

WHAT IS *TRUMP* IMMUNITY?

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In *Trump v. United States*, the Supreme Court held that a former President is entitled to an immunity in criminal cases in certain circumstances.¹ The decision has been heavily criticized, with many commentators saying it places the President above the law.² Exactly how it does so depends on what type of immunity a former President enjoys. Is the immunity enjoyed by former Presidents in criminal cases an immunity from the operation of the primary obligations imposed by the criminal laws in question? Or is it an immunity from being subjected to certain types of sanctions for having violated validly imposed legal obligations? Or is it an immunity from being subjected to the jurisdiction of judicial tribunals in suits seeking to impose validly prescribed legal sanctions? Remarkably little attention has been directed to this question.

The implications of the *Trump* decision vary dramatically depending on the type of immunity the Court recognized. If the immunity is

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1 *Trump v. United States*, 144 S. Ct. 2312, 2327 (2024).

2 See, e.g., Mike Lillis & Mychael Schnell, *Democrats Rage at Supreme Court for Trump Immunity Ruling: 'A Travesty'*, THE HILL (July 1, 2024, 1:26 PM), <https://thehill.com/homenews/house/4749978-supreme-court-immunity-trump-democrats/> [https://perma.cc/48PT-HH6T]; Richard Lempert, *Trump v. United States: Explaining the Outrage*, BROOKINGS (July 12, 2024), <https://www.brookings.edu/articles/trump-v-united-states-explaining-the-outrage/> [https://perma.cc/FX6Q-YAHQ]; Jeevna Sheth, *Trump v. United States: A Foundation for Authoritarian Actions an American President Can Now Commit with Impunity*, CTR. FOR AM. PROGRESS (Aug. 7, 2024), <https://www.americanprogress.org/article/trump-v-united-states-a-foundation-for-authoritarian-actions-an-american-president-can-now-commit-with-impunity/> [https://perma.cc/PH2E-EQLG]; *Supreme Court Grants Trump Broad Immunity for Official Acts, Placing Presidents Above the Law*, ACLU (Jul. 1, 2024, 11:45 AM), <https://www.aclu.org/press-releases/supreme-court-grants-trump-broad-immunity-for-official-acts-placing-presidents-above-the-law> [https://perma.cc/8LB7-A3AN].

from the substantive operation of the law, then the impugned presidential conduct is not illegal. The President would be exempt not only from criminal prosecution but also from civil damages and even prospective relief. The President's subordinates carrying out the President's orders within the scope of the immunity would similarly be exempt from these forms of relief. And, depending on the basis for finding the President's conduct to be legal, the President's conduct might not constitute "high crimes" or "Misdemeanors,"³ and accordingly, the President would not be impeachable for performing or ordering such acts. If the immunity is merely from criminal sanctions, on the other hand, the impugned conduct might well be illegal, and, if it is, the President would be subject to noncriminal sanctions and her subordinates even to criminal sanctions. If the immunity were merely from the jurisdiction of certain judicial tribunals, the President would, in principle, be subject to criminal sanctions, which could be enforced in other tribunals.

The Court's opinion leaves unclear the nature of the immunity the President enjoys. Justice Barrett's concurring opinion, which she regarded as consistent with Chief Justice Roberts's majority opinion on this point, appears to understand *Trump* immunity as an immunity from primary obligations. Chief Justice Roberts's opinion analyzes separately the President's immunity with respect to conduct for which the President's authority is "conclusive and preclusive" and her immunity with respect to conduct that may be regulated by Congress.⁴ An immunity for conduct that is within the President's "conclusive and preclusive" authority would appear to be an immunity from the substantive operation of a congressionally imposed criminal prohibition. An immunity for presidential conduct that Congress has the power to regulate could be an immunity from criminal sanctions for violation of validly imposed obligations, but the Roberts opinion at times suggests that the President's immunity with respect to conduct in this category is an immunity from the operation of generally applicable criminal prohibitions.

Part I of this Essay discusses in general terms the types of immunity that the President might in theory enjoy. Part II discusses the parts of the Court's analysis suggesting that the President enjoys an immunity from the substantive operation of congressionally imposed criminal prohibitions. Part III considers the parts suggesting that the President merely enjoys an immunity from the imposition of criminal sanctions for conduct that has validly been prohibited by Congress.

3 U.S. CONST. art II, § 4.

4 *Trump*, 144 S. Ct. at 2328.

I. VARIETIES OF IMMUNITY

An immunity is an exemption from an otherwise applicable legal norm.⁵ Immunities can take a variety of forms, depending on the type of legal norm the holder of the immunity is exempt from. In theory, the holder of an immunity may be exempt from the reach of laws imposing primary obligations, from laws imposing sanctions for the violation of validly imposed obligations, or from laws conferring jurisdiction on courts. For example, members of the general public are prohibited from murdering people, but (in theory) the President may in certain circumstances enjoy an immunity from the laws prohibiting murder. If so, then, when the President kills someone under circumstances that would otherwise qualify as murder, the President is not acting illegally because the laws prohibiting murder do not apply to her. In such circumstances, the President enjoys an immunity from primary obligations. If this is the type of immunity enjoyed by the President, she is “above the law” in the sense of being exempt from the operation of a criminal prohibition; her act does not violate the law even though the same act performed by someone else would. In the memorable words of Richard M. Nixon, “[w]hen the president does it . . . it is not illegal.”⁶

Alternatively, the President may be subject to the laws prohibiting murder but enjoy an immunity from laws imposing criminal penalties for murder (such as imprisonment). In such circumstances, she is immune from laws imposing secondary obligations. By “secondary obligations,” I mean the remedial or punitive sanctions to which persons are subject if they violate a primary obligation.⁷ If this is the sort of immunity enjoyed by the President, she is subject to the primary obligation—and hence not above the (substantive) law—but her exemption from certain sanctions renders the prohibition less effective. If she is immune from all sanctions, then the prohibition might be said to place her above the law in the sense of being free to violate the applicable legal prohibition with impunity. She is above the law imposing the sanction.

Finally, the President may be subject to the law prohibiting murder *and* the criminal penalties to which murderers are subject, but she may be immune from the jurisdiction of courts, or more broadly from being subjected to judicial proceedings. An immunity from the jurisdiction of courts may only exempt the President from the jurisdiction

5 *Immunity*, BLACK’S LAW DICTIONARY (4th ed. 1968).

6 Interview by David Frost with President Richard Nixon (1977), <https://www.congress.gov/116/meeting/house/110331/documents/HMKP-116-JU00-20191211-SD408.pdf> [<https://perma.cc/3UE3-YRBQ>].

7 See *Primitive or Secondary Obligation*, BLACK’S LAW DICTIONARY (4th ed. 1968).

of certain courts. Thus, the President could in theory be immune from the jurisdiction of state courts but not federal courts. Until the Supreme Court's decision in *Alden v. Maine*,⁸ it was thought that the immunity enjoyed by states under the Eleventh Amendment was an immunity from the jurisdiction of federal courts but not state courts.⁹ Under international law, sovereign states and their officials enjoy an immunity from the jurisdiction of the domestic courts of other sovereign states but not from the jurisdiction of international tribunals.¹⁰

Some may quarrel with my distinction among the three types of immunity described above. For example, if the President is entitled to an immunity from the jurisdiction of all courts, it may plausibly be claimed that she is effectively immune from all secondary obligations. And if the President is immune from all secondary obligations, some might argue that she is effectively immune from the primary obligation. An adherent of the view that a law requires a sanction¹¹ might claim that, without some sanction for committing murder, the President's obligation not to commit murder is not a legal one at all.

But the distinction among the three types of immunity is not merely theoretical. The type of immunity the Court recognized in *Trump* has important implications for the type of evidence needed to support or rebut the existence of the immunity and for the scope of the protection the immunity affords. If the President enjoys an immunity from primary obligations, she is obviously also exempt from criminal (as well as civil) penalties for conduct within the immunity, as such penalties cannot be imposed if the President's conduct is legal. But the converse is not true—an immunity from secondary obligations may shield the President from criminal (or civil) sanctions even if her primary conduct is unlawful. And if the primary conduct is unlawful, there may be enforcement mechanisms other than criminal prosecution.

An immunity from judicial proceedings may inhere in a particular office, protecting the officeholder from judicial proceedings on any matter while she is in office. The immunity *ratione personae*, or personal immunity, enjoyed by ambassadors and heads of state under

8 *Alden v. Maine*, 527 U.S. 706 (1999).

9 See generally Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).

10 See, e.g., Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 58 (Feb. 14); Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Judgment, ¶ 1 (May 6, 2019).

11 See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 151 (Wilfrid E. Rumble ed., Cambridge Univ. Press 2009) (1832).

international law is of this nature.¹² Or the immunity may protect the officeholder only from certain categories of judicial proceedings. The Court in *Trump* endorsed the opinion of the Office of Legal Counsel that a President is not subject to criminal proceedings on any matter while she holds the office of President.¹³ (On the other hand, the Court has held that sitting Presidents do not enjoy an immunity *ratione personae* from civil suits.)¹⁴ An immunity *ratione personae* is typically regarded as an immunity from judicial proceedings, justified on the ground that the officeholder should not be distracted or impeded from the performance of her official duties while she holds the office.¹⁵ When the officeholder enjoys an immunity *ratione personae*, the only question for the court is whether the person sued or prosecuted holds the relevant office.

An immunity from judicial proceedings need not be accompanied by an immunity from primary or secondary obligations. An official who enjoys an immunity *ratione personae* could be subject to criminal prosecution after leaving office. With respect to the immunity recognized in *Trump*, the President would not be immune after leaving office for acts performed before she took office, nor would a former President be immune for unofficial acts performed while she held the office.¹⁶ But an officeholder might enjoy a continuing immunity for certain types of acts she performed while in office. This type of immunity is known as an immunity *ratione materiae*, or functional immunity.¹⁷ The immunity *ratione materiae* enjoyed by state officials under international law is considered an immunity from judicial jurisdiction only, as reflected in the fact that it can be waived by the officer's state.¹⁸ But the qualified immunity enjoyed by federal and state executive officials is not waivable by the state and has been understood as an immunity from liability (i.e., from secondary obligations).¹⁹ In principle, an

12 See Int'l L. Comm'n, Second Rep. on Immunity of State Officers from Foreign Criminal Jurisdiction, ¶ 37, UN Doc. A/CN.4/631 (June 10, 2010).

13 *Trump v. United States*, 144 S. Ct. 2312, 2332 n.2 (2024).

14 *Clinton v. Jones*, 520 U.S. 681, 692, 695 (1997).

15 See *Nixon v. Fitzgerald*, 457 U.S. 731, 751–53 (1982).

16 *Trump*, 144 S. Ct. at 2332.

17 See Roman Anatolevich Kolodkin (Special Rapporteur), *Preliminary Rep. on Immunity of State Officials from Foreign Criminal Jurisdiction*, ¶ 80, U.N. Doc. A/CN.4/601 (May 29, 2008).

18 See Int'l L. Comm'n, Immunity of State Officials from Foreign Criminal Jurisdiction, art. 12, U.N. Doc. A/77/10 (2022).

19 See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (“The general rule of qualified immunity is intended to provide government officials with the ability ‘reasonably [to] anticipate when their conduct may give rise to liability for damages.’” (alteration in original) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984))); *Ryder v. United States*, 515 U.S. 177, 185 (1995) (“Qualified immunity specially protects public officials from the specter of damages liability for judgment calls made in a legally uncertain environment.” (citing

immunity *ratione materiae* can instead be an exemption from the operation of laws imposing primary obligations,²⁰ as *Trump* itself shows.

An official who enjoys an immunity *ratione materiae* from primary or secondary obligations may or may not *also* enjoy an immunity from judicial proceedings. Of course, if an officeholder is exempt from primary obligations for only some types of conduct, or if she is exempt from criminal (or civil) penalties only for certain types of conduct or certain types of cases, she is amenable to judicial proceedings after leaving office at least to determine if the suit brought against her falls within the scope of the immunity. But if the immunity from primary or secondary obligations is also an immunity from judicial proceedings, the officeholder may enjoy certain procedural rights that would not be available if the immunity were not also an immunity from judicial proceedings. With respect to the qualified immunity of executive officials, for example, the Court has held that a judicial decision denying the immunity is immediately appealable because the immunity protects the officer from the burden of trial and not just from primary or secondary obligations.²¹

The Court in *Trump* held that the same is true with respect to the presidential immunity recognized in that case.²² The usual rationale for an immunity *ratione personae*—ensuring that the official is not distracted from performing her official duties while in office—is not implicated in the case of a former officeholder, but the Court appears to have concluded that an official should be protected from the burdens of trial even after leaving office in order to ensure that she is not over-deterred in the performance of her official duties while in office.²³ If

Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982)); Johnson v. Fankell, 520 U.S. 911, 915 (1997) (“If [qualified immunity] is found applicable at any stage of the proceedings, it determines the outcome of the litigation by shielding the official from damages liability.”). I have argued that, after the *Alden* decision, the states’ Eleventh Amendment immunity can also be understood as an immunity from certain forms of liability. See Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927 (2000). See also Carlos M. Vázquez, *Converse-Osborn: State Sovereign Immunity, Standing, and the Dog-Wagging Effect of Article III*, 99 NOTRE DAME L. REV. 717 (2023); Vázquez, *supra* note 9. Other scholars, however, understand the immunity as reflecting an exemption from substantive regulation by Congress. See Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010). For a response, see Carlos M. Vázquez, *The Unsettled Nature of the Union*, 123 HARV. L. REV. F 79 (2011).

20 Cf. Clark, *supra* note 19.

21 Behrens v. Pelletier, 516 U.S. 299, 311–12 (1996).

22 Trump v. United States, 144 S. Ct. 2312, 2343 (2024).

23 See *id.* at 2331. Whether the risk of suit and/or liability does over-deter executive officials, and whether this risk justifies the qualified immunity such officials enjoy, are of course highly contestable. See JOANNA SCHWARTZ, *SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE* (2023). This Essay seeks to understand how the *Trump* majority understood the nature of the immunity it recognized. For this purpose, it is the Court’s proffered

the immunity from primary or secondary obligations is not also an immunity from judicial proceedings, the officeholder would be subject to the final judgment rule and would have to wait until after trial to appeal the denial of her claim that the alleged conduct falls within the scope of an immunity.

By definition, the immunity of a former President is not an immunity *ratione personae*, as this sort of immunity applies only to current officeholders. It is an immunity *ratione materiae* extending only to certain types of acts.²⁴ The Court in *Trump* made clear that the immunity a former President enjoys is at least an immunity from judicial proceedings. It is for this reason that she is entitled to an immediate appeal from the denial of a motion to dismiss the claim against her. The Court left unclear whether the President's immunity is also an immunity from primary obligations or an immunity from secondary obligations. That is the question on which this Essay focuses.

II. *TRUMP* IMMUNITY AS IMMUNITY FROM PRIMARY OBLIGATIONS

Justice Barrett's concurring opinion was the clearest in explaining the type of immunity the Court was recognizing in *Trump*. Her opinion strongly suggests that the presidential immunity recognized in *Trump* relates to the President's primary obligations. Parts of Chief Justice Roberts's majority opinion support that reading.

A. *Justice Barrett's Opinion*

"As I see it," wrote Justice Barrett, "[the] term [immunity] is shorthand for two propositions: The President can challenge the constitutionality of a criminal statute as applied to official acts alleged in the indictment, and he can obtain interlocutory review of the trial court's ruling."²⁵ The second proposition addresses whether the immunity is in part an immunity from judicial proceedings. Justice Barrett agrees with the majority that it is.²⁶ Justice Barrett's first proposition strongly suggests that the immunity is also an immunity from either primary or secondary obligations. Barrett's framing of the first proposition suggests she views the immunity as an immunity from being subjected to the primary obligations specified in the statute: she posits that the

reasons for the immunity that matter, not whether they are justified. For a skeptical view of the latter question, see Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859 (2000).

24 See *Trump*, 144 S. Ct. at 2331.

25 *Id.* at 2352 (Barrett, J., concurring in part).

26 *Id.* at 2354.

statute criminalizing certain conduct may be unconstitutional insofar as it purports to “appl[y]” to the acts alleged in the indictment.²⁷

The immunity issue arises when a statute both prohibits primary conduct and imposes a criminal sanction for such conduct. It is possible that Justice Barrett meant that the immunity concerns a President’s challenge to the constitutionality of the statute on the ground that *the imposition of criminal penalties* for such conduct violates Article II of the U.S. Constitution even if Congress has validly made the acts themselves unlawful. That reading would be consistent with an understanding of the immunity as an immunity from secondary obligations. But, in context, that does not seem to be Justice Barrett’s point. In describing the immunity as a “shorthand” for these two propositions, she seems to be saying that the immunity recognized by the Court is not an “immunity” in the most commonly understood sense of that term.²⁸ She introduces the point by noting that “[t]he Court describes the President’s constitutional protection from certain prosecutions as an ‘immunity,’” placing the latter term in scare quotes.²⁹ In explaining that she understands the term as a shorthand for the two propositions noted, she seems to be distancing herself from that characterization. The proposition that a statute made applicable to the President is unconstitutional insofar as it attaches criminal penalties for certain unlawful acts describes the most common variety of immunity—an immunity from secondary obligations.³⁰ Justice Barrett seems to be saying that the immunity recognized in *Trump* is more unusual.

An immunity from primary obligations is a much less common type of immunity. Indeed, it is questionable whether it is an immunity at all. We would not usually say that a person enjoys an immunity just because the law does not make her conduct unlawful. We would not say that I enjoy an immunity for spitting on the sidewalk just because no law prohibits me from spitting on the sidewalk. On the other hand, one might plausibly say that a category of persons enjoys an immunity when the law exempts that category of persons from an otherwise generally applicable law. For example, one might say that soldiers enjoy an immunity from murder laws insofar as they kill belligerents in

27 *Id.* at 2353.

28 *Id.* at 2352.

29 *Id.*

30 Some commentators appear to regard this as the only true type of immunity. See, e.g., Albert W. Alschuler, *The Supreme Court’s Presidential Immunity Decision Says What??? 11* (U. Chi. L. Sch. Pub. L. & Legal Theory Rsch. Paper No. 861, 2024), <https://ssrn.com/abstract=4923628> [<https://perma.cc/X5TP-6PKW>] (“An *immunity* says that, even if the President acted unlawfully, he shouldn’t be prosecuted.”). Although I argue above that the term “immunity” can be understood more broadly, I agree that this is the way the term is most commonly understood.

battle.³¹ Similarly, the President could be said to enjoy an immunity from murder laws for exercising her legal discretion as Commander in Chief to order soldiers into battle. When the President enjoys an exemption from a generally applicable criminal statute by virtue of the powers conferred on her office, it is plausible to describe the resulting protection from the reach of the statute as an “immunity.” This appears to be the sense in which Justice Barrett understands the protection the *Trump* case affords the President as an “immunity.” Her use of scare quotes, and her description of the term as a shorthand for the two specified propositions, are an acknowledgement that the use of the term in this context is a stretch. In context, the “shorthand” passage strongly supports our reading of Justice Barrett’s opinion as understanding the immunity recognized in *Trump* as operating at the level of primary obligations.³²

This reading is supported by other parts of her opinion. Along with the rest of the majority, Justice Barrett takes the position that the President may not be criminally prosecuted if the conduct on which the prosecution is based falls within the President’s “conclusive and preclusive” authority under Article II.³³ If it does, then the Constitution vests the exercise of executive authority in question “in the President’s sole discretion.”³⁴ If the conduct in question is within the President’s sole discretion, then attaching criminal penalties to such conduct is impermissible because the conduct is, by virtue of Article II, legal. This is an immunity from primary obligations.

Further supporting this reading is Justice Barrett’s statement that “the Constitution does not vest every exercise of executive power in the President’s sole discretion.”³⁵ In some such cases, according to Justice Barrett, Congress has concurrent authority, meaning that “it may sometimes use that authority to regulate the President’s official conduct, including by criminal statute.”³⁶ When Congress does have such

31 See *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (“Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets.”).

32 Accord Keith E. Whittington, *Presidential Immunity*, CATO SUP. CT. REV. 283, 316 (2024) (reading the Justice Barrett concurrence as taking the position that “[f]ormer Presidents are ‘immune’ from criminal prosecution for their actions as President to the extent that those actions are constitutionally insulated from congressional interference. But to the extent that those actions are properly subject to congressional regulation, Presidents must face the consequences of their actions”).

33 *Trump*, 144 S. Ct. at 2352 (Barrett, J., concurring in part).

34 *Id.*

35 *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

36 *Id.*

authority, Justice Barrett writes, “Article II poses no barrier to prosecution.”³⁷ Justice Barrett seems to be saying here that the “barrier to prosecution” recognized by the Court applies when Congress does not have authority to “regulate the President’s official conduct.”³⁸ Again, she regards the President’s immunity from prosecution as applying to presidential primary conduct that is within her authority under the law.

In elaborating on how the courts should address allegations involving “official conduct,” Barrett proposes a two-step analysis.³⁹ The first step is to determine if the relevant criminal statute “reaches the President’s official conduct.”⁴⁰ Even if generally worded, a criminal statute may not reach the conduct of the President. This is in part a question of statutory interpretation and in part a question of whether Congress has the power to regulate the President’s conduct in particular contexts. Again, the focus is on whether the President’s primary conduct violated any applicable legal constraint. If the statute does purport to reach the President’s conduct and can constitutionally do so, then the second step is to determine whether “applying it in the circumstances poses no ‘dange[r] of intrusion on the authority and functions of the Executive Branch.’”⁴¹ Given Justice Barrett’s view that the President’s immunity is coextensive with her substantive legal discretion, this “no danger” test is apparently Justice Barrett’s test for determining whether the alleged conduct is actually within the President’s discretion under Article II. In her words, if “applying” a statute to the President in given circumstances would pose a danger of the pertinent sort, the President is constitutionally entitled to take the action, and Congress is disabled from prohibiting the President from performing the conduct. Again, the issue is whether the President has violated any primary obligations applicable to her.

B. Implications

One implication of regarding the immunity as relating to primary conduct is that the immunity extends not just to the President but also to subordinates carrying out her orders. If the Court held that the President is immune because her conduct was actually legal—because it falls within her powers under Article II—then a holding that she is immune from the reach of a criminal law for giving a particular order

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 2353 (alteration in original) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)).

is a holding that the order was valid. If so, then any subordinate carrying out the order would also be acting legally. Consider a hypothetical that has been discussed in the post-*Trump* commentary: The President orders her chief military aide to shoot someone on Fifth Avenue. According to Professor Tushnet, the subordinate carrying out the order would be subject to criminal penalties even if the President were immune from such penalties for giving the order:

Assuming that Trump is immunized for shooting and for giving the aide the order (not inevitably true depending on circumstances), the aide would be criminally liable absent some defense. The obvious defense is compliance with a superior's orders, but in the military that's not available for "manifestly unlawful" orders (and outside the military there's no such defense, I believe)—and Trump's order would be manifestly unlawful even if he couldn't be held liable for giving it.⁴²

As Professor Tushnet recognizes, the subordinate's liability depends on an understanding of the immunity recognized in *Trump* as merely an immunity from criminal sanctions. Under Justice Barrett's understanding of the immunity, however, the President would be immune only if the court determines that giving the order was within her discretion.⁴³ If so, then the President's order was not "manifestly unlawful." Indeed, it was not unlawful at all. It would appear to follow that the subordinate's carrying out of the order is also lawful. It seems inconceivable that the Court would find the order posited by Professor Tushnet to be lawful. But, under Justice Barrett's apparent understanding of the immunity, if the order is not lawful, the President herself would be subject to criminal prosecution for giving the order.⁴⁴

Another implication of conceptualizing the immunity as an immunity from primary obligations is that the immunity is not merely from criminal penalties. If the President is immune from criminal penalties because her conduct was lawful, then the President would also be immune from other sanctions. She would be equally immune from civil damages and from injunctive relief.

The Court's reliance on *Youngstown Sheet and Tube Co. v. Sawyer* illustrates both of the foregoing points.⁴⁵ In *Youngstown*, the defendant was not President Truman, it was his Secretary of Commerce, who was carrying out the President's order to take possession and operate most

42 Mark Tushnet, *Presidential Immunity: Preliminary and Tentative Thoughts*, BALKINIZATION (July 7, 2024, 11:06 AM), <https://balkin.blogspot.com/2024/07/presidential-immunity-preliminary-and.html> [<https://perma.cc/N9NV-SS3P>].

43 *Trump*, 144 S. Ct. at 2352 (Barrett, J., concurring in part).

44 *Id.* at 2355.

45 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

of the nation's steels mills.⁴⁶ The Court treated the availability of the requested relief as being coextensive with the President's authority to give the order. The Court determined that the President's order went beyond his legal authority and so it upheld the requested relief against the Secretary.⁴⁷ If it had determined that President Truman's order was within the President's authority, it would have denied the requested relief against the Secretary, as the dissenters would have done.⁴⁸ Moreover, the relief requested against the Secretary was not criminal penalties but an injunction, which the Court upheld.⁴⁹ If the Court had concluded that the President's order was valid, it would have denied the injunction.

An additional implication of this form of immunity is that the President would not be impeachable for conduct for which she is immune. The Constitution provides, in Article II, Section 4, that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."⁵⁰ If a President's immunity from criminal prosecution means that the conduct in question falls within her discretion under Article II and is therefore lawful, it would follow that the conduct is not a "high crime" or "misdemeanor." It is true, as numerous scholars have argued, that "conduct need not be criminal to be impeachable,"⁵¹ yet it seems difficult to maintain that conduct that is constitutionally within the President's discretion under Article II could be considered a "high crime" or "misdemeanor" warranting impeachment. Conversely, the Impeachment Clause would appear to establish that the President's Article II discretion does not include conduct that would constitute treason or bribery, as these are specifically characterized in that clause as "high crimes" or "misdemeanors." Consistent with this analysis, both the Barrett and Roberts opinions accept that the President is not immune from criminal prosecution for bribery.⁵²

46 *Id.* at 582.

47 *Id.* at 588–89.

48 *Id.* at 680 (Vinson, C.J., dissenting).

49 *Id.* at 583–84 (majority opinion).

50 U.S. CONST. art II, § 4.

51 See Historians and Legal Scholars for Impeachment, *Letter to Congress from Legal Scholars*, MEDIUM (Dec. 6, 2019), <https://legalscholarsonimpeachment.medium.com/letter-to-congress-from-legal-scholars-6c18b5b6d116> [<https://perma.cc/8B8H-2AJS>].

52 See *Trump v. United States*, 144 S. Ct. 2312, 2341 n.3 (2024); *id.* at 2352–55 (Barrett, J., concurring in part).

C. Chief Justice Roberts's Opinion

Justice Barrett disagreed with the majority on whether immunized conduct could be used as evidence in a prosecution for nonimmunized conduct.⁵³ She made clear, however, that, on the other issues, she “understand[s] most of the Court’s opinion to be consistent with [her] views.”⁵⁴ Some of the analysis in Chief Justice Roberts’s opinion is indeed consistent with Justice Barrett’s understanding of the immunity as the absence of a violation of a valid legal obligation. In framing the issue before it, the majority noted that determining “whether and under what circumstances . . . a [criminal] prosecution [against a former President] may proceed. . . . requires careful assessment of the scope of Presidential power under the Constitution.”⁵⁵ Again, immunity turns on the scope of the President’s substantive legal authority.

Consistent with the view that the immunity is an immunity from primary obligations, the Roberts opinion began its analysis with a discussion of *Youngstown Sheet and Tube Co. v. Sawyer*,⁵⁶ on which the Court relied throughout its opinion.⁵⁷ The Roberts opinion relied on *Youngstown* most heavily in discussing the impermissibility of criminally prosecuting a President for conduct falling within her conclusive and preclusive powers.⁵⁸ As Justice Jackson said in his concurrence in *Youngstown*, although the President’s power is at its “lowest ebb” when she acts in defiance of congressional will, such conduct is valid when she acts on matters that are within her sole and conclusive powers.⁵⁹ I shall refer to such conduct as *Youngstown* category 3 (or Y3) conduct. The Roberts opinion distinguished Y3 conduct from presidential conduct that is valid only if the President acts pursuant to congressional delegation (Y1 conduct) and conduct that is valid when the President acts in the face of congressional silence (Y2 conduct). The Court in *Trump* singled out Y3 conduct for special treatment, concluding that the President’s immunity for such conduct is absolute.⁶⁰ Only later did the majority examine her immunity for Y1 and Y2 conduct, concluding that her immunity for such acts may be absolute, but may merely be presumptive.⁶¹ (The Court left the question open.)⁶² If her immunity for such acts is presumptive, then the immunity can be overcome by a

53 *Id.* at 2354–55 (Barrett, J., concurring in part).

54 *Id.* at 2354.

55 *Id.* at 2326 (majority opinion).

56 *See id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

57 *See, e.g., id.* at 2326–28, 2345, 2347.

58 *Id.* at 2327.

59 *Youngstown*, 343 U.S. at 637, 637–38 (Jackson, J., concurring).

60 *See Trump*, 144 S. Ct. at 2327.

61 *See id.* at 2328–32.

62 *See id.* at 2331–32.

showing that failure to recognize the immunity would “not pose ‘dangers of intrusion on the authority and functions of the Executive Branch.’”⁶³

I discuss in Part III whether the Court’s analysis of the President’s immunity for Y1 and Y2 conduct suggests that it regarded her immunity for such acts as an immunity from the imposition of legal sanctions for concededly unlawful conduct. This Section discusses whether the majority regarded the President’s immunity for Y3 conduct to be an immunity from primary obligations.

The entire point of the Court’s discussion of Y3 conduct was that the President is immune from criminal prosecution for such conduct because the Constitution assigns “conclusive and preclusive” authority over such conduct to the President.⁶⁴ Indeed, the Y3 category is *defined* as Presidential conduct that Congress lacks the power to regulate.⁶⁵ Congress may not criminalize the conduct because Congress may not prohibit the conduct.⁶⁶ The President is exempt from criminal punishment for such conduct because Congress lacks the power to prohibit the President from engaging in such conduct in the first place. If so, then the President’s conduct within this category is, by definition, legal. The majority’s explanation of the theory for this immunity shows that the Court understood the President’s immunity from criminal sanctions for Y3 conduct to be derivative of her immunity from substantive regulation of such conduct.

The majority’s *application* of its newly recognized absolute immunity to some of the counts of the complaint against the former President muddies the water somewhat.⁶⁷ The majority applied its Y3 analysis to the count alleging that the former President pressured the Acting Attorney General to initiate baseless investigations of electoral fraud and threatened to remove the Acting Attorney General if he failed to initiate such claims, and it held that the former President enjoyed absolute immunity with respect to these counts.⁶⁸ If the Court did indeed regard the immunity from criminal prosecution for Y3 conduct as derivative of the President’s immunity from substantive regulation, then it was holding that the President’s “conclusive and preclusive” power

63 *Id.* at 2337 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)).

64 *Id.* at 2328.

65 *Id.*

66 *Id.*

67 This part of the majority opinion may be the most consequential, as it tells us that some of the conduct alleged against the former President was not only not subject to prosecution but was actually legal, and why. See Jack Goldsmith, *The Presidency After Trump v. United States*, 2024 Sup. Ct. Rev. 1, 17 (describing the analysis in this part of the opinion as “the most far-reaching rulings in the decision”).

68 See *Trump*, 144 S. Ct. at 2334–35.

over criminal prosecutions and removal includes the power to pressure executive officials to bring baseless prosecutions and remove executive officials in furtherance of a fraudulent scheme. That this is what the Court meant is suggested by its statement that “[t]he indictment’s allegations that the requested investigations were ‘sham[s]’ or proposed for an improper purpose do not divest the President of exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials.”⁶⁹ In other words, the President has “exclusive authority” (meaning authority that cannot be regulated by Congress) to pursue sham investigations and prosecutions.

It might be contended that the Court could not possibly have so held. Bringing baseless prosecutions is so obviously an abuse of power that it seems inconceivable that the Court was saying that the President has unregulable constitutional power to do so. Indeed, the bringing of baseless prosecutions would appear to be prohibited by the Constitution itself as a denial of due process. The Supreme Court certainly thought so in *Younger v. Harris*.⁷⁰ Although *Younger* holds that the federal courts must generally abstain from enjoining ongoing state criminal proceedings, the Court recognized an exception if the criminal proceedings were brought in bad faith or for purposes of harassment.⁷¹ The implication, of course, is that a criminal proceeding brought in bad faith or for purposes of harassment would be unlawful. Moreover, the authority to pursue criminal prosecutions is not only regulable by Congress but completely depends on congressional action in at least one straightforward way: Since we do not recognize federal common law crimes,⁷² the authority of the Executive to pursue criminal prosecutions depends entirely on Congress having enacted a law making the particular conduct criminal. Bringing a prosecution for conduct that has not at least colorably been made criminal by Congress is thus unquestionably unconstitutional. Is there a possible reading of *Trump* compatible with the conclusion that the initiation of baseless prosecutions is unconstitutional?

A possible alternative reading would be to understand the Court as assuming that, in determining the applicability of an immunity, a court must characterize the relevant presidential conduct that is the basis for the prosecution *without reference to the aspect of the conduct that makes it illegal*. (One might refer to this analytical technique as the “crime-washing” of the allegations.) As discussed in Part III, the Court made something like this point in its analysis of what counts as an

69 *Id.* at 2335.

70 *See Younger v. Harris*, 401 U.S. 37 (1971).

71 *See id.* at 49.

72 *See United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812) (rejecting the concept of federal common law crimes).

“official” act for immunity purposes.⁷³ Under this analysis, if the alleged crime is pressuring officials to pursue baseless investigations, the court asks whether the President’s instruction to officials to pursue *proper* investigations is a conclusive and preclusive power of the President. If it is, then the President cannot be prosecuted even for pressuring subordinates to pursue *improper* investigations. If this is what the Court had in mind, one could say that the President does not have the authority to pressure subordinates to pursue baseless claims, meaning that Congress can prohibit her from doing so, but Congress cannot attach criminal penalties to such conduct and courts may not entertain criminal prosecutions based on such allegations. That this is the type of analysis the Court had in mind is suggested by its sanitized description of the former President’s acts vis-à-vis the Attorney General that it found to fall within the President’s preclusive and conclusive power, before it went on to note that the allegation that the prosecutions were baseless does not vitiate the immunity.⁷⁴

It might further be argued that crime-washing the allegations inheres in the immunity inquiry. An immunity, it might be argued, must protect a defendant from prosecution for conduct that is unlawful. If an immunity protects the President only from legal conduct, it offers no protection at all. But note that this argument begs the question under discussion—i.e., whether the immunity is from primary or secondary obligations. As discussed above, Justice Barrett understood a former President’s “immunity” as merely a combination of (a) a determination that the statute prohibiting the President from engaging in the conduct is unconstitutional, coupled with (b) a procedural right to obtain a definitive judicial ruling on that question before trial. We are now considering whether the majority shared this understanding of the immunity, as Justice Barrett believed. The claim that an

73 Specifically, the majority said that a President’s act does not cease to be an official act “merely because it allegedly violates a generally applicable law.” *Trump*, 144 S. Ct. at 2334. For further discussion of this statement, see *infra* text accompanying notes 94–95.

74 See *Trump*, 144 S. Ct. at 2334 (“According to the indictment, Trump met with the Acting Attorney General and other senior Justice Department and White House officials to discuss investigating purported election fraud and sending a letter from the Department to those States regarding such fraud.”); *id.* (“[I]nvestigation and prosecution of crimes is a quintessentially executive function.” . . . And the Executive Branch has ‘exclusive authority and absolute discretion’ to decide which crimes to investigate and prosecute, including with respect to allegations of election crime.”) (alteration in original) (first quoting Brief for the United States at 19, *Trump*, 144 S. Ct. 2312 (No.23-939); and then quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974)); *id.* at 2335 (“The President may discuss potential investigations and prosecutions with his Attorney General and other Justice Department officials to carry out his constitutional duty to ‘take Care that the Laws be faithfully executed.’”) (quoting U.S. CONST. art II, § 3)).

immunity must, by its nature, protect the immunity-holder from prosecution for conduct that is unlawful presupposes the answer to that question.

In any event, this alternative analysis is not consistent with the Court's professed reason for singling out Y3 conduct for separate treatment. Y3 conduct gets separate treatment because, for this category, the President's conduct cannot be regulated by Congress at all.⁷⁵ If it cannot be regulated by Congress, then any statute prohibiting the conduct is unconstitutional. The President's conduct is legal by virtue of the Constitution. To the extent the conduct can be prohibited by Congress, it would be Y1 or Y2 conduct, and the analysis should have been the same as for such conduct. To say that the President is immune for initiating baseless investigations because her initiation of *proper* investigations would be legal is inconsistent with the Court's professed rationale for concluding that the President is immune for Y3 conduct.

The *Trump* Court did leave open whether the President is entitled to absolute immunity for Y1 or Y2 conduct, so the result might, in the end, be the same. But the Court was at least open to the possibility that, for conduct that Congress does have the power to regulate, the President may only be entitled to immunity if denying her immunity would not pose a danger to the functions of the executive branch. If the President can in fact be prohibited by Congress (or, indeed, is prohibited by the Constitution itself) from pursuing baseless prosecutions, then it is unclear why the Court cut off the possibility of prosecuting her for Y3 conduct if doing so would not endanger executive branch functions. One possibility is that the Court believed that such prosecutions would always pose a danger of intrusion into executive branch functions. But it did not say so, either about the general Y3 category or specifically about prosecutions for ordering baseless prosecutions. Instead, it said that the baselessness of the prosecution "do[es] not divest the President of exclusive authority" over them.⁷⁶

A second possible reading of the *Trump* majority's Y3 analysis would concede that the initiation of baseless investigations and prosecutions by the Attorney General and her subordinates is unlawful, but would insist that the President nevertheless has the constitutional right to pressure those officials to do so. On this view, the President has the constitutional authority to order executive officials to commit unlawful acts. The President's ordering of the conduct is lawful even though the conduct the President orders is unlawful. The idea that the

⁷⁵ See Trevor W. Morrison, *A Rule for the Ages, or a Rule for Trump?*, LAWFARE (July 11, 2024, 1:42 PM), <https://www.lawfaremedia.org/article/a-rule-for-the-ages-or-a-rule-for-trump> [<https://perma.cc/M5AG-YRH8>] ("If Congress may not regulate the exercise of those presidential powers, it follows that Congress may not criminalize them either.").

⁷⁶ *Trump*, 144 S. Ct. at 2335.

President has the constitutional right to pressure (and even order) subordinates to perform acts that are unlawful for that official to perform would be counterintuitive, to say the least. Moreover, according to Professor Tushnet's analysis, discussed above, the official would have a defense of superior orders, as (on this reading of *Trump*) the President's order would not be manifestly unlawful.⁷⁷ If this analysis is correct, the lawfulness of the President's order would effectively immunize lower-level executive officials (although not, perhaps, if the President pressured the official but did not order the conduct).

This reading of *Trump*, however, seems incompatible with the unitary executive theory that the Court endorsed in *Seila Law LLC v. CFPB*⁷⁸ and that apparently underlies *Trump* itself.⁷⁹ According to his theory, all executive power is vested in the President, and other executive officials merely exercise powers as surrogates for the President because she lacks the practical ability to perform all such acts herself. If the due-process analysis above is correct, though, the President herself lacks the power to pursue baseless criminal prosecutions. Under the unitary executive theory, it is because of the President's lack of power that other executive officials lack the power. Could it be that both the President and other executive officials lack the authority to pursue baseless criminal prosecutions, but the President has the power, unregulable by Congress, to order her officials to pursue baseless prosecutions? The mind recoils.

The most straightforward understanding of the majority's holding regarding Y3 conduct may, in the end, be the most shocking one: A President's pressuring of the Attorney General to initiate baseless investigations and prosecutions, and her threat to remove him if he does not do so, is within her constitutional power and thus legal. If so, then it would appear to follow that the conduct of executive officials carrying out such orders would be equally legal. That does not mean the person so prosecuted can be convicted with no evidence. The prosecution will fail—indeed the Constitution *requires* that the prosecution fail.⁸⁰ But neither the President nor her officials violate the law by initiating such prosecutions, and the President does not violate the law by pressuring executive officials to do so. This conclusion is sufficiently implausible that one hopes the Court will clarify that this is not what it

77 See *supra* note 42 and accompanying text.

78 *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020).

79 See Marty Lederman, *A Vivid Illustration of the Impact of the Roberts Court's Radical New "Unitary Executive" Doctrine*, BALKINIZATION (Sept. 23, 2024, 10:00 AM), <https://balkin.blogspot.com/2024/09/a-vivid-illustration-of-impact-of.html> [https://perma.cc/FBM7-Y3R6].

80 See *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (holding that the Constitution prohibits criminal convictions in the absence of proof beyond a reasonable doubt).

meant to hold.⁸¹ Any such clarification will need to explain how the Court's conclusion that the President is absolutely immune from prosecution for an act that is unlawful—indeed, unconstitutional—follows from the premise that the President was acting on a matter within her “conclusive and preclusive” powers, and hence within her sole discretion.

* * *

In sum, Justice Barrett understands the presidential “immunity” recognized in *Trump* as a recognition that the conduct that forms the basis of the criminal indictment against the President is not illegal—either because the criminal statute, properly construed, does not apply to the President or because Congress lacks the power to regulate the President's conduct. Because the immunity protects the President from the burdens of trial for such conduct, the immunity carries with it a procedural right to have the issue finally adjudicated before trial, including the right to take interlocutory appeals of adverse lower-court rulings. Justice Barrett reads the opinion of Chief Justice Roberts as compatible with her understanding. The Roberts opinion does reflect this understanding of the immunity at least with respect to Y3 conduct. The next Part discusses whether Chief Justice Roberts's opinion regards the President's immunity with respect to Y1 and Y2 conduct as also bearing on the legality of the President's primary conduct, or instead as a protection from criminal sanctions for concededly unlawful conduct.

III. *TRUMP* IMMUNITY AS IMMUNITY FROM CRIMINAL SANCTIONS FOR UNLAWFUL CONDUCT

An alternative reading of the *Trump* majority opinion is that the Court was holding that the President enjoys immunity from criminal penalties for her official acts even if her conduct is unlawful. This reading clashes with the majority's reliance on *Youngstown*, but it is possible that the *Youngstown* analysis was put forward only as a partial explanation of a former President's immunity. *Of course*, the President cannot be prosecuted for performing acts that are legal, but perhaps the President is *also* sometimes immune from criminal sanctions for performing conduct *beyond* her lawful authority.

This second variety of immunity is what lower-level executive officials (as well as state officials) enjoy with respect to civil damages. The Court has held that such officials may not be held liable for damages

81 See Lederman, *supra* note 79.

unless they violated clearly established federal law.⁸² The reason is that subjecting them to damages liability might over-deter them in the performance of their duties, which in turn would undermine the vigorous performance of their lawful duties.⁸³ The *Trump* majority relied on this rationale in justifying its holding, repeatedly noting that the immunity is necessary in order to protect the constitutional interest in a vigorous and effective executive branch.⁸⁴ Indeed, the majority relied on an old official immunity chestnut, *Gregoire v. Biddle*, for the proposition that “[v]ulnerability ‘to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute.’”⁸⁵ When a court holds that an executive official is entitled to qualified immunity, it holds that she is not liable in damages even though her conduct may have been illegal. The *Trump* Court’s citation of official immunity precedents, and its invocation of the rationale for such immunity, may suggest that the Court understood *Trump* immunity as an exemption from secondary obligations—specifically, criminal sanctions—even for conduct that is unlawful.

If the President’s immunity is only an exemption from criminal sanctions, then her conduct may validly be prohibited and the prohibition may be enforced through declaratory and injunctive relief (assuming a plaintiff has standing). In theory, the prohibition may also be enforced through civil damage actions. To be sure, the Court in *Nixon v. Fitzgerald* held that the President is immune from civil damage liability for conduct within the outer perimeter of her responsibilities.⁸⁶ But, if the President’s immunity is merely from criminal sanctions, a lower-level official could be held liable in damages for carrying out presidential orders contrary to such prohibitions. The order would be illegal, despite the President’s immunity, and the officer could be subject to sanctions for carrying it out. Indeed, the officer may even be subjected to criminal sanctions. Finally, concluding that the immunity is merely from criminal sanctions also opens up the

82 See, e.g., *Johnson v. Fankell*, 520 U.S. 911, 914–15 (1997) (“We have recognized a qualified immunity defense for both federal officials sued under the implied cause of action asserted in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and state officials sued under 42 U.S.C. § 1983. In both situations, ‘officials performing discretionary function[s] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).

83 See *Harlow*, 457 U.S. at 816–17.

84 See *Trump v. United States*, 144 S. Ct. 2312, 2329, 2331, 2345 (2024).

85 *Id.* at 2344 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 752 n.32 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949))).

86 *Nixon*, 457 U.S. at 756 (“[W]e think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the ‘outer perimeter’ of his official responsibility.”).

possibility that the President can be impeached for the acts Congress has prohibited and made criminal, even if she is immune from criminal prosecution. Even though the President would not be subject to criminal sanctions, the acts that Congress criminalized would be “high Crimes and Misdemeanors.”⁸⁷

A. *Trump Immunity for Conduct Outside the President’s Exclusive Powers as Immunity from Criminal Sanctions*

Is the President’s immunity for official acts outside her conclusive and preclusive powers merely an immunity from criminal sanctions? The structure of the majority’s analysis suggests so. The Court held that the President enjoys immunity not only for conduct within her conclusive and preclusive powers (Y3 conduct), but also for some conduct outside those powers. As the Court noted, the latter category consists of two subcategories—acts the President has authority to perform because Congress has expressly or implicitly delegated the authority to her (Y1 conduct) and conduct the President has concurrent authority to perform in the absence of congressional delegation (Y2 conduct).⁸⁸ With respect to both subcategories, this category consists of presidential conduct that Congress has the power to prohibit. This is clearest with respect to Y1 conduct. Here, the President’s power to perform the act in the first place depends on Congress’s conferral of the power on her. Since Congress did not have to empower the President to perform the act, Congress would, a fortiori, have the power to prohibit the President from performing the act. The same conclusion would appear to be warranted with respect to Y2 conduct. To say that the President’s power is concurrent with Congress’s power, rather than being exclusive to the President, would seem tantamount to saying that Congress has the power to prohibit the President from performing particular acts in this subcategory.

If Congress has the power to prohibit the acts, and if we assume that Congress *has* criminalized the acts, it would appear to follow that the immunity the President enjoys is merely an immunity from criminal sanctions. In the United States, federal criminal prosecution requires the existence of a statute criminalizing the conduct in

⁸⁷ See U.S. CONST. art II, § 4.

⁸⁸ *Trump*, 144 S. Ct. at 2328 (“As Justice Robert Jackson recognized in *Youngstown*, the President sometimes ‘acts pursuant to an express or implied authorization of Congress,’ or in a ‘zone of twilight’ where ‘he and Congress may have concurrent authority.’” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 637 (1952) (Jackson, J., concurring))).

question.⁸⁹ In examining whether the President enjoys an immunity in a criminal case, therefore, it makes sense to assume that Congress has criminalized the conduct in question. A statute that criminalizes conduct also implicitly prohibits the conduct. If we are assuming that Congress has the power to prohibit the conduct in question (as we must if we are examining the President's immunity for conduct outside her sole and exclusive powers), then at most the immunity can protect the President from criminal sanctions. The conduct that Congress has criminalized remains prohibited and the prohibition may be enforced in the ways described above even if it may not be enforced through criminal prosecution of the President.

Some passages in the majority opinion addressing the President's immunity for official acts outside her exclusive powers are consistent with this view. For example, the majority says that "[d]etermining whether an action is covered by immunity . . . *begins with* assessing the President's authority to take that action."⁹⁰ If assessing the President's authority to perform the act is merely the beginning of the inquiry, then presumably the immunity inquiry continues even if the President lacks the authority. The majority also said that "[t]he President, charged with enforcing federal criminal laws, is not above them,"⁹¹ suggesting that the legal prohibition applies to the President even if she is immune from criminal sanctions.

B. Trump Immunity for Conduct Outside the President's Exclusive Powers as Immunity from Primary Obligations

Elsewhere, however, the majority's discussion of the President's immunity with respect to conduct outside her conclusive and preclusive powers suggests that, when the President enjoys immunity, she is not subject to the criminal prohibition in the first place. For example, in discussing how the presumptive immunity would operate with respect to such acts, the Court states that the presumption would be overcome "[if] the Government can show that *applying a criminal prohibition* to that act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'"⁹² Similarly, in examining whether the former President was immune with respect to his conversations with his Vice President regarding the certification of the election, the majority notes that "[a]pplying a criminal prohibition to the President's

89 United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812) (rejecting the concept of federal common law crimes).

90 *Trump*, 144 S. Ct. at 2333 (emphasis added).

91 *Id.* at 2331.

92 *Id.* at 2331–32 (emphasis added) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)).

conversations discussing such matters with the Vice President . . . may well hinder the President's ability to perform his constitutional functions."⁹³ The language the Court used to describe the inquiry suggests that it was discussing whether the legal prohibition, not just the criminal sanction, can be applied to the President.

Additionally, the majority made a point of noting that the Government actually agreed with the majority's position in a number of respects, noting in particular that the Government would "accord[] protection to Presidential conduct if *subjecting that conduct* to generally applicable laws would 'raise serious constitutional questions regarding the President's authority' or cause a 'possible conflict with the President's constitutional prerogatives.'"⁹⁴ Similarly, the majority noted that the Office of Legal Counsel has recognized "that a federal statute generally prohibiting appointments to 'any office or duty in any court' of [certain] persons . . . would, *if applied to the President*, infringe his power to appoint federal judges, thereby raising a serious constitutional question."⁹⁵ In both of these examples, the Court is discussing whether the relevant prohibition *reaches* the President's conduct in the first place, not just whether the President is subject to a criminal sanction. In the majority's view, these concessions by the Government showed that the difference between its position and the Government's boiled down to a disagreement about the immediate appealability of adverse rulings on these questions.⁹⁶

But how can we conclude that the President is immune from the prohibition imposed by Congress if, by hypothesis, we are dealing with conduct outside the President's exclusive powers—conduct that by definition Congress has the power to regulate? The answer is suggested by the majority's frequent references to the particular type of law the former President was alleged to have violated: laws of general applicability. *Trump* involved indictment of a former President for violating criminal laws that apply to the general public, as most criminal laws do. (As Justice Jackson noted in her dissent, this is a characteristic feature of criminal laws.)⁹⁷ Throughout its opinion (including in the passages quoted above),⁹⁸ the majority focused on the fact that the case

93 *Id.* at 2337 (emphasis added).

94 *Id.* at 2343 (emphasis added) (quoting Application of 28 U.S.C. § 458 to Presidential Appointments of Fed. Judges, 19 Op. O.L.C. 350, 351–52 (1995)).

95 *Id.* (emphasis added) (quoting 19 Op. O.L.C. at 350).

96 *See infra* text accompanying notes 109–12.

97 *Trump*, 144 S. Ct. at 2373 (Jackson, J., dissenting) ("Criminal statutes are laws of general applicability that express 'the assent of the people's representatives' that certain conduct is off limits in our society." (quoting *Wooden v. United States*, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring in judgment))).

98 *See supra* notes 94–95 and accompanying text.

concerned the President's immunity from laws of general applicability.⁹⁹ Perhaps most notable was the concern the majority expressed about allowing prosecutors to charge former Presidents under Section 371, which it described as "a broadly worded criminal statute that can cover 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.'"¹⁰⁰ The majority wrote:

Virtually every President is criticized for insufficiently enforcing some aspect of federal law (such as drug, gun, immigration, or environmental laws). An enterprising prosecutor in a new administration may assert that a previous President violated that broad statute. Without immunity, such types of prosecutions of ex-Presidents could quickly become routine.¹⁰¹

The majority also singled out generally applicable laws in distinguishing official from unofficial acts. Specifically, it noted that a President's act does not cease to be an official act "merely because it allegedly violates a generally applicable law."¹⁰² Consistent with this proposition, the majority found that the President's discussions with the Vice President were official acts even though they were alleged to violate criminal laws generally prohibiting the fraudulent alteration of election results.¹⁰³ The negative pregnant is that a President's act would be unofficial, and thus not protected by *Trump* immunity, if it violated a valid congressional prohibition that specifically applies to the President. This conclusion would be consistent with the majority's definition of an official act as one falling within the outer perimeter of the President's responsibilities.¹⁰⁴ Presumably, Y1 or Y2 conduct that violates a prohibition that Congress has validly and *specifically* made applicable to the President falls outside the outer perimeter of the President's authority.¹⁰⁵ It seems to follow from this analysis that the President is not immune when her conduct was validly prohibited by Congress (and, since we are focusing now on Y1 and Y2 conduct, we must assume the congressional prohibition is valid). In other words, the President is immune only when her conduct was legal. If *Trump* immunity for acts outside her conclusive and preclusive powers is absolute, the congressional prohibition would not be applicable to the

99 In addition to the examples in the preceding paragraph, see *Trump*, 144 S. Ct. at 2341, 2343.

100 *Id.* at 2346 (quoting *United States v. Johnson*, 383 U.S. 169, 172 (1966)).

101 *Id.*

102 *Id.* at 2334.

103 See *id.* at 2336–37.

104 *Id.* at 2333.

105 Accord Thomas P. Schmidt, *Presidential Immunity: Before and After Trump*, 79 VAND. L. REV. (forthcoming 2026) (manuscript at 63) <https://ssrn.com/abstract=5187348> [<https://perma.cc/HU9S-BTWX>].

President if the law is of general applicability. If *Trump* immunity for such acts is only presumptive, then the prohibition would not be applicable to the President if the law is generally applicable and “applying [the] criminal prohibition” to the President would pose a danger of intrusion into the executive branch’s authority and functions.¹⁰⁶ But if the law concerns Y1 or Y2 conduct and specifically applies to the President, the congressional prohibition is valid and the President would not be immune. All of this is consistent with Justice Barrett’s understanding of *Trump* immunity as an immunity from the reach of laws imposing primary obligations.

If the foregoing analysis is correct, then the immunity does not disable Congress from imposing criminal sanctions on the President for Y1 and Y2 conduct. If the President had the authority to perform the act in the first place only because Congress had delegated the authority to her, or if she was acting in the “twilight zone” of concurrent powers, then Congress has the power to impose the prohibition. *Trump* tells us that Congress can subject the President to criminal sanctions *if it does so specifically*. If it does not, then subjecting the President to the prohibition may still be valid (if the President’s immunity is merely presumptive). On this reading, the President’s immunity is either an absolute or presumptive immunity from the reach of *generally applicable* criminal laws. Congress can criminalize the conduct by making it clear that the statute extends to the President.

If understood this way, is *Trump* immunity an immunity at all? It is true that, if so understood, the immunity would not shield the President from Congress’s power to prohibit and criminalize the conduct. The President would not be immune from being subjected to criminal sanctions for conduct that she has constitutionally been prohibited from performing. Such an “immunity” operates merely as a rule of statutory interpretation: criminal prohibitions do not apply to the President unless either (a) Congress so specifies or (b) (if the immunity is presumptive) applying the prohibition to the President would not intrude unduly upon the executive power. The issue boils down to whether the criminal law being invoked, properly interpreted, extends to the President’s conduct. Still, as noted, *Trump* immunity can be understood as an immunity *from the reach of generally applicable laws*. In this respect, the immunity would operate similarly to how the Court in *Seminole Tribe of Florida v. Florida* understood Eleventh Amendment immunity to operate.¹⁰⁷ Both the majority and the dissenting opinions in *Seminole Tribe* understood the immunity to be subject to abrogation by

106 *Trump*, 144 S. Ct. at 2331, 2331–32 (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982)).

107 *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

Congress, at least in certain circumstances, yet they had no trouble understanding it as an immunity.¹⁰⁸

The protection the President would enjoy under this reading of *Trump* is properly regarded as an immunity in an additional, and important, sense. As noted, the Court understands the President's immunity as protecting her from the burden of trial. In fact, after noting the ways in which its position that the President is not subject to certain types of prohibitions was shared by the Government, the Court explained that its disagreement with the Government centered on whether the President's exemption from the prohibition also entitled the President to protections from the burdens of trial.¹⁰⁹ The Government had conceded that the President is not subject to criminal sanctions for conduct within her exclusive authority or if interpreting a law to extend to her conduct would intrude unduly upon the executive branch's authority and functions, but it argued that these issues should be decided in the ordinary course of the trial.¹¹⁰ The majority responded by highlighting that, since the President's immunity protects her from judicial process, the issue must be decided at the commencement of the case, and the President is entitled to an immediate appeal from adverse rulings.¹¹¹ Understanding the President's protection as also an immunity from judicial process, in other words, implies that the President is entitled to these procedural protections.

Of course, we can conclude that the President is entitled to these procedural protections without calling it an immunity—we can just interpret the Constitution's separation of powers as implicitly including these protections. Justice Barrett recognized this point by noting that the term "immunity" in this context is merely shorthand for the procedural protections given the President in litigating whether her conduct was legal.¹¹² Reading the majority opinion as recognizing that the President enjoys an immunity from the reach of generally applicable laws under the circumstances described above, combined with the right to have these issues decided before trial, aligns the majority's opinion with that of Justice Barrett. The question to be decided

108 *Id.* at 59 (majority opinion) ("We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment."); *id.* at 161–62 (Souter, J., dissenting) (understanding the Eleventh Amendment as reflecting a common law immunity subject to repeal by Congress). *See also* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (holding that an abrogation of Eleventh Amendment immunity must be clear and specific).

109 *Trump*, 144 S. Ct. at 2343–44.

110 *Id.* at 2342–43.

111 *See id.* at 2343–44.

112 *Id.* at 2352 (Barrett, J., concurring in part).

through these procedures, however, is whether the President's conduct was legal.

Understanding *Trump* immunity as an immunity from being subjected to generally applicable prohibitions also aligns this immunity in one respect with the qualified immunity to which lower-level executive officials are entitled. That immunity is understood to have the status of federal common law.¹¹³ As such, it is subject to being limited or repealed by Congress. In this respect, qualified immunity also operates as a rule of interpretation. It exists only as long as Congress has not expressly limited or repealed it. It is considered an immunity, but it does not limit Congress's legislative power. Similarly, understanding *Trump* immunity for Y1 and Y2 conduct as an immunity from (some) generally applicable criminal laws leaves Congress with the power to remove the immunity by specifying that the law does apply to the President.

If this is the correct analysis, then the President is immune from the operation of generally applicable criminal prohibitions, at least if subjecting her to the prohibition would pose a danger of intrusion into the executive's authority. In such circumstances, as discussed in Part I, the President would be protected not only from criminal sanctions, but also from injunctive relief, and lower-level officials cannot be prosecuted for following her (valid) orders. Nor, apparently, would the President be impeachable for performing those acts, which by hypothesis were legal (although this conclusion is less certain here than with respect to Y3 conduct).

C. *Trump Immunity for Conduct Outside the President's Exclusive Powers as Immunity from Criminal Sanctions—Redux*

The other possibility is that *Trump* immunity is an immunity from being subjected to *criminal sanctions* on the basis of generally applicable laws. On this view, the President, if immune, would be covered by the legal prohibitions set forth in generally applicable criminal laws but not the criminal sanctions attached to such laws. If the President's immunity is only presumptive, the President is subject to the sanctions only if applying those sanctions to her would pose no danger of intruding on the executive branch's authority and functions. If the immunity is absolute, then she cannot be subjected to such sanctions at all for conduct deemed official. But the President would still be subject to the legal prohibition, which could in theory be enforced against her subordinates or through other enforcement mechanisms.

113 See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–05 (1988).

This understanding of the President's immunity is in tension with the majority's frequent statements that the immunity issue relates to whether the criminal *prohibition* can be applied to the President without intruding on executive authority. But perhaps the majority meant to say that the question was whether applying the prohibition to the President *by means of a criminal sanction* would pose a danger of intruding on the executive branch's authority and functions.

The latter interpretation would be consistent with the majority's invocation of the rationale for the qualified immunity of executive officials. Recall that the reason for such immunity is the fear that civil damage claims against executive officials would over-deter them, thus sacrificing some range of lawful executive action. If the idea is that allowing claims for concededly unlawful behavior would result in over-deterrence, the rationale would apply to the application of criminal sanctions for behavior that violates legal prohibitions that do legally operate on the President. As Judge Hand wrote in *Gregoire v. Biddle*,

[I]f it were possible in practice to confine [damage] complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.¹¹⁴

This interpretation finds further support in the Court's statement that a presidential act is official if it is within the "'outer perimeter' of the President's official responsibilities, covering actions so long as they are 'not manifestly or palpably beyond [his] authority.'"¹¹⁵ On one view, conduct that has been prohibited by a law that validly applies to the President is beyond the outer perimeter of her authority. But the *Trump* majority makes clear that an act is not unofficial because it violates a generally applicable law.¹¹⁶ Thus, an act that violates a generally applicable prohibition may still be within the outer perimeter of the President's responsibilities, as the majority understands the term. But the majority's qualification tells us that the conduct is "official" only if it is not *manifestly or palpably* beyond her authority. This seems to mean that the President is entitled to immunity (either absolute or presumptive), only if her conduct does not violate *clear* legal prohibitions. In this respect, the threshold requirement for determining whether the President is eligible for *Trump* immunity resembles the standard for

114 *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

115 *Trump*, 144 S. Ct. at 2333 (alteration in original) (quoting *Blossingame v. Trump*, 87 F.4th 1, 13 (D.C. Cir. 2023)).

116 *Id.* at 2334.

the qualified immunity of lower-level executive officials from civil damage claims. If the President's immunity for conduct outside her "conclusive and preclusive" authority is absolute, then the standard for the immunity turns out to be (ironically) the same as the standard for the "qualified" immunity of lower-level officials. If the President's *Trump* immunity is merely presumptive, then the President is not immune, even if the unlawfulness of the conduct is not manifest or palpable, if applying the sanction would pose no danger of intruding on the executive branch's authority and functions. The majority's test for distinguishing between official and unofficial conduct thus tells us that, like the qualified immunity from civil damages enjoyed by executive officials, *Trump* immunity protects former Presidents from certain sanctions for conduct that is unlawful. It tells us that the President is exempt from prosecution for conduct that is unlawful but not manifestly or palpably so (but possibly only if subjecting the President to criminal sanctions would not pose a danger of intrusion on the executive branch's authority and functions).

If *Trump* immunity protects Presidents from criminal sanctions but leaves Presidents subject to the substantive reach of generally applicable criminal laws, then Presidents (and their subordinates) would be amenable to suits for prospective or declaratory relief from ongoing or threatened violations of the generally applicable criminal prohibition (assuming a plaintiff has standing and has a claim that is ripe and not moot). Also, the President's subordinates would be subject to retrospective sanctions for having enforced unlawful orders. Qualified immunity would protect such officials from civil liability if the unlawfulness was not clearly established at the relevant time, but (unless the Court extends *Trump* immunity to lower-level executive officials) such officials would not be immune from criminal sanctions. In any event, neither they nor the President herself would be immune from criminal prosecution for conduct that was manifestly or palpably beyond her authority, as such conduct would be unofficial under the Court's definition and thus not within the scope of any immunity. And her conduct would appear to be manifestly and palpably beyond her authority if it is Y1 or Y2 conduct that Congress has clearly and specifically prohibited the President from performing.

CONCLUSION

In the end, the *Trump* opinions leave unclear the nature of the immunity enjoyed by former Presidents for official acts performed while President. Given the expedited nature of the Court's review in the case, it is likely that the Court did not fully think through the conceptual issues on which this Essay has focused. Admittedly, much of my analysis relies on a close parsing of the various opinions in *Trump*,

relying on word choices that may not reflect the Justices' well-thought-out views on these conceptual questions. Nevertheless, since phrasing mirrors thought,¹¹⁷ such parsing could at least offer clues to how the Court currently regards this immunity and how it might develop the newly recognized doctrine of presidential immunity in the criminal context.

There is substantial support in the Court's opinions for understanding the immunity as an immunity from the operation of the prohibitions of the criminal laws she is alleged to have violated. If so, the President would be above the law in the sense that she is exempt from the laws that apply to the public generally. In short, if the President does it, it is not illegal. But neither would it be illegal for subordinates to carry out the orders of the President. Nor could the prohibitions be enforced through noncriminal processes or even be the basis for impeaching the President or her subordinates.

But, if the immunity is understood (with respect to Y1 and Y2 conduct) as an immunity from generally applicable laws, then Congress has the power to render the immunity inapplicable with respect to such conduct. Legislation has already been introduced to reverse the *Trump* decision, but it purports to do so in a wholesale manner.¹¹⁸ The proposed legislation, dubbed the No Kings Act, would appear to be unconstitutional to the extent it purports to repeal *Trump* immunity for conduct within the President's conclusive and preclusive power, as this is conduct the President is constitutionally entitled to perform.¹¹⁹ With respect to conduct outside her conclusive and preclusive power, if the foregoing analysis is correct, the Congress does have the power to remove the immunity (whether it is an immunity from primary or secondary obligations), but maybe not in the wholesale manner the No Kings Act purports to remove it. If *Trump* immunity is an immunity from generally applicable criminal laws, Congress can render the immunity inapplicable by making particular criminal prohibitions or sanctions specifically applicable to the President. Whether Congress can render all criminal laws expressly applicable to the President in one fell swoop depends on whether the rule of interpretation reflected in the *Trump* decision is constitutionally based. The majority bases its decision on the Constitution's separation of powers, suggesting it views the immunity, even if merely presumptive, as constitutionally based

117 *Brown v. Allen*, 344 U.S. 443, 501 (1953) (Frankfurter, J., concurring).

118 A bill "[t]o reassert the constitutional authority of Congress to determine the general applicability of the criminal laws of the United States, and for other purposes." No Kings Act, S. 4973, 118th Cong. (2024).

119 *Id.* §§ 1, 2(b)(2).

and thus inalterable by Congress except in accordance with its rationale—i.e., in a retail fashion.¹²⁰

Even if *Trump* recognizes an immunity from the reach of generally applicable criminal prohibitions or sanctions, the *Trump* decision imposes a heavy burden on Congress and affords a correspondingly large advantage to the President. Virtually all criminal laws are framed in generally applicable terms, and most fail to specify that they apply to the President.¹²¹ If Congress wants to limit the effect of the *Trump* decision with respect to Y1 and Y2 conduct, it may have to start reviewing generally applicable criminal laws one by one to specify clearly the conduct that is prohibited and the applicability of the prohibition and sanction to the President.

120 Perhaps that is why the No Kings Act also purports to strip the Supreme Court's jurisdiction over cases raising Trump immunity defenses. *Id.* § 4. Whether the jurisdiction-stripping provisions of the No Kings Act are themselves unconstitutional is beyond the scope of this Essay.

121 *But cf.* Chris Mirasola, *Domestic Military Deployments* after *Trump v. United States*, 67 WM. & MARY L. REV. (forthcoming 2025) (noting several criminal statutes that appear to have been specifically made applicable to Presidential conduct).

