No. 23-939

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* UNITED STATES JUSTICE FOUNDATION & POLICY ISSUES INSTITUTE, INC. IN SUPPORT OF PETITIONER

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae United States Justice Foundation ("USJF") was founded in 1979 as a nonprofit public interest, legal action organization dedicated to instruct, inform and educate the public on, and to litigate, significant legal issues confronting America. The attorneys who founded USJF sought to advance the original understanding of constitutional jurisprudence in the judicial arena. USJF continues to be involved in public interest litigation, recently as a successful plaintiff seeking government records under the Freedom of Information Act in *Lacy v. U.S. Dep't of State*, No. SA CV 22-1065-DOC, 2023 WL 4317659 (C.D. Cal. May 3, 2023).

USJF has a substantial interest in ensuring the proper role of the state and federal judiciary.

Policy Issues Institute ("PII") has worked over the last two decades to educate and inform the public regarding public policy issues that impact the constitutional order upon which our country was founded. PII is primarily focused on promoting robust First Amendment protections for citizens and exposing judicial overreach that contravenes fundamental American principles such as free speech, freedom of the press, and other natural rights bestowed upon the public by our Constitution. PII similarly has a substantial interest in preventing judicial overreach, especially when that overreach has substantial First Amendment implications.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Former President Trump's application for stay raised two questions: (1) "[w]hether the doctrine of absolute presidential immunity includes immunity from criminal prosecution for a President's official acts" and (2) whether the impeachment clause and double jeopardy principles foreclose criminal prosecution after acquittal by the Senate after impeachment for closely related conduct.

This Court granted review on the first question. But the two questions are intertwined because the notion that the President has "immunity" from criminal prosecution arises from recognition that he cannot be charged with a crime unless and until there is a post-impeachment conviction by the Senate. It is not that the President is immune from prosecution; instead, it is that the President cannot be charged with a crime relating to his official acts unless and until he is impeached *then convicted* as provided for in Article I, section 3 of the Constitution.

Nonetheless, this Court's rationale from *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), which established Presidential immunity in civil cases, applies even more so in this criminal matter. In *Fitzgerald*, a concern was whether the President was "above the law." Despite conferring civil immunity, *Fitzgerald* held that the President is not above the law because there are alternative remedies. This was the Court's holding even though the alternative remedies do not benefit civil plaintiffs. Here, however, an initial application of immunity still allows for criminal prosecution preserving all remedies that might be sought in the first instance.

ARGUMENT

I. A President cannot be charged with a crime unless impeached by the House and convicted by the Senate.

Presidents are not immune from criminal prosecution. But constitutional safeguards and separation of powers preclude a criminal conviction of the President by the judicial branch without concurrence from the legislative branch. This concurrence occurs when a President is impeached by the House and convicted by the Senate.

While the Constitution's provision for criminal charges against a President after impeachment means that the President is not immune from criminal charges, the two-step process is a form of immunity when compared to ordinary criminal procedure. The foundations of this immunity go back at least to *Marbury v. Madison*, 5 U.S. 137 (1803), but were more recently elucidated in *Fitzgerald, supra*, 457 U.S. 731.

In *Fitzgerald*, this Court held that there is "absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id*. at 756. With this holding, the Court recognized that this does not mean that the President is "above the law" because there are alternative remedies and deterrents. *Id*. at 758.

Fitzgerald's reasoning extends to criminal charges because impeachment—and the criminal charges that may follow—not only deters misconduct but would also give criminal prosecutors the primary remedy they seek. Therefore, if Presidents are immune from prosecution prior to impeachment, then prosecution after impeachment is the exclusive means to charge them in connection with their official acts.

II. Presidential immunity applies to criminal charges prior to impeachment.

Immunity in this case presents differently than it did in *Fitzgerald*. In *Fitzgerald*, the plaintiff sought monetary damages to redress allegations that the President terminated his employment with the United States Air Force to retaliate against him for providing embarrassing testimony to Congress. 457 U.S. at 734-37.

To determine whether President Nixon was immune from civil liability in *Fitzgerald*, this Court balanced "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. In holding that the "special nature of the President's constitutional office and functions" require immunity from civil liability, this Court recognized that the rule "will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive." *Id*. at 756-57. This is because "alternative remedies and deterrents establish[] that absolute immunity will not place the President 'above the law'." *Id*. at 757-58.

A. Impeachment opens the door to the criminal remedy prosecutors seek.

Looking back to the *Fitzgerald* plaintiff, the alternative remedies that justified immunity would do nothing to compensate him for the damages associated with the wrongful termination. Impeachment, for example, would be a hollow victory because it would not pay him for his loss. Because neither impeachment nor any other alternative remedy can compensate civil plaintiffs, it may seem to them that the President is above the law even if that President suffers some other consequence for his or her misconduct.

In the criminal context, impeachment is the constitutional remedy because it expressly provides for criminal charges. U.S. Const., art. I, § 3, cl 7. Following an impeachment conviction by the Senate, the President could be removed from office and convicted of a crime. This is the exact remedy a prosecutor would seek. Therefore, when looking at *Fitzgerald* through a plaintiff's lens, the President is "above the law" in civil cases but not in criminal cases. Because *Fitzgerald* held that Presidential immunity does not mean that the President is "above the law" in civil cases, it follows naturally that such immunity must apply in criminal cases as well.

B. The importance of an independent executive branch tips *Fitzgerald*'s balancing test in favor of immunity.

This case exists because the Special Counsel does not like the path he must follow: impeachment then criminal charges.[2] The timing of his indictment and unreasonable speed at which he seeks trial suggests a political objective. This political objective frames the balancing test described below.

Putting it simply, the two sides of *Fitzgerald*'s balancing test are very important. On one side is the constitutional interest in holding a President accountable for alleged misconduct. 427 U.S. at 754. The other side considers the danger of intruding on the President's authority and executive branch functions. *Id*.

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[2] Indeed, because President Trump was acquitted in the Senate, there is no path to criminal charges. This is less about double jeopardy and more about the Special Prosecutor's failure to satisfy a requirement that might be described as a jurisdictional prerequisite.

Setting aside recognition that the constitutional interest in holding the President accountable for misconduct is the constitutional interest in criminal charges *after* impeachment, the danger of intruding on the President's authority and executive branch functions outweighs any other interest. This is true even if there are constitutional interests in addition to impeachment because the adequacy of impeachment as a remedy means that other constitutional interests may yield to preserving the President's independence.

The importance of preserving the President's independence can be seen in his duties, one of which is to "take Care that the Laws be faithfully executed."[3] With apparent indignation, the Special Counsel focuses on this duty and argues that this case is exceptionally important not just because he believes the President broke the law but more so because the allegedly illegal conduct breached this fundamental Presidential duty.

But this duty is more complex, especially at a macro level, because "the Laws"—whatever they are—are not clear. When it comes to executing the laws, the President has considerable discretion, the outer limits of which are often poorly defined.

When considering those limits, it is often reasonable for the executive to test them. Sometimes, when evaluating how or where to test those limits, it may be reasonable for the executive to consider ideas that some might believe to be absurd, if not illegal. This is foundational to the deliberative process and executive privileges that are intended to encourage candor in decision making. *See, e.g., U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 267 (2021).

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[3] U.S. CONST., art. II, § 3.

Here, the free flow of ideas is more important to the process than the specifics. There are limits, to be sure. But a brightline rule is impossible, and the limits should not be defined as a question of fact by one special prosecutor and 12 jurors. Instead, those limits should be evaluated by Congress in appropriate impeachment proceedings before there can be any possibility of criminal charges.

C. Whatever happens in the upcoming election is an alternative remedy that allows for Presidential immunity.

One of the alternative remedies *Fitzgerald* considered was the incentive to avoid misconduct out of a desire to earn reelection. 457 U.S. at 757. If an administration is able to weaponize the Department of Justice to pursue its opponents, the desire to earn reelection is an incentive that cuts both ways because the current President has a countervailing incentive to pursue an extra-constitutional prosecution of his predecessor (and current opponent) to bolster his own reelection prospects.

It is easy to see how a President-in-power might benefit from charging an adversary. Rather than submitting the question to Congress in the first instance, where the entire nation has a voice, he can submit the question to a secret grand jury and then submit the case to a trial jury comprised of 12 persons from one community.

This raises questions about venue and whether and where a President can get a fair trial. Rather than choosing a jury from one community, it might make sense to expand the jury pool to include the entire country. Setting aside logistical concerns, this starts to look like an election.

Consistent with the importance of the issues at hand, the facts underlying the Special Counsel's indictment have been discussed in the public domain *ad infinitum* for nearly three years. Despite that widespread discussion, or perhaps because of it, former President Trump is currently the leading candidate in the 2024 election.[4] The need to bump his boss in the polls might explain the Special Counsel's urgency.

More to the point, however, the political nature of these questions and the fact that they can only be fairly considered by a population that represents the country as a whole starts to suggest that the underlying questions are questions that should be resolved in the course of the political campaign that will be decided on November 5, 2024. This is consistent with *Fitzgerald*'s recognition that election prospects are an alternative remedy in situations where a President is immune from prosecution.

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[4] Shane Goldmacher, *Voters Doubt Biden's Leadership and Favor Trump, Times/Siena Poll Finds*, N.Y. Times, Mar. 2, 2024 (accessed from https://www.nytimes.com/2024/03/02/us/politics/biden-trump-times-siena-poll.html on Mar. 18, 2024).

CONCLUSION

The decisions below should be reversed, and the charges against former President Trump should be dismissed. Alternatively, the cause should be remanded to the District Court to determine whether the acts for which the President was charged were official acts within the outer perimeter of his official responsibility.

Respectfully submitted,

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