ALL THE PRESIDENT'S MEN

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In Trump v. United States*, the Supreme Court held the President at least presumptively immune from criminal prosecution for all of his official acts and absolutely immune for acts taken within his "conclusive and preclusive" constitutional authority. Critically, it then held that the President has conclusive and preclusive power over the investigative and prosecutorial functions of the Justice Department (and potentially over the execution of the law more broadly). Because the Court deemed that power conclusive and preclusive, it held that Congress may not regulate or restrict it in any way—even if it is used to conduct "sham" or otherwise improper investigations or prosecutions. As other commentators have pointed out, the Court's sweeping language on this point would appear to have far-reaching consequences well beyond the criminal prosecutability of the President.*

Thus far, however, commentators have largely overlooked the implications of Trump *for subordinate executive officials who implement the President's orders. In fact, a widespread belief that* Trump *carries no implications for subordinates has been cited as mitigating its impact. On this view, even if a President may not be prosecuted for directing his subordinates to conduct unlawful investigations and prosecutions, his subordinates do face those (and other) constraints. Thus, a lawless President will be kept somewhat in check by the unwillingness of his subordinates to expose themselves to liability.*

This Essay argues that the conventional understanding is wrong. Executive subordinates who act at the President's direction to effectuate his powers have long been understood to be exercising the President's powers, not their own. If the presidential power at issue is conclusive and preclusive of congressional or judicial limitation, it remains so even when exercised by a subordinate. That was clear well before the Court decided Trump*. But when the point is combined with* Trump*'s sweeping account of presidential power, the result is new and deeply troubling.*

If the Court meant what it seemed to say about the President's conclusive and preclusive

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power over law execution, then presidential subordinates who conduct sham or otherwise improper investigations or prosecutions at the President's behest are just as absolutely immune as he is. And the immunity applies not just to criminal charges, but to any congressional or judicial attempt to constrain the President's conclusive and preclusive power. This Essay shows how Trump *seemingly leads to this result, discusses some of its potentially disastrous consequences, and identifies some ways to limit those consequences.*

INTRODUCTION

The presidency of the United States is an immensely consequential role.[1] It is also just immense. As the Supreme Court has explained, "Because no single person could fulfill [the President's] responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance."[2] And indeed he does. The President typically exercises his powers through others in the Executive Branch, who act on his behalf and at his (direct or indirect) behest. Sometimes, the law treats the person of the President differently than the subordinates who help discharge his role; other

1 *See* FORREST MCDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY (1994) ("The presidency of the United States is often described as the most powerful office in the world."); THEODORE J. LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED, at x–xi (1985) (calling the presidency "the most powerful office in the world"); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 568 (1973) ("The man who holds this office has become, as Presidents like to think, the most important, the most powerful man in the world.").

2 Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2191 (2020).

times, it does not.[3] This Essay is about how the Supreme Court's decision in *Trump v. United States*[4] bears on that issue.

Trump has not been well received. It declared the President broadly immune from criminal prosecution for his official acts, which Justice Sotomayor in dissent described as turning the President into "a king above the law."[5] Press commentators reacted similarly, lamenting that the decision created a "lawless presidency."[6] Most of the criticism has focused on the Court's recognition of "at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility."[7] Justice Sotomayor argued that the Court's account of this presumption made it virtually impossible to rebut, and thus that the Court had in effect made the President absolutely immune from prosecution for all official acts, no matter how abusive or unlawful.[8] The result, she said, "ma[de] a mockery of the principle . . . that no man is above the law."[9]

Whatever one makes of those criticisms,[10] the Court's holding on official-acts immunity has overshadowed its separate holding that the President is *absolutely* (not just "at least presumptively") immune for a subset of his official acts—those that fall "within his 'conclusive and preclusive' constitutional authority."[11] Justice Sotomayor told readers they

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3 *Cf.* Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1122–23 (2020) (describing two models of the presidency, one focused on the individual elected to the role and the other encompassing the various actors and offices that wield and shape presidential power).

4 144 S. Ct. 2312 (2024).

5 *Id.* at 2371 (Sotomayor, J., dissenting).

6 *See, e.g.*, Kate Shaw, Opinion, *The Supreme Court Creates a Lawless Presidency*, N.Y. TIMES (July 2, 2024), https://www.nytimes.com/2024/07/02/opinion/supreme-court-immunity-trump.html [https://perma.cc/D9S8-DA63]; Michael Stokes Paulsen, *A Lawless Court Gives Us a Lawless Presidency*, PUB. DISCOURSE (July 22, 2024), https://www.thepublicdiscourse.com/2024/07/95374 [https://perma.cc/529V-A923].

7 *Trump*, 144 S. Ct. at 2331 (emphasis omitted).

8 *See id.* at 2357 (Sotomayor, J., dissenting) ("Whether described as presumptive or absolute, under the majority's rule, a President's use of any official power for any purpose, even the most corrupt, is immune from prosecution. That is just as bad as it sounds, and it is baseless."); *id.* at 2361 (pointing out that, under the majority's test, "the President must . . . be immune from prosecution for an official act unless 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'" (alteration in original) (emphasis omitted) (quoting *id.* at 2331–32 (majority opinion)), which all but guarantees immunity because "[i]t is hard to imagine a criminal prosecution for a President's official acts that would pose no dangers of intrusion on Presidential authority in the majority's eyes").

9 *Id.* at 2355.

10 Jack Goldsmith argues they are overstated. He points out that it was already difficult to stop "a bad-man President [from] engaging in widespread lawless criminal behavior," and that "the bad-man President had many tools to skirt the criminal law before *Trump*, to which its uncertain immunity ruling added relatively little." Jack Goldsmith, *The Presidency After* Trump v. United States, 2024 SUP. CT. REV. 1, 2.

11 *Trump*, 144 S. Ct. at 2328, 2344 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J., concurring)).

should "[f]eel free to skip over those pages of the majority's opinion," because "[w]ith broad official-acts immunity covering the field, this ostensibly narrower immunity serves little purpose."[12] If we focus only on the narrow question presented in *Trump*, she may be right: If the President's nominally presumptive official-act immunity is effectively absolute, the existence of a narrower category of truly absolute immunity is largely irrelevant.[13]

Yet as some commentators have pointed out, the *Trump* Court's discussion of "conclusive and preclusive" presidential power could have far-reaching effects, well beyond the specific issue of presidential immunity from criminal charges.[14] That is because of what it said about the content of that power. According to *Trump*, the President has "exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials,"[15] and Congress therefore may not regulate or restrict the exercise of that authority in any way, even if it is used to conduct "sham" or otherwise unlawful investigations or prosecutions.[16] *Trump* grounded its reasoning in part in the Take Care Clause of the Constitution,[17] suggesting that its view of unregulable presidential control of law execution may extend well beyond criminal law.

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12 *Id.* at 2367 (Sotomayor, J., dissenting).

13 Although it is beyond the scope of this Essay to consider, it is possible that the Court's standard for official-act immunity could turn out to be more flexible in practice. *See* Shalev Gad Roisman, Trump v. United States *and the Separation of Powers*, 173 U. PA. L. REV. ONLINE 33, 52 (2025) (arguing that although the language of the *Trump* majority's test "is overly restrictive," it "do[es] not . . . need[] to be applied literally," and observing that "there is precedent for an ostensibly demanding standard like this one being overcome in separation of powers cases").

14 *See, e.g.*, Goldsmith, *supra* note 10, at 2 (arguing that *Trump*'s primary impact will be on the President's removal, investigatory, and prosecutorial powers rather than on presidential immunity); Shalev Gad Roisman, *President Trump in the Era of Exclusive Powers*, HARV. L. REV. BLOG (Apr. 12, 2025), https://harvardlawreview.org/blog/2025/04/president-trump-in-the-era-of-exclusive-powers/ [https://perma.cc/WEN2-RDA3] (exploring *Trump*'s impact on the scope of the President's exclusive powers beyond the immunity context); Marty Lederman, *A Vivid Illustration of the Impact of the Roberts Court's Radical New "Unitary Executive" Doctrine*, BALKINIZATION (Sept. 23, 2024), https://balkin.blogspot.com/2024/09/a-vivid-illustration-of-impact-of.html [https://perma.cc/39FP-AT38] (arguing that "the most extraordinary and troubling thing about [the *Trump*] opinion" is not the immunity decision, but rather the holding that the President's investigatory and prosecutorial powers are "preclusive" and thus untouchable by Congress).

15 *Trump*, 144 S. Ct. at 2335; *see also id*. at 2334 ("[T]he Executive Branch has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute, including with respect to allegations of election crime." (quoting United States v. Nixon, 418 U.S. 683, 693 (1974))).

16 *Id.* at 2335 ("The 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 . . . ." (quoting Joint Appendix at 186, *Trump*, 144 S. Ct. 2312 (No. 23-939))).

17 *See id.* ("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)).

The language of this part of the *Trump* decision is as sweeping as it is unprecedented. It is one thing to say, as the Court has in recent cases like *Seila Law LLC v. CFPB*, that the President generally must have "unrestricted . . . power . . . to remove those who assist him in carrying out his duties" so that he may effectively oversee the execution of the law.[18] As others have noted, it is a giant further step to suggest, as *Trump* seemed to do, that Congress could not "create and structure executive branch offices and departments as it sees fit," and that it "could not require the executive branch to adhere to standard requirements of administrative law."[19] And yet it is something else again to say, as the *Trump* majority did explicitly, that the President's power over law execution includes the power to direct his subordinates to do things that the law says no one may do.[20] In describing the presidential power of law execution in those terms, *Trump* did not simply immunize the President from a particular legal sanction for his otherwise unlawful actions. Instead, it declared the President's conduct in relation to law execution categorically lawful, even if it violated the law. To borrow from Richard Nixon, the *Trump* majority opinion seems to have embraced the view that when it comes to law execution, "when the President does it, that means that it is not illegal."[21] Yet the Court did not even acknowledge, much less attempt to justify (or to disclaim), this consequence of its reasoning.

Even among those focused on this aspect of *Trump*, however, there is a consensus that the decision had no impact on a separate but critically important issue—whether subordinate officials in the Executive Branch may

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18 140 S. Ct. 2183, 2198 (2020) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010)). As the Court there explained, its cases recognize "only two exceptions to the President's unrestricted removal power": "Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause," and "Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties." *Id.* at 2192.

19 Roisman, *supra* note 14; *see* Goldsmith, *supra* note 10, at 20 ("The Court's holding about the President's exclusive control over how the executive branch enforces the law . . . enhance[s] the president's vertical control over executive branch action, [which] gives the President expanded discretion from the pre-*Trump* baseline over when and how to enforce (and thus, perhaps, comply with) federal law."); Lederman, *supra* note 14 (stating that "the most extraordinary and troubling thing about [*Trump*] was not the Court's already infamous holding that the President enjoys some sort of immunity . . . from criminal trial and sanction when he violates a valid law while acting in his official capacity," but instead the part of the opinion where "the Court held not only that the President has 'exclusive authority over the investigative and prosecutorial functions of the Justice Department,' but also (apparently) that that authority is 'preclusive' and that Congress therefore may not regulate it by statute!" (quoting *Trump*, 144 S. Ct. at 2335)).

20 *See* 144 S. Ct. at 2335 (holding that the the President's "exclusive authority over the investigative and prosecutorial functions" includes the authority to direct investigations "for an improper purpose").

21 *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16.

claim any immunity (criminal, civil, or otherwise) for violating the law at the President's direction. In fact, in the aftermath of the *Trump* decision, a belief that it had no impact on subordinates has been invoked as tempering *Trump*'s holding on presidential immunity.[22] On this view, even if a President may not be prosecuted for directing his subordinates to conduct unlawful investigations and prosecutions, his subordinates do face those (and other) constraints. Thus, a lawless President will be kept somewhat in check by the unwillingness of his subordinates to expose themselves to liability.[23]

The premise of this position is that immunity is specific to the nature and function of the office, and that presidential immunity is about the person of the President. Given the uniqueness of the presidency, the mere fact that he is absolutely immune from some set of judicial remedies does not necessarily mean the same thing for his subordinates. That is indeed how officer immunity works with civil suits for money damages: The President is absolutely immune for acts "within the 'outer perimeter' of his official responsibility,"[24] while most executive officials enjoy only qualified immunity.[25] The majority opinion in *Trump* said nothing about presidential subordinates, and it is tempting to think that its holding has no implications for them.[26]

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22 *See, e.g.*, Zachary S. Price, *Even if the President Is Immune, His Subordinates Are Not*, YALE J. ON REGUL.: NOTICE & COMMENT (July 11, 2024), https://www.yalejreg.com/nc/even-if-the-president-is-immune-his-subordinates-are-not-by-zachary-s-price/ [https://perma.cc/SS6J-C3S4] (arguing that *Trump* "left in place one of the most important constraints on the American presidency: the need to act through subordinates to carry out most government functions," and that "[b]ecause those subordinates lack the same criminal immunity as the President, this constraint may now be all the more important"); Goldsmith, *supra* note 10, at 35–37 ("*Trump* nowhere hinted that it was extending immunity to subordinates. . . . The availability of remedies against presidential subordinates even when the President receives absolute immunity accommodates the President's special position . . . with the need for government accountability to law. The same accommodation would serve the same aim in the criminal immunity context . . . ."); Thomas P. Schmidt, *Presidential Immunity: Before and After* Trump, 79 VAND. L. REV. (forthcoming 2026) (manuscript at 50 n.364), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5187348 [https://perma.cc/7AYW-5B9N] ("One palliative [of the *Trump* decision] is that . . . criminal prosecutions might still proceed against executive branch subordinates.").

23 *See* Price, *supra* note 22 ("[E]ven when the President is immune . . . , he or she will often be able to take unlawful action only if subordinate officers are willing to risk personal legal jeopardy . . . . These constraints should alleviate some of gravest risks predicted by the dissenters in *Trump*."); Goldsmith, *supra* note 10, at 33–34 ("Subordinate liability is one reason why administrations do not engage in rampant violations of non-criminal law. . . . [P]otential criminal liability for subordinates is an important hurdle for a lawless president to carry out lawless acts.").

24 Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982).

25 *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). There are exceptions, the most notable being that prosecutors enjoy absolute immunity for their prosecutorial acts. *See* Butz v. Economou, 438 U.S. 478, 511–12 (1978); Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

26 *See* Goldsmith, *supra* note 10, at 35 ("The [*Trump*] Court emphasized that its decision turned on the unique position of the President in the constitutional scheme and the need to protect presidential decisionmaking, and its holding about immunity concerned only the President."); Schmidt, *supra* note 22 (manuscript at 50 n.364) ("[T]he Court in *Trump* did not suggest that the

That position is untenable. We have long understood that when presidential subordinates take actions to effectuate a power that the President asserts for himself, the legality of the subordinates' actions depends on an assessment of the President's authority. Relatedly, the Supreme Court has made clear that if the President cannot be regulated in the exercise of a particular power because it is conclusively and preclusively his, subordinates effectuating that power likewise cannot be regulated.[27] That point is neither new nor controversial. When it is combined with the *Trump* Court's sweeping account of the President's power over law execution, however, the consequences for presidential subordinates are potentially immense.

This Essay traces those consequences. It shows that—whether or not the Court intended it—the logic of *Trump*'s analysis renders the President's subordinates absolutely immune for a potentially broad range of official acts, even if those acts are otherwise unlawful. Worse, the immunity *Trump* unleashes is not easily limited to criminal prosecution: When implementing the President's now-conclusive-and-preclusive power over law execution, subordinates are immune from *all* legislative restrictions and *all* judicial remedies.[28] That is because if the President has the conclusive and preclusive power over law execution, then any conduct taken by his subordinates to implement that power is *lawful*, not just immune from a particular remedy.[29]

Trump gave rise to this concern the day it was issued. But the problem has become far greater—and the need for judicial course correction more urgent—in light of the actions of the new Trump Administration. From the very beginning of his second term in office, Trump has "used his official powers to carry out a retribution campaign against his perceived enemies."[30]

President's immunity would extend to subordinates.").

27 See infra Part II.

28 See infra Part II.

29 The only extended treatment of subordinate liability after *Trump* seems to miss this point. *See* Carter S. Squires, Note, *Writing a Rule for the Aegis: Against Subordinate Criminal Immunity After* Trump v. United States, 135 YALE L.J. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id= [https://perma.cc/7HMC-MYFD]. Instead, it treats the question of criminal immunity for subordinates as subject entirely to a functionalist balancing, in the same way the Court approached presidential and subordinate immunity from civil damages in *Nixon* and *Harlow*. *See id.* (manuscript at 63–64 & n.240). That approach does not come to grips with the implications of the highly formalist part of the *Trump* decision that addressed conclusive and preclusive presidential power. It is true that the part of the decision addressing the broader category of official-act immunity is more functionalist in its analysis, but that is not the part of the opinion that matters for these purposes.

30 Charlie Savage, *A Campaign to Extract Revenge, Using the Powers of the Presidency*, N.Y. TIMES (Apr. 28, 2025), https://www.nytimes.com/interactive/2025/04/28/us/trump-100-days-actions.html [https://perma.cc/4S8H-ZLFS]; *see* Charlie Savage, Maggie Haberman, Jonathan Swan & Michael S. Schmidt, *Trump Escalates Use of Official Power to Intimidate and Punish His Perceived Foes*, N.Y. TIMES (Apr. 10, 2025), https://www.nytimes.com/2025/04/10/us/politics/trump-officials-justice-department.html [https://perma.cc/8XG9-VBNS] ("Mr. Trump is openly using his control of the executive branch

One part of that campaign has involved opening official investigations targeting those enemies. For example, Trump singled out a member of his first administration for "falsely and baselessly den[ying] that the 2020 election was rigged and stolen," and he directed the Attorney General to "take all appropriate action to review [the former official's] activities as a Government employee" and to make recommendations about "appropriate remedial . . . actions"—which may include criminal charges.[31] More broadly, Trump has directed the Attorney General to investigate the supposed "weaponization" of the legal process by federal officials during the Biden Administration.[32] To implement that directive, the Attorney General has established a "Weaponization Working Group" and charged it with investigating the Special Counsel who filed the criminal charges at issue in *Trump*, among others.[33] To take another example, Trump has suggested that the Internal Revenue Service should look into revoking the tax-exempt status of universities and other nonprofit organizations whose policies or activities he opposes.[34] It is not difficult to imagine additional possibilities.[35]

It is at least arguable that all these actions fall within *Trump*'s account of the President's conclusive and preclusive authority over law execution. If they do, then even if the investigations were all "shams" with no lawful basis—indeed, even if they were conducted in ways that violated the criminal law—under *Trump*, they apparently could not be constrained by Congress or the courts. And that would be true, not just for President Trump himself, but for all executive subordinates implementing his orders.[36] The Trump

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to satisfy his desire for retribution against people he perceives as working against him. And his officials are readily helping him.").

31 Memorandum on Addressing Risks from Chris Krebs and Government Censorship, 2025 DAILY COMP. PRES. DOC. 465 (Apr. 9, 2025).

32 *See* Exec. Order No. 14,147, 90 Fed. Reg. 8235, 8235 (Jan. 20, 2025).

33 *See* Memorandum from the Att'y Gen. to All Dep't Emps., Restoring the Integrity and Credibility of the Department of Justice (Feb. 5, 2025), https://www.justice.gov/ag/media/1388506 [https://perma.cc/ATX7-QWE7].

34 *See* Andrew Duehren, Maggie Haberman & Alan Blinder, *Harvard Signals It Will Resist Trump's Efforts To Revoke Tax-Exempt Status*, N.Y. TIMES (May 2, 2025), https://www.nytimes.com/2025/05/02/us/politics/trump-harvard-tax-exempt-status.html [https://perma.cc/3A7Z-8KM5] (quoting Trump as saying on social media that the federal government would be "taking away Harvard's Tax Exempt Status," and adding that "[i]t's what they deserve"); Lisa Mascaro, *Law Firms, Universities and Now Civil Society Groups Are in Trump's Sights for Punitive Action*, ASSOCIATED PRESS (Apr. 18, 2025, 12:04 AM), https://apnews.com/article/trump-tax-exempt-crew-environmental-groups-harvard-5e1e0ffacfa040ccdeaf4e43fb72b5fe [https://perma.cc/4M7M-L3N2].

35 *See, e.g.*, Abrego Garcia v. Noem, No. 25-1404, slip op. at 5 (4th Cir. Apr. 17, 2025) (Wilkinson, J.) (opinion and order denying motions for stay pending appeal and writ of mandamus) ("If today the Executive claims the right to deport without due process and in disregard of court orders, what assurance will there be tomorrow that it will not deport American citizens and then disclaim responsibility to bring them home[,] . . . [or] train its broad discretionary powers upon its political enemies?").

36 *See infra* Section IV.A.

Administration is already invoking *Trump* in cases challenging various actions it has taken in recent months,[37] though not yet on the issue of subordinate liability. But the danger is there. For now, *Trump* is the proverbial "loaded weapon,"[38] lying about and available to be seized not just by a vengeful President but by his subordinates, who now have little personal legal incentive to say no to the President when it comes to law execution.

The goal of this Essay is to show how *Trump* can be read to yield this result, and to urge the Court to fix the problem it has created. Part I begins by distinguishing between two types of officer immunities, which I call *remedial* and *substantive*. Both were at issue in *Trump*. Remedial immunity is officer- and conduct-specific and has no necessary connection to the legality of the defendant's underlying conduct. Substantive immunity has everything to do with the lawfulness of the defendant's conduct and the unlawfulness of attempts to restrict it. Settled principles of the constitutional separation of powers recognize that there are certain presidential authorities that the Constitution vests so exclusively in the President that they are "conclusive and preclusive," and as to which the President is therefore substantively immune from constraint by Congress.

Part II discusses the implications of substantive, conclusive and preclusive presidential immunity for the President's subordinates. Again turning to canonical separation of powers authorities, it shows that when a subordinate executive official acts to effectuate the President's conclusive and preclusive powers, the subordinate is no more subject to legislative or judicial constraint than is the President. We have known this for decades.

Part III then turns to the Court's decision in *Trump* itself. It focuses on the unprecedentedly broad language the Court used to assert a conclusive and preclusive presidential power over law enforcement. This part of the majority opinion is rather thinly reasoned, with no acknowledgement of its potential consequences. But if read in the context of the Court's actual holding in the case, the language of the majority opinion seems to grant the President the power, in the name of law enforcement, to order illegal action. The laws that had allegedly been violated in *Trump* were not simply laws structuring the inner operation and organization of the Executive Branch; they were laws defining certain primary conduct to be crimes. The Court held the President immune from those laws when exercising his power over

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37 *See infra* notes 117–18 and accompanying text; *see also* Jack Goldsmith, *The President's Favorite Decision: The Influence of* Trump v. U.S. *in Trump 2.0*, LAWFARE (Feb. 10, 2025, 8:52 AM), https://www.lawfaremedia.org/article/the-president-s-favorite-decision—the-influence-of-trump-v.-u.s.-in-trump-2.0 [https://perma.cc/77FD-YEMY] (noting that "[t]he conception of presidential power articulated in *Trump* . . . went further on many dimensions, and in the aggregate, than prior decisions," and that "[t]he Trump administration is relying on the maximalist implications of *Trump*").

38 Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

law enforcement. *Trump*, then, can be read to recognize a conclusive and preclusive presidential power to commit crimes in the course of enforcing the law. It seems unlikely that the Court intended this result. Yet it is not an easy result to avoid.

Putting Parts II and III together, Part IV traces *Trump*'s implications for subordinate immunity. They are dramatic. The logic of *Trump* seems to suggest that not only the President but all presidential subordinates acting at his direction are absolutely immune from *all* judicial remedies relating not just to the investigation and prosecution of criminal offenses, but to the enforcement of federal law more generally. That immunity remains in place even if the enforcement in question is itself a "sham" or otherwise unlawful. This entails an enormous expansion of absolute substantive immunity for executive officials below the President. Again, it is difficult to believe that the Court meant this result, but the critical parts of the majority opinion contain no qualifying language foreclosing it.

Part V proceeds from the assumption that the *Trump* majority did not mean to sweep as far as its language can be read to reach. It considers ways—within the general framework of conclusive and preclusive presidential powers—to limit the President's authority over law execution, and thus to limit his subordinates' immunity in this area. In the absence of such limits, the Conclusion contends, *Trump* may well fuel the fires of presidentially-driven retribution and reprisal that seem to be characterizing our new political moment.

I
DISTINGUISHING IMMUNITIES

The term "immunity" has "a wide variety of meanings."[39] Hohfeld proposed that it could be understood to refer to "one's freedom from the legal power or 'control' of another as regards some legal relation."[40] But depending on the precise legal relation at issue, the nature of the immunity can vary significantly. In *Trump*, the Court used "immunity" to refer to two quite different things, which I will call *remedial* and *substantive* immunity.[41] Distinguishing the two will make it easier to grasp *Trump*'s implications for executive subordinates.

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39 Schmidt, *supra* note 22 (manuscript at 10).

40 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 55 (1913).

41 This nomenclature roughly corresponds to Jack Goldsmith's distinction between limits on judicial review of executive action and limits on congressional control of executive action, though they may not be identical in all particulars. *See* Goldsmith, *supra* note 10, at 6.

A. Remedial

Most immunity doctrines are remedial. They are concerned with whether a given actor may be subjected to a particular judicial remedy in particular circumstances. The doctrine of qualified officer immunity, for example, governs the circumstances in which most government officials may be personally subject to private suits for money damages for acts taken in their official capacity.[42] The real force of the doctrine is to shield officers from damages liability for conduct that was unlawful, but not so clearly unlawful that a reasonable officer at the time would have known.[43] Similarly, the doctrine of state sovereign immunity governs the circumstances in which states may be subject to suit by private parties.[44] Here again, the real force of the doctrine is to shield states from certain suits even though they may have acted unlawfully. These forms of immunity, in other words, are distinct from the legality of the defendant's challenged conduct. To the extent they shield defendants from certain sanctions even though they may have acted unlawfully, remedial immunity doctrines contribute to the familiar "right-remedy gap" in American public law.[45] However, there will often be other ways to enforce the law against the offending party without triggering any remedial immunity.[46]

The presidential immunity recognized in *Nixon v. Fitzgerald* is remedial. "Because of the singular importance of the President's duties," the Court reasoned, "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. . . . In view of the visibility of his office and the effect of his actions on countless

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42 *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, 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.").

43 *Id.*

44 *See* Hans v. Louisiana, 134 U.S. 1, 13 (1890) ("It is inherent in the nature of [state] sovereignty not to be amenable to the suit of an individual without its consent." (emphasis omitted) (quoting THE FEDERALIST NO. 81 (Alexander Hamilton))).

45 *See generally* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779–87 (1991) (examining sovereign and official immunity as remedial bars in constitutional law). The distinction between immunity and the substance of the law is found in other legal systems as well. *See, e.g.*, André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT'L L. 769, 773 (2012) (noting that, in international law, "[i]mmunity is an example of a procedural principle that is distinct from the substance of the law on which a claim is based").

46 *See*, *e.g.*, Pearson v. Callahan, 555 U.S. 223, 242 (2009) (noting that qualified officer immunity is "not available" in "criminal cases and . . . cases . . . where injunctive relief is sought"); Alden v. Maine, 527 U.S. 706, 755 (1999) ("The States have consented . . . to some suits pursuant to the plan of the Convention or to subsequent constitutional Amendments[, including] suits brought by other States or by the Federal Government."); *id.* at 756 ("Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power.").

people, the President would be an easily identifiable target for suits for civil damages."[47] To protect against those risks, the Court adopted a rule of absolute immunity from implied causes of action seeking money damages for conduct falling "within the 'outer perimeter' of his official responsibility."[48]

The *Fitzgerald* Court emphasized that its rule "merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends."[49] It did not apply to any other remedies that might be available. The Court also confirmed that the immunity had nothing to do with whether the President's alleged conduct in fact violated the law. If determining a President's entitlement to immunity involved determining the legality of his actions, he would be "subject . . . to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect."[50] As the D.C. Circuit recently explained in a case involving an assertion of *Fitzgerald* immunity, "the President's actions do not fall beyond the outer perimeter of official responsibility merely because they are unlawful or taken for a forbidden purpose. Rather, the President's official immunity insulates all of his official actions from civil damages liability, regardless of their legality or his motives."[51]

The broader holding in *Trump*—regarding official-act immunity from criminal charges[52]—is also remedial. The *Trump* Court drew on *Fitzgerald* as well as *United States v. Nixon*[53] to emphasize that, in light of the unique breadth and complexity of the President's responsibilities,[54] an at least presumptive criminal immunity for all presidential acts "is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution."[55] Specifically, the Court held that "[a]t a minimum,

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47 Nixon v. Fitzgerald, 457 U.S. 731, 751, 753 (1982).

48 *Id.* at 756.

49 *Id.* at 758; *see id.* at 758 n.41 ("This case involves only a damages remedy. Although the President is not liable in civil damages for official misbehavior, that does not lift him 'above' the law."); *id.* at 759 (Burger, C.J., concurring) ("The immunity is limited to civil damages claims.").

50 *Id.* at 756 (majority opinion).

51 Blassingame v. Trump, 87 F.4th 1, 14 (D.C. Cir. 2023).

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

53 418 U.S. 683 (1974).

54 *See Trump*, 144 S. Ct. at 2329 ("The President 'occupies a unique position in the constitutional scheme,' as 'the only person who alone composes a branch of government.'" (citations omitted) (first quoting *Fitzgerald*, 457 U.S. at 749; and then quoting Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2034 (2020))).

55 *Id.* at 2331; *see id.* at 2230 (contending that "[c]riminally prosecuting a President for official conduct undoubtedly poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in his possession," and that "[t]he danger is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages

the President must . . . be immune from prosecution for an official act unless 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.'"[56]

Critically, this aspect of *Trump* immunity also has nothing to do with the lawfulness of the President's alleged conduct. As in *Fitzgerald*, the Court emphasized that the point of the immunity is to shield the President from liability without subjecting him to the full rigors of a trial.[57] Only that level

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liability"); *id.* at 2331 ("Although the President might be exposed to fewer criminal prosecutions than the range of civil damages suits that might be brought by various plaintiffs, the threat of trial, judgment, and imprisonment is a far greater deterrent."); *id.* ("Indeed, if presumptive protection for the President is necessary to enable the 'effective discharge' of his powers when a prosecutor merely seeks evidence of his official papers and communications, it is certainly necessary when the prosecutor seeks to charge, try, and imprison the President himself for his official actions." (citation omitted) (quoting *Nixon*, 418 U.S. at 711)).

56 *Id.* at 2331–32 (quoting *Fitzgerald*, 457 U.S. at 754). As Justice Sotomayor pointed out in her dissent, this "no dangers" standard may be impossible to satisfy as a practical matter, in which case the immunity is functionally absolute. *See supra* notes 8–9 and accompanying text.

In prior writing, I have questioned whether *Fitzgerald* actually supports any remedial immunity in *Trump*. *See* Trevor W. Morrison, *Moving Beyond Absolutes on Presidential Immunity*, LAWFARE (Mar. 18, 2024, 8:00 AM) [hereinafter Morrison, *Beyond Absolutes*], https://www.lawfaremedia.org/article/moving-beyond-absolutes-on-presidential-immunity [https://perma.cc/64YR-SL5S]; 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/4FBH-M8XA]. Without repeating all of that here, two points bear mentioning. First, the civil suit in *Fitzgerald* asserted statutory and constitutional claims as to which Congress had not expressly provided any right of action, and a plurality of the Court explicitly limited its holding to those circumstances. *See* 457 U.S. at 748 n.27 ("In the present case we . . . are presented only with 'implied' causes of action, and we need not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States."). It thus left open the possibility that the President might not be immune from privately initiated suits (or civil enforcement actions by the government) that are expressly authorized by Congress. In *Trump*, of course, Congress had expressly authorized the government to enforce the federal criminal statutes at issue. Second, although the *Trump* majority quoted *Fitzgerald* (regarding "dangers of intrusion on the authority and functions of the Executive Branch") when describing what it would take to rebut the presumption of criminal immunity, it took that language spectacularly out of context. Here is the full sentence in *Fitzgerald*: "But our cases have also established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." 457 U.S. at 754. *Fitzgerald* thus portrayed the key inquiry as a balancing test: Weigh the interest served by immunity (protecting against intrusions on presidency) against the interest served by allowing the case to move forward (vindicating the values served by the law being invoked). Applied in the criminal context, this would mean balancing the risk of undue intrusions on the presidency against the public interest in upholding the criminal law and the rule of law more generally. The *Trump* majority all but ignored the second side of the scales, transforming a balancing inquiry into a one-sided test of its own invention. *Fitzgerald* does not support that maneuver.

57 *See* 144 S. Ct. at 2334 (explaining that courts may not deem an action unofficial (and thus beyond the scope of the President's immunity) "merely because it allegedly violates a generally applicable law. . . . Otherwise, Presidents would be subject to trial on 'every allegation that an action was unlawful,' depriving immunity of its intended effect." (quoting *Fitzgerald*, 457 U.S. at

of insulation, the Court concluded, could adequately ward against "seriously crippl[ing] the proper and effective administration of public affairs as entrusted to the executive branch of the government."[58]

The key components of the remedial immunity holding in *Trump*, then, are that the immunity precludes only a particular kind of remedy (criminal prosecution), covers only the official acts of a particular officeholder (the President), and is uncoupled from the lawfulness of the alleged conduct. Recognizing an immunity of this sort does not affect the availability of other remedies for unlawful presidential action (like injunctive relief),[59] or the immunity enjoyed by other officeholders. If the immunity announced by the *Trump* Court were only of this variety, it would carry no necessary consequences for subordinates.

B. Substantive

Substantive immunities involve questions about whether the legal rule that the plaintiff seeks to enforce against the defendant lawfully applies to the defendant. Intergovernmental immunity, for example, holds that the Supremacy Clause of the Constitution generally bars states from regulating the federal government.[60] Tracing to the Court's decision in *McCulloch v. Maryland*,[61] this form of immunity is not about the unavailability of only certain judicial remedies. Instead, it recognizes constitutional limits on the power of states to regulate the federal government. Such state regulation is substantively unconstitutional, without regard to how the state seeks to enforce it.

Supremacy Clause immunity is similar. It bars states from bringing criminal charges against federal officers for acting within their lawful federal authority. The foundational case is *In re Neagle*, where the Court explained that if a federal officer took an action "which he was authorized to do by the law of the United States, . . . and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under [state] law."[62] Because of the principle of federal supremacy enshrined in the

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58 *Id.* at 2333 (quoting *Fitzgerald*, 457 U.S. at 745).

59 *See generally* Schmidt, *supra* note 22 (exploring the availability of injunctive and declaratory claims against presidential action before and after *Trump*).

60 *See* United States v. Washington, 142 S. Ct. 1976, 1982 (2022) ("The Constitution's Supremacy Clause generally immunizes the Federal Government from state laws that directly regulate or discriminate against it."); *id.* at 1984 (describing this protection as "the intergovernmental immunity doctrine").

61 17 U.S. (4 Wheat.) 316 (1819) (holding unconstitutional Maryland's effort to tax the Bank of the United States).

62 135 U.S. 1, 75 (1890). *See generally* Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195 (2003) (examining the foundations and exploring the scope of federal officer immunity from state

Supremacy Clause, using state law to punish a federal officer for exercising his federally authorized responsibilities is substantively unconstitutional.

Although we do not typically speak of it in such terms, there is another substantive immunity already established by settled principles of the constitutional separation of powers. The framework laid out in Justice Jackson's canonical concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[63] is instructive. As he explained, "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[64] The President's authority is at its maximum when he acts "pursuant to the express or implied authorization of Congress"; it is in a somewhat ambiguous "zone of twilight" when he acts in the absence of congressional authorization or prohibition; and it is at its "lowest ebb" when he acts in ways that are "incompatible with the express or implied will of Congress."[65] The last category is the key one for present purposes.

As Justice Jackson emphasized, when the President asserts a power to contravene the will of Congress, his claim "must be scrutinized with caution," because "what is at stake" with a "[p]residential claim to a power at once so conclusive and preclusive . . . is the equilibrium established by our constitutional system."[66] Indeed, "[c]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject."[67] The Constitution contains no general presumption of executive immunity from congressional regulation. As Justice Amy Coney Barrett recognized in *Trump*, "Congress has concurrent authority over many Government functions, and it may sometimes use that authority to regulate the President's official conduct, including by criminal statute."[68] Accordingly, the President must clear a high bar in order to establish that the Constitution not only empowers him to act in a given area, but that it does so in a way that makes his power "conclusive and preclusive" of congressional regulation.[69]

Yet it has long been understood that there are some limited areas of conclusive and preclusive presidential power. In *Youngstown* itself, Justice Jackson suggested that the President's "power of removal" of executive branch officials fell within this category (though he did not specify exactly

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law enforcement).

63 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

64 *Id.* at 635.

65 *Id.* at 635–37.

66 *Id.* at 638.

67 *Id.*

68 Trump v. United States, 144 S. Ct. 2312, 2352 (2024) (Barrett, J., concurring in part).

69 *See Youngstown*, 343 U.S. at 640 (Jackson, J., concurring) (explaining that when the President acts contrary to Congress, his "power [is] most vulnerable to attack and in the least favorable of possible constitutional postures.").

which categories of officials it covered).[70] Other examples include the President's power to grant pardons for federal criminal offenses[71] and to recognize foreign governments.[72] Because these presidential powers are conclusive and preclusive, Congress may not direct the President in how to exercise them.

The *Trump* majority recognized that if a given presidential power is conclusive and preclusive and thus beyond the power of Congress to regulate, Congress may not criminalize the use of that power. As the Court put it,

> Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority. It follows that an Act of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize the President's actions within his exclusive constitutional power.[73]

The majority was correct about this general proposition, and the dissenting Justices agreed with it.[74] This, then, is a substantive immunity: Legislation purporting to prohibit or impermissibly constrain the President in the exercise of one of his "conclusive and preclusive" powers is substantively unconstitutional, and he is immune from such regulation. Unlike remedial immunities, substantive immunities of this sort have everything to do with the legality of the conduct in question, and of the unenforceability (no matter the remedy) of laws invoked to constrain that conduct.[75]

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[70] *Id.* at 638 n.4. Of course, the scope of the President's unilateral removal authority is its own immensely important topic. The modern Court views that authority as largely unregulable by Congress. *See generally* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2191 (2020) ("'[A]s a general matter,' the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties.'" (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010))).

[71] *See* U.S. CONST. art. II, § 2, cl. 1; United States v. Klein, 80 U.S. 128 (1871) (holding that Congress cannot limit the President's pardon power).

[72] *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1 (2015) (holding that the President has the exclusive power to recognize foreign governments).

[73] *Trump*, 144 S. Ct. at 2319.

[74] *See id.* at 2367–68 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting) ("The idea of a narrow core immunity might have some intuitive appeal, in a case that actually presented the issue. If the President's power is 'conclusive and preclusive' on a given subject, then Congress should not be able to 'ac[t] upon the subject.'" (alteration in original) (quoting *Youngstown*, 343 U.S. at 638)). Justice Sotomayor cited the removal, pardon, and recognition powers as examples. *See id.*

[75] One might object that substantive immunity should not be called an immunity at all, that this category of cases simply describes laws that are substantively unconstitutional, and that they are no different in principle from laws that violate some individual right like the First Amendment or the Equal Protection Clause. As I have noted, however, there are other doctrines that travel under the immunity label (intergovernmental immunity and Supremacy Clause immunity) that are based on similarly substantive theories. Thus, I do not think it is anomalous to use the term here. *See*

II
SUBSTANTIVE IMMUNITY AND SUBORDINATES

A substantive presidential immunity has significant implications for presidential subordinates. Those implications flow from the Court's well-established precedents and our general understanding of how executive power works.

As a starting point, the Court's cases make clear that when the President directs a subordinate to effectuate a power that belongs to the President, the subordinate's actions are understood as an exercise of presidential power. *Youngstown* is illustrative. There, President Truman issued an executive order directing the Secretary of Commerce to take possession of most of the nation's steel mills and to keep them running. The Secretary implemented that order by issuing "his own possessory orders, calling upon the presidents of the various seized companies to serve as operating managers for the United States."[76] The companies "[o]bey[ed] the Secretary's orders under protest" while also filing suit "against him in the District Court."[77] But the fact that the Secretary was the one being sued, and that the orders that the companies were challenging were his, did not affect the constitutional analysis. The Secretary was understood to be acting at the direction of the President to effectuate an assertion of power by the President.[78] All members of the Court approached the case on that basis—as a case about presidential

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Schmidt, *supra* note 22 (manuscript at 10) (surveying different uses of "immunity," including in ways that cover what I am calling substantive immunity). Moreover, there is one practical consideration that cuts in favor of viewing *Trump*'s "conclusive and preclusive" rule as an immunity. In cases where it is asserted to apply—that is, in cases where a former President faces prosecution for acts taken within what he claims is a zone of his conclusive and preclusive authority—surely it should be possible to assert the objection at the outset of the case, to seek dismissal of the charges on that basis, and to take an immediate appeal if the trial court refuses to dismiss. But if the absolute immunity recognized in *Trump* were viewed as merely a defense and not an immunity, it is not obvious that an interlocutory appeal would be available. *See* Goldsmith, *supra* note 10, at 13–14 (discussing this issue). Justice Barrett's concurring opinion in *Trump* seemed both to acknowledge the potential awkwardness of treating conclusive and preclusive presidential power as an immunity, and to emphasize the importance of it being immediately appealable the way other immunities are. *See Trump*, 144 S. Ct. at 2352 (Barrett, J., concurring in part) ("The Court describes the President's constitutional protection from certain prosecutions as an 'immunity.' As I see it, that term 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."). If we grant that the denial of a motion to dismiss on these grounds is immediately appealable, I don't think anything substantive turns on whether it is called an immunity or a defense. So while I am comfortable calling it an immunity for the reasons I have identified, that terminology is not necessary to this Essay's main claims.

76 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952).

77 *Id.*

78 *See id.* at 583–84 (describing the case as involving a challenge to "the Secretary's orders," then framing the substantive question in the case as, "is the seizure order within the constitutional power of the President?").

power, not the power of the Secretary of Commerce.

Youngstown is no anomaly. As noted at the beginning of this Essay, it is well understood that the President cannot personally exercise all the powers and fulfill all the responsibilities assigned to him by the Constitution and laws, and so he must act through his subordinates.[79] When he directs his subordinates to effectuate power that he asserts for himself, the legal analysis of the subordinates' actions will focus on the President's power.[80] This is especially important in the context of suits for injunctive relief. The Court is, at a minimum, highly reluctant to enjoin the President directly.[81] But as Justice Scalia explained in a concurring opinion in *Franklin v. Massachusetts*, the unavailability of injunctive relief directly against the President does not "in any way suggest[] that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive . . . ."[82] That approach depends on an understanding that when presidential subordinates act to implement presidential directives, courts will evaluate their actions as exercises of presidential power.

It follows, then, that when subordinates act to effectuate presidential powers that are conclusive and preclusive, the subordinates are no more subject to legislative or judicial constraint than is the President himself. Consider the Court's 2014 decision in *Zivotofsky v. Kerry*.[83] There, the Court held that the power to recognize a foreign state belongs to "the President alone," and therefore that Congress cannot "command" the President "to issue a formal statement that contradicts" his own exercise of that power.[84]

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79 *See supra* note 2 and accompanying text. Although the Court's unitary executive precedents treat the President's power to direct his subordinates as inherent to "the executive Power" granted to him by the Constitution, Congress has also provided statutory authorization. *See* 3 U.S.C. § 301 ("[The President] is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform . . . any function which is vested in the President by law.").

80 Multiple Supreme Court cases reflect this understanding. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (Secretary of Defense asserting presidential authority to convene military commissions); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (Secretary of Defense asserting presidential authority to detain enemy combatants); Dames & Moore v. Regan, 453 U.S. 654 (1981) (Secretary of the Treasury asserting presidential authority under the International Economic Emergency Powers Act (and otherwise)); Panama Refining Co. *v.* Ryan, 293 U.S. 388 (1935) (Secretary of the Interior asserting presidential power under the National Industrial Recovery Act).

81 *See* Franklin v. Massachusetts, 505 U.S. 788, 802–03 (1992) (citing United States v. Nixon, 418 U.S. 683 (1974), to confirm that "the President may be subject to a subpoena to provide information relevant to an ongoing criminal prosecution," but observing that, "in general 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'" (quoting Mississippi v. Johnson, 71 U.S. 475, 501 (1866))). For a persuasive argument that injunctive relief targeting the President should not be categorically foreclosed, see Schmidt, *supra* note 22.

82 *Franklin*, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment).

83 576 U.S. 1 (2015).

84 *Id.* at 21, 5.

On that basis, the Court held unconstitutional a federal statute providing that, when issuing a U.S. passport, "'the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel' for a 'United States citizen born in the city of Jerusalem.'"[85] As the Court explained:

> The statute require[d] the President, through the Secretary, to identify citizens born in Jerusalem who so request as being born in Israel. But according to the President, those citizens were not born in Israel. As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem. In this way, [the statute] directly contradicts the carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem.[86]

The key for our purposes is that the statute in *Zivotofsky* did not impose any obligations directly on the President; it regulated the Secretary of State. But that did not stop the Court from seeing that the President's recognition power was implicated. The statute "require[d] the President, *through the Secretary*," to take actions that would contradict the President's exercise of the recognition power.[87] The constitutional analysis did not differ just because the statute formally targeted the Secretary for regulation, rather than the President himself. And having concluded that the statute impermissibly infringed on the President's conclusive and preclusive recognition power, the Court held the statute unenforceable against the Secretary.

It is important to see that the Court's approach in *Zivotofsky* and Justice Scalia's observation in *Franklin* do not conflict. The fact that courts are reluctant to enjoin the President directly but often enjoin his subordinates for essentially the same conduct should be understood as a difference in remedial, not substantive, immunity. As Justice Barrett observed in her *Trump* concurrence, "the Constitution does not vest every exercise of executive power in the President's sole discretion. Congress has concurrent authority over many Government functions, and it may sometimes use that authority to regulate the President's official conduct."[88] In such cases, treating presidential subordinates as subject to injunctive relief for violating relevant statutes while treating the President as immune is a difference in remedial immunity, akin to the difference between qualified and absolute immunity when it comes to civil damages.[89] But the fact that executive

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85 *Id.* at 29 (alteration in original) (quoting 116 Stat. 1366).

86 *Id.* The position of the United States on the status of Jerusalem changed significantly during the first Trump Administration. The United States now understands Jerusalem to be part of Israel. *See* Proclamation No. 9683, 82 Fed. Reg. 58331 (Dec. 6, 2017) (recognizing Jerusalem as the capital of Israel and relocating the United States Embassy to Israel to Jerusalem).

87 *Zivotofsky*, 576 U.S. at 29 (quoting 116 Stat. 1366).

88 144 S. Ct. at 2352 (Barrett, J., concurring in part) (citation omitted).

89 *See supra* notes 42–46 and accompanying text.

subordinates (and not the President) are *generally* subject to the injunctive power of the courts does not establish a basis for treating subordinates and the President differently when it comes to the President's conclusive and preclusive powers. That is the point underscored by *Zivotofsky*. The Secretary of State is not generally immune from the injunctive power of the courts, even when acting to implement presidential powers that are regulable by Congress. But when he acts to implement a conclusive and preclusive presidential power like the recognition power, the Secretary is just as insulated from congressional regulation and judicial remedies as is the President himself.[90]

Equally important, the link between the President and his subordinates discussed here is not confined just to certain judicial remedies. If the President may not be enjoined by the courts to comply with a statute that impermissibly interferes with his conclusive and preclusive powers, then neither may his subordinates when they act to effectuate that power.[91] And if (as *Trump* recognized) "[i]t follows that an Act of Congress . . . may not

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[90] For this reason, I think Judge Katsas was partially right and partially wrong in his recent dissenting opinion in *Dellinger v. Bessent*, No. 25-5028, 2025 WL 559669 (D.C. Cir. Feb. 15, 2025). The case challenged President Trump's unilateral removal (acting through the Presidential Personnel Office) of Special Counsel Dellinger, despite a statutory restriction providing that "[t]he Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1211(b). The key issue was the scope of the President's conclusive and preclusive power of removal, and whether the statute conflicted with that power. *See infra* notes 102–03 and accompanying text (discussing that power). If the statute ran afoul of that power, then the fact that the suit sought to enjoin the presidential subordinate through whom the President effected Dellinger's removal would not change the analysis. The panel majority seems to have missed this point. Instead, it acknowledged that, under *Franklin* and the earlier case *Mississippi v. Johnson*, 71 U.S. 475 (1866), the President generally may not be enjoined directly, and it responded by stressing that "a court can unquestionably review the legality of the President's action by enjoining the officers who would attempt to enforce the President's order." 2025 WL 559669 at *6 n.1 (citing *Youngstown* as an example). But as I have explained, the general availability of injunctive relief against presidential subordinates does not address circumstances where a subordinate is implementing the President's conclusive and preclusive powers. In those circumstances, the subordinate is no more enjoinable for their acts than the President would be if he took the action himself. Judge Katsas correctly recognized that point. *See Dellinger*, 2025 WL 559669 at *13 n.2 (Katsas, J., dissenting).

At the same time, Judge Katsas seems to have suggested that the general unavailability of an injunction directly against the President means that subordinates are also not enjoinable for implementing the President's will, *no matter the nature of the presidential power at issue*. He observed, for example, that the Temporary Restraining Order in the case "necessarily targets the President—the only official with the *statutory and* constitutional authority to appoint, remove, and supervise the Special Counsel." *Id.* (emphasis added). By definition, a power conferred on the President by statute cannot be conclusive and preclusive of congressional regulation. Thus, if all that were at issue in the case were a statutory presidential power (or a constitutional presidential power that is not conclusive and preclusive), the fact that the President could not be enjoined with respect to that power would not bar an injunction against his subordinates. To the extent Judge Katsas meant to suggest otherwise, he was mistaken.

[91] *See Zivotofsky*, 576 U.S. at 21 (holding that Congress may not interfere with the Secretary of State's implementation of an exclusive Executive power).

criminalize the President's actions within his exclusive constitutional power,"[92] then it follows that his subordinates also may not be prosecuted for helping him execute that exclusive power.[93]

Remedial immunities are typically a function of the particular actor and remedy at issue. *Substantive* immunities are not. They are a function of the unregulability of the underlying conduct. Thus, when it comes to the substantive immunities flowing from the President's conclusive and preclusive powers, they insulate the President's subordinates just as much as they insulate him.

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There is a critical caveat to the link between Presidents and their subordinates explored in this Part. As just discussed, when a subordinate acts at the President's behest to effectuate a presidential power, the subordinate's actions will be evaluated as an exercise of that presidential power. The premise of that understanding is that the subordinate is, in fact, acting at the President's direction. If they are not—if they are acting without presidential direction on authority they claim the law has given to them, or if they are illegitimately invoking presidential power, without any delegation or direction from the President—then they should not be understood to be exercising the President's powers. The link between the President and his subordinates, in other words, should not be understood to protect rogue subordinates.[94]

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92 *Trump*, 144 S. Ct. at 2319.

93 The Justice Department's Office of Legal Counsel has long recognized the same basic point. *See* Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege, 8 Op. OLC 101, 140 (1984) ("[T]he Constitution does not permit Congress to make it a crime for an official to assist the President in asserting a constitutional privilege that is an integral part of the President's responsibilities under the Constitution.").

94 I thank Tom Schmidt for raising this point with me. It raises the question of how the subordinate can show that they acted at the President's direction. If the action in question is challenged in court as it is happening—with the plaintiff seeking an injunction against the subordinate in their official capacity—the Department of Justice will presumably defend against the action and cite the President's direction as the basis for its legality. To be sure, the Court in *Trump* held that in a criminal prosecution of a former President, courts may not "scrutiniz[e]" "official conduct for which the President is immune," even if the charges in the case focus on the President's unofficial conduct for which he has no immunity. 144 S. Ct. at 2341. Whatever the merits of that position, it need not be understood to preclude the courts from admitting evidence submitted by a (current or former) President to establish that he directed a subordinate to take certain actions to effectuate the President's own powers. Put another way, the evidentiary privilege discussed in *Trump* is best understood to be waivable by the President if he wants evidence of his interactions with his subordinates to be admitted in evidence. *Cf.* Carroll v. Trump, 88 F.4th 418, 425–29 (2d Cir. 2023) (holding presidential immunity from civil damages under *Nixon v. Fitzgerald* is waivable).

However, if the litigation against the subordinate is a civil damages suit or criminal prosecution after the subordinate has left office, it is conceivable that the (now former) President might not be willing to shoulder the weight of telling the court that he directed the subordinate to act. If so, and if the subordinate has no other way to establish that they acted at the President's

III

CONCLUSIVE AND PRECLUSIVE SUBSTANTIVE IMMUNITY IN *TRUMP*

The problem with *Trump*'s account of conclusive and preclusive substantive immunity is not its recognition of the *concept*. As noted in Part I,[95] everyone on the Court agreed with the general idea that the President possesses some authorities that are so exclusively his as to be beyond the power of Congress or the courts to regulate. Instead, the problem with *Trump* lies in what it said about the *content* of the President's purported conclusive and preclusive power over law execution.

The *Trump* indictment generally "alleged that after losing [the 2020 presidential] election, Trump conspired to overturn it by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results."[96] Of greatest interest for present purposes, it charged that Trump tried to "leverage the Justice Department to use deceit to get state officials to replace legitimate electors and electoral votes with [Trump's]."[97] The indictment alleged that those actions violated multiple federal statutes, including those prohibiting fraud against the United States,[98] obstructing an official proceeding and conspiring and attempting to do so,[99] and conspiring to interfere with the exercise of constitutional rights.[100]

The Court held that all of those charges implicated the President's conclusive and preclusive authority. Here is the bulk of what it said on that score:

> Investigation and prosecution of crimes is a quintessentially executive function. . . . 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.' And the Attorney General, as head of the Justice Department, acts as the President's chief law enforcement officer who provides vital assistance to [him] in the performance of [his] constitutional duty to preserve, protect, and defend the Constitution. . . .
>
> Investigative and prosecutorial decisionmaking is the special province of the Executive Branch, and the Constitution vests the entirety of the executive power in the President. . . .

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direction, the court may conclude that the subordinate's actions do not constitute exercises of the President's power.

95 *See supra* notes 73–74 and accompanying text.

96 *Trump*, 144 S. Ct. at 2324.

97 Indictment, United States v. Trump, No. 1:23-cr-00257-TSC, 27 (D.D.C. Aug. 1, 2023) (capitalization in heading omitted).

98 18 U.S.C. § 371.

99 18 U.S.C. § 1512(c)(2), (k).

100 18 U.S.C. § 241.

> The 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. And the President cannot be prosecuted for conduct within his exclusive constitutional authority. Trump is therefore absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials.[101]

There are a number of large and undefended steps in this analysis, but the rationale appears to be sweeping.

To be sure, the idea that some aspects of the President's interactions with the Justice Department might fall within his exclusive authority is not novel. Under *Seila Law* and the Court's other removal precedents, the President generally has unfettered power to remove high-ranking executive officials whom he has appointed.[102] Thus, Trump could not be prosecuted simply for threatening to remove (or, had he done it, actually removing) the Acting Attorney General for refusing to go along with efforts to advance Trump's election subversion plans.

The *Trump* majority went much further. It announced that the President has "exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials."[103] And when describing conclusive and preclusive presidential powers generally, the Court said that the "authority of the President 'disabl[es] the Congress from acting upon the subject.'"[104] Under the logic of *Trump*, therefore, it appears that Congress cannot "ac[t] upon" the Justice Department's "investigative and prosecutorial" functions at all.

That is breathtaking. It is one thing to observe that the President has broad power to supervise the functioning of the Justice Department. But it is quite another to say that all presidentially-directed law enforcement actions are within the President's unfettered discretion, even if they violate otherwise applicable laws.[105] As Justice Sotomayor observed, by the

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101 *Trump*, 144 S. Ct. at 2334–35 (quoting U.S. CONST. art. II, § 3) (citations omitted).

102 *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2191 (2020) ("'[A]s a general matter,' the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties.'" (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010))).

103 144 S. Ct. at 2335.

104 *Id.* at 2327 (alteration in original) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952)).

105 I am sympathetic to efforts to cabin the Court's reasoning on this point. Gillian Metzger, for example, has suggested that *Trump* should perhaps be understood to say that the President has the conclusive and preclusive authority to *communicate* with Justice Department officials about how to enforce the law, but that those officials' subsequent *actions* implementing the President's directions should be deemed subject to regulation. *See* Gillian E. Metzger, *Disqualification, Immunity, and the Presidency*, 138 HARV. L. REV. F. 112, 134 (2025). I'm afraid that I don't see how that limitation can be squared with what the *Trump* majority actually said. As noted above, the Court said the President has "exclusive authority over the investigative and prosecutorial functions

majority's reasoning, "even fabricating evidence and insisting the Department use it in a criminal case" could fall within the President's conclusive and preclusive authority, and thus be immunized from any legislative restriction.[106] Tellingly, the majority nowhere disclaimed that consequence or provided any reason for resisting it.

To make matters worse, the *Trump* majority also gestured towards the President's constitutional responsibility to "take Care that the Laws be faithfully executed" as a basis for his conclusive and preclusive immunity.[107] That responsibility is not limited to the activities of the Justice Department; it stretches across all law execution. The majority thus seems to have said that the President is not subject to *any* legislative restriction (through the criminal law or otherwise) of *any* of his interactions with *any* executive official who has any role in law execution, no matter the context, no matter the purpose, no matter the result.[108] That would upend a great deal of settled caselaw recognizing, for example, that "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities or by circumscribing an agency's power to discriminate among issues or cases it will pursue."[109]

The more conventional understanding would have been that Congress—whose legislation creates, authorizes, and funds all executive departments and agencies—and the President each have some authority in this space, and that they overlap in ways that make some aspects of the President's interactions with his subordinates (and their subsequent conduct) subject to congressional regulation.[110] The President undoubtedly has significant power to direct the Justice Department and other law enforcement

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of the Justice Department and its officials." 144 S. Ct. at 2335. That goes well beyond a power to talk with relevant officials about enforcement priorities; it goes to the power to control how the law is actually enforced. As I discuss *infra* in Part V, I do think there are ways to limit *Trump*'s impact even within the framework of conclusive and preclusive power that it embraces. But as long as *Trump* remains in place, I don't think it can be done by confining the President's power just to discussions with his subordinates about how to execute the law.

106 *Trump*, 144 S. Ct. at 2368 (Sotomayor, J., dissenting).

107 *See 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)).

108 *See* Goldsmith, *supra* note 10, at 14 (The *Trump* Court's "logic appears to disable Congress from punishing the President for firing or threatening to fire a subordinate official in an effort to facilitate any crime."); Lederman, *supra* note 14 (noting that numerous federal laws "provide that DOJ officials . . . may not corruptly alter, destroy or conceal documents to prevent them from being used in an official proceeding; may not suborn others to commit perjury; and may not bribe or threaten witnesses," but then observing that, according to *Trump*, "Congress may not prohibit the President from directing DOJ officials to abuse their statutory authorities for unlawful ends").

109 Heckler v. Chaney, 470 U.S. 821, 833 (1985).

110 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (recognizing "a zone of twilight in which [the President] and Congress may have concurrent authority").

agencies in the exercise of their enforcement discretion. Direct legislative attempts to cabin that discretion have been treated warily by the Court.[111] Yet Congress surely possesses considerable authority to affect the Justice Department's activities. Congress, after all, created the Department by legislation.[112] It decides which powers to give to the Department. It determines the Department's budget, and, if it wants, how that budget shall be allocated across the Department's various functions.[113] That includes the power to specify that certain funds may be used for certain activities (including to enforce certain laws), and not others. In all these ways and myriad others, Congress has an enormous role in structuring the Department's enforcement of the law.[114] It seems unthinkable that *Trump* simply swept all that aside. Yet the majority opinion contains no language protecting against that result.

Moreover, until *Trump*, even the Court's most pro-unitary executive holdings had not suggested that the President's power to execute the laws includes the power to take actions that Congress has said no one may take. As then-Judge Alito explained during his Supreme Court confirmation hearings, a move of that sort tends to confuse questions about who controls the exercise of executive power with the scope of executive power itself.[115] As to the latter, the longstanding understanding has been that in taking care that the laws are faithfully executed, the President "cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure."[116] It is hard to believe that a majority of

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111 *See, e.g.*, United States v. Texas, 143 S. Ct. 1964, 678–79 (2023) ("Under Article II, the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021))).

112 *See* An Act to Establish the Department of Justice, 16 Stat. 162 (1870).

113 *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 500 (2010) ("Congress has plenary control over the salary, duties, and even existence of executive offices.").

114 As Shalev Roisman puts it, "decisions by Congress about how to structure the executive branch—by creating principal and inferior offices and departments and granting them specific powers as it sees fit—quite obviously interfere with the President's control over law execution." Through these acts, "Congress is *telling the President* which officers are in charge of what and which departments they sit in. This is hardly a system where the President is exclusively in charge of how to execute the law." Shalev G. Roisman, *President Trump in the Era of Exclusive Powers*, HARV. L. REV. (Apr. 12, 2025), https://harvardlawreview.org/blog/2025/04/president-trump-in-the-era-of-exclusive-powers [https://perma.cc/63AR-4CT3].

115 In Alito's words, "the scope of Executive power" is "very different" from the question, "when you have a power that is within the prerogative of the Executive, who controls the Executive?" *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 351–52 (2006) (statement of Samuel A. Alito, J., United States Court of Appeals for the Third Circuit). *See* John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 YALE L.J. F. 374 (2017) (discussing this distinction as drawn by Alito).

116 United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Patterson,

the Court now thinks the President possesses such power. Yet the literal holding of *Trump* is that the President may violate statutory prohibitions on defrauding the United States, obstructing official proceedings, and conspiring to interfere with constitutional rights and then successfully claim substantive immunity, on the ground that the violations all happened in the exercise of his conclusive and preclusive power over law execution.

The new Trump Administration, for its part, is seizing the opportunity. Unsurprisingly, it has invoked *Trump*'s discussion of the removal power when defending Trump's summary firings of various executive officials.[117] But it is not stopping there. For example, in a pair of cases challenging an executive order directing federal agencies to condition federal funds on recipients' refusal to provide gender-affirming care to minors, the Administration has argued that "[t]he President has the constitutional authority to direct his subordinates to pursue a general policy goal," and that, under *Trump*, "[f]ederal courts cannot superintend—let alone proscribe—that policy direction."[118] Although it has not yet said so in so many words, the Administration may be inching in the direction of arguing that *Trump* places presidential orders about law execution categorically beyond the power of courts to review.

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A year before it decided *Trump*, the Court in *United States v. Texas*[119] held that a state lacked standing to challenge a federal immigration policy for violating a law that, the state claimed, required the Executive to arrest a broad category of removable noncitizens. The majority opinion couched part of its analysis in respect for the Executive's inherent prosecutorial discretion, though it allowed that Congress likely could constrain and channel that discretion in certain ways.[120] Even with that allowance, Justice Alito was appalled. Dissenting for himself alone, he accused the Court of tacitly accepting a "grossly inflated conception of 'executive Power,' which seriously infringes the 'legislative Powers' that the Constitution grants to Congress."[121] He did not stop there:

> What the majority has done is to apply Oliver Wendell Holmes's bad-man

J.); *see* Kendall v. U.S. ex rel. Stokes, 37 U.S. 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.").

117 *See, e.g.*, Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Preliminary Injunction and Summary Judgment at 7, Grundmann v. Trump, No. 1:25-cv-00425 (D.D.C. Feb. 25, 2025); Emergency Motion for a Stay Pending Appeal at 17–18, Harris v. Bessent, No. 25-5055 (D.C. Cir. Mar. 4, 2025).

118 Defendant's Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order at 8–9, PFLAG, Inc. v. Trump, No. 8:25-cv-337 (D. Md. Feb. 11, 2025).

119 143 S. Ct. 1964 (2023).

120 *See id.* at 1973 & n.4.

121 *Id.* at 1990 (Alito, J., dissenting) (citations omitted).

> theory of the law to the separation of powers. Under Holmes's theory, as popularly understood, the law consists of those things that a bad man cannot get away with. Similarly, the majority's understanding of the "executive Power" seems to be that a President can disobey statutory commands unless Congress, by flexing its muscles, forces capitulation. That is not the Constitution's conception of "the executive Power." The Constitution, instead, requires a President to "take Care that the Laws be *faithfully* executed."[122]

There is more than a little tension between this position and the *Trump* majority opinion that Justice Alito joined the following year. But hypocrisy aside, whatever one makes of the bad-man accusation in *United States v. Texas*, surely in *Trump* it has run amok. If the law constraining the President describes the things he "cannot get away with," *Trump* seems to suggest that there is very little law left when it comes to the President and law execution.

None of this was necessary to the outcome the *Trump* Court was evidently determined to reach. The Court could have covered the charges relating to law execution with the remedial official-act immunity it recognized for the President, with no broader implications for executive power or executive subordinates. But because the Court insisted on declaring law execution a matter of the President's conclusive and preclusive power, and because, as described in Part II, that substantive immunity radiates to subordinates executing the President's will, the potentially sweeping implications just discussed all apply to the President's subordinates as well.

The only viable way to limit those implications is to put boundaries on the President's authority over law execution. Although the *Trump* majority did not explicitly recognize any meaningful boundaries in that area, it may be possible to identify some even within the general framework of conclusive and preclusive presidential powers. Part V considers some possibilities along those lines. But first, the next Part applies *Trump*'s account of the President's power over law execution to his subordinates.

IV
TRUMP'S IMPLICATIONS FOR SUBORDINATES

As we have seen, presidential immunity has implications for subordinate immunity when it is *substantive*, deriving from a presidential power that qualifies as conclusive and preclusive within the *Youngstown* framework. We can organize *Trump*'s implications for subordinates accordingly.

A. Subordinate Actions Implementing the President's Power Over Law

122 *Id.* at 2002 (footnote omitted) (citations omitted).

Execution

Some of *Trump*'s implications for subordinates are easy to see. The Court was explicit that the President may not be prosecuted for conspiring with Justice Department officials to open "sham" investigations and prosecutions.[123] That necessarily means that the Justice Department officials with whom he conspires also may not be prosecuted for participating in the sham, to the extent they are acting at his direction to effectuate his conclusive and preclusive power. Justice Sotomayor went further and argued that the President now may not be prosecuted for "fabricating evidence and insisting the Department use it in a criminal case" in an effort to advance a sham.[124] The majority did not deny that accusation, though it is possible the Court would find a way to avoid that result. But if Justice Sotomayor was correct in her accusation, then the investigators and prosecutors who fabricated the evidence at the President's behest likewise may not be prosecuted. This follows straightforwardly from the way the Court has always grouped presidential subordinates together with the President when it comes to analyzing conclusive and preclusive presidential power.

Moreover, given *Trump*'s reliance on the Take Care Clause,[125] there is no obvious basis for confining things just to the activities of the Justice Department. To take just one example, a provision of the Internal Revenue Code makes it unlawful for certain executive officials (including the President and Vice President, anyone employed by their respective offices, and any member of the Cabinet other than the Attorney General) "to request, directly or indirectly, any officer or employee of the Internal Revenue Service to conduct or terminate an audit or other investigation of any particular taxpayer with respect to the tax liability of such taxpayer."[126] There is at least a very colorable argument that *Trump* immunizes the President for violating that statute in exercise of his conclusive and preclusive power to execute the law. If it does, then if a Cabinet member or anyone in the President's or the Vice President's office (i.e., any other official covered by the statute) makes the prohibited request at the President's direction, that official is likewise immune.

Next, recall that substantive immunities are not remedy-specific. They derive from the substantive unenforceability (by whatever means) of the underlying law against the defendant. Thus, to the extent the President is immune from criminal prosecution in all of the above scenarios, he is also immune from any other form of congressional regulation or judicially imposed remedy (specifically, civil damages and equitable remedies like

123 Trump v. United States, 144 S. Ct. 2312, 2335 (2024).
124 *Id.* at 2368 (Sotomayor, J., dissenting).
125 *See id.* at 2334–35.
126 26 U.S.C. § 7217(a), (e).

injunctions). In the case of the President, this is not all that significant since he was already immune from civil damages for actions falling within the outer perimeter of his official responsibility,[127] and he was probably safe from an injunction since courts are extremely reluctant to enjoin the President directly.[128]

For the President's subordinates, however, the implications are significant. Outside the President's conclusive and preclusive authority, personal immunities for executive officials are generally remedial in nature. They are specific to the remedy, officer, and function at issue, and they are typically not absolute. As discussed in Parts I and II, the President's subordinates generally enjoy only qualified immunity from civil suits for damages and no immunity at all from suits for injunctive relief. The latter are particularly important as a means of ensuring the basic requirement that the government operate lawfully. But because *Trump* instructs that the President's immunity with respect to law execution is a matter of his conclusive and preclusive power, that immunity must radiate to his subordinates as well. Thus, if the various illegal shams and reprisals hypothesized above all fall within the President's unregulable authority, then his subordinates cannot be sued for money damage or injunctive relief for participating in any of them.[129] Their actions "cannot [be] act[ed] on" by Congress, and "courts cannot examine" them.[130]

What other remedies might be affected? One possibility for government lawyers is disbarment and other forms of bar discipline. Wholly apart from criminal or civil damages liability, the prospect of disbarment could be a significant deterrent to participating in the schemes of a lawless President.[131] But in at least some cases, those sanctions may not survive *Trump*.

Until the late 1990s, there were questions about the extent to which federal lawyers were bound by state bar disciplinary rules. In 1985, for example, the Justice Department's Office of Legal Counsel (OLC) opined that "[r]ules promulgated by state courts or bar associations that are inconsistent with the requirements or exigencies of federal service may

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127 *See* Nixon v. Fitzgerald, 457 U.S. 731, 755–57 (1982).

128 *See* Franklin v. Massachusetts, 505 U.S. 788, 802–03 (1992).

129 Harlow v. Fitzgerald, 457 U.S. 800 (1982), is not to the contrary. That decision set the general level of civil damages immunity for executive subordinates. *See id.* at 819. It did not consider the special case of when subordinates act to effectuate a conclusive and preclusive presidential power.

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

131 *See, e.g.*, Bruce E. Yannett, *Prosecutors Seeking 'Retribution' for Trump Can Be Disbarred*, WASH. POST (Feb. 26, 2025), https://www.washingtonpost.com/opinions/2025/02/26/justice-prosecutors-trump-enemies-states [https://perma.cc/4WCE-DH6T] (opining on the risks that prosecutors in the Department of Justice might face if they engage in politically-motivated prosecutions).

violate the Supremacy Clause."[132] But in 1998, Congress passed the McDade Amendment, which provides that government attorneys are "subject to State laws and rules . . . governing attorneys in each State where such attorney[s] engage in [their] duties, to the same extent and in the same manner as other attorneys in that State."[133] That effectively ended any Supremacy Clause-based arguments against subjecting federal attorneys to state disciplinary rules, since federal law now subjected them to it.

Trump's discussion of the President's power over law execution poses a new challenge. If neither the President nor his subordinates acting at his direction may be subject to criminal or civil sanction for their conduct in this area, it is difficult to see how his lawyer-subordinates could be subject to professional discipline for the same. If the President depends on his subordinates to effectuate his power over law execution, imposing bar sanctions on those subordinates for doing so could impede the exercise of the President's power. And that is exactly what *Trump* said Congress and the courts may not do.[134] Thus, it would appear that the President's conclusive and preclusive constitutional authority over law execution must preclude enforcement of state disciplinary rules (whether via the McDade Amendment or directly on their own), just as the President's exclusive power of recognition precluded enforcement of the statute at issue in *Zivotofsky* against the Secretary of State.[135]

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132 State Bar Disciplinary Rules, 9 Op. O.L.C. 71, 71 (1985).

133 28 U.S.C. § 530B(a). *See* United States v. Grass, 239 F. Supp. 2d 535, 539 (M.D. Pa. 2003) ("In the past, significant debate surrounded the issue of whether state rules of professional responsibility apply at all to federal prosecutors. However, in 1998, Congress eliminated all doubt regarding this issue by enacting what is commonly referred to as the McDade Amendment." (citation omitted)). The District of Columbia Court of Appeals has held that the District counts as a state for purposes of the McDade Amendment. *See In re* Clark, 311 A.3d 882, 888 (D.C. 2024).

134 *See Trump*, 144 S. Ct. at 2327 ("The exclusive constitutional authority of the President 'disabl[es] the Congress from acting upon the subject.' And the courts have 'no power to control [the President's] discretion' when he acts pursuant to the powers invested exclusively in him by the Constitution." (alterations in original) (first quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38; then quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803)).

135 This could have significant implications for the still-pending D.C. Bar disciplinary proceeding against Jeffrey Clark, who served as Acting Assistant Attorney General during the final months of the first Trump Administration and who aided Trump in his (otherwise unlawful and obviously abusive) attempt to pressure state-level election officials to change the outcome of the election. *See In re* Clark, 311 A.3d at 884 (reciting facts of the proceeding). In July 2022, the D.C. Bar's Office of Disciplinary Counsel filed disciplinary charges against Clark in relation to those activities. Clark asserted immunity under *Trump*, and in August 2024 the Hearing Committee of the D.C. Bar's Board on Professional Responsibility rejected the assertion, reasoning that "*Trump* does not discuss immunity of Executive Branch employees for criminal liability, much less immunity from disciplinary sanction." Rep. and Recommendation of Hearing Com. No. Twelve at 148, *In re* Clark, (D.C. Bd. on Pro. Resp. Aug. 1, 2024), https://statesunited.org/wp-content/uploads/2024/08/2024-08-01-issuance-letter-and-report-and-recommendation-of-hearing-committee-number-twelve.pdf [https://perma.cc/AV9Z-ULFE]. The Board's analysis treated *Trump* immunity as purely remedial (though it did not use that terminology) and thus as confined

B. Subordinate Actions Implementing Other Presidential Powers

Trump's discussion of conclusive and preclusive immunity focused on the President's authority over law enforcement—principally criminal investigations and prosecutions, but also law execution more broadly. But of course, the Constitution grants the President a number of other powers, and questions of subordinate immunity could potentially arise with each of them. As noted above, in each case the key question is whether the presidential power in question is conclusive and preclusive within the meaning of the *Youngstown* framework.

Consider the most prominent hypothetical raised during the course of the *Trump* litigation: May the President be prosecuted (or, we might add, face any other judicial remedy) for ordering Navy Seal Team Six to assassinate a political rival? And critically for purposes of this Essay, may any of the Seals involved in the operation themselves be prosecuted (or face any other legal sanction) for their actions?

The question first arose during oral argument before the D.C. Circuit. Trump's lawyer (now the Solicitor General, D. John Sauer) suggested that the President would indeed be immune from prosecution for directing the military to assassinate a political rival.[136] The Supreme Court majority did not take up the hypothetical, but Justice Sotomayor accused the majority of providing the same answer as Sauer.[137] She reached that conclusion by focusing on the majority's analysis of the President's official-act immunity, which, as noted above,[138] is a remedial immunity that applies only to the President and not to his subordinates. So even if Justice Sotomayor were correct in her account of the President's official-act immunity under *Trump* (which would depend on whether she's right that the majority's nominally presumptive standard for official-act immunity is actually irrefutable and thus effectively absolute), it would not apply to the Seals.[139]

The answer would be different, however, if the President's

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only to the President himself, and with respect only to criminal immunity. But for the reasons advanced in this Essay, to the extent the underlying conduct involved matters within the President's conclusive and preclusive authority, the resulting immunity is neither actor- nor remedy-specific, and (at least very arguably) covers subordinates like Clark as well.

136 *See* David A. Graham, *A Thought Experiment About SEAL Team 6 Goes Terribly, Terribly Wrong*, THE ATLANTIC (Jan. 9, 2024), https://www.theatlantic.com/ideas/archive/2024/01/trump-presidential-immunity-trial/677068 [https://perma.cc/7GGA-RJ2T] (describing the oral argument).

137 *Trump*, 144 S. Ct. at 2371 (Sotomayor, J., dissenting) (opining that, according to the majority, if the President wields "his official powers in any way, . . . he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.").

138 *See supra* notes 52–59 and accompanying text.

139 *See* Schmidt, *supra* note 22, at 50 n.364 (arguing on this basis that the Seals could be prosecuted).

assassination order were thought to be an exercise of conclusive and preclusive presidential power. If it were, the resulting immunity would preclude any and all judicial remedies, and it would cover not just the President but also the Seals. Could the assassination order be understood to be within the President's conclusive and preclusive power? Jack Goldsmith persuasively argues no.[140] The Supreme Court has never suggested that the President has any such power. Indeed, even in its most extreme pro-executive opinions, OLC has not concluded that the President's power to use military force is entirely conclusive and preclusive.[141] If it is not, the Seals in the hypothetical likely could not claim immunity.

Having said that, the new Trump Administration has asserted a rather remarkable presidential authority to interpret the law for the entire Executive Branch on potentially every legal question that might arise within it.[142] If a President were truly intent on ordering the assassination of a political or personal enemy, he might well be prepared to announce a new and broader legal theory of exclusive presidential authority to use military force, and to direct everyone in the Executive Branch to follow it. Or he might simply appoint an Attorney General or an Assistant Attorney General for OLC who is prepared to write a legal opinion going beyond prior precedents and extending exclusive presidential power as far as necessary. If OLC adhered to its traditional norms and practices, it would be quite unlikely to take that step.[143] But in the absence of a Justice Department leadership willing to uphold those norms and practices, they cannot stop an administration determined to chart a new course.

Still, if the Seals actually carried out a presidential assassination order and later faced criminal charges (presumably during a subsequent presidential administration), the courts would have the final say on whether the operation implicated any conclusive and preclusive presidential power. *Trump* does not dictate an answer to that question, and I see no reason to think the courts would accept an account of conclusive and preclusive

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140 *See* Goldsmith, *supra* note 10, at 33–34 n.146 (explaining why "the assassination order would almost certainly not be an exclusive presidential power").

141 Goldsmith, *supra* note 10, at 33 n.146 ("[I]n any event OLC has recognized that the President's offensive war power is not exclusive, though it once without analysis asserted that Congress could not limit the President's self-defensive reactions to the 9/11 terrorist attacks." (citations omitted)).

142 *See* Ensuring Accountability for All Agencies, Exec. Order No. 14215, 90 Fed. Reg. 10447, 10448–49 (Feb. 18, 2025) (asserting that the President and Attorney General determine their employee's official stances on questions of law and that "[n]o employee of the executive branch acting in their official capacity may advance an interpretation of the law as the position of the United States that contravenes the President or the Attorney General's opinion on a matter of law").

143 *See generally* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) (discussing interpretive norms and cultural practices within OLC, including a presumptive obligation to adhere to OLC's own precedents).

presidential power broad enough to cover such conduct.

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The prevailing understanding that *Trump* carries no special implications for subordinate liability is wrong. When it comes to investigation, prosecution, and law execution more generally, the Court's finding of conclusive and preclusive presidential authority means that presidential subordinates who implement the President's directions are just as immune as he is. Not every presidential power is conclusive and preclusive, as the Seal Team Six hypothetical illustrates. But the scope of absolute immunity for presidential subordinates is now very broad.

V
LIMITS

The main problem with *Trump* is how sweepingly it described the President's power to control the execution of the law, without identifying any meaningful limits on that power. But precisely because the *Trump* majority did not acknowledge the potential implications of its analysis, there is reason to suspect that it did not intend to recognize as broad a sweep of unregulable presidential power (with its concomitant implications for presidential subordinates) as the language of its opinion seems to embrace. Justice Barrett sounded an optimistic note along these lines in her concurrence, stating that she did "not understand the Court to hold that all exercises of the Take Care power fall within the core executive power."[144] She may be right about that as a matter of the majority's intent. If so, we might hope that, given the opportunity, the Court might walk back—perhaps in the guise of "clarifying"—some of what it said in *Trump*.

In doing so, the Court could identify some limits even within a framework of conclusive and preclusive presidential power. These limits do not provide a basis for subjecting presidential subordinates to greater liability than the President when executing those powers; the longstanding linking of the President and his subordinates in that context needs to remain, lest the President's genuinely conclusive and preclusive powers themselves be undermined.[145] Instead, the considerations I have in mind provide ways to identify appropriate limits on the President's law execution power itself, and thus to limit the substantive immunity (for him and his subordinates) that flows from that power. These limits can potentially be understood to be

144 Trump v. United States, 144 S. Ct. 2312, 2352 (2024) (Barrett, J., concurring in part).

145 As discussed above, *see supra* note 94 and accompanying text, this linkage depends on a demonstration that the subordinate is in fact acting at the President's direction to implement a power that belongs to the President. Depending on the context, this requirement could be quite limiting.

implicit within the logic of *Trump* itself (because not explicitly rejected by it), or as elaborations of *Trump*'s basic approach that impose limits on its otherwise sweeping language.

A. Constitutional Rights

Even if the Court insists on a broad understanding of the President's conclusive and preclusive authority over law execution, that power need not be understood to be "preclusive" of the rest of the Constitution. Justice Jackson's *Youngstown* framework was designed principally to provide a framework for thinking about the relationship between the Executive and Legislative Branches.[146] It should not be understood to exempt executive power from all constitutional limitations that otherwise apply.[147]

When it comes to prosecutorial discretion, for example, the Court has emphasized that although the discretion "is broad, it is not 'unfettered.'"[148] Specifically, "the decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' . . . including the exercise of protected statutory and constitutional rights."[149] Relatedly, the Court has made clear that "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'"[150] To be sure, the doctrines implementing these prohibitions on selective and retaliatory prosecution are highly protective of prosecutors. Thus, it is extremely difficult for defendants to prevail on such claims. But the doctrines' very existence confirms that the Constitution places limits on prosecutorial discretion.

Suppose, then, that a defendant in a federal criminal case were able to establish that the government was deliberately pursuing them on account of an impermissible reason such as their race, religion, or political views, and moved to dismiss the charges on that basis. Could the government defeat the motion by showing that the President had ordered the prosecution? Surely

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146 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

147 *Cf. id.* at 636–37 (observing that even when the President acts with congressional authorization, his actions might be found unconstitutional in circumstances where "the Federal Government as an undivided whole lacks power" to take the action in question).

148 Wayte v. United States, 470 U.S. 598, 608 (1985) (quoting United States v. Batchelder, 442 U.S. 144, 125).

149 *Id.* (citations omitted); *see* United States v. Texas, 143 S. Ct. 1964, 1973 (2023) ("[T]he Court has adjudicated selective-prosecution claims under the Equal Protection Clause.").

150 Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 32–33 & 32 n.20 (1973)); *see* Nat'l Rifle Ass'n v. Vullo, 144 S. Ct. 1316, 1322 (2024) (holding that, under the First Amendment, "[g]overnment officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors.").

not.[151] If that is correct, it must mean that the President's "exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials"[152] is not preclusive of constitutional limitations like equal protection, due process, and the First Amendment. And that, in turn, would entail a significant limitation on subordinate immunity under *Trump*.

To see this more clearly, suppose the President and the Justice Department officials who conspired to engage in unconstitutional selective or retaliatory prosecution are later pursued civilly and criminally for that conduct. Specifically, suppose they are sued civilly under *Bivens*[153] and charged criminally under either or both of 18 U.S.C. §§ 241 and 242.[154] What immunities would apply? If the President's power to direct the Department's investigative and prosecutorial functions does *not* include the power to do so in ways that violate constitutional rights, then neither the President nor his subordinates could assert a *substantive* immunity based on the President's conclusive and preclusive authority. Any immunity that any defendant could assert would thus be a form of *remedial* immunity. The President would likely enjoy absolute immunity from civil damages under *Fitzgerald* and at least presumptive immunity from prosecution under *Trump*'s official-act immunity.[155] As for the Justice Department officials, they could assert some

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151 *Cf.* Perkins Coie LLP v. U.S. Dep't of Just., No. 25-716 (BAH), 2025 WL 1276857 at *1 (D.D.C. May 2, 2025) (noting that "[n]o American President has ever before issued executive orders like the one at issue in this lawsuit targeting a prominent law firm with adverse actions to be executed by all Executive branch agencies"); *id.* at *4 (observing that "government officials 'cannot . . . use the power of the State to punish or suppress disfavored expression'" and holding that the executive order at issue in the case is therefore unconstitutional (alteration in original) (quoting *Vullo*, 144 S. Ct. at 1326)).

152 Trump v. United States, 144 S. Ct. 2312, 2335 (2024)

153 *See generally* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Of course, under current doctrine there are many significant barriers to bringing a *Bivens* action, quite apart from questions of immunity. *See, e.g.*, Egbert v. Boule, 142 S. Ct. 1793 (declining to extend *Bivens* to cover an alleged First Amendment violation); Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (declining to extend *Bivens* to cover conditions of confinement and prisoner abuse). Those barriers are beyond the scope of this Essay.

154 *See* 18 U.S.C. § 241 (making it a crime for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same"); *id.* § 242 (making it a crime to, "under color of any law, . . . willfully subject[] any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties" because of a person's race or citizenship status).

155 *See supra* notes 47–59 and accompanying text. In the criminal case, the President might also argue that the statute simply does not apply to him. As Justice Barrett emphasized in her *Trump* concurrence, an important protection for Presidents facing potential criminal charges is that not all laws of general application are understood to apply to the President. *See Trump*, 144 S. Ct. at 2352 (Barrett, J. concurring) ("The first question is whether the relevant criminal statute reaches the President's official conduct. Not every broadly worded statute does."). OLC has taken the position that if a federal statute does not explicitly refer to the President and if application of the statute to him would "involve a possible conflict with his constitutional prerogatives," the statute should be

combination of absolute immunity from civil damages for their prosecutorial decisions and qualified immunity for their investigative actions. But on the criminal side, they would enjoy no immunity.[156]

Here, then, is a situation where the exposure of the President's subordinates to criminal sanction could potentially frustrate the ambitions of a lawless President. Importantly, however, this limit on *Trump* applies only in circumstances where the actions of the President and his subordinates violate the target's constitutional rights. Not all sham investigations, prosecutions, and other modes of law execution involve such violations.

B. Judicial Power

Relatedly, the fact that a given presidential power is conclusive and preclusive does not mean the President can commandeer other branches of government in the exercise of that power. Recall the selective prosecution example discussed above.[157] Wholly apart from whether the government lawyers who brought the charges could be sued or prosecuted later for their actions, it is clear that the court hearing the criminal case in the first place would have the power to dismiss the charges if it concluded they were brought in violation of the Constitution—even if the President had ordered the prosecution. In addition to showing that the President's powers are constrained by constitutional rights, this example highlights something else: The President may have "exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials,"[158] but that does not include the power to control the outcome of a case once it is brought to court. The President takes the courts as he finds them, subject to all the jurisdictional, procedural, and other rules that govern their operation.

The substantive immunity discussed in this Essay significantly limits the power of parties to go to court to challenge the exercise of certain presidential powers (whether by the President himself or his subordinates).

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construed not to apply to him. *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 351 (1995). Others, however, have argued that there is no such clear statement rule. *See, e.g.*, Brief of Professor Martin S. Lederman as Amicus Curiae in Support of Respondent at 12–26, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939) ("There is no canon of construction that precludes application of a generally applicable statute to a President's official conduct absent a clear statement."). For her part, Justice Barrett indicated that she would not apply either a clear statement rule or any version of the general canon of constitutional avoidance when determining whether a law of general applicability applies to the President. *See Trump*, 144 S. Ct. at 2353–54 n.3 (Barrett, J. concurring) ("In my view, neither canon applies in this circumstance. Courts should instead determine the statute's ordinary meaning . . . .").

156 *See* Imbler v. Pachtman, 424 U.S. 409, 429 (1976) ("This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights . . . .").

157 *See supra* notes 151–52 and accompanying text.

158 *Trump*, 144 S. Ct. at 2335.

But it does not entitle the President to invoke the courts himself and then to dictate the resolution of the case. To conclude otherwise would be to allow the executive power of prosecution to swallow the judicial power itself.[159] The President's conclusive and preclusive power over investigation and prosecution means he and his subordinates are at least substantially immune from legal sanction for pursuing sham cases, but it doesn't mean they get to win them.

Of course, a lawless President and his willing subordinates can still do significant harm to the targets of their sham investigations and prosecutions, even if they don't get to win the prosecutions in court. Merely subjecting a target to a criminal investigation can impose huge costs (financial, reputational, emotional, and otherwise) on a target. Members of the Trump Administration recognize this and have expressed enthusiasm for inflicting such costs on their enemies without regard to their prospects in court.[160] The limits I have described thus far in this Part may not do much to curb such abuses.

C. Exclusive ≠ Conclusive and Preclusive

Finally, the Court might give further thought to what it means for a Presidential power to be truly conclusive and preclusive of congressional regulation. In my view, before characterizing a given power in those terms, courts should require more than a simple finding that the power belongs exclusively to the President. Articles I, II, and III of the Constitution are full of provisions that grant just one branch of the federal government the authority to do something. For example, only Congress may regulate commerce among the several states; the Constitution gives the President and

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159 This point recalls Justice Jackson's dissent in *Korematsu*. While acknowledging that the courts had no basis to judge the "military necessity" of the exclusion order at issue in the case, and while allowing that the courts should not have "attempted to interfere with the Army" in enforcing the order, Jackson emphasized that the posture was critically different when the government decided to come to court to prosecute Korematsu for violating the order. *Id.* at 246, 248 (Jackson, J., dissenting). As he put it, courts are not required to uphold a constitutionally impermissible order "even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy." *Id.* at 247 (Jackson, J., dissenting). I thank Adam Samaha for raising this point with me.

160 *See* Glenn Thrush & Alan Feuer, *If Justice Dept. Can't Prosecute Trump's Foes, It Will 'Shame' Them, Official Says*, N.Y. TIMES (May 21, 2025), https://www.nytimes.com/2025/05/21/us/politics/trump-justice-department-ed-martin-weaponization.html [https://perma.cc/TY7E-SW4F] (reporting that "Ed Martin, the self-described 'captain' of the Justice Department's 'weaponization' group," has said that "[h]e plans to use his authority to expose and discredit those he believes to be guilty, even if he cannot find sufficient evidence to prosecute them" and quoting Martin as saying, "if they can't be charged, we will name them. And . . . in a culture that respects shame, they should be people that are ashamed.").

the judiciary no power to do so.[161] Congress's commerce power is thus exclusive in that sense. But the fact that the Constitution grants a particular power to only one branch of government does not, by itself, establish that no other branch may exercise *its* constitutionally conferred authority in ways that affect what the first branch has done.[162] If a statute regulating interstate commerce is enforceable by the government, the Executive will, in exercise of its enforcement discretion, be able to affect when and how the statute is applied. And when the Executive's enforcement of the statute is challenged in litigation, the courts will ultimately determine the scope and meaning of the statute. These executive and judicial functions coexist perfectly well with the exclusivity of Congress's power to regulate interstate commerce. All of this is elementary.

Following the same reasoning, there is a difference between the exclusive presidential power to appoint and remove certain executive officials and an unregulable authority to determine how, when, and to what extent to execute federal law (even in ways that violate other laws). Something more than the former is needed to justify the latter. To go from being an exclusive presidential power to a presidential power that is preclusive of any congressional regulation (or judicial oversight), it must be shown that the President's ability to exercise the power would be undermined or frustrated in some critical way if it were subject to the regulation in question.

Zivotofsky is illustrative. There, the Court readily concluded that "[t]he text and structure of the Constitution grant the President the power to recognize foreign nations and governments."[163] But that alone was not enough to establish that the power was conclusively and preclusively the President's. To reach that conclusion, the Court pointed to a number of functional considerations:

> [T]he Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal. Recognition is a topic on which the Nation must 'speak . . . with one voice.' . . . That voice must be the

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161 *See* U.S. CONST. art. I, § 8, cl. 3.

162 *See* Lederman, *supra* note 14 (explaining that the majority's reasoning, that powers exclusive to the Executive Branch should have preclusive protection from other branches, is logically incomplete because "it does not follow that Congress may not use one of *its* constitutional powers . . . to limit or condition what the President could otherwise do" (alteration in original)).

163 Zivotofsky *ex. rel.* Zivotofsky v. Kerry, 576 U.S. 1, 13 (2015).

President's.[164]

At the same time, and critically, the Court emphasized that treating the recognition power as belonging conclusively and preclusively to the President did not entail denying Congress all power to act on matters adjacent to recognition. To the contrary:

> Congress' powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President's recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.[165]

Two points bear emphasis here. First, before concluding that the recognition power was preclusive of congressional regulation, the *Zivotofsky* Court engaged in a functional analysis of whether such preclusion was necessary for the effective exercise of the President's power. That question was not answered by asking the formalist question whether recognition is inherently "executive"; it was answered by asking whether the executive power of recognition could function effectively if Congress also wielded the power. The *Trump* Court's analysis of the President's power over law execution included no such considerations. Had it done so, it could have found a basis for allowing Congress to play a greater role in structuring the exercise of the executive power over law execution.[166]

Second, even after declaring the President's recognition power to be conclusive and preclusive, the *Zivotofsky* Court emphasized that Congress possessed considerable authority to legislate on matters closely adjacent to the power, in ways that could have "consequences" for the President's recognition policy and could even render that policy "hollow."[167] That approach stands in marked contrast to *Trump*'s discussion of conclusive and preclusive powers, which seems to admit of no even incidental legislative burdens on such powers.[168] A re-orientation of the analysis in *Zivotofsky*'s

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164 *Id*. (quoting American Ins. Ass'n v. Garamendi, 539 U.S. 396, 424 (2003)); *see id.* at 17 ("A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations.").

165 *Id.* at 16.

166 For an argument that "*Youngstown* category 3" cases inevitably require a functionalist, balancing analysis to determine whether the President or Congress should prevail, see Roisman, *supra* note 14 at 50–56. *See also* Shalev Gad Roisman, *Balancing Interests in the Separation of Powers*, 91 U. CHI. L. REV. 1331, 1340–42 (2024) (positing a new approach for resolving "separation of powers infringements").

167 *Zivotofsky*, 576 U.S. at 16.

168 *See, e.g.*, Trump v. United States, 144 S. Ct. 2312, 2328 (2024) ("Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and

direction could thus narrow the scope of the President's conclusive and preclusive powers to their core, where legislative preclusion truly is functionally necessary. And that, in turn, would cause a corresponding narrowing of subordinate immunity.

To see how this could work in another context, consider the federal criminal prohibition on bribery.[169] Suppose the President accepts a bribe in return for issuing a pardon. Does the conclusive and preclusive nature of the pardon power render him substantively immune to prosecution for taking the bribe? I have argued no, on the ground that we can distinguish between laws that regulate conclusive and preclusive presidential powers themselves and laws that regulate matters *adjacent* but not *inherent* to those powers.[170] The former are impermissible and trigger substantive immunity; the latter are valid and do not. On this formulation, the pardon itself would remain in effect even though the President granted it in return for a bribe. But the bribe is not inherent to the pardon power, and, as OLC has recognized, "[t]he Constitution confers no power in the President to receive bribes."[171] Subjecting the President to prosecution for taking the bribe may well have "consequences" for his exercise of the pardon power,[172] just as the criminal law generally is presumed to deter criminal behavior. But as *Zivotofsky* illustrates, such consequences are not enough to support substantive immunity.[173] So the President may be prosecuted for taking the bribe even though Congress (and the courts) may not undo the pardon.

Drawing lines like this can admittedly be difficult, but the *Trump* majority may already have agreed to do it. In an exchange with Justice Barrett, the majority seemed to endorse prosecuting a President for taking a bribe in connection with the exercise of a presidential power, even though he may not be prosecuted for exercising the power itself.[174] The majority and Justice Barrett disagreed over exactly how such a prosecution would work, and what kind of evidence should be admissible to support it.[175] As others

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preclusive' constitutional authority.").

169 18 U.S.C. § 201(c).

170 *See* Morrison, *Beyond Absolutes*, *supra* note 56.

171 Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges, 19 Op. OLC 350, 357 n.11 (1995). OLC supported this conclusion by observing that "the Constitution expressly authorizes Congress to impeach the President for, inter alia, bribery." *Id.* It would be strange if the President could be impeached for exercising a power that the Constitution grants conclusively and preclusively to him. Hence, we need some way to separate that power (in this hypothetical, the pardon power) from the bribe.

172 *Zivotofsky*, 576 U.S. at 16.

173 *Id.* at 16–17.

174 Trump v. United States, 144 S. Ct. 2312, 2341 n.3 (2024) ("[O]f course the prosecutor may point to the public record to show . . . that the President performed the official act. And the prosecutor may admit evidence of what the President allegedly demanded, received, accepted, or agreed to receive or accept . . . for being influenced in the performance of the act.").

175 *Compare id.* ("What the prosecutor may not do, however, is admit testimony or private

have observed, the precise scope of that disagreement is hard to pin down.[176] Both, however, evidently agreed on the permissibility of the bribery prosecution, which depends on distinguishing between the prosecutable bribe and the immune exercise of presidential power.[177]

Going forward, if the Court were to adopt *Zivotofsky*'s approach to identifying and discerning the boundaries of conclusive and preclusive presidential power, and if it were to remain mindful of core/periphery issues raised by the bribery example, it could rein in its account of the President's power over law execution in a way that leaves more room for Congress. In so doing, it would correspondingly limit the substantive immunity of presidential subordinates. That would be a very helpful corrective to *Trump*'s excesses.

CONCLUSION

When analyzing separation of powers issues that the judiciary rarely addresses, the Court tends to seek modest rulings that don't unduly upset the existing equilibrium.[178] That is especially true when the Court is obliged to hear a case on an expedited basis.[179] *Trump v. United States* did not follow

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records of the President or his advisers probing the official act itself. Allowing that sort of evidence would invite the jury to inspect the President's motivations for his official actions and to second-guess their propriety.") *with id.* at 2355 (Barrett, J., concurring) ("I appreciate the Court's concern that allowing into evidence official acts for which the President cannot be held criminally liable may prejudice the jury . . . [b]ut the rules of evidence are equipped to handle that concern on a case-by-case basis." (citation omitted)).

176 *See, e.g.*, Anna Bower & Benjamin Wittes, *What's Going On in Footnote 3?*, LAWFARE (July 23, 2024), https://www.lawfaremedia.org/article/what-s-going-on-in-footnote-3 [https://perma.cc/635A-GXKP]; Goldsmith, *supra* note 10, at 18–19 n.80.

177 Jack Goldsmith is right, however, that the exchange between the majority and Justice Barrett did not focus specifically on bribery in relation to a conclusive and preclusive presidential power (as opposed to any other presidential power). *See* Goldsmith, *supra* note 10, at 19 n.80. That distinction might make a difference in this context; as I have argued throughout this Essay, it makes a big difference on the issue of subordinate liability generally. But I don't see any basis in the logic of conclusive and preclusive presidential powers to think that substantive immunity would need to include immunity for taking a bribe in return for exercising those powers.

178 *See, e.g.*, Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (noting that while the case was "the first of its kind to reach this Court[,] . . . Congress and the Executive have nonetheless managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us" and emphasizing that "[s]uch longstanding practice 'is a consideration of great weight' in cases concerning 'the allocation of power between [the] two elected branches of Government,' and it imposes on us a duty of care to ensure that we not needlessly disturb 'the compromises and working arrangements . . .'" of Congress and the Executive branch) (first quoting NLRB v. Noel Canning, 573 U.S. 513, 524 (2014) then quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929)). *See generally* Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913, 1920 (2020) ("[W]e aim to suggest ways that courts can preserve an appreciation for practice-based historical settlement that can last beyond the aberrations of the current moment.").

179 *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 660–01 (1981) (asserting, without positing general guidance, that "the expeditious treatment of the issues involved by all of the courts

that pattern. The Court's sweeping account of the President's purportedly conclusive and preclusive power over law execution ran roughshod over its own precedents without even acknowledging them, and rested on a theory whose logic reaches far beyond the circumstances of the case.

One senses that much of this was unintended. Near the conclusion of his majority opinion, the Chief Justice stressed the need to protect against the "prospect of an Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next."[180] He invoked George Washington's Farewell Address to emphasize that "[a] government 'too feeble to withstand the enterprises of faction' . . . could lead to the 'frightful despotism' of 'alternate domination of one faction over another, sharpened by the spirit of revenge.'"[181] That may be the wellspring of the Court's decision: As a matter of pure pragmatism, unmoored from any serious engagement with conventional sources of constitutional meaning, the Court thought it was simply unwise to allow Presidents to be prosecuted by their successors. I cannot say whether I would have opposed a decision based explicitly and exclusively on such consequentialist reasoning.

But that's not what we got. Instead, we got a decision that may well have been motivated by "raw consequentialism,"[182] but that sought to ground itself in settled separation of powers principles to which it then did considerable violence. The result was irony.

The irony is that *Trump* did indeed protect former Presidents from the vengeance of their successors. Yet in doing so, the Court made it easier for the very same vengeance to be directed against virtually all of a sitting President's other rivals and enemies—and anyone else they might care to target. And in embracing an unprecedentedly broad account of a conclusive and preclusive presidential power over law execution, the Court necessarily rendered presidential subordinates similarly unregulable when acting to effectuate the President's will. No matter that the investigation or prosecution is a sham, corrupt, or otherwise unlawful.[183]

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which have considered the President's actions make us acutely aware of the necessity to rest decision on the narrowest possible ground capable of deciding the case").

180 *Trump*, 144 S. Ct. at 2346.

181 *Id.* at 2347 (quoting President George Washington, Farewell Address (Sept. 19, 1796) *reprinted in* 35 WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799, 214, 226–27 (John C. Fitzpatrick ed., 1940)).

182 *See* Aziz Z. Huq, *Structural Logics of Presidential Disqualification: An Essay on* Trump v. Anderson, 138 HARV. L. REV. 172, 217 (2024) (drawing parallels between consequentialist arguments underpinning the majority's reasoning in *Trump v. Anderson* and *Trump v. United States*).

183 The irony compounds: During oral argument in *Trump*, Justice Alito asked Michael Dreeben, counsel for the government, whether Justice Department lawyers could be "trusted to act in a professional and ethical manner" when contemplating whether to prosecute a former President.

And that, in turn, laid the groundwork for turning executive officials responsible for enforcing federal law into the President's own personal faction of Holmesian bad men,[184] available to help him wreak vengeance on his enemies and beyond the power of Congress to tame. In seeking to shield the President from cycles of political revenge, the Court's recklessly broad reasoning helped underwrite the era of presidentially-directed reprisal and retribution in which we now find ourselves. No reasonable person wants that. The Court should fix it.

Transcript of Oral Argument at 101, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-939_3fb4.pdf [https://perma.cc/X6ZA-G9AQ]. Mr. Dreeben answered that they could indeed be relied upon to meet their professional ethical responsibilities, and he offered the facts of *Trump* as evidence: Trump tried to get senior DOJ officials to send fraudulent letters to state officials to get them to reverse the results of the 2020 election, but the DOJ officials refused to cooperate. *Id.* at 102–03. Justice Alito replied: "I understand that, Mr. Dreeben, but as I said, this case will have effects that go far beyond this particular prosecution." *Id.* at 104. That's for sure.

184 *See* United States v. Texas, 143 S. Ct. 1964, 2022 (2003) (Alito, J., dissenting) ("Under Holmes's theory, as popularly understood, the law consists of those things that a bad man cannot get away with.").