The President’s Criminal Immunity

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THE PRESIDENT’S CRIMINAL IMMUNITY

Amandeep S. Grewal*

ABSTRACT

This Article addresses a monumental question that the Supreme Court will soon decide: does the President enjoy criminal immunity for her official acts? This Article argues that she does.

The potential criminal immunity for official acts has drawn exceptionally sharp critiques. Some scholars believe that the immunity is nonsensical, absurd, or downright offensive. Judge Florence Pan of the D.C. Circuit even posited that criminal immunity would allow the President to murder her political enemies with SEAL Team Six.

This Article shows that the critics are profoundly mistaken. Criminal immunity for a president’s official acts finds a strong foothold in Supreme Court jurisprudence. As important, criminal immunity for official acts applies more narrowly than the critics believe. Immunity would allow a president to fearlessly exercise her constitutional prerogatives but would not allow her to bribe, steal, or murder.

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FROST: So what in a sense, you’re saying is that there are certain situations . . . where the President can decide that it’s in the best interests of the nation or something, and do something illegal.

NIXON: Well, when the President does it, that means that it is not illegal.

FROST: By definition.


I. INTRODUCTION

Presidents and ordinary citizens may do many of the same things. They may watch television, argue with friends, play with their children, and so on. But there are some things that only a president can do. Ordinary citizens, no matter

how hard they try, cannot veto legislation, issue pardons, make treaties, or appoint ambassadors. The Constitution vests the President, and only the President, with these powers.

When a president exercises constitutional authority, an unfortunate question arises: can the federal criminal laws properly apply to her? This Article argues that they cannot. If the criminal laws reach the President’s exercises of constitutional authority (that is, her official acts), those laws would violate the “indefeasibility principle.” Congress would have taken away what the people have granted her through the Constitution. This would violate the separation of powers.

This framework differs from that embraced by the D.C. Circuit in United States v. Trump. In Trump, the court concluded that a president may enjoy criminal immunity for official acts only when they are “discretionary.” The court believed that the indictment against former President Trump described, at most, official acts that were “ministerial.” The court thus concluded that former President Trump lacked criminal immunity for the allegations in his indictment.

This Article rejects the D.C. Circuit’s discretionary-ministerial approach. It argues, consistent with the indefeasibility principle, that a president should enjoy criminal immunity for every official act. If the President has not performed an

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5. Id.
6. Though a president may have signed into law a criminal provision that limited her powers, her signage would not establish the law's constitutionality. A president cannot alter the Constitution’s assignment of powers or limit her successors' exercise of them. See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497 (2010) (“Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents.”).
7. See infra Part IV; see also, e.g., Kendall v. U.S. ex rel. Stokes, 37 U.S. 524, 610 (1838) (“The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power.”).
8. 91 F.4th 1173, 1173 (D.C. Cir. 2024), cert. granted, 144 S. Ct. 1027 (2024).
9. Id. at 1191–92.
10. See id. at 1194.
11. See id.
12. If the discretionary-ministerial framework were properly applied, rather than as how the D.C. Circuit applied it, the framework would comport with the indefeasibility principle. See infra Part IV.C.
13. In some discussions, immunity might refer to situations where a defendant has a blanket shield from prosecution. A sitting President is often considered fully shielded (immune) from prosecution by virtue of holding his office. See infra note 114. This Article refers to immunity in a broader sense, reaching situations where the application of a federal criminal statute to the President’s conduct would exceed the legislature’s authority. That is, in the language of this Article, the President enjoys criminal immunity for official acts because no law can properly criminalize those acts. Whether this protection should be described as a substantive defense to prosecution rather than as “immunity” may matter in other contexts. But it does not affect the separation of powers issues discussed here. For similar usage of “immunity,” see Trump v. United States, 144 S. Ct. 1027, 1027 (2024) (granting certiorari related to “presidential immunity from criminal prosecution for conduct alleged to involve official acts”).
official act, then she would rely on the same defenses that an ordinary citizen or other government representative might rely on.\textsuperscript{14}

Criminal immunity for official acts might seem dangerous or even absurd. An official act might be as corrupt or harmful as other acts, if not even more so. If a president enjoys criminal immunity for official acts, one might argue, the President may stand above the law. However, this Article claims that the indefeasibility principle does not present absurdities or allow for uncheckable dangers. Criminal immunity for official acts should apply narrowly. Also, criminal immunity does not translate to blanket immunity. A president may face checks through the political or impeachment processes.

Whether a president has performed an official act stands critical to her criminal immunity claim. Part II of this Article thus defines official acts. Part III examines how the D.C. Circuit in \textit{Trump} largely rejected criminal immunity for those acts. Part IV provides support for the indefeasibility principle, under which all official acts would enjoy criminal immunity. Part V addresses functionalist concerns that the indefeasibility principle leads to absurd results or allows for wanton corruption.

\textbf{II. SCOPE OF OFFICIAL ACTS}

Official acts include any exercise of the President’s constitutional authority. Those acts may flow directly from the Constitution, without regard to legislation. For example, the Constitution expressly grants the pardon power to the President.\textsuperscript{15} If the President grants a pardon, she has performed an official act. This pardon power does not depend on legislation, except in the most literal sense.\textsuperscript{16}

Some exercises of the President’s constitutional authority depend on legislation. The Article II executive power typically requires legislation for its exercise.\textsuperscript{17} For example, the executive power does not itself allow the President to detain and prosecute individuals. But once Congress establishes a criminal law regime, the President invokes the executive power when she enforces it.\textsuperscript{18} Her enforcement actions will thus qualify as official acts. Though her actions relate to enacted law, they reflect the exercise of her constitutional authority (that is, her authority to execute the law).\textsuperscript{19}


\textsuperscript{15} \textit{U.S. CONST.} art. II, § 2, cl. 1.

\textsuperscript{16} The pardon power relates to “Offences against the United States.” \textit{Id.} If Congress has not established any offences (crimes), then there would be no acts that required pardons.

\textsuperscript{17} \textit{See} \textit{U.S. CONST.} art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

\textsuperscript{18} \textit{See} Myers v. United States, 272 U.S. 52, 117 (1926) (“The vesting of the executive power in the President was essentially a grant of the power to execute the laws.”).

\textsuperscript{19} \textit{See id.}
Difficult questions may arise when a president’s act contradicts legislation. Under the *Youngstown* framework, any “Presidential claim to a power” to contradict legislation “must be scrutinized with caution.”²⁰ The President’s authority to contradict legislation will depend on her inherent powers under the Constitution. Inherent powers are those conferred by the Constitution without express mention.²¹ Most notably, Presidents have asserted the inherent power to respond to emergencies.²² When a president enjoys and exercises an inherent power, she will have performed an official act.

Some examples can help illustrate when a president performs an official act. Suppose the House and Senate each pass a bill that relates to the environment. If the President signs or vetoes that bill, she has performed an official act.²³ Similarly, if the law takes effect and carries criminal penalties, the President performs an official act when she pardons an alleged offender.²⁴ In these examples, the President’s official acts flow directly from the Constitution.²⁵

The President may also take official acts connected to the legislation. In that case, she invokes the executive power. For example, suppose that the environmental legislation allows the President to restrict industrial activities in specific areas. If the President restricts those activities, she has performed an official act. She has exercised the executive power, as informed by the environmental legislation.

Suppose instead that the President, for policy reasons, restricts industrial activities in areas not described in the law. In this case, she has not performed an official act. She has not implemented the law. Her actions thus do not reflect the exercise of the executive power. Nor do they (by assumption) reflect any inherent, emergency powers.

Not every action taken in an official capacity qualifies as an official act. If a president speaks to the nation about her economic policies, she has acted in her official capacity. She has spoken as the country’s chief executive, not as a mother, sister, or friend. But she has not performed an official act because she has not exercised any constitutional authority.²⁶ She has not executed any law, pardoned any person, appointed any ambassadors, or so on.

²² *See Samuel Weitzman, Back to Good: Restoring the National Emergencies Act*, 54 Colum. J.L. & Soc. Probs. 365, 375 (2021) (“This proclivity [to invoke emergency power] spans both political parties: the administrations of (among others) Presidents Abraham Lincoln, Franklin Roosevelt, Harry Truman, and George W. Bush have asserted broad crisis powers under one or more clauses in Article II.”).
²³ *See U.S. Const. art. I, § 7, cl. 2 (establishing the President’s powers in the legislative process).
²⁴ *See U.S. Const. art. II, § 2, cl. 1 (establishing the pardon power).
²⁵ *See Chemerinsky, supra note 21, at 876–79; Weitzman, supra note 22, at 375.
²⁶ *See Blassingame v. Trump*, 87 F.4th 1, 31 (D.C. Cir. 2023) (Katsas, J., concurring) (“Presidents routinely speak in an official capacity even when not directly exercising any
Whether a president has exercised constitutional authority will often implicate broader interpretive debates. For example, some scholars doubt whether the Constitution confers inherent powers to the President. Others believe that it does. Similar divisions arise over the President’s law enforcement authority. Some believe that the Constitution provides the President with absolute control over law enforcement. Others believe that Congress can limit that control.

For present purposes, debates of that sort may be largely avoided. All should agree that the President enjoys some constitutional authority, even if they disagree over the extent of that authority. The principal question here is whether a criminal statute can reach the exercise of the President’s constitutional authority, whether that authority reaches near or far. The next Part examines the framework that the D.C. Circuit adopted to resolve that question.

III. THE DISCRETIONARY-MINISTERIAL FRAMEWORK

This Part examines the discretionary-ministerial framework for criminal immunity. Part A shows how the D.C. Circuit applied that framework in United States v. Trump. Part B argues that the D.C. Circuit defined “discretionary” and “ministerial” in ways that largely eviscerate any criminal immunity for a president’s official acts. Later, this Article will explain that the D.C. Circuit misapplied the discretionary-ministerial framework.

A. IMMUNITY IN THE D.C. CIRCUIT

In United States v. Trump, the D.C. Circuit addressed whether a president enjoys criminal immunity for his official acts. The case involved former President Trump’s attempt to dismiss an indictment against him. The


29. See, e.g., Saikrishna B. Prakash, The Essential Meaning of Executive Power, 2003 U. ILL. L. REV. 701, 713 (2003) (“[T]he president, by virtue of his executive power, controls federal law execution in at least two ways. First, the president may use his executive power to execute the laws himself . . . Second, the president may use his exclusive grant of executive power to direct the law execution of officers.”).

30. See, e.g., Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM. L. REV. 1, 2 (1994) (“Many think that under our constitutional system, the President must have the authority to control all government officials who implement the laws . . . [T]his vision of the executive is just plain myth.”).

31. 91 F.4th 1173, 1173 (D.C. Cir. 2024).

32. See infra Part IV.C.

33. 91 F.4th at 1173.

34. Id. at 1182.
indictment listed four counts, each related to the last few months of Trump’s presidency.\(^{35}\) During that time, Trump challenged the 2020 election results in numerous ways, including allegedly through criminal acts.\(^{36}\)

In \textit{Trump}, the former President argued that the acts described in his indictment were all official acts.\(^{37}\) He also argued that criminal immunity should extend to those acts.\(^{38}\) Trump thus asked the District Court to dismiss the indictment against him.\(^{39}\) The court refused,\(^{40}\) leading him to the D.C. Circuit.\(^{41}\)

The D.C. Circuit rejected Trump’s immunity claim.\(^{42}\) The court focused heavily on \textit{Marbury v. Madison}.\(^{43}\) In \textit{Marbury}, the Supreme Court had warned that some official acts “can never be examinable by the courts,”\(^{44}\) implying that a president enjoys absolute immunity for those acts. But the D.C. Circuit concluded that criminal immunity did not extend to the acts described in Trump’s indictment.\(^{45}\) The D.C. Circuit noted that \textit{Marbury} “distinguished between two kinds of official acts: discretionary and ministerial.”\(^{46}\) For discretionary acts, “‘[t]he subjects are political’ and ‘the decision of the executive is conclusive.’”\(^{47}\) Discretionary acts would thus enjoy criminal immunity.\(^{48}\) Ministerial acts would not.\(^{39}\)

The D.C. Circuit believed that the Trump indictment reached, at most, official acts that were ministerial acts. A ministerial act typically arose when a statute directed the President to act in a specific way.\(^{50}\) In a prior case, the D.C. Circuit concluded that a statute contemplated a ministerial act when it ordered the


\(^{36}\) See id.; see also \textit{Trump}, 91 F.4th at 1180 (referring to election-related challenges through “litigation, pressure on state and federal officers, the organization of an alternate slate of electors and other means”).

\(^{37}\) See 91 F.4th at 1188 (“Former President Trump claims absolute immunity from criminal prosecution for all ‘official acts’ undertaken as President, a category, he contends, that includes all of the conduct alleged in the Indictment.”); see also Opening Brief of Defendant-Appellant at 42, United States v. Trump, 91 F.4th 1173 (D.C. Cir. 2024) (No. 23-3228) (arguing that the election actions “reflect[ed] President Trump’s efforts and duties, squarely as Chief Executive of the United States, to advocate for and defend the integrity of the federal election, in accord with his view that it was tainted by fraud and irregularity”).

\(^{38}\) \textit{Trump}, 91 F.4th at 1188.


\(^{40}\) See id.

\(^{41}\) \textit{Trump}, 91 F.4th at 1182–83.

\(^{42}\) See id. at 1194.

\(^{43}\) See id. at 1189–94 (discussing \textit{Marbury} v. Madison, 5 U.S. 137, 166 (1803)).

\(^{44}\) 5 U.S. at 166.

\(^{45}\) \textit{Trump}, 91 F.4th at 1189.

\(^{46}\) \textit{Id.}

\(^{47}\) \textit{Id.} (quoting \textit{Marbury}, 5 U.S. at 166).

\(^{48}\) See \textit{id.}

\(^{49}\) See \textit{id.}

\(^{50}\) See \textit{id.} (Ministerial acts arise when the law imposes duties on an officer, when he is “directed peremptorily to perform certain acts,” and “when the rights of individuals are dependent on the performance of those acts.”) (quoting \textit{Marbury}, 5 U.S. at 166).
President to implement pay increases for federal employees. In *Trump*, the court concluded that when ministerial acts were at issue, the President would be “amenable to the laws for his conduct.” That is, no immunity would apply.

The court then applied these principles to former President Trump. The court concluded that the acts in the indictment were ministerial acts, if they were official acts at all. The indictment alleged violations under “generally applicable criminal laws.” And criminal laws established various prohibitions. The President did not enjoy the discretion to defy those prohibitions. Thus, Trump’s alleged acts could not qualify as criminally immune discretionary acts.

The D.C. Circuit forwent an act-by-act analysis of the conduct described in the indictment. That is, the court did not try to individually classify Trump’s various election-related acts as official or non-official. Nor did the court try to determine whether, if any given act were official, it would qualify as discretionary or ministerial. Instead, the court broadly concluded that the acts could not qualify as discretionary acts, because they allegedly violated generally applicable criminal laws.

Trump thus recognizes only a tiny sliver of criminal immunity. A president may be immune from prosecution when his official act (i) reflects the exercise of discretion and (ii) is not reached by a generally applicable criminal law. Otherwise, “the fact of the prosecution” establishes that the President faces the criminal process. The next subpart explains how the D.C. Circuit’s approach largely negates any Presidential criminal immunity.

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51. See Nat’l Treasury Emps. Union v. Nixon, 492 F.2d 587, 603 (D.C. Cir. 1974) (explaining how a pay increase statute established a ministerial act because “the duty imposed upon the President by the statutes involved in this case is one which is clearly prescribed”).

52. 91 F.4th at 1192 (quoting *Marbury*, 5 U.S. at 166).

53. See id. at 1205 n.14 (“It is . . . doubtful that ‘all five types of conduct alleged in the indictment constitute official acts.’”). *See also id.* (“If a President who is running for re-election acts ‘as office-seeker, not office-holder,’ he is not immune even from civil suits.”) (quoting *Blassingame v. Trump*, 87 F.4th 1, 4 (D.C. Cir. 2023)).

54. *Trump*, 91 F.4th at 1192 (“Former President Trump’s actions allegedly violated generally applicable criminal laws, meaning those acts were not properly within the scope of his lawful discretion.”).

55. Id. at 1194 (“Former President Trump lacked any lawful discretionary authority to defy federal criminal law.”).

56. Id. at 1192 (“Here, former President Trump’s actions allegedly violated generally applicable criminal laws, meaning those acts were not properly within the scope of his lawful discretion.”).

57. Id.: see also, e.g., Trevor W. Morrison, *Moving Beyond Absolutes on Presidential Immunity*, LAWFARE (Mar. 18, 2024, 8:00 AM), https://www.lawfaremedia.org/article/moving-beyond-absolutes-on-presidential-immunity [https://perma.cc/9DRM-E43S] (“[T]he D.C. Circuit seemed to embrace . . . the theory that any presidential action that violates generally applicable federal criminal law necessarily exceeds the president’s lawful authority.”).

58. *Trump*, 91 F.4th at 1192 (“The separation of powers doctrine, as expounded in Marbury and its progeny, necessarily permits the Judiciary to oversee the federal criminal prosecution of a former President for his official acts because the fact of the prosecution means that the former President has allegedly acted in defiance of the Congress’s laws.”).
B. CRIMINAL IMMUNITY UNDER THE DISCRETIONARY-MINISTERIAL FRAMEWORK

This subpart explains how the D.C. Circuit’s version of the discretionary-ministerial framework largely eviscerates criminal immunity for official acts. That evisceration occurs whether the official act stems from a specifically listed constitutional power or from the general executive power. This subpart uses an example involving the veto power and an example involving prosecutorial discretion to illustrate those eviscerations.

i. Immunity and the Veto Power

Under the Constitution, the legislative process does not end when the Senate and House each pass a given bill. Instead, that bill must “be presented to the President of the United States.” He may then sign the bill, in which case it becomes a law. Or he may return (veto) the bill, describing to Congress his objections. A vetoed bill does not become law absent a super-majority congressional override. A veto stems directly from the Constitution and qualifies as an official act.

Under the conventional view, a president enjoys full discretion to exercise his veto power. As the Supreme Court explained in the Pocket Veto Case, the veto power “conferred upon the President cannot be narrowed or cut down by Congress.” If a litigant challenged a presidential decision to veto a bill, the judiciary would deem the case nonjusticiable. This follows from Marbury v. Madison. In Marbury, the Supreme Court acknowledged that the Constitution vests the President with “important political powers,” which he could use only

59. For a proper application of the discretionary-ministerial framework to Presidential acts, see infra Part IV.C.
60. U.S. CONST. art. I, § 7, cl. 2.
61. Id.
62. More specifically, the President must return the bill to the house of Congress in which the bill originated. Id.
63. See id. The Constitution also provides that the President may exercise a “pocket veto” mechanism. In brief, a pocket veto arises when a president does not sign a bill but also does not affirmatively reject it, because Congress has adjourned. A bill that has been pocket vetoed does not become law. See id.
64. See, e.g., Robert J. Pushaw, Jr., Justiciability and Separation of Powers: A Neo-Federalist Approach, 81 CORNELL L. REV. 393, 505 (1996) (“The President must have total discretion in deciding whether to veto a bill; giving the executive this specific share in the legislative power would be pointless if the judiciary could share it too.”).
65. 279 U.S. 655, 678 (1929).
68. Id. at 165.
in his “own discretion.” For these, she is accountable only in his “political character” and in his “conscience.” The veto power fits comfortably within Marbury’s description of discretionary, political powers.

Whether the veto power remains discretionary after Trump remains uncertain. To the D.C. Circuit, at least, when a president’s acts have “allegedly violated generally applicable criminal laws,” they are “not properly within the scope of his lawful discretion.” One can easily posit a veto that is made criminal by that standard. Suppose, for example, Congress passes a politically controversial appropriations bill. That bill, among many other things, feedens federal law enforcement agencies. Suppose further that the President, for reasons unclear from the outside, vetoes that bill. Federal prosecutors allege that the President, with corrupt intent, vetoed that bill to stymie federal investigations into the President himself and his associates. They thus indict the President under a generally applicable obstruction of justice statute.

Under Trump, the President would not enjoy criminal immunity for his veto. A discretionary act under Marbury and other Supreme Court cases becomes ministerial through “the fact of the prosecution.” The President cannot present immunity claims once prosecutors decide to charge him because he has allegedly violated “generally applicable criminal laws.” Though the Supreme Court has said that the veto power “cannot be narrowed or cut down by Congress,” Trump established an exception. To the D.C. Circuit, at least, a statute does not “narrow[] or cut down” the veto power if it criminalizes it.

One may believe that this veto hypothetical is unrealistic or even absurd. The allegations in Trump involve election interference, not the veto power. A person might doubt that a reasonable prosecutor would ever charge a president over a veto.

How federal prosecutors would apply the D.C. Circuit’s framework remains uncertain. But a state-level case from Texas, Ex Parte Perry, suggests that a veto prosecution could easily happen. That case arose when Governor Rick Perry

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69. Id. at 166.
70. Id. at 165–66.
71. See id. at 165–66.
73. There remains significant uncertainty over whether a sitting President, as opposed to a former President, may be indicted. See Akhil Reed Amar & Brian C. Kalt, The Presidential Privilege Against Prosecution, 2 Nexus 11, 11 (1997); Saikrishna B. Prakash, Prosecuting and Punishing Our Presidents, 100 Tex. L. Rev. 55, 71 (2021) [hereinafter Prosecuting and Punishing]; Brian C. Kalt, Criminal Immunity and Schrödinger’s President: A Response to Prosecuting and Punishing Our Presidents, 100 Tex. L. Rev. Online 79, 83–85 (2021), Whether the President is prosecuted during or after her term in office does not relate to the issues here. That is, the focus of this Article is whether the President may be prosecuted for the exercise of her constitutional authority, whether that prosecution occurs during or after her term.
74. Trump, 91 F.4th at 1191.
75. Id. at 1192.
76. Pocket Veto Case, 279 U.S. 655, 678 (1929).
77. Id.
78. See supra Part III.A.
vetoed some funding legislation. The legislation related to a specific Texas governmental unit. Governor Perry said he would veto the legislation unless the current unit head resigned. But the unit head refused to do so, and Governor Perry carried through on his threat. The state then brought charges against Governor Perry, arguing that his veto violated a criminal statute.

Governor Perry countered that his prosecution violated the state constitution. Texas’s highest criminal court, over dissent, agreed with him. The court accepted Governor Perry’s argument that a veto prosecution violated the separation of powers. It emphasized that the U.S. Supreme Court, in the Pocket Veto Case, had held that Congress could not “narrow[] or cut down” the President’s veto power. It also believed that this principle “applie[d] equally to the governor’s veto in Texas.” That is, no law could “make the mere act of vetoing legislation a crime.” The Perry indictment had to be dismissed.

In Ex Parte Perry, the defendant Governor prevailed because the court applied the indefeasibility principle to the Texas Constitution. But Trump does not apply that principle. The D.C. Circuit used the discretionary-ministerial framework to permit prosecutions for official acts. A veto, though discretionary under Marbury, becomes ministerial when the President faces prosecution for it under a generally applicable criminal law. Thus, even though Ex Parte Perry involved an unsuccessful veto prosecution, that case would hardly dissuade a federal prosecutor who embraces Trump.

80. See id. at 888.
81. See id. at 889.
82. See id.
83. See id. at 888 (“This case arises from a governor’s threat to exercise a veto and his ultimate exercise of that veto.”).
84. See id. at 889–90 (discussing Tex. Penal Code § 39.02(a)(2), under which the “offense of abuse of official capacity is committed when a public servant, with intent to harm another, intentionally or knowingly misuses government property that has come into his custody or possession by virtue of his office or employment”).
85. See id. at 890.
86. Texas has a two-track appellate system, with a high court for civil matters and another high court for criminal matters. See Andrew T. Solomon, A Simple Prescription for Texas’s Ailing Court System: Stronger Stare Decisis, 37 ST. MARY’S L.J. 417, 433–38 (2006) (describing the structure and history of Texas’s two-track system). Ex Parte Perry was heard by the Texas Court of Criminal Appeals, the state’s high court for criminal matters.
87. See Ex Parte Perry, 483 S.W.3d at 925 (Myers, J., dissenting); Id. at 928 (Johnson, J., dissenting).
88. See Ex Parte Perry, 483 S.W.3d at 901–02 (“The governor’s power to exercise a veto may not be circumscribed by the Legislature, by the courts, or by district attorneys (who are members of the judicial branch). When the only act that is being prosecuted is a veto, then the prosecution itself violates separation of powers. We sustain Governor Perry’s separation of powers challenge.”).
89. See id. at 900 (quoting Pocket Veto Case, 279 U.S. 655, 678 (1929)).
90. See id. at 901.
91. Id.
92. Id. at 889.
93. See supra Part III.A.
ii. Immunity for the Executive Power

Under Article II’s Vesting Clause, “[t]he executive Power shall be vested in a President of the United States of America.” The executive power includes, at a minimum, the power to execute federal laws. Under the indefeasibility principle, a criminal statute cannot limit the executive power. The Constitution vests the executive power—“all of it”—in the President. If a president faced prosecution for its exercise, then Congress would have taken away what the Constitution grants.

Under Trump, however, a president could face prosecution for using the executive power. An example from the Social Security context can help illustrate this. Suppose a federal statute provides that persons who meet specific criteria may receive Social Security benefits. The statute also instructs the President (or, more realistically, his subordinate) to send Social Security payments to qualified applicants.

Now, suppose that a person submits a fraudulent Social Security application. Though a fraudulent application would violate federal criminal law, the President decides that no prosecution should follow here. This choice to decline criminal prosecution would seemingly reflect the type of decision left entirely to the President’s constitutional discretion. The Supreme Court has emphasized that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.” Thus, if the President used this “absolute discretion” and closed any prosecution against the applicant, this official act would seem beyond criminal law. His nonprosecution order would qualify as a nonreviewable, discretionary act under Marbury.

But under Trump, the President’s order could lead to criminal charges. Prosecutors might allege that the President had obstructed justice. That allegation might arise, for example, if the President enjoyed close personal associations with the fraudulent applicant. Under Trump, the President could not invoke the “absolute discretion” the Supreme Court said he enjoys over

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94. U.S. CONST. art. II, § 1, cl. 1.
95. Id.
96. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191 (2020) (“Under our Constitution, the ‘executive Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’”).
100. Id. A reader might reject the Supreme Court’s position in Seila L. LLC, 140 S. Ct. at 2191, that the Constitution vests all the executive power in the President. If so, the reader should still find useful the illustrations about specific powers helpful. Even those who reject that the President exclusively enjoys the executive power should acknowledge that he exclusively enjoys the veto and pardon powers, for example.
prosecution decisions. That is, to the D.C. Circuit, the President “cannot at his discretion” violate generally applicable criminal law.

Trump thus largely eviscerates criminal immunity for the President. Of course, the D.C. Circuit did not expressly state that it eviscerated that immunity. Instead, the court acknowledged that “the separation of powers doctrine may immunize lawful discretionary acts.” But lawful acts need no immunity. Also, though the D.C. Circuit contemplated that “certain discretionary actions may be insulated from judicial review,” its approach—under which prosecution under a generally applicable law renders an act ministerial—makes the class of protected discretionary actions exquisitely small.

IV. CRIMINAL IMMUNITY UNDER THE INDEFEASIBILITY PRINCIPLE

The D.C. Circuit in Trump should have applied the indefeasibility principle. Under that principle, a federal criminal statute cannot reach exercises of the President’s constitutional authority (i.e., official acts). As the Supreme Court explained in Kendall v. U.S. ex rel. Stokes, when the President’s “powers are derived from the constitution, he is beyond the reach of any other department, except” through impeachment. This indefeasibility principle follows from the simple observation that the Constitution stands supreme over a statute. If Congress can make an official act a crime, then Congress will have taken away what the Constitution has granted.

This Part focuses on authorities that support the indefeasibility principle. Subpart A examines historical materials related to presidential immunity and explores structural inferences drawn from the Constitution. Subpart B examines various Court descriptions of presidential powers. It briefly explains how criminal liability for official acts would contradict the Court’s expansive descriptions of those powers. It also explores the extent to which Special Counsel Robert Mueller acknowledged those powers. Subpart C illustrates how the indefeasibility principle differs from the D.C. Circuit’s version of the discretionary-ministerial framework. Subpart C also reconciles the indefeasibility principle with Marbury.

101. Id.
103. Id. at 1189 (emphasis added).
104. Id. at 1191 (emphasis added).
105. 37 U.S. 524, 610 (1838). Kendall addressed the President’s executive power, rather than the President’s specific powers. But the same principle should apply.
106. See U.S. CONST. art. VI, cl. 2. Under the Supremacy Clause, only statutes “made in Pursuance” of the Constitution reflect “the supreme Law of the Land.” Id. This means a statute cannot validly transgress the Constitution.
A. HISTORICAL AND STRUCTURAL SUPPORT

This subpart first examines historical materials related to the indefeasibility principle. Then, it considers whether a negative inference related to the Speech or Debate Clause overcomes that principle. Last, it considers whether the Impeachment Judgment Clause permits prosecution for official acts.

i. Historical Materials

Few early materials bear on whether the President may face prosecution for official acts. Professor Saikrishna Prakash observes that the Philadelphia delegates enjoyed a “golden opportunity”107 to incorporate express presidential privileges or immunities in the Constitution, but they did not. James Madison’s suggestion for “considering what privileges ought to be allowed to the Executive” went nowhere.108 The Constitution which emerged from Philadelphia did not expressly address presidential immunity, whether for official acts or anything else.

Early-era materials mostly relate to whether a sitting president could face prosecution at all.109 Some believed that the President was “a kind of sacred person,”110 immune from ordinary courts. Under this view, “Presidents were only subject to one form of judicial process: the impeachment process.”111 Other commenters rejected any special treatment for the President.112 One concluded that the President could “be proceeded against like any other man in the ordinary course of law.”113

The “any other man” standard would resolve threshold issues over the timing of presidential prosecution. That is, the standard would imply that the President could face prosecution while in office, rather than only after departure.114 But

107. Prosecuting and Punishing, supra note 73, at 71.
108. Id. (quoting Journal of the Constitutional Convention (Sept. 4, 1787)), in 4 THE WRITINGS OF JAMES MADISON 369 (Gaillard Hunt ed., 1903)). See also 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 503 (Max Farrand ed., 1911) (noting adjournment following Madison’s suggestion).
109. For further analysis of the relevant materials, see Prosecuting and Punishing, supra note 73, at 68–75.
111. Prosecuting and Punishing, supra note 73, at 76.
112. See id. at 74.
114. For arguments related to a sitting President’s susceptibility to criminal process, see Memorandum on Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office from Robert G. Dixon, Jr., Assistant Att’y Gen., Off. Legal Counsel 29 (Sept. 24, 1973) (on file with author) (“A possibility not yet mentioned is to indict a sitting President but defer further proceedings until he is no longer in office.”); A Sitting President’s Amenability to Indictment and Crim. Prosecution, 24 U.S. Op. Off. Legal Counsel 222, 249 n.22 (Oct. 16, 2000) (“[S]tructural considerations suggest that an elected President remains immune from criminal prosecution until he permanently leaves the Office by the expiration of his term, resignation, or removal through conviction upon impeachment.”).
the “any other man” standard does not help resolve whether a president may face prosecution for official acts. The ordinary man does not wield constitutional authority. So, for example, prosecutors cannot pursue the President like “any other man” for a veto, because that other man cannot execute a veto.

Madison’s convention notes provide a slight suggestion that the President enjoys criminal immunity for official acts. In September 1787, as the delegates debated whether the President should enjoy an unlimited pardon power, Edmund Randolph moved for a treason exception. He believed that the “President may himself be guilty” of treason, with the “Traytors . . . his own instruments.” Thus, Randolph reasoned that the pardon power should not extend to treason cases. James Wilson replied that the President should enjoy the pardon power, even for treason. Wilson believed that if the President were “himself a party to the guilt[,] he can be impeached and prosecuted.”

This debate suggests, albeit weakly, that the President enjoys criminal immunity for official acts. The delegates posited circumstances where the President would have corruptly exercised his constitutional authority. That is, Randolph contemplated that a president might extend pardons to his own treasonous “instruments.” But Wilson’s reply does not suggest that the pardon itself would be criminal. Wilson contemplated impeachment and prosecution if a president were “party to the guilt,” not if he extended a pardon. The guilt, in context, refers to the treasonous acts that preceded the pardon, not the pardon itself.

ii. Negative Inferences

Though the Framers did not establish an express immunity provision for the President, they created express protections for legislators. Under the Speech or Debate Clause, Representatives and Senators enjoy criminal and other immunities. Through negative inference, this might imply that the President enjoys no special immunities.

117. See id.
118. See id.
119. See id. (“Pardon is necessary for cases of treason, and is best placed in the hands of the Executive. If he be himself a party to the guilt he can be impeached and prosecuted.”); see also THE FEDERALIST No. 74, 386 (Alexander Hamilton) (Carey and McClellan eds., 2001) (“[I]n seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth.”).
121. Id.
122. Id.
The President’s unique constitutional status should rebut this negative inference. Legislators and the President are not similarly situated. Legislators do not individually wield constitutional authority. The Constitution vests the legislative power in Congress, not in Congressmen. So, without the Speech or Debate Clause, legislators would enjoy limited immunity.

The President is different. The Constitution vests the President individually with extraordinary powers. She thus can rely on the indefeasibility principle. The Supreme Court has properly concluded that the President may enjoy immunities even without specific textual protections. The Court has squarely rejected negative inferences from the Speech or Debate Clause.

iii. Impeachment Provisions

Under the Constitution, a federal officer’s impeachment leads to limited immediate consequences. That is, upon conviction by the Senate, the federal officer faces no more than removal from his office and disqualification from future offices. However, the Impeachment Judgment Clause warns that the federal officer “shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.” In other words, the criminal justice system remains available to address the impeached officer’s acts.

One might believe that this framework negates any immunity for official acts. After all, if a president faces potential prosecution after his impeachment, does this not imply that criminal statutes may reach his exercises of constitutional authority? His abuse of that authority may very well have sparked the impeachment efforts against him.

However, abuse of constitutional authority does not provide the only grounds for impeachment. Under the Constitution, federal officers face impeachment for

125. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).
126. Absent the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1, legislators would likely enjoy criminal immunity for casting votes. That is, the power to vote on legislative matters is vested in them, implicitly or explicitly, by the Constitution. For Representatives, that right to vote is implicit. For Senators, it is explicit. See U.S. CONST. art. I, § 3, cl. 1 (“[E]ach Senator shall have one Vote”). If a statute criminalized the act of voting, then the statute would have taken away what the Constitution has granted. The Speech or Debate Clause adds protections for legislators beyond criminal immunity for casting votes. See THE RECORDS OF THE FEDERAL CONVENTION, supra note 108, at 626.
127. See Trump v. Vance, 140 S. Ct. 2412, 2425 (2020) (The President’s “duties, which range from faithfully executing the laws to commanding the Armed Forces, are of unrivaled gravity and breadth.”).
128. See Nixon v. Fitzgerald, 457 U.S. 731, 750 (1982) (“The President’s unique status under the Constitution distinguishes him from other executive officials.”); id. at 750 n.31 (“Noting that the Speech and Debate Clause provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any similar grant of executive immunity. This argument is unpersuasive.”).
129. See U.S. CONST. art. I, § 6, cl. 1.
130. See U.S. CONST. art. I, § 3, cl. 7 (“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.”).
131. Id.
“Treason, Bribery, or other high Crimes and Misdemeanors.”

“Treason” and “Bribery” reach actions well beyond official acts. “[H]igh Crimes and Misdemeanors” carries an expansive meaning, which can include official acts and nonofficial acts.

Given the scope of impeachable offenses, the Impeachment Judgment Clause does not imply that the President’s official acts may face prosecution. If those acts were the only grounds for impeachment, then the clause would imply that prosecution. But the Constitution’s impeachment provisions reach many types of acts and numerous federal officers. Impeachable offenses can include actions that do not violate any criminal laws. The Impeachment Judgment Clause thus cannot plausibly establish that any impeachable offense automatically faces prosecution.

B. ILLIMITABLE CONSTITUTIONAL POWERS

The Supreme Court has never expressly addressed whether a criminal statute may reach a president’s official acts. However, the Court has described official acts in ways incompatible with criminal prosecution. The indefeasibility principle likely motivates the Court’s various descriptions.

i. Veto Power

As discussed earlier, the Pocket Veto Case concluded that the President’s veto power “cannot be narrowed or cut down by Congress.” To support its conclusion, the Court partially relied on a state case that adopted the indefeasibility principle. In Tuttle v. Boston, the Supreme Judicial Court of Massachusetts concluded that the Governor’s veto power enjoyed protection from the “legislative department” because “[i]t is a power conferred by the Constitution itself.” The Pocket Veto Case and Tuttle advise against applying a federal criminal statute to the veto power. To criminalize the exercise of the veto power would “narrow[] or cut down” that power.

133. For more on the scope of official acts in the bribery context, see infra Part V.C.
134. See 2 JOS. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 762 (1833) (“[I]mpeachable offenses are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law.”); Michael Stokes Paulsen, To End a (Republican) Presidency, 132 HARV. L. REV. 689, 694 (2018) (“[T]he Constitution’s language specifying proper grounds for impeachment... is broad, indefinite, and by no means limited to commission of criminal offenses.”). For a provocative challenge to the conventional view, see Nikolas Bowie, High Crimes Without Law, 132 HARV. L. REV. F. 59, 76 (2018) (to impeach someone without a violation of positive law would “set a dangerous precedent, giving congressional prosecutors and judges as much unlimited discretion as Parliament once had to accuse and convict a political opponent of a crime”).
136. 279 U.S. 655, 678 (1929).
137. See id. at 678 n.5 (citing Tuttle v. Boston, 102 N.E. 350, 351 (Mass. 1913)).
138. 102 N.E. 350, 351 (Mass. 1913).
139. Id. (construing MASS. CONST. Part II, C. 1, § 1, art. 2).
140. Pocket Veto Case, 279 U.S. at 678.
ii. Pardon Power

Under the Constitution, the President has the “Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”141 The Court held in Schick v. Reed that “the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself.”142 This suggests that a federal criminal statute cannot reach the grant of pardon. The Constitution grants the pardon power “without limit.”143 And because the pardon power stems “from the Constitution alone, not from any legislative enactments,” the power “cannot be modified, abridged, or diminished by the Congress.”144 If a federal criminal statute could reach the pardon power, then Congress would have “modified, abridged, or diminished” that power.145

iii. Removals

An active scholarly debate surrounds the source and extent of the President’s authority to remove subordinate officials.146 However, the Court has a settled view of the President’s power to remove some officers. Under the Article II vesting clause and the Take Care Clause,147 the President enjoys an “unrestrictable power”148 to remove principal officers who perform executive functions.149 These principal executive officers are “inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid [they are].”150 Criminal prosecution for removals contradicts this framework. If a president faces jail time for removal, then he no longer has an “illimitable power of removal.”151

144. Schick, 419 U.S. at 266.
145. Id.
148. Id. at 2199 (quoting Humphrey’s Ex’r v. United States, 295 U.S. 602, 632 (1935)).
149. Id.
151. Humphrey’s Ex’r, 295 U.S. at 627.
Congress has previously tried to restrict the President’s authority to remove a principal executive officer.\textsuperscript{152} That is, rather than allow the President to remove the principal executive officer at will, Congress has imposed a good-cause standard.\textsuperscript{153} The Court has found that a good-cause removal standard improperly interferes with the President’s constitutional authority.\textsuperscript{154} This implies that the President enjoys criminal immunity when he removes a principal executive officer. After all, if a good-cause standard violates the Constitution, then a fiercer measure, like the threat of prosecution, likely does so as well. Prosecution may lead to a president’s imprisonment, while a good-cause standard does not subject the President to any personal liability.\textsuperscript{155}

iv. Foreign Affairs

The Constitution does not specifically vest the President with a foreign affairs power. However, the Court has inferred the President’s foreign affairs authority from several provisions.\textsuperscript{156} Through his foreign affairs authority, “the President has ‘a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.’”\textsuperscript{157}

The Court’s “freedom from statutory restriction” language suggests that the President enjoys immunity for some actions that could otherwise come within a federal criminal statute.\textsuperscript{158} For example, in \textit{United States v. Curtiss-Wright Export Corp.}, the Court acknowledged the President’s constitutional authority to withhold foreign affairs-related information from Congress.\textsuperscript{159} For ordinary persons, criminal consequences may arise if they withhold relevant information from Congress.\textsuperscript{160} But under \textit{Curtiss-Wright} the President may do so, without concern for any “statutory restriction.”\textsuperscript{161}

\textit{Curtiss-Wright} does not use language as forceful as the Court has used for pardons, vetoes, and removals. So, the President’s freedom here may be relatively limited. But there are presumably some refusals to disclose

\begin{footnotesize}
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\item \textsuperscript{152} See \textit{Seila L. LLC}, 140 S. Ct. at 2193 (discussing how, by statute, the President could remove the Director of the Consumer Financial Protection Bureau only for “inefficiency, neglect of duty, or malfeasance in office”).
\item \textsuperscript{153} See \textit{id}.
\item \textsuperscript{154} See \textit{id.} at 2211.
\item \textsuperscript{155} If an officer were removed in violation of a good-cause restriction, his relief would likely include a recovery for lost wages and a judicial declaration that the removal order against him was void. \textit{See United States v. Perkins}, 116 U.S. 483, 485 (1886) (officer who was removed by the Secretary of the Navy in violation of good-cause restriction “is still in office, and is entitled to the pay attached to the same”) (internal citation omitted). For a case brought by an Air Force employee who alleged wrongful termination by the President, see \textit{infra} Part V.A.
\item \textsuperscript{156} For a discussion of the President’s exclusive power to recognize foreign sovereigns, see Zivotofsky v. Kerry, 576 U.S. 1, 10-28 (2015). \textit{See also generally} Saikrishna B. Prakash & Michael D. Ramsey, \textit{The Executive Power over Foreign Affairs}, 111 \textit{Yale L.J.} 231, 231 (2001).
\item \textsuperscript{158} \textit{Id}.
\item \textsuperscript{159} 299 U.S. 304, 320 (1936).
\item \textsuperscript{160} \textit{See} 18 \textit{U.S.C} § 1505 (establishing, among other things, criminal violations for obstruction of Congress).
\item \textsuperscript{161} 299 U.S. at 320.
\end{itemize}
\end{footnotesize}
information that lie beyond federal criminal law, because those refusals stem from the President’s constitutional authority.

* * *

Taken at face value, the Court’s descriptions of vetoes, pardons, removals, and foreign affairs coalesce around the indefeasibility principle. They seemingly resolve whether the President may face prosecution for his official acts: he cannot. Powers that stem “from the Constitution alone . . . cannot be modified, abridged, or diminished by the Congress.” 162 Such powers are “illimitable” 163 or “unrestrictable.” 164 Nonetheless, the Court’s various cases do not expressly address criminal restrictions on a president’s constitutional authority. Nor do they announce that “official acts lie beyond criminal law.” Thus, the cases do not definitively resolve whether the President enjoys criminal immunity for those acts. Until Trump, no court has had to address the indefeasibility principle.

One set of federal prosecutors has wrestled with that principle. During President Trump’s term in office, Special Counsel Robert Mueller investigated Russia’s interference with the 2016 Presidential Election. 165 As that investigation proceeded, President Trump fired FBI Director James Comey. 166 Mueller then considered whether the Comey firing criminally obstructed the Russia investigation. President Trump’s counsel maintained that a criminal statute could not reach that official act. 167 Mueller seemingly accepted the indefeasibility principle but did not believe that it applied to the Comey termination. Mueller acknowledged that under Supreme Court doctrine, “[w]hen the President’s power is “both ‘exclusive’ and ‘conclusive’ on the issue,” Congress cannot regulate its exercise. 168 Mueller believed that the President’s powers to issue pardons, recognize foreign nations, and sign or veto legislation were “exclusive” and thus constitutionally immune from prosecution. 169 However, Mueller believed that “discharging law enforcement officials” 170 did not implicate the President’s exclusive powers. For a non-exclusive power, Congress could regulate the President under a “balancing test.” 171 Here, that

164. Id. at 632.
167. See id. (“The President’s counsel has argued that ‘the President’s exercise of his constitutional authority . . . to terminate an FBI Director and to close investigations . . . cannot constitutionally constitute obstruction of justice.’”).
168. See id. at 172 (quoting Zivotofsky v. Kerry, 135 S. Ct. 2076, 2084 (2015)).
169. See id. at 172–173 (describing, by way of contrast, a President’s grant of a pardon as a “constitutionally immunized act”).
170. Id.
171. Id. at 172.
meant that Congress could use the criminal laws to protect its interest in “federal investigations,” so long as Congress did not “prevent[] the Executive Branch from accomplishing its constitutionally assigned functions.” Applying that balancing test to the Comey termination, Mueller concluded that Congress could “validly make [criminal] statutes applicable” here.

Mueller acknowledged that removals of principal executive officers, rather than inferior officers like Comey, might present a different situation. That is, “it may be that [criminal] statutes could not be constitutionally applied to limit the removal of a cabinet officer such as the Attorney General.” But, for inferior officers, removal “need not necessarily be at will for the President to fulfill his constitutionally assigned role in managing the Executive Branch.” Thus, he concluded that a criminal obstruction statute could reach Trump’s termination of Comey.

One can read Mueller’s report as either fully or partially consistent with the indefeasibility principle. That is, one might say that Mueller’s report fully accepts the indefeasibility principle but adopts a relatively narrow view of the President’s constitutional authority. Mueller acknowledges the President’s unrestrictable authority in only a few areas. He even equivocates over whether the President enjoys complete authority to remove principal executive officers. Mueller may have accepted the indefeasibility principle but believed that it protected few things.

One might alternatively conclude that Mueller embraced the indefeasibility principle on qualified terms. That is, Mueller may have believed that the President enjoys broad constitutional authority, but the indefeasibility principle protects only a slice of that authority. This would oppose this Article’s thesis that criminal immunity protects all exercises of constitutional authority.

In any event, one need not resolve these alternate characterizations of Mueller’s report. This subpart has shown that under Court doctrine, some exercises of constitutional authority must be free from congressional regulation. Even federal prosecutors have acknowledged that criminal immunity, to some degree or another. That should be enough for skeptics to take seriously the indefeasibility principle. The next subpart further illustrates the principle and reconciles it with Marbury.

C. INDEFEASIBILITY FRAMEWORK ILLUSTRATED

Under the indefeasibility principle, the President enjoys criminal immunity for every official act. This approach differs from that established by Trump. The

172. Id. at 168.  
173. Id. at 172 (quoting Nixon v. Admin’r of Gen. Servs., 433 U.S. 425, 443 (1977)).  
174. Id. at 171.  
175. Id. at 174.  
176. Id. at 175.  
177. See id. at 173.  
178. See id. at 174 (suggesting, obliquely, that the President would not enjoy unfettered authority to removal principal executive officers when “the President was clearly attempting to thwart accountability for personal conduct while evading ordinary political checks and balances”).
D.C. Circuit concluded that an official act lacks immunity when it is ministerial. And, the court believed, an official act will be ministerial when it violates a generally applicable criminal law. The D.C. Circuit’s framework thus largely eviscerates a president’s criminal immunity and raises major tensions with the authorities discussed in this Part.

The discretionary-ministerial framework would stand on firm ground if it were properly applied. To remain faithful to Marbury, an official act that flows directly from the Constitution should never qualify as ministerial. Thus, for example, pardons, vetoes, and removals of principal executive officers would always qualify as discretionary acts.

Ministerial acts, properly understood, would occur when the President’s exercise of constitutional authority relates to enacted legislation. Social Security can again provide an example. Suppose that the law says that the President must transmit benefits to an applicant who meets specified criteria. Here, the law contemplates a ministerial act. If the President blocks payment, then her action may be subject to criminal law. The President has refused to perform an act over which she enjoys no discretion.

The approach just suggested—under which the criminal law can reach a refusal to perform a ministerial act—reconciles the discretionary-ministerial framework with the indefeasibility principle. Using that principle here, one would find that the President’s payment blockage does not reflect the exercise of constitutional authority. That blockage does not stem from any express constitutional authority. Also, it does not reflect the exercise of the executive power. Thus, as under the discriminatory-ministerial framework, no criminal immunity attaches to the blockage order. The indefeasibility principle protects exercises of constitutional authority, not exercises beyond that authority.

180. See id. at 1192.
181. If a qualified person applied for Social Security, the obligation to transmit Social Security payments would fit comfortably within the definition of a ministerial act or duty. Cf. Kendall v. U.S. ex rel. Stokes, 37 U.S. 524, 613 (1838) ("The act required by the law to be done by the postmaster general is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial; and about which the postmaster general had no discretion whatever."). Thus, there is no doubt that a court could review the denial of a Social Security benefits application.
182. Determining whether a generally worded criminal statute reaches the President raises further questions. See generally Jack Goldsmith, Why the Supreme Court Should Grant Certiorari in United States v. Trump, LAWFARE (Feb. 6, 2024, 10:28 PM), https://www.lawfaremedia.org/article/why-the-supreme-court-should-grant-certiorari-in-united-states-v-trump [https://perma.cc/7EDF-8K9L] (discussing the “separation of powers concern about construing generally worded statutes in ways that burden the president’s Article II powers.”)
183. Cf. Marbury v. Madison, 5 U.S. 137, 150 (1803) (When the Secretary of State is acting as “a ministerial officer,” he “is compellable to do his duty, and if he refuses, is liable to indictment.”).
184. This Article is limited to immunities unique to the Presidency (i.e., the criminal immunity established by the indefeasibility principle). If a president has exceeded her constitutional authority, the indefeasibility principle would not protect her. But she may enjoy immunity or defenses under other principles. Doctrines related to civil immunity may provide a starting point for analysis. See, e.g., Scott A. Keller, Qualified and Absolute Immunity at Common Law, 73 STAN. L. REV. 1337, 1358–68, 1379–1385 (2021) (discussing common-law and statutory civil immunities for executive officials).
The situation would be different if, as suggested in Part III.B.i, the President halted the prosecution of a Social Security fraudster. Here, the nonprosecution order would rest on constitutional authority. The President enjoys complete authority to terminate prosecution or to simply pardon a fraudster. Under the indefeasibility principle, any nonprosecution order or pardon could not create criminal consequences. The same result would follow under a proper discretionary-ministerial framework. The nonprosecution order and the pardon would each reflect discretionary acts. They would thus enjoy criminal immunity.

Under Trump, a different discretionary-ministerial framework would apply. To the D.C. Circuit, the nonprosecution order and the pardon each become ministerial when they violate generally applicable criminal laws. The President would enjoy no immunity for those acts.

When the Supreme Court reviews Trump, it should use the indefeasibility principle to guide its analysis. The Court should flatly hold that no criminal statute can reach the exercise of constitutional authority. Lower courts can then wrestle with whether specific acts do or do not reflect the exercise of that authority.

The Court should not retreat from the indefeasibility principle when a president faces prosecution through “generally applicable criminal laws.” Under the indefeasibility principle, Congress simply cannot limit the President’s exercise of constitutional authority. Focusing on whether Congress does so deliberately or incidentally misses the point.

Also, when the Court considers the discretionary-ministerial framework, it should define the relevant terms properly. It should not follow the D.C. Circuit’s definitions. The President’s acts that arise directly from the Constitution should qualify as discretionary and should enjoy absolute criminal immunity. Ministerial acts will ordinarily arise under statutes that impose obligations on the President. The performance of those acts should never create criminal consequences. But, the indefeasibility principle would not protect acts contrary to the President’s statutory obligations unless those acts rest on constitutional authority.

187. See Trevor W. Morrison, Moving Beyond Absolutes on Presidential Immunity, LAWFARE (Mar. 18, 2024, 8:00 AM), https://www.lawfaremedia.org/article/moving-beyond-absolutes-on-presidential-immunity [https://perma.cc/VCL7-E2TN] (“What happens when Congress passes a law of more general application that, if applied against the president, would impinge impermissibly on his exercise of an exclusive, unregulable power? The answer is straightforward: although the law might be constitutional as applied to others, the president would remain immune from prosecution.”).
188. A ministerial act, compelled by statute, should never create criminal consequences. It would be absurd for one federal statute to criminalize what another federal statute required.
V. FUNCTIONAL CONSIDERATIONS AND CRIMINAL IMMUNITY

Part IV examined various authorities that support the indefeasibility principle and the criminal immunity for official acts that it establishes. The indefeasibility principle relies on a bright line rule grounded in the separation of powers. The principle will appeal most naturally to formalists. Broadly speaking, formalists strictly observe the Constitution’s textual assignments of powers to the different branches. They cast doubt on any “undue accretion of power” by one branch at the expense of another, “no matter how small, and regardless of whether that power is being misused.”

Functionalists take a more flexible approach. They may thus express skepticism over the indefeasibility principle. Functionalists usually do not resolve major separation of powers questions through textual analysis or fixed rules. Instead, functionalists use “an evolving standard designed to advance the ultimate purposes of a system of separation of powers.” The functionalist method typically emphasizes “pragmatic values like adaptability, efficacy, and justice in law.” How the functionalist method applies to the criminal immunity question issue remains unclear. A method that turns on ultimate purposes, evolving standards, and pragmatic values may yield unpredictable results.

Today, the Supreme Court applies a formalist method to the Constitution. Thus, it may seem unlikely that the Court will resolve Trump through functionalist analysis. However, several functionalist separation of powers precedents remain good law. The Court will thus likely examine functional concerns when it decides Trump.

192. Cf. id. (In contrast to functionalism, “[f]ormalism might be understood as giving priority to rule of law values such as transparency, predictability, and continuity in law.”).
193. See, e.g., Robert L. Glicksman & Richard E. Levy, The New Separation of Powers Formalism and Administrative Adjudication, 90 GEO. WASH. L. REV. 1088, 1090 (2022) (“There can be little doubt that the United States Supreme Court has entered a new era of separation of powers formalism, even if the precise contours and implications of this formalistic approach are still unfolding.”).
195. See also Clinton v. Jones, 520 U.S. 681, 694 (1997) (“[W]hen defining the scope of an immunity for acts clearly taken within an official capacity, we have applied a functional approach.”).
With that in mind, this Part addresses a president’s criminal immunity through a functionalist perspective. Subpart A considers how *Nixon v. Fitzgerald*, a largely functional case, supports criminal immunity for official acts. Subparts B–D address several related functionalist arguments against a president’s criminal immunity for official acts. Subpart B examines the claim that a president lacks constitutional authority to violate generally applicable criminal law. Subpart C examines the claim that the indefeasibility principle would allow a president to take bribes without consequences. Subpart D examines the startling hypothetical offered by Judge Florence Pan in *Trump* over whether criminal immunity allows a president to murder her political enemies without consequence.

Subparts B–D do not address every functionalist argument against a president’s criminal immunity. But those subparts should give functionalists some pause before they apply criminal laws to exercises of constitutional authority. Those subparts should also establish that criminal immunity for official acts does not allow for wanton corruption.

A. IMMUNITY UNDER NIXON

In *Nixon v. Fitzgerald*, the Court concluded that separation of powers principles provided the President with absolute immunity for civil damages. That immunity extended to all of the President’s official acts. The President enjoyed immunity even though criminal obstruction allegations motivated the damages claim against him. The Court did not rely on the indefeasibility principle to reach its conclusions. Instead, it relied on functional analysis. *Nixon* implies but does not establish a president’s criminal immunity for official acts.

i. Case Summary

In *Nixon*, a former Air Force employee, Ernest Fitzgerald, sued former President Richard Nixon. As an employee, Fitzgerald had testified in Congress about waste and inefficiencies in his agency. He subsequently lost his job as part of an Air Force reorganization ordered by then-President Nixon. Fitzgerald believed that Nixon ordered the reorganization to retaliate against him and had thus violated 18 U.S.C. § 1505. That statute makes it a crime to obstruct congressional testimony. Fitzgerald believed that Section 1505 established a

197. *Id.* at 758.
198. *Id.* at 733–34 (“Fitzgerald’s dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated.”).
199. The Court assumed, for sake of its analysis, that “Nixon ordered the reorganization in which [Fitzgerald] lost his job.” *Id.* at 756.
200. *Id.*
cause of action for congressional witnesses like him.\textsuperscript{201} Thus, he sought civil damages from Nixon under Section 1505, as well as under other authorities.\textsuperscript{202}

The controversy eventually reached the Supreme Court. Nixon argued that he enjoyed immunity from Fitzgerald’s suit. The Court agreed. The Court concluded that a president “is entitled to absolute immunity from damages liability predicated on his official acts.”\textsuperscript{203} Official acts included any actions taken within the “outer perimeter”\textsuperscript{204} of the President’s authority.

This immunity for official acts, the Court concluded, easily applied to Nixon’s reorganization order. The President enjoyed “constitutional and statutory authority” to prescribe how the Secretary of the Air Force operated the agency.\textsuperscript{205} That authority necessarily “include[d] the authority to prescribe reorganizations and reductions in force.”\textsuperscript{206} Nixon’s reorganization order was thus an official act, entitled to damages immunity.

\textbf{ii. Separation of Powers Considerations}

Nixon’s civil immunity framework does not expressly apply to criminal matters. But Nixon rested on separation of powers considerations that indirectly support criminal immunity for official acts.

The Court’s separation of powers analysis heavily incorporated functional elements. That is, the Court believed that civil immunity would allow a president “the maximum ability to deal fearlessly and impartially with’ the duties of his office.”\textsuperscript{207} Presidents often deal with matters that “arouse[d] the most intense feelings.”\textsuperscript{208} This could make them frequent targets for lawsuits. And frequent lawsuits “could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation.”\textsuperscript{209}

The Court’s separation of powers considerations included some formal elements. Fitzgerald argued that the Court should have inquired into the President’s motives for the Air Force reorganization. That is, the Court should have determined whether the Air Force reorganization stemmed from retaliation

\begin{itemize}
\item \textsuperscript{201} See Brief for Respondent at 32–33, Nixon v. Fitzgerald, 457 U.S. 731 (1982) (Nos. 79-1738, 80-945), 1981 WL 389866, at *32–33 (“Congress conferred upon [federal employees] the right ‘to furnish information to either House of Congress’ without interference. 5 U.S.C. § 7211. Congress has also made it a felony to retaliate against a witness because of his testimony. 18 U.S.C. § 1505. Meaningful enforcement of these rights requires that individual plaintiffs be able to seek damages for their violation.”).
\item \textsuperscript{202} Nixon, 457 U.S. at 740. The Court noted that the district court had “held that Fitzgerald had stated triable causes of action under two federal statutes [5 U.S.C. § 7211 (1976 ed., Supp. IV) and 18 U.S.C. § 1505] and the First Amendment to the Constitution.” The Court did not pass on whether the district court had properly inferred causes of action for Fitzgerald. See id. at 740 n.20.
\item \textsuperscript{203} Id. at 749.
\item \textsuperscript{204} Id. at 755. The special nature of the Presidency does not itself protect acts taken beyond the President’s authority. See Clinton v. Jones, 520 U.S. 681, 695 (1997) (The President’s “effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office is unsupported by precedent.”).
\item \textsuperscript{205} Id. at 757 (citing 10 U.S.C. § 8012(b), as it then existed).
\item \textsuperscript{206} Id.
\item \textsuperscript{207} Id. at 752 (1982) (quoting Ferri v. Ackerman, 444 U.S. 193, 203 (1979)).
\item \textsuperscript{208} Id. (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).
\item \textsuperscript{209} Id. at 753.
\end{itemize}
or from efficiency concerns. But the Court concluded that this “kind of ‘functional’ theory . . . could be highly intrusive.”

The Court acknowledged that some government officials enjoyed immunity only for specific functions. But the President enjoyed “discretionary responsibilities in a broad variety of areas.” The Court thus concluded that all his official acts should enjoy civil damages immunity. Not even an allegation that the President violated federal law could warrant an exception. If it did, the President would face “trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose.”

The Court’s separation of powers considerations support criminal immunity for a president’s official acts. Potential criminal liability, like potential civil liability, can burden a president’s ability to “deal fearlessly and impartially” with the duties of his office. Also, Presidents often deal with matters that “arouse the most intense feelings.” Criminal prosecution may be more likely when passions run high. Additionally, criminal matters often involve motive inquiries, which may be “highly intrusive” for a president. The Court in Nixon concluded that immunity arose even if an act were allegedly “unlawful” or “taken for a forbidden purpose.”

The dissenters in Nixon complained that the Court’s separation of powers analysis may have established criminal immunity for the President’s official acts, Justice White, joined by three other Justices, observed intimations that the Court’s decision was “grounded in the Constitution.” If that were the case, the dissenters complained, then the Court had prevented Congress from establishing any remedy for presidential misconduct. The Court had rendered the “criminal laws of the United States ... wholly inapplicable to the

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210. Id. at 756.
211. Id. at 755 (“Frequently our decisions have held that an official’s absolute immunity should extend only to acts in performance of particular functions of his office.”).
212. Id. at 756.
213. Id. (“In view of the special nature of the President’s constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the “outer perimeter” of his official responsibility.”).
214. Id.
215. Id. at 752 (quoting Ferri v. Ackerman, 444 U.S. 193, 203 (1979)).
216. Id. (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).
217. Id. at 756. The Court, of course, has not blessed the idea that every legal distraction violates the separation of powers. See Trump v. Vance, 591 U.S. 786, 801 (2020) (rejecting the President’s claim to absolute immunity from state criminal process) (“Fitzgerald did not hold that distraction was sufficient to confer absolute immunity.”).
218. See Evan Caminker, Democracy, Distrust, and Presidential Immunities, 36 CONST. COMMENTARY 255, 268 (2021) (“Fitzgerald’s central rationale, that the fear of civil damages might unduly chill otherwise desirable and legal presidential decisions and actions, certainly extends to typically scarier criminal sanctions.”).
220. See id. at 765 (White, J., dissenting). Justices Brennan, Marshall, and Blackmun joined White’s dissent. See id. at 764.
221. Id. at 765 (White, J., dissenting).
222. See id.
President.”\textsuperscript{223} The President, they believed, had thus become “above the law.”\textsuperscript{224} A holding grounded in the Constitution would mean that the President “is immune not only from damages actions but also from . . . criminal prosecutions” for his official acts.\textsuperscript{225}

The Court did not deny that the Constitution supported its decision. Nor did the Court address, one way or the other, the President’s criminal immunity for his official acts. Instead, to respond to the dissent, the Court emphasized that damages immunity for official acts would “not leave the Nation without sufficient protection against misconduct” by the President.\textsuperscript{226} The impeachment remedy remained, as did various other “formal and informal checks” like “constant scrutiny by the press,” “[v]igilant oversight by Congress,” and so on.\textsuperscript{227} The Court thus rejected the dissent’s claim that its opinion rendered the President above the law.\textsuperscript{228}

In listing protections against presidential misconduct, the Court could have, but did not, refer to the criminal justice system. That omission seems significant. Fitzgerald’s claim related, in part, to Nixon’s alleged criminal obstruction under 18 U.S.C. § 1505.\textsuperscript{229} The Court could have easily referred to prosecution as a potential remedy for a president’s allegedly criminal acts, but it did not.\textsuperscript{230} Nixon may thus imply that the President enjoys criminal immunity for his official acts,\textsuperscript{231} though it does not resolve the question.\textsuperscript{232}

\textbf{B. Threshold Presidential Authority}

Under the indefeasibility principle, a president’s official acts (her exercises of constitutional authority) enjoy criminal immunity. A person might accept this principle but doubt its relevance. The President, the argument might go, does not enjoy any constitutional authority to violate criminal law. So, the

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\textsuperscript{223} Id.
\textsuperscript{224} Id. at 766.
\textsuperscript{225} Id. at 780.
\textsuperscript{226} Id. at 757.
\textsuperscript{227} Id.
\textsuperscript{228} See id. at 758 (“The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President ‘above the law.’”).
\textsuperscript{229} See supra notes 200–02 and accompanying text.
\textsuperscript{230} Nixon himself had received a pardon for all federal crimes he might have committed during his Presidency. See President Gerald R. Ford, Proclamation No. 4311, 88 Stat. 2503 (1974) (granting “a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States” committed during Nixon’s term as president). Thus, prosecution against Nixon would not have been possible. But the Court was speaking of remedies for Presidential misconduct generally. See Nixon, 457 U.S. at 757.
\textsuperscript{231} See Caminker, supra note 218, at 268–69 (“[W]hile Justice White’s dissent specifically argued that Presidents lack permanent immunity from criminal prosecution, the Court very pointedly omitted any reference to criminal liability when listing other accountability mechanisms.”).
\textsuperscript{232} See Nixon v. Fitzgerald, 457 U.S. 731, 758 n.41 (1982) (“This case involves only a damages remedy.”); see also 457 U.S. at 759 (Burger, C.J., concurring) (“The immunity is limited to civil damages claims.”). Justice Burger’s concurrence may have been an attempt to limit any implications in the majority opinion related to criminal immunity.
indefeasibility principle applies to a null set. A criminal act cannot qualify as an official act.

This argument enjoys some rhetorical appeal. Why would the Constitution authorize criminal acts? But rhetoric does not always explain reality. As earlier discussion showed, 233 a federal criminal statute can reach plain exercises of constitutional authority. For example, when a president corruptly vetoes legislation, that veto may violate a criminal obstruction statute.

One might cleverly respond that the President enjoys no authority to corruptly veto legislation. Thus, if a criminal statute reached a corrupt veto, the statute would not have abridged the President’s constitutional authority. The President has exceeded, not applied, her authority.

This theory—that the Constitution does not authorize any act caught by criminal law—raises a major functional concern. If the President ever lacks authority to veto legislation, then her veto becomes meaningless. This means that legislation, even if vetoed, would still be the law. 234

Whether a president corruptly vetoed a bill may thus present an immediate issue over a bill’s effect. Yet a court might not determine whether the President executed a corrupt veto until years after her action. If the court found corruption, the bill would be revived. One can only imagine the havoc that suddenly resurrected legislation might wreak.

Similar functional concerns may arise for enacted legislation. Professors Claire Finkelstein and Richard Painter ask, what if “President Lyndon Johnson had crossed the line into bribery of members of Congress to pass the Voting Rights Act of 1965”? 235 The authors consider whether this hypothetically corrupt motivation behind the law could render it void. They conclude that the legislation should stand: “there is little value gained by invalidating a law because of evidence of corruption in its passage.” 236 The authors, who follow the functionalist method, thus implicitly acknowledge that the Constitution authorizes some potentially criminal acts. Otherwise, the voting law would be dead.

Professors Finkelstein and Painter view corrupt removals differently from corrupt legislation. To determine whether to void a corrupt removal, they focus “on the role the removal plays relative to the illegal course of conduct.” 237 If a removal furthers illegal conduct, “the removal should be invalidated and the former federal officer restored.” 238 The authors posit that a removal would be void when the removal itself obstructs justice. This could happen when a

233. See supra Part III.B.i (discussing the criminalization of a veto).
234. Outside of pocket veto situations, “[i]f any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law.” See U.S. CONST. art. I, § 7, cl. 2.
236. The authors caution that they are offering a hypothetical, and that there is no evidence that President Johnson bribed legislators. See id.
237. See id.
238. Id. at 378.
239. Id.
The president tried to remove a federal officer who was investigating her. Other corrupt removals, however, may stand. The authors, in explaining their tentative conclusions, do not support a “one-size-fits-all legal theory.”

Maybe there is a sound principle that supports a bright line approach for legislation and an ad hoc approach elsewhere. Regardless, even functionalists accept that some potentially corrupt actions enjoy constitutional authority. Thus, whether the Constitution authorizes criminal acts yields a straightforward answer: it does. The harder question relates to the remedy. When the President’s official acts violate criminal law, may she face prosecution? The next two subparts address the concerns that, with criminal immunity for official acts, wanton corruption may result.

C. Bribery Authorized?

A common functionalist argument against the indefeasibility principle relates to bribery. If official acts enjoy criminal immunity, the argument goes, then the President can freely accept bribes. This renders the indefeasibility principle absurd, if not outright dangerous. However, as this subpart shows, bribery does not qualify as an official act. Bribes enjoy no immunity.

The D.C. Circuit in Trump addressed whether bribery qualified as an official act. The Court concluded that it did. To reach that conclusion, the court looked to past bribery prosecutions of public officials. Former President Trump argued that those prosecutions showed that bribes were nonofficial acts, unprivileged from immunity doctrines. But the D.C. Circuit drew a different inference. The court concluded that past bribery prosecutions against government officials showed that generally applicable criminal laws reached official acts.

240. Id.

241. Several scholars believe that a corrupt pardon remains valid, even if its grant may be a prosecutable offense. See, e.g., Daniel J. Hemel & Eric A. Posner, Presidential Obstruction of Justice, 106 CAL. L. REV. 1277, 1324–25 (2018) (“The most natural interpretation of Ex parte Garland, 71 U.S. 333, 380 (1866), is that Congress cannot limit the effect of a pardon that has been granted, but that criminal law can still apply to the pardon’s grantor.”); Laurence Tribe, Donald Trump’s Pardons Must Not Obstruct Justice, FIN. TIMES (Dec. 26, 2020, 7:27 PM), https://www.ft.com/content/e73fdd69-1fee-4886-b299-959ce9647151 [https://perma.cc/9JAL-D32G] (“Pardons used as a means of obstructing justice are integral parts of criminal conduct . . . . The result is not to negate the pardons issued but to expose a president to prosecution for the way he deployed them.”); Frank O. Bowman, III, Presidential Pardons and the Problem of Impunity, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 425, 472, 474 (2021) (suggesting that the “corrupt misuse of the pardon power may itself be a crime,” but rejecting academic theories that “a presidential pardon can be challenged in court and reversed”). But see Albert W. Alschuler, Limiting the Pardon Power, 63 ARIZ. L. REV. 545, 593 (2021) (“[A] pardon obtained by bribery should be void.”).


244. See id. at 1192.

245. See id. at 1194.

246. See id.
The D.C. Circuit misunderstood the scope of official acts. As established by Nixon, and as described in Part II, an official act in the immunity context refers only to the exercise of constitutional authority. If a president makes or takes a bribe, he has not in any way exercised constitutional authority. Bribery is not an official act.

The Supreme Court’s decision in United States v. Brewster illustrates how bribery stands distinct from the exercise of governmental authority. In Brewster, the Court held that the defendant, a former U.S. Senator, lacked criminal immunity for an accepted bribe. Though the Speech or Debate Clause provides criminal immunity for legislative acts, “[t]aking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act.” The briber paid the Senator with the hope that he would perform a legislative act (a vote on postal rate legislation), but that made no difference: “it does not matter whether the promise for which the bribe was given was for the performance of a legislative act.” The Court thus held that the federal bribery statute properly reached the defendant’s conduct.

The D.C. Circuit in Trump should have minded Brewster. The principles of Brewster extend easily to the presidential context. Using Brewster’s language, “[t]aking a bribe is, obviously, no part of the [executive] process or function; it is not [an official] act.” The indefeasibility principle does not permit bribes. The Department of Justice’s Office of Legal Counsel, often keen on expansive presidential powers, has flatly acknowledged that “[t]he Constitution confers no power in the President to receive bribes.” If a president accepts a bribe for (say) a veto, she faces prosecution for that acceptance. Only her official act, the veto, enjoys criminal immunity.

If bribery law reached official acts, functional concerns would arise. Suppose, for example, that a statute established a crime when, with corrupt intent, any elected government official both (1) accepted a payment in exchange for a promise to perform an official act and (2) subsequently performed that act. Suppose further that a president corruptly accepts a payment in exchange for her promise to sign a particular bill. On these facts, a president would establish her guilt if she signed the bill. This means that, to avoid criminal consequences, she would have to veto the bill, even if the bill serves the public interest. The absence of criminal immunity for the official act thus leads to perverse incentives: a

247. Nixon, in establishing civil immunity for official acts, referred to the President’s “constitutional and statutory authority,” Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982) (emphasis supplied). However, a president’s authority to administer or enforce statutes ultimately relates to his executive power under Article II. See supra Part II. Thus, this Article defines official acts with sole reference to the President’s constitutional authority.
249. Id. at 526.
250. Id.
251. Id.
252. See Jack Goldsmith, Zivotofsky II as Precedent in the Executive Branch, 129 HARV. L. REV. 112, 135–36 (2015) (Various factors “lead OLC (and the executive branch generally) to take a broader, and perhaps much broader, view of presidential power than the Supreme Court.”).
president, to save herself, should hurt the nation. Perhaps to avoid this scenario, the current federal anti-bribery statute does not reach the performance of an official act.\textsuperscript{254}

The foregoing discussion should address concerns related to bribery. Bribery does not qualify as an official act and enjoys no immunity from prosecution. However, criminal immunity might raise concerns beyond the bribery context. The next subpart considers some of those concerns.

D. ASSASSIN PRESIDENT

Under the indefeasibility principle, a criminal statute cannot reach an official act, no matter how corrupt or pernicious. This necessarily means that a president might abuse her authority without facing prosecution.\textsuperscript{255} Everyone, not just functionalists, should concern themselves with corrupt exercises of authority. However, the indefeasibility principle does not allow for wanton corruption.

During D.C. Circuit oral arguments in \textit{United States v. Trump}, Judge Florence Pan wrestled with the corruption issue. She asked whether, with criminal immunity for official acts, a president could “sell pardons”\textsuperscript{256} or “order SEAL Team 6 to assassinate a political rival.”\textsuperscript{257} Trump’s counsel replied that the President could face prosecution for those acts only after impeachment in the House and conviction in the Senate.\textsuperscript{258}

A better answer would have turned on the proper definition of official acts.\textsuperscript{259} For reasons already discussed, the acceptance of a payment in exchange for a pardon does not qualify as the exercise of constitutional authority.\textsuperscript{260}

\textsuperscript{254} See 18 U.S.C. § 201(c)(1)(B) (It is a crime when a public official “demands, seeks, receives, accepts, or agrees to receive or accept anything of value” for his official act, not when he actually performs that act).

\textsuperscript{255} Cf. \textit{Pierson v. Ray}, 386 U.S. 547, 554 (1967) (“[T]he immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . applies even when the judge is accused of acting maliciously and corruptly.”), \textit{United States v. Brewster}, 408 U.S. 501, 516 (1972) (The Speech or Debate Clause “has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers.”).


\textsuperscript{257} \textit{Id.} at 8:00. Seal Team 6 is “one of the nation’s most mythologized, most secretive and least scrutinized military organizations.” Mark Mazzetti et al., \textit{SEAL Team 6: A Secret History of Quiet Killings and Blurred Lines}, N.Y. TIMES (June 6, 2015). It has “been transformed by more than a decade of combat into a global manhunting machine.” \textit{Id.}


\textsuperscript{259} Judge Pan believed that the pardon sale and assassination order would each reflect an official act. \textit{See id.} at 7:16, 8:06.

\textsuperscript{260} \textit{See supra} Part V.C. Judge Pan also hypothesized a president’s sale of military secrets. \textit{See id.} at 7:14. For reasons analogous to the bribery example, the sale of military secrets would not qualify as an official act.
immunity applies to bribes. Only the pardon itself would enjoy criminal immunity.\textsuperscript{261}

A similar official acts analysis covers the SEAL Team 6 hypothetical. There is no official act here. No serious person would find that the Commander in Chief Clause,\textsuperscript{262} the apparent motivation behind the hypothetical, authorizes a president to kill whomever she wants.\textsuperscript{263} If a president ordered political assassinations, then she would have exceeded her constitutional authority. The indefeasibility principle would not apply.

The SEAL Team 6 hypothetical illustrates a critical distinction between “acts made in an official capacity” and “official acts.”\textsuperscript{264} A president’s Seal Team 6 order may have been made in an official capacity, but an official act, as described in Part II and in \textit{Nixon}, refers only to the exercise of constitutional authority.\textsuperscript{265} An official act does not arise simply because the order-giver wears her presidential hat. The indefeasibility principle protects acts authorized by the Constitution, not every act made by a president.

But suppose, for the sake of discussion, that the Commander in Chief Clause authorizes a president to kill whomever she wants. Her order to SEAL Team 6 would then qualify as an official act, protected by criminal immunity. One might believe that this absurd result undermines the indefeasibility principle.

This assassination hypothetical is jarring, but it means little for debates over criminal immunity. If a puppet military assassinates a president’s political rivals, then fine points of constitutional law do not matter.\textsuperscript{266} Even if a judge ruled that a president faced prosecution for ordering a political assassination, she could just order the military to kill anyone who tried to detain her. Her military could also kill the judge and the prosecutors. In such a scenario, the rejection or acceptance of the indefeasibility principle would not save the republic.


\textsuperscript{262} See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States.”).


\textsuperscript{264} See supra Part II (distinguishing between official acts and acts in an official capacity).

\textsuperscript{265} See supra note 247. The Court in \textit{Nixon} noted that Fitzgerald’s claims “rest[ed] on actions allegedly taken in the former President’s official capacity during his tenure in office.” \textit{Nixon v. Fitzgerald}, 457 U.S. 731, 733 (1982). However, the Court’s immunity analysis and holding related to official acts, rather than any action taken in an official capacity. \textit{See id.} at 749 (\textit{Nixon} “is entitled to absolute immunity from damages liability predicated on his official acts.”). The Court did not broadly hold that a president enjoys absolute civil damages immunity whenever she wears the presidential hat.

\textsuperscript{266} Cf. Philip Bobbitt, \textit{Indicting and Prosecuting a Sitting President}, LAWFARE (Jan. 14, 2019, 2:58 PM), https://www.lawfaremedia.org/article/indicting-and-prosecuting-sitting-president [https://perma.cc/GCS9-DRM8] (If Congress did not immediately impeach and convict a murderer President, “the country would face many more profound problems than that of postponing the indictment of the president.”).
One might insist that we take the law seriously, even with a murderous president and a puppet military. But even then, criminal immunity matters little. Suppose again that a president assembles SEAL Team 6 in Washington. She orders the team to assassinate her political rivals at the Capitol. They then do so. She and her squad have surely committed crimes through this operation. But the rejection of the indefeasibility principle would not guarantee redress. A president can still pardon the team members if they were prosecuted. And, arguably, she can even pardon herself. Even if she cannot pardon herself, she might quickly leave office when facing prosecution and just receive a pardon from her ex-vice president (now president) in order to avoid criminal liability. The President of the United States thus does not need immunity for official acts to escape prosecution. She can rely on the unrestrictable, illimitable pardon power.

The SEAL Team 6 hypothetical thus does not present a silver bullet against the indefeasibility principle. It does not even present an issue relevant to constitutional law. The hypothetical raises issues unsolvable by any written document or by any interpretive debate over those issues. One may as well ask who constitutionally succeeds to the presidency after an extinction-level asteroid strike.

None of this suggests a nihilistic approach to criminal immunity questions. A law journal would be a strange place to argue that the law does not matter. But the law has limits. Hypotheticals that raise issues beyond those limits should not control the analysis.

As a practical matter, criminal immunity for official acts will not allow for unchecked corruption. After all, a severely corrupt president probably will not confine her corruption to official acts. She will probably pair a corrupt pardon with a bribe, for example. Or, given her generally corrupt character, she will perform criminal acts entirely unrelated to her constitutional authority. Either way, she would face potential prosecution.

Criminal immunity for official acts thus provides a corrupt president with only a narrow escape hatch. To avoid prosecution, she must perfectly calibrate and confine her corrupt behavior to the performance of official acts. Even if she

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267. The President’s pardon would relate to any offenses under federal or District of Columbia law. See U.S. Const. art. II, § 2, cl. 1. See also Letter from Roger C. Adams, Pardon Att’y, Dep’t of Justice, to David A. Guard, Crim. Just. Pol’y Found. (on file with author) (discussing Presidential pardon authority over offenses within the District of Columbia). One might insist that the SEAL Team 6 murder plot would implicate criminal laws in a state. If so, he should extend that hypothetical. He should assume that the state’s governor sympathizes with the President and would extend any necessary pardons.


somehow manages to do so, other remedies like impeachment remain potent tools to address her corruption.270

VI. CONCLUSION

When Richard Nixon said no crime arises “when the President does it,” he was right. However, “it” must be defined properly. Under the indefeasibility principle, a president enjoys criminal immunity only for her official acts. The principle gives her no license to accept bribes, assassinate political enemies, or otherwise exceed her constitutional authority. The criminal justice system remains available to sanction her in those circumstances.

Nonetheless, excessive focus on the criminal justice system creates serious risks. The criminal justice system provides the last check, not the best check, against corrupt behavior. To prevent abuses of office, voters should elect persons who are unlikely to abuse their office in the first place.

When corruption claims arise, courts should not stretch constitutional doctrine to address any failures in the political process. Doing so risks upsetting the balances established by the Constitution. The affirmation of the indefeasibility principle would help restore that balance.

270. See Nixon v. Fitzgerald, 457 U.S. 731, 755 (1982) (describing impeachment remedy). One might believe that a corrupt Congress aligned with a president would refuse to impeach and remove her, even if she committed criminal acts. As with the SEAL Team Six hypothetical, a hopelessly corrupt Congress would raise issues beyond what interpretive debates can resolve. Even if the debate revealed that a president lacked criminal immunity, a corrupt Congress could impeach and remove any judge who attempted to subject a president to criminal process.