

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 23-939  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
 )  
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Pages: 1 through 177  
Place: Washington, D.C.  
Date: April 25, 2024

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Washington, D.C. 20005  
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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 Katz's 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 to 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 Blasingame 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 JUSTICE KAVANAUGH: And he said: And  
23 I think this applied to the independent counsel  
24 system, and it could apply if presidents are  
25 routinely subject to investigation going



1 forward. One thing is certain, however. It  
2 involves investigating and perhaps prosecuting a  
3 particular individual. Can one imagine a less  
4 equitable manner of fulfilling the executive  
5 responsibility to investigate and prosecute?  
6 What would the reaction be if, in an area not  
7 covered by this statute, the Justice Department  
8 posted a public notice inviting applicants to  
9 assist in an investigation and possible  
10 prosecution of a certain prominent person?

11 Does this not invite what Justice  
12 Jackson described as picking the man and then  
13 searching the law books or putting investigators  
14 to work to pin some offense on him?

15 To be sure, the investigation must  
16 relate to the area of criminal offense specified  
17 by the statute, but that has often been and  
18 nothing prevents it from being very broad. I  
19 paraphrased at the end because it was referring  
20 to the judges.

21 MR. DREEBEN: Mm-hmm. Yes.

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

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

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

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

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

25 JUSTICE KAVANAUGH: Well, I think

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

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

10 JUSTICE KAVANAUGH: Yeah.

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

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

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

25 JUSTICE KAVANAUGH: Right. No, I was

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

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

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

15 MR. DREEBEN: Mm-hmm.

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

19 MR. DREEBEN: So --

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

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

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

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

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

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

25 JUSTICE KAVANAUGH: I -- I agree.

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

3 JUSTICE KAVANAUGH: Right.

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

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

8 MR. DREEBEN: Mm-hmm.

9 JUSTICE KAVANAUGH: Very controversial  
10 in the moment.

11 MR. DREEBEN: Yes.

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

14 MR. DREEBEN: Yes.

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

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

1 responsibilities that Congress cannot regulate.

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

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

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

23 JUSTICE KAVANAUGH: Thank you for your  
24 answers.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

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

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

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



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

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

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

20                   MR. DREEBEN: Yes.

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

23                   MR. DREEBEN: Yes.

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

1 MR. DREEBEN: Yes.

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

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

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

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

16 MR. DREEBEN: Yes.

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

19 MR. DREEBEN: Correct.

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

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

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

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

15 MR. DREEBEN: Mm-hmm.

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

23 MR. DREEBEN: Mm-hmm.

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

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

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

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

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

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

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

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

10 MR. DREEBEN: Mm-hmm.

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

17 MR. DREEBEN: Okay.

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

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

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

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

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

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

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

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

6 MR. DREEBEN: Mm-hmm.

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

10 MR. DREEBEN: Mm-hmm.

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

14 MR. DREEBEN: Of course.

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

22 What do you have to say to that?

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

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

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

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

19 MR. DREEBEN: Well, any --

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



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

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

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

21 JUSTICE BARRETT: Yeah.

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

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

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

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

12 MR. DREEBEN: Yes.

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

16 MR. DREEBEN: Yes.

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

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

23 MR. DREEBEN: Yes.

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

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

4 MR. DREEBEN: Yes.

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

7 MR. DREEBEN: Yes.

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

13 MR. DREEBEN: Mm-hmm.

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

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

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

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

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

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

25           That's the usual rule with protected

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

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

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

23           JUSTICE BARRETT: Thank you.

24           CHIEF JUSTICE ROBERTS: Justice  
25 Jackson?

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

11 MR. DREEBEN: Correct.

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

18 MR. DREEBEN: That is right.

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

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

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

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

12 JUSTICE JACKSON: Right.

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

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

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

1 we'd have to answer the question can the  
2 President be held liable, consistent with the  
3 Constitution, for that behavior; is that right?

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

6 JUSTICE JACKSON: Yes, please.

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

9 JUSTICE JACKSON: Okay. Right.

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

15 JUSTICE JACKSON: Yes.

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

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

25 In fact, the question of whether or



1 not the President can be held liable consistent  
2 with the Constitution or does he have immunity  
3 is the question that's being presented to us.

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

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

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

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

1 at a typical White House event.

2 Would that violate Section 201(c)?

3 And the Court offered a construction that it had  
4 to be for or because an official act to avoid  
5 that problem.

6 I think if there was such a  
7 well-received understanding that presidents are  
8 not included in general federal criminal law  
9 unless the president is specifically named,  
10 which he is not in Section 201, Justice Scalia  
11 would have thought of that and some member of  
12 the Court would have reacted and none did.

13 JUSTICE JACKSON: All right. Let me  
14 go on to ask about what you take the  
15 Petitioner's position in this case. Because  
16 we've a lot of talk about drawing the lines.  
17 Justice Kavanaugh, Justice Gorsuch suggested  
18 that we should be thinking about Blassingame and  
19 that within -- first we have private versus  
20 official and then within official now we have  
21 something about core acts versus other acts as  
22 we try to figure out, you know, at what level  
23 the president is going to have immunity.

24 But I took the Petitioner's argument  
25 in this case not to be inviting us to engage in

1 that kind of analysis. I thought he was arguing  
2 that all official acts get immunity. And so I  
3 didn't understand us to be having to drill down  
4 on which official acts do.

5 And so my question is why isn't it  
6 enough for the purposes of this case, given what  
7 the Petitioner has argued, to just answer the  
8 question of whether all official acts get  
9 immunity?

10 MR. DREEBEN: That -- that is enough.  
11 And if the Court answers that question the way  
12 that the government has submitted, that resolves  
13 the case.

14 I want to make a clarification that I  
15 may have left the Court with some uncertainty  
16 about.

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

25 JUSTICE JACKSON: That's an absolute

1 immunity kind of concept, right?

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

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

6 MR. DREEBEN: That is right.

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

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

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

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

1 opportunity to make the kinds of arguments that  
2 arise as -- at the level of, you know, this  
3 particular act or this particular statute has a  
4 problem in retrospect.

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

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

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

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

24 I mean, I had understood that the  
25 most, if not all, but most of the allegations

1 here, there's really no plausible argument that  
2 they would fall into core versus not, such that  
3 they are immune.

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

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

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

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

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

1 existing administrations have a self-interest in  
2 protecting the presidency that they understand  
3 that if they go after the former guy, soon  
4 they're going to be the former guy and they will  
5 have created precedent that will be problematic.

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

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

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

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

1 investigated and prosecuted and it chills to  
2 some extent their, you know, ability to do what  
3 they want in office.

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

23           I see that as a concern that is at  
24 least equal to the president being worried -- so  
25 worried about criminal prosecution that he, you



1 know, is a little bit limited in his ability to  
2 function.

3 So can you talk about those competing  
4 concerns?

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

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

17 JUSTICE JACKSON: Thank you.

18 MR. DREEBEN: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Rebuttal, Mr. Sauer?

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

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1                   Counsel.  
2                   The case is submitted.  
3                   (Whereupon, at 12:40 p.m., the case  
4 was submitted.)  
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## Official - Subject to Final Review

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