core powers, then he would not be
8 subject to any laws that attempted to limit
9 those core powers, correct?

10 MR. DREEBEN: That is correct.

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

13 MR. DREEBEN: That is essentially
14 correct, yes.

15 JUSTICE SOTOMAYOR: All right. And
16 the only words in the Constitution is -- that --
17 that have to do with the president and law is
18 that he shall take care that the law be
19 faithfully executed." Correct?

20 MR. DREEBEN: That is right.

21 JUSTICE SOTOMAYOR: Hard to imagine
22 that a president who breaks the law is
23 faithfully executing the law. Correct?

24 MR. DREEBEN: He has to execute all of
25 the laws.

1 JUSTICE SOTOMAYOR: All right.

2 JUSTICE BARRETT: Counsel --

3 JUSTICE ALITO: Mr. Dreeben --

4 JUSTICE BARRETT: Oh.

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

15 MR. DREEBEN: Well, I --

16 JUSTICE ALITO: You don't think he's
17 in a special -- a peculiarly precarious
18 position?

19 MR. DREEBEN: He's in a special
20 position for a number of reasons. One is that
21 he has access to legal advice about everything
22 that he does. He's under a constitutional
23 obligation to -- he's supposed to be faithful to
24 the laws of the United States and the
25 Constitution of the United States.

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

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

19 MR. DREEBEN: It's designed to protect
20 the functions of the United States government.
21 And it's difficult to think of a more critical
22 function than the certification of who won the
23 election.

24 JUSTICE ALITO: You know, I'm not --
25 as I said, I'm not discussing the particular

1 facts of this case, but it applies to any fraud
2 that interferes seriously with any government
3 operation, right?

4 MR. DREEBEN: So what -- what the
5 government needs to show is an intent to impede,
6 interfere, or defeat a lawful government
7 function by deception, and it has to be done
8 with scienter.

9 These are not the kinds of activities
10 that I think any of us would think a president
11 needs to engage in, in order to fulfill his
12 Article II duties. And particularly in a case
13 like this one.

14 I -- I want to pick up on something
15 that the Court said earlier about the
16 distinction between a public official acting to
17 achieve public ends and a public official acting
18 to achieve private ends.

19 As applied to this case, the president
20 has no functions with respect to the
21 certification of the winner of the presidential
22 election. It seems likely that the Framers
23 designed the Constitution that way because, at
24 the time of the founding, presidents had no
25 two-term limit. They could run again and again

1 and were expected, potentially, to want to do
2 that.

3 So the potential for self-interest
4 would explain why the states conduct the
5 elections. They send electors to certify who
6 won those elections and to provide votes. And
7 then Congress in a joint -- extraordinary joint
8 session certifies the vote.

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

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas?

21 Justice Alito?

22 JUSTICE ALITO: Could we just briefly
23 review the layers of protection that you think
24 exists? And I'm going to start with what the
25 D.C. Circuit said.

1 So the first layer of protection is
2 that attorneys general and other Justice
3 Department attorneys can be trusted to act in a
4 professional and ethical manner, right?

5 MR. DREEBEN: Yes.

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

16 MR. DREEBEN: There have been rare
17 exceptions, Justice Alito, but when we're
18 talking about layers of protection, I do think
19 this is the starting point. And if the Court
20 has concerns about the robustness of it, I -- I
21 would suggest looking at the charges in this
22 case.

23 They involve --

24 JUSTICE ALITO: Well, I want to talk
25 about this in the abstract because what is

1 before us, of course, does involve this
2 particular case, which is immensely important,
3 but whatever we decide is going to apply to all
4 future presidents.

5 So as for attorneys general, there
6 have been two who were convicted of criminal
7 offenses while in office. There were others, a
8 Mitchell Palmer is one that comes to mind, who
9 is wildly regarded as having abused the power of
10 his office.

11 Would you agree with that?

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

20 The allegations about the misuse of
21 the Department of Justice to perpetuate election
22 fraud show exactly how the Department of Justice
23 functions in the way that it is supposed to.
24 Petitioner is alleged to have tried to get the
25 Department of Justice to send fraudulent letters

1 to the states to get them to reverse electoral
2 results. The Department of --

3 JUSTICE ALITO: Yeah, I --

4 MR. DREEBEN: -- Justice --

5 JUSTICE ALITO: I understand. I
6 understand -- I understand that, Mr. Dreeben,
7 but as I said, this case will have effects that
8 go far beyond this particular prosecution.

9 So moving on to the second level of
10 protection that the D.C. Circuit cited, federal
11 grand injuries will shield former presidents
12 from unwarranted indictments.

13 How much protection is that?

14 MR. DREEBEN: Well, it -- it affords
15 two levels of protection. One is the probable
16 cause finding requires evidence. I think some
17 of the fears about groundless prosecutions
18 aren't supported by evidence.

19 And they're not going to get out of
20 the starting gate.

21 JUSTICE ALITO: I mean, there --
22 there's the old saw about indicting a ham
23 sandwich.

24 MR. DREEBEN: Yes, but I think Justice
25 Alito --

1 JUSTICE ALITO: I mean, you -- you had
2 a lot of experience in the Justice Department.
3 You come across a lot of cases where the -- the
4 U.S. attorney or another federal prosecutor
5 really wanted to indict a case and the grand
6 jury refused to do so?

7 MR. DREEBEN: There are such cases.

8 JUSTICE ALITO: Are there?

9 MR. DREEBEN: Yes. But I think that
10 the other --

11 JUSTICE ALITO: Every once in a while
12 there's an eclipse too.

13 (Laughter.)

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

20 JUSTICE ALITO: All right. Then the
21 third level is that former presidents enjoy all
22 the protections afforded all criminal
23 defendants, right?

24 I mean, we've discussed that. And
25 that may be true at the end of the day, but a

1 lot can happen between the time when an
2 indictment is returned and the time when the
3 former President finally gets vindication,
4 perhaps, on appeal.

5 Isn't that correct?

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

17 And Watergate cemented that
18 understanding. The Watergate smoking gun tape
19 involved President Nixon and H.R. Haldeman
20 talking about and then deciding to use the CIA
21 to give a bogus story to the FBI to shut down a
22 criminal investigation.

23 JUSTICE ALITO: I mean, Mr. Sauer and
24 others have identified events in the past where
25 presidents have engaged in conduct that might

1 have been charged as a federal crime and you --
2 you say well, no, that's not really true. This
3 is page 42 of your brief.

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

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

16 JUSTICE ALITO: Is that really true?
17 I thought -- I thought Attorney General Biddle
18 thought that there was really no threat of
19 sabotage, as did J. Edgar Hoover.

20 MR. DREEBEN: So I think that there is
21 a lot of historical controversy, but it
22 underscores that that occurred during wartime.
23 It implicates a potential commander in chief
24 concerns, concerns about the exigencies of
25 national defense that might provide an

1 as-applied Article II challenge at the time.

2 I'm not suggesting today.

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

11 JUSTICE ALITO: All right. Well we
12 can go through other historical examples. I
13 won't do that. Let me touch briefly on a couple
14 of other things.

15 One is the relevance of advice of
16 counsel. And I wasn't clear what your answer
17 is. So if the president gets advice from the
18 attorney general that something is lawful, is
19 that an absolute defense?

20 MR. DREEBEN: Yes. I -- I think that
21 it is. Under the principle of entrapment by
22 estoppel, this is a due process doctrine that we
23 referred to in our brief or reply brief in
24 Garland versus Cargill this term at page 19
25 where we cited authority of this Court that if

1 an authorized government representative tells
2 you that what you are about to do is lawful, it
3 would be a root violation of due process to
4 prosecute you for that.

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

12 MR. DREEBEN: So I think the
13 constitutional structure protects against that
14 risk. The president nominates the attorney
15 general and the Senate provides advice and
16 consent.

17 And these are the sort of structural
18 checks that have operated for 200 years to
19 prevent the kind of abuses that my friend fears
20 going forward as a result of this
21 once-in-history prosecution.

22 JUSTICE ALITO: On the question of
23 whether a president has the authority to pardon
24 himself, which came up earlier in the argument,
25 what's the answer to that question?

1 MR. DREEBEN: I don't believe the
2 Department of Justice has taken a position. The
3 only authority that I'm aware of is a member of
4 the Office of Legal Counsel wrote on a
5 memorandum that there is no self-pardon
6 authority. As far as I know the Department has
7 not addressed it further.

8 And of course this Court had not
9 addressed it either.

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

16 MR. DREEBEN: I am speaking on behalf
17 of the Justice Department. We're representing
18 the United States.

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

23 Because if a president has the
24 authority to pardon himself before leaving
25 office and the D.C. Circuit is right that there

1 is no immunity from prosecution, won't the
2 predictable result be that presidents on the
3 last couple of days of office are going to
4 pardon themselves from anything that they might
5 have been conceivably charged with committing?

6 MR. DREEBEN: I -- I really doubt
7 that, Justice Alito. And it sort of presupposes
8 a regime that we have never had except for
9 President Nixon and as alleged in the indictment
10 here.

11 Presidents who are conscious of having
12 engaged in wrongdoing and seeking to shield
13 themselves, I think the political consequences
14 of a president who asserted a right of
15 self-pardon that has never been recognized, that
16 seems to contradict a bedrock principle of our
17 law that no person shall be the judge in their
18 own case. Those are adequate deterrents, I
19 think, so that this kind of dystopian regime is
20 not going to evolve.

21 JUSTICE ALITO: All right. Let me end
22 -- end with just a question about what is
23 required for the functioning of a stable
24 democratic society, which is something that we
25 all want. I'm sure you would agree with me that

1 a stable democratic society requires that a
2 candidate who loses an election, even a close
3 one, even a hotly contested one, leave office
4 peacefully if that candidate is -- is the
5 incumbent.

6 MR. DREEBEN: Of course.

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

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

20 MR. DREEBEN: So I think it's exactly
21 the opposite, Justice Alito. There are lawful
22 mechanisms to contest the results in an
23 election. And outside the record but I think of
24 public knowledge, Petitioner and his allies
25 filed dozens of electoral challenges and, in my

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

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

13 JUSTICE ALITO: All right. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?

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

19 MR. DREEBEN: Absolutely.

20 JUSTICE SOTOMAYOR: And that good
21 faith assumes that they will follow the law?

22 MR. DREEBEN: Correct.

23 JUSTICE SOTOMAYOR: Now, putting that
24 aside, there is no fail-safe system of
25 government, meaning we have a judicial system

1 that has layers and layers and layers of
2 protection for accused defendants in the hopes
3 that the innocent will go free. We fail
4 routinely, but we succeed more often than not.
5 In the vast majority of cases, the innocent do
6 go free. Sometimes they don't, and we have some
7 post-conviction remedies for that. But we still
8 fail. We've executed innocent people.

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

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

23 And crimes that are alleged in this
24 case that are the antithesis of democracy, that
25 subvert it --

1 JUSTICE SOTOMAYOR: An encouragement

2 --

3 MR. DREEBEN: -- undermine that.

4 JUSTICE SOTOMAYOR: An encouragement

5 to believe words have been somewhat put into

6 suspicion here, that no man is above the law

7 either in his official or private acts?

8 MR. DREEBEN: I think that is an

9 assumption of the Constitution.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: Mr. Dreeben, I want to

12 go through your framework and make sure I

13 understand it.

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

16 MR. DREEBEN: Yes.

17 JUSTICE KAGAN: -- that they are core
18 executive functions --

19 MR. DREEBEN: Yes.

20 JUSTICE KAGAN: -- what are those
21 small categories?

22 MR. DREEBEN: Pardon power.

23 JUSTICE KAGAN: Pardon. Veto?

24 MR. DREEBEN: Veto, foreign
25 recognition, appointments. Congress cannot say

1 you can't appoint a federal judge who hasn't
2 received, you know, a certain diploma, hasn't
3 achieved a certain age. There are a few other
4 powers in the Constitution.

5 JUSTICE KAGAN: Is commander in chief?

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

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

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

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

23 MR. DREEBEN: Yes.

24 JUSTICE KAGAN: -- but we're still in
25 the world of official actions --

1 MR. DREEBEN: Mm-hmm.

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

5 MR. DREEBEN: Correct.

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

11 MR. DREEBEN: That is right.

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

18 MR. DREEBEN: Mm-hmm.

19 JUSTICE KAGAN: -- which says
20 bribery --

21 MR. DREEBEN: Mm-hmm.

22 JUSTICE KAGAN: -- the president can
23 be tried and convicted of bribery, even in the
24 part of the bribery statutes that do not say the
25 president.

1 MR. DREEBEN: Mm-hmm.

2 JUSTICE KAGAN: Why is that true?

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

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

15 MR. DREEBEN: No.

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

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

24 In a bribery case, the public official
25 cannot extract the bribe without the official

1 power to offer as the quid or the pro. I guess
2 the quo actually. So it really is a crime that
3 can only be committed by public officials who
4 misuse their power, and it was one of the things
5 that was most mistrusted.

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

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

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

1 federal judges. It cannot be presumed that
2 Congress intended to do that because it would
3 raise a very serious constitutional question.
4 The president is out.

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

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

21 And then the third example that I will
22 give you is the statute that would permit
23 prosecution for contempt of Congress. The
24 Office of Legal Counsel concluded that a
25 good-faith assertion of executive privilege as a

1 reason for not providing information to Congress
2 would preclude prosecution because Congress
3 cannot be deemed to have altered the separation
4 of powers in such a manner.

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

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

18 And there may be some instances where
19 the statutes here could be carved out and a
20 particular act could be found to be protected.
21 Or does the statute across the board, in such a
22 wide range of applications, somewhat analogous
23 to overbreadth analysis, infringe on the
24 president's power so that we're going to say
25 that -- that the president is just out.

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

4 MR. DREEBEN: Mm-hmm.

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

8 MR. DREEBEN: Mm-hmm.

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

14 MR. DREEBEN: Yes. Yes.

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

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

24 And the -- the analysis that I would
25 use to get there is a fusion of a couple of

1 principles. One is the Court has often resolved
2 threshold questions that are a prerequisite to
3 an intelligent resolution of the question
4 presented.

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

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

21 And the Court wrote an analysis of why
22 it could reach both questions. The reaching the
23 person question didn't expand the Court's
24 jurisdiction, and it made sense as a matter of
25 constitutional avoidance to do that.

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

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

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

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

24 MR. DREEBEN: Yes.

25 JUSTICE KAGAN: And you heard Mr.

1 Sauer's responses to both Justice Barrett's
2 questions and my questions about what he thinks
3 counts as official here and what he thinks
4 counts as unofficial here.

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

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

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

25 And I think that the D.C. Circuit in

1 the Blassingame case did draw an appropriate
2 distinction. A first-term president who's
3 running for re-election can act in the capacity
4 as office-seeker or office-holder.

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

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

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

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

23 Seeking as a candidate to oust the
24 lawful winner of the election and have oneself
25 certified with private actors is a private

1 scheme to achieve a private end, and many of the
2 co-conspirators alleged in the indictment are
3 private.

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

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

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

24 We're not seeking to impose criminal
25 liability on the president for exercising or

1 talking about exercising the appointment and
2 removal power. No. What we're seeking to
3 impose criminal liability for is a conspiracy to
4 use fraud to subvert the election, one means of
5 which was to try to get the Justice Department
6 to be complicit in this.

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

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

19 MR. DREEBEN: Mm-hmm.

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

22 MR. DREEBEN: So this is one of the
23 most difficult questions for the Department of
24 Justice, and I -- I want to explain why that is.

25 If we are operating under a Fitzgerald

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

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

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

20 JUSTICE KAGAN: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 JUSTICE GORSUCH: If you did, though,
24 I just wanted to confirm, I thought I heard you
25 thought that the Blassingame framework was the

1 appropriate one.

2 Is that right?

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

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

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

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

23 JUSTICE GORSUCH: I would have
24 thought, yeah.

25 MR. DREEBEN: Okay. Not here, because

1 we don't think that Fitzgerald applies in the
2 criminal context.

3 JUSTICE GORSUCH: Well, I understand
4 that.

5 MR. DREEBEN: Okay.

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

10 MR. DREEBEN: Yes.

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

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

18 The Blassingame decision focused on
19 objective contextual indications to try to see
20 whether the President was acting as a campaigner
21 as opposed to --

22 JUSTICE GORSUCH: Yeah.

23 MR. DREEBEN: -- a -- you know, an
24 office-holder.

25 JUSTICE GORSUCH: Yeah.

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

6 JUSTICE GORSUCH: Briefly.

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

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

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

18 MR. DREEBEN: Right.

19 JUSTICE GORSUCH: I'm not hearing any
20 objections to it.

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

24 JUSTICE GORSUCH: Okay. All right.
25 And then I wanted to understand, on the core

1 immunity or whatever word we use, that -- that
2 it seems to me that we're narrowing the ground
3 of dispute here considerably, do -- do we look
4 at motives, the President's motives for his
5 actions?

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

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

19 JUSTICE GORSUCH: Right.

20 MR. DREEBEN: -- is covered.

21 JUSTICE GORSUCH: I mean, every
22 first-term President --

23 MR. DREEBEN: Yes.

24 JUSTICE GORSUCH: -- everything he
25 does can be seen through the prism, by critics

1 at least, of his personal interest in
2 re-election.

3 MR. DREEBEN: Yes.

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

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

12 JUSTICE GORSUCH: Right.

13 MR. DREEBEN: Yes.

14 JUSTICE GORSUCH: Regardless of
15 motive?

16 MR. DREEBEN: Correct.

17 JUSTICE GORSUCH: Regardless of
18 motive?

19 MR. DREEBEN: That's right.

20 JUSTICE GORSUCH: Okay.

21 MR. DREEBEN: That's right.

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

24 MR. DREEBEN: Right.

25 JUSTICE GORSUCH: -- where we're

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

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

15 JUSTICE GORSUCH: Sure.

16 MR. DREEBEN: And -- and restrictions
17 --

18 JUSTICE GORSUCH: Let's put that
19 aside. Yeah, I -- I understand that.

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

1 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 non-core
22 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 reelected.

2 Everything he does.

3 MR. DREEBEN: Yeah.

4 JUSTICE GORSUCH: He wants to get
5 reelected. If you're -- if you're allowing in
6 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 reelected.

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 reframe 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's 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 at -- back at,
18 like, the injunction, back to Marbury and the
19 early cases, 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.

9 MR. DREEBEN: Okay.

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

13 MR. DREEBEN: Right.

14 JUSTICE GORSUCH: And same thing in
15 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.

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

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

17 JUSTICE GORSUCH: Testing -- testing
18 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.

22 (Laughter.)

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

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

4 MR. DREEBEN: Yes.

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

7 MR. DREEBEN: Yes.

8 JUSTICE GORSUCH: -- for the ages.

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

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

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

25 And 1512(c)(2), we may have different

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

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

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

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

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

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

1 The regulations envision that we reach
2 out and consult. And on a question of this
3 magnitude, that involves equities that are far
4 beyond this prosecution, as the questions of the
5 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 the 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 Justice Scalia wrote that the --
15 the fairness of a process must be adjudged on
16 the basis of what it permits to happen --

17 MR. DREEBEN: Mm-hmm.

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

22 And he said: And I think this applied
23 to the independent counsel system, and it could
24 apply if presidents are routinely subject to
25 investigation going forward. "One thing is

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

20 MR. DREEBEN: Mm-hmm. Yes.

21 JUSTICE KAVANAUGH: That's the concern
22 going forward, is that the -- the system will --
23 when former presidents are subject to
24 prosecution and the history of Morrison versus
25 Olson tells us it's not going to stop. It's

1 going to -- it's going to cycle back and be used
2 against the current president or the next
3 president or -- and the next president and the
4 next president after that.

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

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

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

24 JUSTICE KAVANAUGH: Well, I think
25 President Reagan, President Bush, and President

1 Clinton, whether rightly or wrongly, thought
2 opposite, thought contrary to what you just
3 said.

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

9 JUSTICE KAVANAUGH: Yeah.

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

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

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

24 JUSTICE KAVANAUGH: Right. No, I was
25 just saying this is kind of the mirror image of

1 that, is one way someone could perceive it, but
2 I take your point about the different structural
3 protections internally.

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

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

14 MR. DREEBEN: Mm-hmm.

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

18 MR. DREEBEN: So --

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

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

1 criminal statutes. They've never been
2 prosecuted.

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

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

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

24 JUSTICE KAVANAUGH: I -- I agree.

25 MR. DREEBEN: -- not information that

1 is intentionally and knowingly false.

2 JUSTICE KAVANAUGH: Right.

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

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

7 MR. DREEBEN: Mm-hmm.

8 JUSTICE KAVANAUGH: Very controversial
9 in the moment.

10 MR. DREEBEN: Yes.

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

13 MR. DREEBEN: Yes.

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

22 MR. DREEBEN: So this would fall into
23 that small core area that I mentioned to Justice
24 Kagan and Justice Gorsuch of presidential
25 responsibilities that Congress cannot regulate.

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

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

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

22 JUSTICE KAVANAUGH: Thank you for your
23 answers.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

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

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

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

25 MR. DREEBEN: You know, Justice

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

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

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

19 MR. DREEBEN: Yes.

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

22 MR. DREEBEN: Yes.

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

25 MR. DREEBEN: Yes.

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

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

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

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

15 MR. DREEBEN: Yes.

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

18 MR. DREEBEN: Correct.

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

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

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

14 MR. DREEBEN: Mm-hmm.

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

22 MR. DREEBEN: Mm-hmm.

23 JUSTICE BARRETT: -- and it would be a
24 freedom from standing trial but not a -- a jet
25 -- not a get-out-of-jail-free card?

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

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

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

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

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

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

9 MR. DREEBEN: Mm-hmm.

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

16 MR. DREEBEN: Okay.

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

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

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

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

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

22 And the perfect system that calibrates
23 all of those values probably has not been
24 devised. I think that the system that we have
25 works pretty well. Maybe it needs a few

1 ancillary rules. It is different from the
2 radical proposal of my friend.

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

5 MR. DREEBEN: Mm-hmm.

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

9 MR. DREEBEN: Mm-hmm.

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

13 MR. DREEBEN: Of course.

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

21 What do you have to say to that?

22 MR. DREEBEN: So that raises a
23 Supremacy Clause issue, and the Court would run
24 a Supremacy Clause analysis that would probably
25 start with basic principles like McCulloch

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

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

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

18 MR. DREEBEN: Well, any --

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

1 have to worry about, that might not carry the
2 day, but, you know, that's a concern.

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

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

20 JUSTICE BARRETT: Yeah.

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

1 have to have some process.

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

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

11 MR. DREEBEN: Yes.

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

15 MR. DREEBEN: Yes.

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

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

22 MR. DREEBEN: Yes.

23 JUSTICE BARRETT: -- you say, even if
24 the Court were inclined to recognize some
25 immunity for a former president's official acts,

1 it should remand for trial because the
2 indictment alleges substantial private conduct.

3 MR. DREEBEN: Yes.

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

6 MR. DREEBEN: Yes.

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

12 MR. DREEBEN: Mm-hmm.

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

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

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

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

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

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

24 That's the usual rule with protected
25 speech, for example, under Wisconsin versus

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

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

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

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: Just to pick up

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

10 MR. DREEBEN: Correct.

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

17 MR. DREEBEN: That is right.

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

1 the constitutional question.

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

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

11 JUSTICE JACKSON: Right.

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

13 JUSTICE JACKSON: And the nature -- I
14 guess I'm going at -- what is -- what is -- my
15 understanding is that what is being avoided in
16 that situation is the question of whether a
17 former president or, you know, can be held
18 criminally liable for doing the alleged act that
19 is being asserted in that statute, consistent
20 with the Constitution.

21 So we look at the statute. It's got
22 some elements in it. And we are saying well,
23 geez, if this statute and those elements apply
24 to the President's conduct in this situation,
25 we'd have to answer the question can the

1 President be held liable, consistent with the
2 Constitution, for that behavior; is that right?

3 MR. DREEBEN: So the first step in
4 that analysis, I just want to --

5 JUSTICE JACKSON: Yes, please.

6 MR. DREEBEN: Yes, but the first step
7 is there ambiguity.

8 JUSTICE JACKSON: Okay. Right.

9 MR. DREEBEN: And these statutes apply
10 to whoever. There's no ambiguity in these
11 phrases. This Court in Nardone versus United
12 States concluded that similar words, "any
13 person" --

14 JUSTICE JACKSON: Yes.

15 MR. DREEBEN: -- apply to government
16 officials.

17 JUSTICE JACKSON: All right. Well,
18 assume -- let's just assume that we -- I guess
19 I'm just trying to get at we're avoiding a
20 constitutional question if we do that in -- in
21 the ordinary case. And -- and what's confusing
22 to me about this case is that we're not being
23 asked to avoid the constitutional question.

24 In fact, the question of whether or
25 not the President can be held liable consistent

1 with the Constitution or does he have immunity
2 is the question that's being presented to us.

3 So I don't understand how the clear
4 statement kind of analysis even works. It seems
5 completely tautological to me for us to hold
6 that presidents cannot be prosecuted under any
7 criminal statute without a clear statement from
8 Congress to avoid the question of whether or not
9 the Constitution allows them to be prosecuted.

10 We'd have to have a reason, right? I
11 mean, we'd have -- we'd have to have a rationale
12 for applying the clear statement rule.

13 MR. DREEBEN: I -- I think the Court
14 would have to have some rationale that's not
15 evident in either the existing doctrine or the
16 text. And just one data point for the Court in
17 thinking about how the clear statement rule
18 works.

19 In the United States versus
20 Sun-Diamond, a case about gratuities that the
21 Court is probably familiar with, Justice Scalia
22 wrote an opinion for unanimous Court in which he
23 used a hypothetical about what would happen if
24 the president received a sports replica jersey
25 at a typical White House event.

1 Would that violate Section 201(c)?
2 And the Court offered a construction that it had
3 to be for or because an official act to avoid
4 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 in this case. Because
15 we've 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 -- 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.

16 The official act analysis that my
17 friend is talking about is the Fitzgerald versus
18 Nixon outer perimeter test, which is extremely
19 protective of the president. It's not looking
20 at core versus ancillary. It's saying
21 everything the president does is a target for
22 private civil lawsuits. That's not a great
23 thing. And therefore, they are all cut off.

24 JUSTICE JACKSON: That's an absolute
25 immunity kind of concept, right?

1 MR. DREEBEN: Correct. That's right.

2 JUSTICE JACKSON: Anything that's
3 official in the outer perimeter is not subject
4 to liability.

5 MR. DREEBEN: That is right.

6 JUSTICE JACKSON: And so we don't have
7 to then go well, okay, we have the bucket of
8 official, now let's figure out which within that
9 might be subject to liability. Not on the
10 theory of absolute immunity, correct?

11 MR. DREEBEN: Neither on the theory of
12 absolute immunity or on our theory. On his
13 theory everything's protected. On our theory
14 there is no immunity, but this is where I would
15 draw the distinction.

16 There are as-applied constitutional
17 challenges that you run through the Youngstown
18 framework and this Court's customary method of
19 analysis, and you determine whether there's a --
20 an infringement of Article II.

21 JUSTICE JACKSON: So what you're
22 saying is even if we reject the absolute
23 immunity theory, it's not as though the
24 president is, you know, doesn't have the
25 opportunity to make the kinds of arguments that

1 arise as -- at the level of, you know, this
2 particular act or this particular statute has a
3 problem in retrospect.

4 I think I hear you saying we should
5 not be trying to, in the abstract, set up those
6 boundaries ahead of time as a function of sort
7 of blanket immunity. Allow each allegation to
8 be brought and then we would decide in that
9 context.

10 MR. DREEBEN: Yes, with -- with the
11 additional note that Petitioner has never made
12 that argument. And I think it would be up to a
13 district court to decide whether to go that
14 route at this point in the litigation.

15 He's put all of his eggs in the
16 absolute immunity basket.

17 JUSTICE JACKSON: All right. And if
18 we -- if we invite -- you know, if we see the
19 question presented as broader than that and we
20 do say let's engage in the core official versus
21 not core and try to figure out the line, is this
22 the right vehicle to hammer out that test?

23 I mean, I had understood that the
24 most, if not all, but most of the allegations
25 here, there's really no plausible argument that

1 they would fall into core versus not, such that
2 they are immune.

3 MR. DREEBEN: We don't think there are
4 any core acts that have been alleged in the
5 indictments that would be off limits as a matter
6 of Article II.

7 JUSTICE JACKSON: So if we were going
8 to do this kind of analysis, try to figure out
9 what the line is, we should probably wait for a
10 vehicle that actually presents it in a way that
11 allows us to test the different sides of the --
12 the standard that we'd be creating, right?

13 MR. DREEBEN: I don't see any need in
14 this case for the Court to embark on that
15 analysis.

16 JUSTICE JACKSON: All right. The
17 final sort of set of questions that I have have
18 to do with what I do take as a very legitimate
19 concern about prosecutorial abuse, about future
20 presidents being targeted for things that they
21 have done in office.

22 I -- I take that concern. I think
23 it's a real thing. But I wonder whether some of
24 it might also be mitigated by the fact that
25 existing administrations have a self-interest in

1 protecting the presidency that they understand
2 that if they go after the former guy, soon
3 they're going to be the former guy and they will
4 have created precedent that will be problematic.

5 So I wonder if you might comment on
6 whether some of the caution from the Justice
7 Department and the prosecutors and whatnot comes
8 from an understanding that they will soon be
9 former presidents as well.

10 MR. DREEBEN: I think, absolutely.
11 And -- and I would locate this as a structural
12 argument that's built into the Constitution
13 itself. The executive branch, I think as this
14 Court knows, has executive branch interests that
15 it at times asserts in opposition to Congress,
16 so that the proper functioning of the president
17 is protected.

18 And I believe that that value would be
19 operative and is operative in anything as
20 momentous as charging a former president with a
21 crime.

22 JUSTICE JACKSON: And I would also
23 say, I think, and ask you to comment on, you
24 know, presidents are concerned about being
25 investigated and prosecuted and it chills to

1 some extent their, you know, ability to do what
2 they want in office.

3 And that's a concern on one side. But
4 can -- can you comment on the concern about
5 having a president unbounded while in office, a
6 president who knows that he does not have to
7 ultimately follow the law because there is
8 really nothing more than, say, political
9 accountability in terms of -- of impeachment? I
10 mean, we have amicus briefs here, from Professor
11 Lederman, for example, who says, you know, a
12 president would not be prohibited by statute
13 from perjuring himself under oath about official
14 matters, from corruptly altering, destroying, or
15 concealing documents to prevent them from being
16 used in an official proceeding, from suborning
17 others to commit perjury, from bribing witnesses
18 or public officials. And he goes on and on and
19 on about the things that a president in office
20 with the knowledge that they have no criminal
21 accountability would do.

22 I see that as a concern that is at
23 least equal to the president being worried -- so
24 worried about criminal prosecution that he, you
25 know, is a little bit limited in his ability to

1 function.

2 So can you talk about those competing
3 concerns?

4 MR. DREEBEN: So, Justice Jackson, I
5 think it would be a sea change to announce a
6 sweeping rule of immunity that no president has
7 had or has needed. I think we have also had a
8 perfectly functioning system that has seen
9 occasional episodes of presidential misconduct.
10 The Nixon era is the paradigmatic one. The
11 indictment in this case alleges another.

12 For the most part, I believe that the
13 legal regime and the constitutional regime that
14 we have works. And to alter it poses more
15 risks.

16 JUSTICE JACKSON: Thank you.

17 MR. DREEBEN: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Rebuttal, Mr. Sauer?

21 MR. SAUER: I have nothing further,
22 Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Counsel.

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The case is submitted.
(Whereupon, at 12:40 p.m., the case
was submitted.)

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