No. 23-939

In the Supreme Court of the United States

DONALD J. TRUMP, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

JACK L. SMITH
Special Counsel
J. P. COONEY
Deputy Special Counsel
MICHAEL R. DREEBEN
Counselor to the Special Counsel
Counsel of Record
JAMES I. PEARCE
Assistant Special Counsel

Department of Justice
950 Pennsylvania Ave. NW
Room B-206
Washington, D.C. 20530-0001
SCO_JLS_SupremeCtBriefs@usdoj.gov
(202) 305-9654

QUESTION PRESENTED

Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 1-62) is reported at 91 F.4th 1173. The opinion of the district court (J.A. 65-122) is not yet reported but is available at 2023 WL 8359833.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 2024. On February 28, 2024, this Court treated petitioner's application for a stay as a petition for a writ of certiorari and granted the petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).[1]

[1] Pursuant to 28 U.S.C. 518(a), and in accordance with 28 C.F.R. 600.4(a), 28 C.F.R. 600.7(a), and Attorney General Order No. 5559-2022 (Nov. 18, 2022), the Special Counsel has been authorized to conduct litigation before this Court on behalf of the United States in this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. From January 2017 until January 2021, petitioner was President of the United States. According to a federal grand jury indictment, petitioner, while serving as President, conspired with several private individuals and a public official to "overturn the legitimate results of the 2020 presidential election by using knowingly false claims of election fraud to obstruct the federal government function by which those results are collected, counted, and certified." J.A. 180-181, 183-184. The indictment alleges that petitioner sought to accomplish the conspiracy's objectives through five means: using deceit toward state officials to subvert the legitimate election results in those States, J.A. 192-207; using deceit to organize fraudulent slates of electors in seven targeted States and cause them to send false certificates to Congress, J.A. 208-215; leveraging the Department of Justice (DOJ) to use deceit to have state officials replace the legitimate electoral slate with electors who would cast their votes for petitioner, J.A. 215-220; attempting to enlist the Vice President, in his capacity as President of the Senate, to fraudulently alter the election results during the certification proceeding on January 6, 2021, and directing supporters to the United States Capitol to obstruct the proceeding, J.A. 220-230; and exploiting the violence and chaos that transpired at the Capitol on January 6, 2021, J.A. 230-235.

Based on those allegations, Count 1 charges petitioner with conspiring to defraud the United States, in

violation of 18 U.S.C. 371. J.A. 180-235. Counts 2 and 3 charge petitioner with conspiracy and substantive violations of 18 U.S.C. 1512(c)(2) for corruptly obstructing the certification of the presidential election results on January 6, 2021. J.A. 235-236. Count 4 charges petitioner with conspiring to violate one or more person's constitutional right to vote and have one's vote counted, in violation of 18 U.S.C. 241. J.A. 236.

2. Petitioner moved to dismiss the indictment on the grounds, *inter alia*, that he enjoys absolute immunity from criminal prosecution for acts taken within the "outer perimeter" of his official responsibilities and that the indictment's allegations all fall within that scope. The district court denied petitioner's presidential-immunity claim and a related double-jeopardy claim.[2] J.A. 71-101, 110-117. The court explained that the Constitution's text, structure, and history support the conclusion that petitioner "may be subject to federal investigation, indictment, prosecution, conviction, and punishment for any criminal acts undertaken while in office." J.A. 71.

The court of appeals affirmed. The court explained that "any executive immunity that may have protected [petitioner] while he served as President no longer protects him against this prosecution." J.A. 3. The court observed that petitioner's "alleged efforts to remain in power despite losing the 2020 election were, if proven, an unprecedented assault on the structure of our government," and it rejected petitioner's "claim that a President has unbounded authority to commit crimes that would neutralize the most fundamental check on executive power—the recognition and implementation

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[2] The district court also denied petitioner's motion to dismiss raising claims under the First Amendment, J.A. 101-110, and the Fifth Amendment's Due Process Clause, J.A. 117-122.

of election results." J.A. 42-43. To the contrary, the court stated, beyond the general reasons for rejecting petitioner's categorical immunity claim, the charges here "implicate the Article II interests in vesting authority in a new President and the citizenry's interest in democratically selecting its President." J.A. 40. After analyzing constitutional text, structure, and history, the court of appeals concluded that the considerations identified by this Court in assessing presidential-immunity claims "compel the rejection of his claim of immunity in this case." J.A. 61.

SUMMARY OF ARGUMENT

I. A former President lacks absolute immunity from federal criminal prosecution for conduct involving his official acts.

A. Petitioner asserts a novel and sweeping immunity from the federal criminal laws that govern all citizens' conduct. Under this Court's established separation-of-powers framework, a claim of presidential exemption from a statutory limitation requires the President to identify an Article II basis that precludes the application of that congressional act. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring). No presidential power at issue in this case entitles the President to claim immunity from the general federal criminal prohibitions supporting the charges: fraud against the United States, obstruction of official proceedings, and denial of the right to vote. The President's constitutional duty to take care that the laws be faithfully executed does not entail a general right to violate them.

B. History likewise refutes petitioner's claim. The Framers never endorsed criminal immunity for a former President, and all Presidents from the Founding to

the modern era have known that after leaving office they faced potential criminal liability for official acts. The closest historical analogue is President Nixon's official conduct in Watergate, and his acceptance of a pardon implied his and President Ford's recognition that a former President was subject to prosecution. Since Watergate, the Department of Justice has held the view that a former President may face criminal prosecution, and Independent and Special Counsels have operated from that same understanding. Until petitioner's arguments in this case, so had former Presidents.

C. The Court's holding in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), that a President enjoys immunity from private civil damages actions does not extend to federal criminal prosecutions. This case involves the far weightier interest in vindicating federal criminal law in a prosecution brought by the Executive Branch itself. That was not true in *Fitzgerald.* On the other side of the ledger, while the *Fitzgerald* Court was concerned about the potential that a multiplicity of private civil actions would chill a President's decisions, the same concerns are not present in the criminal context. A criminal prosecution must be brought by the Executive, with strong institutional checks to ensure evenhanded and impartial enforcement of the law; a grand jury must find that an indictment is justified; the government must make its case and meet its burden of proof in a public trial; and the courts enforce due process protections to guard against politically motivated prosecutions. Collectively, these layered safeguards provide assurance that prosecutions will be screened under rigorous standards and that no President need be chilled in fulfilling his responsibilities by the understanding that he is subject to prosecution if he commits federal crimes.

D. Federal criminal law applies to the President. Petitioner suggests that unless a criminal statute expressly names the President, the statute does not apply. That radical suggestion, which would free the President from virtually all criminal law—even crimes such as bribery, murder, treason, and sedition—is unfounded. That rule finds no support in this Court's decisions. Nor is it supported by opinions of the Department of Justice, which have instead construed statutes to apply to the President unless doing so creates a serious risk of infringing the President's constitutional powers. That more modest interpretive principle has no application to the crimes charged here, which pose no risk of unconstitutionally regulating the President's conduct. Ample other safeguards protect legitimate presidential interests: for instance, the established public-authority exemption of certain official conduct from the criminal law, narrowing constructions of statutes to avoid serious constitutional questions, and, as a backstop, as-applied constitutional challenges.

E. The Impeachment Judgment Clause, U.S. Const. Art. I, § 3, Cl. 7, does not establish a rule requiring a President's impeachment and conviction before a former President may be prosecuted. The text of the clause clarifies that an impeached and convicted President may nevertheless be prosecuted and thus expressly recognizes that former Presidents are subject to federal criminal prosecution. Petitioner acknowledges that prosecution is permitted after impeachment and conviction, which refutes many of the other arguments in his brief. And text, structure, and history contradict petitioner's assertion that the Impeachment Judgment Clause implicitly makes Senate conviction a condition precedent to prosecution. Impeachment is an

inherently political process, not intended to provide accountability under the ordinary course of the law. Criminal prosecution, in contrast, is based on facts and law, and is rigorously adjudicated in court. Adopting petitioner's position would thwart the ordinary application of criminal law simply because Congress, in administering the political process of impeachment, did not see fit to impeach or convict.

F. Likewise, neither *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), nor petitioner's other remaining arguments support his claim. *Marbury* did not hold that a President's official acts can never be examined in a court, and a host of cases from the Founding to the present refute that claim. The cases on which petitioner relies stand for the distinct and narrower proposition that courts will not enjoin a *sitting* President. That principle has no application to criminal prosecution of a *former* President.

The absence of any prosecutions of former Presidents until this case does not reflect the understanding that Presidents are immune from criminal liability; it instead underscores the unprecedented nature of petitioner's alleged conduct. And none of the dissimilar historical examples on which petitioner relies suggests otherwise.

Petitioner's reliance on common-law immunity principles fares no better. The established rule for judges and prosecutors—that they may claim civil immunity for official acts but lack any corresponding criminal immunity—applies equally to former Presidents. By contrast, neither constitutional text nor historical practice supports applying anything akin to legislative immunity to Presidents.

II. Even if this Court holds that a former President is entitled to some immunity from criminal prosecution for official acts, that principle does not preclude trial on this indictment.

First, the specific form of criminal conduct charged here—efforts to subvert an election in violation of the term-of-office clause of Article II and the constitutional process for electing the President—does not justify any form of immunity. Second, the private conduct that the indictment alleges is sufficient to support the charges. Thus, even if liability could not be premised on official acts, the case should be remanded for trial, with the district court to make evidentiary and instructional rulings in accordance with this Court's decision. Petitioner could seek appellate review of those rulings, if necessary, following final judgment.

ARGUMENT

This case implicates two principles of paramount importance: the necessity of the effective functioning of the Presidency, and the equally compelling necessity of upholding the rule of law. Petitioner is charged with crimes that, if proved at trial, reflect "an unprecedented assault on the structure of our government." J.A. 42. The effective functioning of the Presidency does not require that a former President be immune from accountability for these alleged violations of federal criminal law. To the contrary, a bedrock principle of our constitutional order is that no person is above the law—including the President. Nothing in constitutional text, history, precedent, or policy considerations supports the absolute immunity that petitioner seeks.

I. A FORMER PRESIDENT LACKS IMMUNITY FROM FEDERAL CRIMINAL PROSECUTION FOR OFFICIAL ACTS DURING HIS PRESIDENCY

As the Department of Justice has long recognized, the separation of powers precludes the criminal prosecution of a *sitting* President. See *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (2000) (*Amenability to Indictment*). Such a prosecution—whether for personal or official misconduct—would impermissibly interfere with the proper functioning of the Executive Branch. But the same concerns do not apply to prosecution of a *former* President. Rather, a former President is subject to federal criminal prosecution for personal and official acts that violate valid criminal laws.

The President, of course, "occupies a unique position in the constitutional scheme." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982). The Constitution vests the "executive Power" in the President, *ibid.* (quoting U.S. Const. Art. II, § 1), and entrusts him with supervisory and policy duties "of utmost discretion and sensitivity," including matters of national security and foreign affairs, *id.* at 750. The President is "the only person who alone composes a branch of government." *Trump* v. *Mazars USA, LLP*, 591 U.S. 848, 868 (2020). The Presidency, however, exists within a framework of separated powers in which Congress makes laws, U.S. Const. Art. I; the President "shall take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3; and the Article III courts exercise the judicial power to "say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)—a power that generally includes "the authority to determine" whether a

President's "official action[s]" are "within the law," *Clinton* v. *Jones*, 520 U.S. 681, 703 (1997).

If petitioner were correct that the former President has permanent immunity from federal criminal prosecution except after his impeachment and Senate conviction—which has never happened—it would upset the separation of powers and usher in a regime that would have been anathema to the Framers. The Framers had experienced firsthand the dangers of a monarch who was above the law, and they adopted a system of checks and balances to avoid those dangers. They designed a Constitution that would ensure an effective and energetic President under Article II—but one who was accountable to justice under laws passed by Congress under Article I, enforced by the Executive Branch under Article II, and adjudicated by the courts under Article III. That careful design leaves no room for an implicit and previously unrecognized rule categorically immunizing the President from accountability for criminal conduct involving the misuse of his office.

A. A Claim Of Absolute Criminal Immunity For A Former President's Official Acts Violates Established Separation-Of-Powers Principles

1. Petitioner asks this Court to create a doctrine of absolute criminal immunity, under which duly enacted federal criminal statutes cannot be enforced against a former President based on conduct involving official acts, unless he has been impeached and convicted by the Senate for the same conduct. Pet. Br. 6, 22. Petitioner therefore asserts a new presidential power to be free of congressional commands in criminal statutes in virtually all circumstances. This Court analyzes "claims of Presidential power" under the tripartite framework set out in Justice Jackson's concurrence in *Youngstown*

Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579, 635-638 (1952). *Zivotofsky* v. *Kerry*, 576 U.S. 1, 10 (2015); see, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 661-662, 669 (1981).

Under that framework, the President's power is at its height when he "acts pursuant to an express or implied authorization of Congress." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Where Congress has not expressly legislated on a matter, a "zone of twilight" exists "in which [the President] and Congress may have concurrent authority." *Id.* at 637. And where "the President takes measures incompatible with the express or implied will of Congress," his power is "at its lowest ebb." *Ibid.* In that third category, the President can prevail only when he asserts an Article II power "so conclusive and preclusive" as to "disabl[e] the Congress from acting upon the subject." *Id.* at 637-638; see *Zivotofsky*, 576 U.S. at 10.

That principle flows from the Constitution itself: Article II, § 3, requires the President to "faithfully execute[]" valid laws made by Congress under its Article I authority. Congress, of course, may act beyond its constitutional authority, and an Act of Congress may trench on an Article II power "that Congress may not qualify." *Zivotofsky*, 576 U.S. at 17. This Court has held, for example, that Congress may not constrain the President's power to recognize foreign countries, *id.* at 16; to grant pardons, see *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 147-148 (1872); or to remove at will a principal officer who leads an executive agency headed by a single director, *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2192 (2020). More generally, the Court has recognized that a statute may not validly "prevent the Executive Branch from accomplishing its constitutionally

assigned functions." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (*GSA*). But in other cases, the Court has rejected a claim of presidential power when it contravenes Congress's express enactments and so falls within *Youngstown*'s third category. See, *e.g.*, *Medellin* v. *Texas*, 552 U.S. 491, 527 (2008); *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 639 (2006); *Youngstown*, 343 U.S. at 587-589 (majority opinion).

2. In claiming here that the Constitution prevents all federal criminal statutes from applying to a President's official acts, petitioner does not purport to identify any "exclusive" and "preclusive" power that would justify such an exemption. *Youngstown*, 343 U.S. at 637-638 (Jackson, J., concurring). Nor could he. The Framers did not provide any explicit textual source of immunity to the President. "The text of the Constitution explicitly addresses the privileges of some federal officials, but it does not afford the President absolute immunity." J.A. 47 (quoting *Trump* v. *Vance*, 591 U.S. 786, 816 (2020) (Thomas, J., dissenting)). And while the absence of constitutional text does not foreclose petitioner's immunity claim, see *United States* v. *Nixon*, 418 U.S. 683, 705-706 n.16, 711 (1974), the Constitution's structure presupposes a government under law, not an absolute shield that places the President above the criminal law unless he is first impeached and convicted.

Recognition of petitioner's immunity claim would prevent Congress from applying the criminal laws equally to all persons—including the President. His immunity claim thus contradicts bedrock principles by placing the President "above the law." *United States* v. *Lee*, 106 U.S. 196, 220 (1882); see also *Vance*, 591 U.S. at 812 (Kavanaugh, J., concurring in the judgment) (observing that the principle that no one is above the law

"applies, of course, to a President"). Petitioner's allusion (Br. 35-37) to alternative remedies for official misconduct does not avoid the necessary result of his argument: a constitutional exemption for the President from the criminal laws that govern everyone else.

The criminal prohibitions at issue here illustrate that point: they proscribe a conspiracy to defraud the United States by defeating its lawful functions, 18 U.S.C. 371; substantive and conspiratorial efforts to obstruct official proceedings, 18 U.S.C. 1512(c)(2); and a conspiracy to "injure [or] oppress * * * the free exercise or enjoyment" of any citizen's constitutional rights, 18 U.S.C. 241. Petitioner has not argued—and could not plausibly argue—that the Constitution vests the President with authority to perform the conduct prohibited by those statutes, or that the President would be unable to fulfill his constitutionally assigned role if he were prosecuted for such inherently culpable conduct. Yet petitioner's immunity claim would not only exempt the President from those statutes; it would free him from federal criminal accountability for any and every crime committed through official acts absent impeachment and conviction. Article II does not require that result, and it is therefore foreclosed by the fundamental separation-of-powers principle that the President is bound by valid statutes unless the Constitution exempts him. See *United States* v. *Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807).

B. History Supports The Conclusion That Former Presidents Are Subject To Prosecution For Official Acts

History also forecloses petitioner's claim that the Constitution grants a former President absolute immunity from criminal prosecution. Since the Founding, every President has known that he could be impeached

and separately "subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. Const. Art. I, § 3, Cl. 7. Even under petitioner's view, Presidents have faced the prospect of impeachment followed by prosecution throughout our Nation's history, and it has never been thought to deter a President's "bold and unhesitating action." *Fitzgerald*, 457 U.S. at 745.

1. The Framers' most relevant writings provide no support for immunity of the type that petitioner claims. "James Wilson, a signer of the Constitution and future Justice of this Court, explained to his fellow Pennsylvanians that 'far from being above the laws, [the President] is amenable to them in his private character as a citizen, and in his public character by *impeachment*.'" *Vance*, 591 U.S. at 816-817 (Thomas, J., dissenting) (quoting 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (J. Elliot ed. 1891) (*Debates on the Constitution*)). Wilson therefore recognized that prosecution was the means of holding a President accountable in his "private character" for criminal acts, while impeachment was the means of addressing his "public character" as office holder. "James Iredell, another future Justice, observed in the North Carolina ratifying convention that '[i]f [the President] commits any crime, he is punishable by the laws of his country.'" *Id.* at 817 (Thomas, J., dissenting) (quoting 4 *Debates on the Constitution* 109). Alexander Hamilton likewise confirmed that a President, unlike a King, would be "liable to prosecution and punishment in the ordinary course of law." *The Federalist* No. 65, at 442; see *id.* at No. 69, at 463; *id.* at No. 77, at 520-521 (noting that the President is "at all times liable to impeachment, trial, [and] dismission from

office" as well as "forfeiture of life and estate by subsequent prosecution in the common course of law").

2. The events of Watergate similarly reflect a broad understanding that a former President may be prosecuted for official acts. During Watergate, President Nixon was an unindicted co-conspirator in a prosecution charging White House officials with conspiracy to defraud the United States and to obstruct justice. *Nixon*, 418 U.S. at 687 n.2; see *Vance*, 591 U.S. at 804 (recognizing that President Nixon was "under investigation" in Watergate). Those charges were proved by evidence of a range of acts taken to achieve an unlawful objective, including the abuse of presidential power as a means of carrying out the conspiracy. See *United States* v. *Haldeman*, 559 F.2d 31, 121-122 (D.C. Cir. 1976) (en banc) (per curiam) (describing use of the CIA to obstruct the FBI's investigation of the Watergate burglary), cert. denied, 431 U.S. 933, and 431 U.S. 933 (1977). President Nixon resigned after release of the tape revealing his misuse of the CIA, yet no one suggested that he was immune from federal prosecution once no longer in office. See, *e.g.*, Philip B. Kurland, *Watergate and the Constitution* 135-136 (1978) (concluding that a sitting President "must be immune from prosecution," but that "there should be no doubt that a removed or retired or resigned President is vulnerable to the criminal process").

To the contrary, President Ford's pardon of former President Nixon, and his acceptance, rested on the understanding that the former President faced potential criminal liability. See Gerald R. Ford, Presidential Statement at 8 (Sept. 8, 1974) (granting former President Nixon a "full, free, and absolute pardon * * * for all offenses against the United States which he * * *

has committed or may have committed or taken part in during" his Presidency);[3] Richard Nixon, Statement by Former President Richard Nixon at 1 (Sept. 8, 1974) (accepting "full and absolute pardon for any charges which might be brought against me for actions taken during the time I was President of the United States").[4] Both men were aware of and relied on this Court's statement in *Burdick* v. *United States*, 236 U.S. 79 (1915), that acceptance of a pardon represents a "confession of guilt," *id.* at 91.[5]

During the Watergate era, DOJ rejected as "unreasonable" the claim that "an offending federal officer acquires a lifetime immunity against indictment unless the Congress takes time to impeach him." *Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* 4-5 (1973). And former President Nixon, despite his capacious view of presidential privileges, acknowledged that a President may "be indicted after he leaves office at the end of his term or after being 'convicted' by the Senate in an impeachment proceeding." Resp. Br. at 98, *United States* v. *Nixon*, Nos. 73-1766 and 73-1834 (June 21, 1974). DOJ reiterated that position in 2000. *Amenability to Indictment*, 24 Op. O.L.C. at 255.

3. Subsequent investigations by Independent and Special Counsels have taken as a given that a former President can be prosecuted for official acts. For

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[3] https://www.fordlibrarymuseum.gov/library/document/0067/1563096.pdf.

[4] https://www.fordlibrarymuseum.gov/library/document/0019/4520706.pdf.

[5] Staff of the National Constitution Center, *The Nixon pardon in constitutional retrospect* (Sept. 18, 2023), https://constitutioncenter.org/blog/the-nixon-pardon-in-retrospect.

instance, the Independent Counsel investigating the Iran/Contra affair recognized that "a past President" can be "subject to prosecution in appropriate cases" and so reviewed "the conduct of President Reagan in the Iran/contra matter * * * against the applicable statutes," ultimately concluding "that President Reagan's conduct fell well short of criminality which could be successfully prosecuted."[6] But no President before or since suggested that the prospect of criminal exposure had a chilling effect. And not until petitioner's briefs in this case has a *former* President suggested that the Constitution affords him criminal immunity.

Reflecting the same presupposition that a former President may face prosecution, arguments for a sitting President's temporary immunity from criminal prosecution typically include or advocate offsetting rules, such as tolling or extending the statute of limitations, to ensure that temporary immunity does not place a President above the law. See, *e.g.*, *Amenability to Indictment*, 24 Op. O.L.C. at 255-256 & nn.33-34; Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1462 & n.32 (2009); Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2-SPG NEXUS 11, 16 (1997). Absent from these writings is any claim that former Presidents have absolute, lifelong immunity from prosecution. The absence of any such absolute-immunity claim throughout our history weighs heavily against its novel recognition now. See *Trump* v. *Anderson*, 601 U.S. 100, 113-114 (2024) (per curiam).

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[6] 1 Lawrence E. Walsh, *Final Report Of The Independent Counsel For Iran/Contra Matters: Investigations and Prosecutions*, Chap. 27 (1993), https://irp.fas.org/offdocs/walsh/chap_ 27.htm.

C. Criminal Immunity For A Former President Enjoys No Support From *Fitzgerald*'s Recognition Of Civil Immunity

Petitioner argues (Br. 7, 25-29) that *Fitzgerald* supports his claim of absolute immunity from criminal prosecution. That is incorrect. In *Fitzgerald*, this Court held that a former President is immune from a civil damages suit based on official acts within the outer perimeter of presidential responsibility. 457 U.S. at 749, 755-757. The Court explained that a private citizen's interest in recovering damages was outweighed by the burden on the Presidency posed by the threat of scores of civil suits brought by people affected by presidential decisions. *Id.* at 752-754. The Court thus held that immunity from civil liability under otherwise valid laws is a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of separation of powers." *Id.* at 749. In other words, the Court deemed such immunity to be required by Article II because private damages suits would prevent the President from "accomplishing [his] assigned functions." *GSA*, 433 U.S. at 443.

Applying *Fitzgerald*'s reasoning in this context, however, leads to the opposite result: Article II does not grant a former President absolute *criminal* immunity because the calculus on each side of the scales fundamentally differs. The interest in enforcement of federal criminal laws is far weightier than the private damages claim at issue in *Fitzgerald*. And the many safeguards against unfounded federal prosecutions refute petitioner's argument that the Constitution requires an absolute bar against federal prosecution of a former President.

1. The interest in applying federal criminal law to all persons is compelling

The charges in this case, alleging a President's crimes to overturn an election and perpetuate himself in power, illustrate the compelling public interest in enforcing the criminal law. The "commitment to the rule of law * * * is nowhere more profoundly manifest" than in criminal justice. *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 384 (2004) (citation omitted). Indeed, "the primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions." *Nixon*, 418 U.S. at 707. Accordingly, *Fitzgerald* emphasized that "there is a lesser public interest in actions for civil damages" than "in criminal prosecutions." 457 U.S. at 754 n.37. And although the Court declined to approve the "exercise of jurisdiction over the President" in a case involving a "merely private suit for damages," it acknowledged that "the exercise of jurisdiction [over the President] has been held warranted" in order to "vindicate the public interest in an ongoing criminal prosecution." *Id.* at 754 & n.37 (citing *Nixon*, 418 U.S. 683 (1974)).

This case also involves a countervailing Article II consideration absent in *Fitzgerald*: petitioner's immunity claim would frustrate the Executive Branch's enforcement of the criminal law. In *Fitzgerald*, all the relevant Executive Branch interests counseled in favor of recognizing immunity from private civil suits—there, based on implied rights of action. See 457 U.S. at 740 & n.20. A federal prosecution, in contrast, implicates the President's constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3; see *Morrison* v. *Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) (The "investigation and prosecution of crimes is a quintessentially executive function.").

The Attorney General and federal prosecutors help fulfill that constitutional function. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). Allowing a former President to assert absolute immunity from applicable criminal laws would frustrate the Executive's constitutional authority and responsibility to enforce those laws. See *United States* v. *Texas*, 599 U.S. 670, 678-679 (2023). "It would be a striking paradox if the President, who alone is vested with the constitutional duty to 'take Care that the Laws be faithfully executed,' were the sole officer capable of defying those laws with impunity." J.A. 39.

2. Robust safeguards protect against the risk of improper prosecutions

The interests on the other side of the scales also weigh against criminal immunity because the possibility of federal criminal prosecution after a President leaves office imposes a much lesser burden on the Executive Branch than the private civil suits at issue in *Fitzgerald*. *Fitzgerald* reasoned that "highly intrusive" private lawsuits from "countless people" directed at a former President, "an easily identifiable target," would chill the President's conduct and render him "unduly cautious in the discharge of his official duties." 457 U.S. at 752 n.32, 753, 756. Those concerns do not translate to the federal criminal context. All federal prosecutions must originate in the Executive Branch itself, acting through DOJ. Institutional standards of impartial prosecution are embedded in longstanding DOJ norms set forth in Department policy. The grand jury provides a further independent check against abusive prosecutions, and a trial unfolds in public within the systemic constraints of the adversary criminal justice system. Finally, Article III courts—including this Court—ensure that any

prosecution of a former President stays within constitutional limits.

a. The Executive Branch and the criminal justice system contain strong safeguards against groundless prosecutions. Congress has vested in the Attorney General "the power to conduct the criminal litigation of the United States Government," *Nixon*, 418 U.S. at 694, and DOJ has a longstanding commitment to the impartial enforcement of the law. See Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18 (1940). DOJ's standards and institutional structures reinforce those values: federal prosecutors are required to make prosecution decisions based on the facts and the law, see U.S. Dep't of Justice, *Justice Manual* § 9-27.000 (Principles of Federal Prosecution), https://www.justice.gov/jm/justice-manual; and they may not consider, *inter alia*, a potential defendant's "political associations, activities, or beliefs," *id.* § 9-27.260; see also *id.* § 1-8.100 ("The rule of law depends upon the even-handed administration of justice. The legal judgments of the Department of Justice must be impartial and insulated from political influence."). This Court has explained that, based on long experience, absent "clear evidence to the contrary, courts presume that [federal prosecutors] have properly discharged their official duties." *Armstrong*, 517 U.S. at 464 (citation omitted).[7]

The criminal justice system provides further safeguards. Federal felony indictments must be returned by the grand jury, see U.S. Const. Amend. V, which is "'a constitutional fixture in its own right'" and "serv[es]

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[7] Reliance on Special Counsels in sensitive matters provides further safeguards by balancing independence in day-to-day prosecutorial decisionmaking with ultimate accountability in the Attorney General. See 64 Fed. Reg. 37,038 (July 9, 1999).

as a kind of buffer or referee between the Government and the people." *United States* v. *Williams*, 504 U.S. 36, 47 (1992) (citation omitted). Grand juries are "prohibited from engaging in arbitrary fishing expeditions and initiating investigations out of malice or an intent to harass." *Vance*, 591 U.S. at 805 (citation omitted).

Prosecutions are also subject to public scrutiny and rigorous protections for a defendant's rights. The accused is guaranteed a fair trial, with an array of procedural rights. U.S. Const. Amend. VI. And the government bears the burden to prove its allegations beyond a reasonable doubt to a unanimous jury, *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995), which guards against abusive, unfounded prosecutions. These established safeguards sharply contrast with the potential barrage of unscreened private damages actions that concerned the *Fitzgerald* Court. Cf. *Cheney*, 542 U.S. at 386 (contrasting the criminal justice system's protections "to filter out insubstantial legal claims" with the absence of "analogous checks" in civil litigation).[8]

b. Article III courts—including this Court—provide the ultimate check against potentially abusive prosecutions of former Presidents. Politically motivated prosecutions violate the Constitution, see *Wayte* v. *United States*, 470 U.S. 598, 608 (1985), and courts will review a former President's claims "meticulous[ly]," *Vance*, 591 U.S. at 809 (quoting *Nixon*, 418 U.S. at 702). The

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[8] Petitioner's suggestion that a former President would be at the mercy of "2,300 district attorneys," Pet. Br. 26 (citation omitted), is unfounded. The Supremacy Clause, U.S. Const. Art. VI, Cl. 2, prevents state prosecutors "from interfering with a President's official duties." *Vance*, 591 U.S. at 806; see *In re Neagle*, 135 U.S. 1 (1890). Rejecting petitioner's claim of immunity from federal prosecution would not displace those protections.

groundless threats of politically motivated prosecution that petitioner fears (Br. 6-7, 33-35) would not survive such review.

Courts will also enforce the due process principle that a criminal statute must provide "a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U.S. 285, 304 (2008); see *United States* v. *Lanier*, 520 U.S. 259 (1997). If a former President lacked fair warning that his official acts would violate a criminal prohibition, a court would dismiss a prosecution on due process grounds.[9] Here, the district court correctly rejected petitioner's due process challenge to the charged statutes, J.A. 121-122, but those requirements would protect a former President if a case arose in which he lacked fair notice.[10]

Together, these layers of familiar safeguards refute petitioner's contention (Br. 3) that without his novel absolute immunity claim, "[t]he President cannot function,

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[9] That due process requirement, and the many other safeguards that apply in a criminal prosecution, render it unnecessary and inappropriate to import the qualified immunity that applies in civil damages actions into the criminal context. Cf. Pet. Br. 46-47.

[10] Petitioner asserts (Br. 39 n.4) that the grant of review in *Fischer* v. *United States*, No. 23-5572 (oral argument scheduled for Apr. 16, 2024), suggests that the Section 1512(c)(2) charges here impermissibly stretch the statute. But whether the Court interprets Section 1512(c)(2) consistently with a natural reading of its text or adopts the evidence-impairment gloss urged by the petitioner in *Fischer*, the Section 1512 charges in this case are valid. J.A. 208-215, 220-221 (describing efforts to use fraudulent electoral certifications rather than genuine ones at the Joint Session); see Merits Reply Br. at 9-10, *Fischer*, *supra* (acknowledging that the use of falsehoods or creation of "false" documents satisfies an evidence-impairment interpretation).

and the Presidency itself cannot retain its vital independence."

* * *

Because a greater interest exists in vindicating the public's interest in enforcement of the criminal laws—by Executive officials vested by law with that singular public responsibility—than in permitting private individuals to pursue tort suits, and because greater protections exist for a former President in the criminal context, *Fitzgerald*'s reasoning does not support petitioner's claim of absolute immunity from criminal prosecution. Congress remains free, however, to "respond with appropriate legislation" if it "deems it appropriate to afford the President stronger protection" from liability. *Clinton*, 520 U.S. at 709.

D. Federal Criminal Law Applies To The President

Petitioner's opening brief in this Court asserts, for the first time in this litigation, that "the doctrine of immunity" requires courts to interpret criminal laws to exempt the President unless he is expressly named. Pet. Br. 40; see *id.* at 37-40. That claim finds no basis in text, congressional intent, this Court's precedents, or Office of Legal Counsel (OLC) opinions. And existing principles of statutory construction, as well as the availability of as-applied constitutional challenges, ensure that federal criminal statutes do not impede the President's ability to carry out his constitutionally assigned duties.

1. The express text of nearly all federal criminal laws covers all persons, including the President. The statutes under which petitioner has been indicted are illustrative. They use the terms "[w]hoever" and "person[]" to describe their coverage. See 18 U.S.C. 1512(c) ("whoever"); 18 U.S.C. 241, 371 ("two or more persons"). Both terms naturally include individuals who

occupy government offices such as the Presidency. See *Nardone* v. *United States*, 302 U.S. 379, 381-384 (1937) (holding that the term "any person" in a statute barring wiretapping includes federal agents because "the sovereign is embraced by general words of a statute intended to prevent injury and wrong"). And another provision of the criminal law, 18 U.S.C. 202(c), demonstrates that Congress knows how to exclude the President from a broadly defined term when it wishes to do so. That statute provides that the terms "'officer' and 'employee'" in five specific statutes "shall not include the *President*, the Vice President, a Member of Congress, or a Federal judge." *Ibid.* (emphasis added).

No evidence exists that Congress intended courts to graft an extra-textual exception for the President into all the other federal criminal laws in which he is not specifically named. Only two criminal statutes would appear to remain applicable to the President under that rule. One prohibits a "covered government person" from taking an "official act" to influence private employment decisions, and then defines a "'covered government person'" to include members of Congress and "the President, Vice President," and "executive branch employee[s]." 18 U.S.C. 227. The other includes the President as one of the officials who is barred from soliciting or receiving campaign funds "in any room or building occupied in the discharge of official duties." 18 U.S.C. 607(a)(1).

It is implausible that Congress intended for the President to face criminal sanctions for influencing private employment or accepting campaign contributions in federal buildings, while exempting him from every other federal criminal statute, including those barring bribery, murder, treason, and seditious conspiracy—

none of which mentions the President. See 18 U.S.C. 201, 1111, 2381, 2384. And accepting petitioner's understanding of federal criminal law would render hollow his concession (Br. 16-22) that the President may face criminal prosecution after impeachment and conviction. Under petitioner's rule, scarcely any laws would allow such a prosecution to proceed.

2. Petitioner errs in asserting (Br. 37-38) that his statutory-construction argument finds support in this Court's decisions or OLC's opinions. To the contrary, those sources recognize a more tailored principle of statutory construction that comes into play only when the application of a particular statute presents a serious risk of infringing the constitutional powers of the Executive Branch.

a. This Court has twice construed terms in a statute to avoid such a risk. In *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440 (1989), the Court interpreted the term "utilized" in the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (5 U.S.C. App. 1 *et seq.* (1982)), to exclude a particular application of the statute that would have created "formidable constitutional difficulties" by intruding upon the "President's prerogative under Article II to nominate and appoint officers of the United States." 491 U.S. at 443, 466-467. And in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), the Court construed the term "agency" in the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, to exclude the President to avoid the serious separation-of-powers questions that would have arisen if the APA's judicial review provisions were understood to permit Article III courts to review "the President's performance of his statutory duties" for "abuse of discretion." 505 U.S. at 800-801.

Neither decision supports reading an implied exception for the President into every criminal statute that does not name him. Rather, in both cases, the Court responded to a specific and serious separation-of-powers concern raised by the statute—in *Public Citizen*, the threat of intrusion on the President's Appointment Clause power, and in *Franklin*, the risk that the Judicial Branch would be allowed to second-guess the President's policy decisions. And in both cases the Court adopted a targeted solution that avoided the problem while hewing as closely as possible to the statutory text. Thus, in *Public Citizen*, the Court interpreted the term "utilize" to exclude a specific application to a presidential advisory committee involved in judicial nominations, while recognizing that the statute continued to apply to other presidential advisory committees. And in *Franklin*, the Court's interpretation of the term "agency" to exclude the President was in keeping with the ordinary meaning of the term "agency," which connotes a government entity, not an individual.

b. OLC has distilled from these decisions a "clear statement principle" that interprets general statutes that do not expressly refer to the President not to reach him where "doing so would raise a serious question under the separation of powers." *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 354, 357 (1995) (*Application of Section 458*). But that principle cannot justify the blanket presidential exception from the criminal law that petitioner seeks because—as OLC has explained—many applications of the criminal law to the President do not implicate separation-of-powers concerns, much less "serious" ones. *Id.* at 351.

Thus, OLC has observed that the clear statement principle "does not apply" to 18 U.S.C. 201, the primary federal bribery law, explaining that applying Section 201 to the President "raises no separation of powers question, let alone a serious one" because "[t]he Constitution confers no power in the President to receive bribes." *Application of Section 458*, 19 Op. O.L.C. at 357 n.11; see *United States* v. *Sun-Diamond Growers*, 526 U.S. 398, 407-408 (1999) (discussing the application of Section 201's bar on illegal gratuities to the President's conduct as a reason for a limiting construction). The same reasoning applies to the statutes charged here.

Further, where OLC has found that particular applications of a criminal law to the President raise serious separation-of-powers concerns, it has construed the statute to exempt those particular applications, rather than exempting the President from the law altogether. For example, OLC has concluded that "serious constitutional problems" support a broad interpretation of an exception to the criminal anti-lobbying statute to cover most forms of routine communication by the President and his direct subordinates. *Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts*, 13 Op. O.L.C. 300, 305 (1989). But OLC has "caution[ed]" those officials "against" engaging in the grassroots lobbying that is at the heart of the statutory prohibition. *Id.* at 303 n.5. Similarly, when OLC determined that it would create serious separation-of-powers concerns to apply the criminal contempt-of-Congress statute to an official asserting executive privilege on the President's behalf, OLC did not conclude that the President or any other Executive Branch official is entirely excluded from the statute, instead finding that the statute does not "apply

to Presidential assertions of executive privilege." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 129 (May 30, 1984).

And to the extent OLC would construe a criminal statute to exempt the President altogether, such a decision would be based on a conclusion that most or all of the statute's core applications to the President would present serious separation-of-powers concerns. See Memorandum from Laurence H. Silberman, Deputy Att'y Gen., to Richard T. Burress, Office of the President, *Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution* 2, 5 (Aug. 28, 1974) (finding that the text and legislative history permitted construing a criminal conflict-of-interest law to exclude the President where the law might otherwise either "disempower [the President] from performing some of the functions prescribed by the Constitution" or "establish a qualification for his serving as President * * * beyond those contained in the Constitution"). But no such claim can be made here.

3. Petitioner suggests (Br. 37) that his novel implied presidential exception from all federal criminal law is necessary to protect the President's ability to carry out his constitutionally assigned functions. But that purpose is already achieved by existing principles of statutory construction and as-applied constitutional challenges. If a former President were prosecuted under a criminal law that raises serious separation-of-powers concerns in a particular context, an Article III court could first determine whether a background principle such as the public-authority defense protects against

liability;[11] construe the statute to avoid a serious separation-of-powers concern;[12] or, if that is not possible, declare a particular application of the statute unconstitutional.[13]

4. Petitioner, however, has no plausible as-applied separation-of-powers challenge to the criminal laws he is alleged to have violated. Indeed, petitioner did not even challenge the constitutionality of the statutes on this basis despite making numerous other pretrial claims, see D. Ct. Doc. Nos. 113, 114, 115, and 116 (Oct. 23, 2023), and such a challenge could not succeed.

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[11] See Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Att'y Gen., *Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* (July 16, 2010); *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994).

[12] See *United States* v. *Butenko*, 494 F.2d 593, 601 (3d Cir.) (en banc) (interpreting a surveillance statute to permit the President to order foreign wiretaps because the contrary interpretation might have interfered with the "President's effective performance of his duties in the foreign affairs field"), cert. denied, 419 U.S. 881 (1974); cf. *Sale* v. *Haitian Centers Council*, 509 U.S. 155, 188 (1993) (presumption that federal laws do not apply extraterritorially applies "with special force" with respect to a treaty or statute that "may involve foreign and military affairs for which the President has unique responsibility").

[13] The foreign-affairs and national-security contexts would be strong candidates for such as-applied holdings. See *Zivotofsky*, 576 U.S. at 31-32; see also, *e.g.*, *Ziglar* v. *Abbasi*, 582 U.S. 120, 142 (2017) ("Judicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'"); *Nixon*, 418 U.S. at 706, 710 (recognizing greater strength of a privilege claim for "military, diplomatic, or sensitive national security secrets" where "the courts have traditionally shown the utmost deference to Presidential responsibilities").

The Constitution does not give a President the power to conspire to defraud the United States in the certification of presidential-election results, obstruct proceedings for doing so, or deprive voters of the effect of their votes. And because neither Article II nor any other constitutional provision gives the President *any* role in certifying the election of his successor, petitioner cannot make a viable claim that the President's constitutional role renders it essential for him to engage in the criminal conduct alleged in the indictment. Thus, even if petitioner had properly preserved a separation-of-powers challenge to the application or interpretation of the statutes in the indictment, it would fail.

E. The Impeachment Judgment Clause Does Not Make Senate Conviction A Prerequisite To Criminal Prosecution Of A Former President

The Impeachment Judgment Clause provides further reason to reject petitioner's novel claim of absolute criminal immunity. That Clause provides:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

U.S. Const. Art. I, § 3, Cl. 7. Although much of petitioner's brief is devoted to arguments that necessarily imply that a former President can *never* face criminal prosecution, he acknowledges, as he must, that the Clause expressly contemplates such prosecutions. Petitioner attempts to reconcile that necessary concession with his position by maintaining (Br. 16-22) that the

Clause implicitly immunizes a former President from prosecution unless he has first been impeached by the House and convicted by the Senate for the same or closely related official conduct. That argument lacks merit.

1. The text of the Impeachment Judgment Clause affords no support for petitioner's claim. The first part of the Clause limits Congress's remedies to removal of an officer and disqualification from holding office in the future. The second part of the Clause explains that, despite conviction after an impeachment trial, a party convicted "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. Const. Art. I, § 3, Cl. 7. The text thus clarifies that an official who is impeached and convicted is "nevertheless" exposed to criminal prosecution in the courts of law; he has no double-jeopardy defense. But as the court of appeals noted, "[t]he text says nothing about non-convicted officials." J.A. 47.

Petitioner's contrary assertion (Br. 17) that the phrase "Party convicted" in the Impeachment Judgment Clause requires that an officer be both impeached and convicted before that officer may face criminal prosecution leads to structurally implausible results at odds with historical practice. Under his interpretation of the text, all federal officers, not just the President, would have to be impeached and convicted before prosecution. Although petitioner contends (Br. 19-20) that Presidents have a special status under the Clause, the Constitution itself refutes that claim. The Framers provided a separate rule for presidential impeachments in the immediately preceding clause (requiring the Chief Justice to preside, see U.S. Const. Art. I, § 3, Cl. 6), but

wrote no similar presidential exception into the Impeachment Judgment Clause.

Petitioner's proposed rule would also raise separation-of-powers concerns by giving Congress a veto over the Executive's decision to prosecute—a decision over which the Executive Branch has "exclusive authority and absolute discretion." *Nixon*, 418 U.S. at 693. And history reflects a clear separation between impeachment and prosecution. Although scores of federal officers have been criminally prosecuted throughout our history, fewer than two dozen officers have ever been impeached by the House, with only eight—all federal judges—convicted in the Senate. See Elizabeth Rybicki & Michael Greene, Cong. Research Serv., R45769, *The Impeachment Process in the House of Representatives* (2024). And in the few cases in which both procedures have been invoked, prosecution has regularly preceded impeachment. See, *e.g.*, *Nixon* v. *United States*, 506 U.S. 224, 226 (1993) (impeachment following prosecution of Article III judge). Courts have thus uniformly rejected the claim that criminal prosecution may occur only after impeachment and conviction. See *United States* v. *Claiborne,* 727 F.2d 842, 845 (9th Cir.) (per curiam), cert. denied, 469 U.S. 829 (1984); *United States* v. *Hastings*, 681 F.2d 706, 710 (11th Cir. 1982), stay denied, 459 U.S. 1094, cert. denied, 459 U.S. 1203 (1983); *United States* v. *Isaacs*, 493 F.2d 1124, 1142 (7th Cir.) (per curiam), cert. denied, 417 U.S. 976 (1974).

2. Petitioner's contention that impeachment must precede criminal prosecution also misapprehends the distinct roles that impeachment and prosecution play under the Constitution. The impeachment process is, by design, a political remedy for the dangers to governance posed by an office holder who has committed

"Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. Art. II, § 4. The Constitution contemplates that Congress will weigh the need for removal of an official from office by evaluating his fitness for continued or future exercise of governmental power. That process does not depend on rigorously adjudicating facts and applying law, or on finding a criminal violation; it is inherently political.

Unlike in the criminal justice system, Congress may decide not to impeach or convict for reasons that have little or no connection to the nature of the evidence or the officer's culpable conduct. The disruptive consequences of removal from office may be too great. The political alignment of Congress may prevent impeachment and conviction, without regard to the officer's conduct. The culpable conduct may come to light only after the President has left office or may occur so close to the end of the President's term that his impending departure from office makes impeachment seem less urgent. Or, as here, the impeachment trial could occur only after the President has left office, obviating the need for removal. The Senate has never convicted a *former* official, and Senators at petitioner's impeachment trial expressed doubt about their power to do so. See, *e.g.*, 167 Cong. Rec. S736 (daily ed. Feb. 13, 2021). All of those scenarios further confirm that petitioner's novel impeachment-first theory of criminal liability is untenable.

In contrast to impeachment, the criminal process produces legal, not political, results. For that reason, petitioner's extrapolation (Br. 29) from "[t]he recent history of Presidential impeachment" is inapt. Because impeachment is intrinsically political, experience with impeachment provides no basis for speculating that criminal prosecutions will follow the same path. And

basic structural features of the federal system confirm that they will not. Prosecutions do not grow out of "inter-branch conflict" (*ibid.*), but proceed from institutions that apply the facts and the law. And they unfold under judicial supervision to prevent any abuses. See pp. 22-24, *supra*. Petitioner's further claim (Br. 34) that DOJ "recognizes that the prosecution of a President is 'necessarily political'" distorts the reasoning of the opinion he cites. The OLC opinion petitioner quotes addresses prosecution of a *sitting* President. See *Amenability to Indictment*, 24 Op. O.L.C. 222, *supra*. Incapacitating a *sitting* President through criminal prosecution is tantamount to removal, and thus prosecution in that context is "*in some respects*, necessarily political." *Id.* at 230 (emphasis added). Prosecution itself is not. And prosecution of a former President does not raise concerns about the impact on an incumbent President that prompted OLC's statement. To the contrary, OLC concluded that "an immunity from prosecution for a sitting President would not preclude such prosecution once the President's term is over or he is otherwise removed from office by resignation or impeachment." *Id.* at 255.

3. Neither historical sources nor DOJ policy supports petitioner's impeachment-first rule. Petitioner invokes (Br. 17-18, 33-34) three of Alexander Hamilton's essays in *The Federalist* Nos. 65, 69, and 77 (Jacob E. Cook ed. 1961). None states that conviction by the Senate is a prerequisite to a former President's criminal prosecution. Hamilton's essays instead explained why the Supreme Court was not the proper body to serve as an impeachment court, *id.* No. 65, how a President differed from the British monarch, *id.* No. 69, and that, despite the President's formidable powers, strong

constitutional safeguards existed to protect the Nation, *id.* No. 77. Hamilton's discussions therefore focused on the constitutional processes for remedying misconduct by a *sitting* President; they do not suggest that a *former* President could not be prosecuted unless he was first impeached and convicted.

Petitioner fares no better with his other historical sources. See Br. 18-19. Petitioner contends that Chief Justice Marshall and Charles Lee (who was not Attorney General when he argued *Marbury*, as petitioner implies) advocated an impeachment-first rule. But that contention is premised on petitioner's flawed argument that courts cannot review a President's alleged criminal conduct under the reasoning in *Marbury* and its progeny. See pp. 38-40, *infra*. And Justice Joseph Story never endorsed the view that criminal prosecution was available only following impeachment and conviction for the same conduct; indeed, he explicitly rejected it. See 2 Joseph Story, *Commentaries on the Constitution of the United States* §§ 780-781 (1833) (observing that the Constitution separated an impeachment trial, with its exclusive remedies of removal and disqualification, from a trial "in the common tribunals of justice" to ensure that "a second trial for the same offence could be had, either after an acquittal, or a conviction in the court of impeachments").

Those historical sources and the DOJ materials that petitioner cites (Br. 19-22) reflect the longstanding Department position that although a *sitting* President enjoys temporary immunity from criminal prosecution—for all conduct, public and private—he may be prosecuted after leaving office. *Amenability to Indictment*, 24 Op. O.L.C. at 255; see also Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 Geo. L.J.

2133, 2161 (1998) (noting that if Congress declines to "impeach and remove" a sitting President, he cannot face criminal prosecution "until his term in office expires"). Contrary to petitioner's implication (Br. 19-22), neither OLC nor former Solicitor General Robert Bork expressed the view that impeachment and conviction were conditions precedent to federal criminal prosecution of a President. They instead reasoned that once a President has left office—whether through impeachment and conviction, resignation, or the end of his term—he may face federal criminal prosecution like any other citizen.[14] *Amenability to Indictment*, 24 Op. O.L.C. at 255; Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, at 6-7, *In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States*, No. 73-965 (D. Md.) (filed Oct. 5, 1973). Their conclusions therefore accord with Chief Justice Marshall's statement that "the president is elected from the mass of the people, and, on the expiration of the time for which he is elected,

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[14] Petitioner's account (Br. 28) of OLC's conclusion on the temporary immunity of a *sitting* President from criminal prosecution inaccurately extends that opinion's rationales to the distinct context of a *former* President's amenability to prosecution—despite OLC's explicit conclusion that a former President may face prosecution. See *Amenability to Indictment*, 24 Op. O.L.C. at 255 & n.32, 257. OLC relied on the ways in which the stigma of criminal charges and the distraction they would bring would interfere with a sitting President's performance of his constitutional duties, as well as the incongruity of *de facto* removing a President from office by prosecution given the constitutional remedy of impeachment for that purpose. *Id.* at 254, 258. Those rationales do not apply to prosecution of a former President: he has no constitutional duties and no office to leave.

returns to the mass of the people again." *United States* v. *Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14692D).

F. Petitioner's Understanding Of *Marbury* And His Other Remaining Arguments Lack Merit

1. Relying on the Vesting Clause, U.S. Const. Art. II, § 1, Cl. 1 ("The executive Power shall be vested in a President of the United States of America"), and *Marbury*, *supra*, petitioner argues that a President's official conduct "can never be examinable by the courts." Br. 11-16, 30, 47 (quoting *Marbury*, 5 U.S. (1 Cranch) at 166). But petitioner's position that a President may be criminally prosecuted following impeachment and Senate conviction is fundamentally inconsistent with his reading of *Marbury*. He admits (Br. 16) that courts can examine official presidential acts if the former President has been impeached and convicted. If the judiciary can directly examine a former President's official acts in that context, Article III courts unquestionably have the constitutional authority and capacity to preside over such prosecutions.

Petitioner's interpretation of *Marbury* also fails on its own terms. It is true that courts cannot enter an injunction against a *sitting* President directing his performance of official acts. See *Franklin*, 505 U.S. at 826-828 (Scalia, J., concurring in part and concurring in the judgment); see also *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19 (1827). But that protection against judicial direction of the President's ongoing conduct of office does not suggest that courts are disabled from holding a *former* President accountable when his actions violate federal criminal law.

The exercise of judicial power to review presidential acts in certain circumstances dates from the early years

of the Republic and continues to this day. See, *e.g.*, *Trump* v. *Hawaii*, 585 U.S. 667 (2018); *Medellin*, 552 U.S. 491; *Dames & Moore*, 453 U.S. 654; *Youngstown*, 343 U.S. 579; *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170 (1804) (Marshall, C.J.). Petitioner suggests (Br. 15) that the review of official presidential acts takes place through the actions against the President's subordinates because of judicial incapacity to exercise *any* authority "directly over the President's official acts." That claim contradicts the passage from *Marbury* on which he repeatedly relies, which discussed review of a subordinate's acts as an agent for the President. 5 U.S. (1 Cranch) at 166. Beyond that, the principle applies to judicial control over the President's ongoing administration of the government; it has nothing to do with potential criminal prosecution once the President has left office.

Petitioner likewise derives no support from *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1867). Pet. Br. 12, 31-32. There, the Court held that it could not issue an injunction to control the President's enforcement of the Reconstruction Acts. 71 U.S. (4 Wall.) at 500; see *Fitzgerald*, 457 U.S. at 753 n.34. But the Court declined to "express[] any opinion on the broader issues * * * whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case otherwise than by impeachment for crime." *Johnson*, 71 U.S. (4 Wall.) at 498. *Johnson*'s holding that a sitting President's acts are not susceptible to injunctions against him in his official capacity therefore says nothing about whether a former President can be prosecuted under federal criminal law.

Finally, *Fitzgerald*'s civil-immunity ruling is not a "'bookend to Marshall's ruling' in *Marbury*." Pet. Br. 14 (quoting *Vance*, 591 U.S. at 798). *Fitzgerald* in fact reaffirmed that courts *can* exercise "jurisdiction over the President," 457 U.S. at 753-754, and mentioned *Marbury* only in a footnote to refute an argument advanced by the dissent, *id.* at 754 n.37. And more recently, this Court invoked *Marbury* for precisely the opposite of the rule petitioner urges, stating that "when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton*, 520 U.S. at 703. The Court supported that statement by citing *Youngstown*, *supra*, which it described as "an application of the principle established" in *Marbury* that it "is emphatically the province and duty of the judicial department to say what the law is." 520 U.S. at 703 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177). The actual historical bookends that govern this case are Chief Justice Marshall's decision in *Burr* through the Court's decision in *Vance*: each decision applies the principle that Presidents are amenable to judicial process and that no person is above the law. *Vance*, 591 U.S. at 793-797 (discussing *Burr*).

2. Petitioner contends (Br. 22) that the lack of any prosecutions of former Presidents until this case reflects the settled conclusion that criminal immunity precludes such a prosecution. But this prosecution is a historical first not because of any assumption about immunity but instead because of the singular gravity of the alleged conduct. The indictment describes petitioner's efforts to "remain in power despite losing the 2020 election." J.A. 42. The severity, range, and democracy-damaging nature of the alleged crimes are unique in American history. Other than former

President Nixon, whose pardon precluded criminal prosecution, petitioner can point to no former President alleged to have engaged in remotely similar conduct.

In listing presidential conduct that he asserts was criminal (Br. 22-24), petitioner makes no effort to examine the specifics of any criminal statutes, consider relevant legal defenses, or address the threshold requirement that "the admissible evidence will probably be sufficient to obtain and sustain a conviction." Justice Manual § 9-27.220 (Grounds for Commencing or Declining Prosecution). Accusations leveled in political discourse do not constitute evidence.

Petitioner's examples also fail to prove his point. Even if it is true that John Quincy Adams and Henry Clay agreed to exchange political support for an appointment following the election of 1824, see Rami Fakhouri, *The Most Dangerous Blot in Our Constitution: Retiring the Flawed Electoral College 'Contingent Procedure,'* 104 Nw. U. L. Rev. 705, 719-720 (2010), Adams was a presidential candidate, not the President, and petitioner fails to explain how the asserted political deal constituted a crime. See *United States* v. *Blagojevich*, 794 F.3d 729, 734 (7th Cir. 2015) ("[A] proposal to trade one public act for another, a form of logrolling, is fundamentally unlike the swap of an official act for a private payment."), cert. denied, 577 U.S. 1234 (2016). Petitioner likewise identifies no court order or criminal statute that would have applied to President Jackson's decision not to send federal forces to prevent Georgia officials from interfering with the Cherokee following this Court's decision in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832). See generally Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 Stan. L. Rev. 500 (1969).

Petitioner's 20th and 21st century examples are similarly flawed. He identifies no criminal statutes that could have validly applied to President Roosevelt's decision to intern Japanese Americans during World War II, President Clinton's decision to launch military strikes in the Middle East, or President Obama's decision to launch a drone strike abroad. Those examples involved quintessential exercises of the President's Commander-in-Chief power during war or to protect the Nation from foreign threats, see U.S. Const. Art. II, § 2, Cl. 1. Attempts by Congress to regulate the President's exercise of those authorities through the criminal laws would raise the sort of serious separation-of-powers concerns that are absent here. See pp. 26-30, *supra*. And petitioner's assertion (Br. 23) that President Clinton engaged in an "illegal quid pro quo"—granting a pardon in exchange for a thing of value—rests on speculation.[15] Finally, petitioner makes no effort to support his contentions (Br. 23) that President George W. Bush made knowingly false statements about weapons of mass destruction in Iraq or that any of the conduct he ascribes to President Biden would violate a criminal law.

3. Petitioner's invocation (Br. 24-25) of common-law immunity doctrine is misplaced. The Court has acknowledged that common-law immunity doctrine is of limited use because "the Presidency did not exist through most of the development of common law." See *Fitzgerald*, 457 U.S. at 747-748; see also *Vance*, 591 U.S.

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[15] See Josh Gerstein, *Comey 'enthusiastic' about Bill Clinton probe in 2001, FBI memo says*, Politico, Jan. 18, 2017 (explaining that FBI closed the investigation in 2005 with no charges filed), https://www.politico.com/story/2017/01/james-comey-fbi-bill-clinton-233808.

at 801-802. And critically, for judges and prosecutors, absolute *civil* immunity has never implied *criminal* immunity. J.A. 27-32. The Court has instead reasoned that despite absolute immunity from civil damages claims, judges and prosecutors are "subject to criminal prosecutions as are other citizens." *Dennis* v. *Sparks*, 449 U.S. 24, 31 (1980) (judges); *Imbler* v. *Pachtman*, 424 U.S. 409, 429 (1976) (prosecutors). The recognition that civil immunity does not imply criminal immunity for these officials has deep roots in the law, *e.g.*, *Ex parte Virginia*, 100 U.S. 339, 348 (1880), and it equally applies here.

Indeed, exposure to criminal liability is one of the justifications for civil immunity. Criminal prosecutions ensure that, despite immunity from private civil damages actions, official misconduct is adequately punished and deterred. Accordingly, this Court has "never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivation of constitutional rights." *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974). "On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress.'" *Ibid.* (quoting *Gravel* v. *United States*, 408 U.S. 606, 627 (1972)).[16]

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[16] Petitioner suggests (Br. 25) that *Spalding* v. *Vilas*, 161 U.S. 483 (1896), recognized judicial immunity from criminal prosecution. But the language in *Spalding* was dicta relying on a state case from 1810, *see id.* at 494 (discussing *Yates* v. *Lansing*, 5 Johns. 282 (N.Y. Sup. Ct. 1810), aff'd, 9 Johns. 395 (N.Y. 1811)), and is inconsistent with this Court's more recent pronouncements in *O'Shea*, *Imbler*, and *Dennis*.

Likewise, the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1, does not support petitioner's immunity claim. No similar textual immunity applies to Presidents. And history explains the distinctive reasons for protecting legislators. The Clause arose in response to British kings' use of "the criminal and civil law to suppress and intimidate critical legislators," *United States* v. *Johnson*, 383 U.S. 169, 178 (1966), where "judges were often lackeys of the Stuart monarchs." *Id.* at 181. That history of interbranch abuse against legislators has no parallel here. And structural safeguards protect against any such abuses with respect to potential criminal prosecution of former Presidents under federal law. See pp. 20-24, *supra*.

II. EVEN IF A FORMER PRESIDENT HAS SOME IMMUNITY FROM FEDERAL CRIMINAL PROSECUTION FOR OFFICIAL ACTS, THIS PROSECUTION SHOULD PROCEED

Even assuming that a former President is entitled to some immunity for official acts, that immunity should not be held to bar this prosecution. First, a President's alleged criminal scheme to overturn an election and thwart the peaceful transfer of power to his lawfully elected successor is the paradigmatic example of conduct that should *not* be immunized, even if other conduct should be. Second, at the core of the charged conspiracies is a private scheme with private actors to achieve a private end: petitioner's effort to remain in power by fraud. Those allegations of private misconduct are more than sufficient to support the indictment. Thus, even if the Court determines that some form of official-act immunity exists and may apply to some acts alleged in this case, the Court should remand so the

district court can address the issues through evidentiary and instructional rulings at trial.

A. No Form Of Official Immunity Should Preclude Trial On The Indictment In This Case

This case should be remanded for trial because any novel immunity from criminal liability for a former President's official acts should not apply to the allegations in this case. A President's alleged criminal scheme to use his official powers to overturn the presidential election and thwart the peaceful transfer of power frustrates core constitutional provisions that protect democracy. See J.A. 40-43. These provisions include the term-of-office clause, see U.S. Const. Art. II, § 1, Cl. 1; the provision for electing Presidents, see *id.* Art. II, § 1, Cl. 2; and the installation-of-successor provision in the 20th Amendment. Petitioner's concern about chilling official conduct that violates those provisions rings hollow because no President has an Article II interest in using crimes to give himself a second term after an election he lost. Nor would it be a "gerrymandered approach," Pet. Br. 47, to focus on the specific allegations that petitioner conspired with others "to overturn the legitimate results of the 2020 presidential election by using knowingly false claims of election fraud," J.A. 183. To the contrary, a holding that petitioner has no immunity from the alleged crimes would suffice to resolve this case, leaving potentially more difficult questions that might arise on different facts for decision if they are ever presented. See *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (describing as a hallmark principle of judicial restraint that "[t]he Court will not formulate a rule of constitutional law broader than is required by the precise facts to

which it is to be applied") (citation and internal quotation marks omitted).

B. Any Remand Should Permit The District Court To Make Evidentiary And Instructional Rulings At Trial

Even if the Court were inclined to recognize some immunity for a former President's official acts, it should remand for trial because the indictment alleges substantial private conduct in service of petitioner's private aim. The district court can make evidentiary rulings and craft appropriate jury instructions for trial clarifying that petitioner may be held criminally liable based only on the private conduct alleged in the indictment, even though the jury could consider official-acts evidence for limited and specified purposes.

1. Petitioner's use of official power was merely an additional means of achieving a private aim—to perpetuate his term in office—that is prosecutable based on private conduct. The conspiracy centrally embraced private actors agreeing with petitioner to achieve his private end through private means. In particular, petitioner is alleged to have conspired with four private attorneys and a private political consultant in his effort, as a candidate, to subvert the election results. For example:

- Petitioner turned to a private attorney who "was willing to spread knowingly false claims" of election fraud to spearhead his challenges to the election results. J.A. 183, 192-193.
- Petitioner conspired with another private attorney who caused the filing in court of a "verification" signed by petitioner that contained false allegations to support a challenge. J.A. 183, 199-200.

- Three private actors—two attorneys (including one mentioned above) and a political consultant—helped implement a plan to submit fraudulent slates of presidential electors to obstruct the certification proceeding, and petitioner and a co-conspirator attorney directed that effort. J.A. 184, 208-215.

That alleged conduct falls well outside of any conception of presidential official acts.

Petitioner confirmed that he acted in a private capacity by seeking First Amendment protection for his false speech and moving to dismiss the entire indictment on that basis. D. Ct. Doc. Nos. 113, at 4-18 and 114, at 16-17 (Oct. 23, 2023), 162, at 1-10 (Nov. 22, 2023)); see *Manhattan Community Access Corp.* v. *Halleck*, 587 U.S. 802, 804 (2019) ("The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors."); *Garcetti* v. *Ceballos*, 547 U.S. 410, 424 (2006) (employee speech for the government has no First Amendment protection). The district court correctly held that petitioner's false speech in furtherance of the charged conspiracies is not constitutionally protected, J.A. 101-110, but petitioner's assertion of private First Amendment rights speaks volumes about the private character of the charged offenses.

That petitioner also engaged in official conduct that was intertwined with his private means of attaining the conspiracy's aim, see J.A. 215-220, should not immunize *all* of his conduct. No valid claim of blanket immunity should attach to a non-immune conspiracy committed with private actors through private conduct to obtain a private end simply because a former President also used official powers to further the conspiracy. See *Haldeman*, 559 F.2d at 122 (noting that the Watergate defendants

were charged with a conspiracy to defraud the United States, "not * * * with a crime of misusing the CIA"; the proof of "misusing the CIA" served to illustrate "a means of accomplishing the crime of defrauding the Government").

2. If the Court were to find that some form of immunity from criminal prosecution for a former President's official acts exists, that immunity should not preclude all evidentiary uses of official acts in a trial based on petitioner's purely private conduct. His interactions with government officials or actions in his official capacity would still be admissible to prove, for example, petitioner's knowledge or notice of the falsity of his election-fraud claims. *E.g.* J.A. 109, 206, 207, 216 (DOJ officials telling petitioner that his election-fraud claims were false). That evidentiary use parallels the established rule in comparable contexts. For instance, the First Amendment prohibits criminalizing most speech or other protected expression but it "does not prohibit the evidentiary use of speech," including "to prove motive or intent." *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993); see also *Dowling* v. *United States*, 493 U.S. 342, 348 (1990) (declining to exclude "relevant and probative evidence" under the Double Jeopardy Clause "simply because it relates to alleged criminal conduct for which a defendant has been acquitted"). Through evidentiary rulings and instructions to the jury, the district court can make clear that evidence concerning any protected official acts "is to be considered only for the proper purpose for which it was admitted." *Huddleston* v. *United States*, 485 U.S. 681, 691-692 (1988). And if petitioner objects to such rulings, he can seek appellate review, if necessary, after final judgment. Cf. *United States* v. *Rostenkowski*, 59 F.3d 1291, 1300 (D.C. Cir. 1995) (former member of Congress could appeal

evidentiary or instructional rulings based on congressional privilege after final judgment).

CONCLUSION

The judgment of the court of appeals should be affirmed. Consistent with the Court's expedited treatment of this case, the government respectfully requests that the Court issue the opinion and a certified copy of the judgment forthwith. Cf. *Nixon*, 418 U.S. at 716.

Respectfully submitted.

JACK L. SMITH
Special Counsel
J. P. COONEY
Deputy Special Counsel
MICHAEL R. DREEBEN
Counselor to the Special Counsel
JAMES I. PEARCE
Assistant Special Counsel

APRIL 2024

APPENDIX

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APPENDIX

1. U.S. Const. Art. I, § 3, Cl. 6 provides:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

2. U.S. Const. Art. I, § 6, Cl. 1 provides:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

3. U.S. Const. Art. I, § 3, Cl. 7 provides:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

4. U.S. Const. Art. II, § 1, Cl. 1 provides in pertinent part:

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years * * * .

5. U.S. Const. Art. II, § 2 provides:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

6. U.S. Const. Art. II, § 3 provides:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

7. U.S. Const. Art. II, § 4 provides:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

8. U.S. Const. Amend. XX, § 1 provides:

The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

9. 18 U.S.C. 241 provides in pertinent part:

Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District 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; * * * [t]hey shall be fined under this title or imprisoned not more than ten years, or both * * * .

* * * * *

10. 18 U.S.C. 371 provides in pertinent part:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire * * * to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both * * * .

* * * * *

11. 18 U.S.C. 1512 provides in pertinent part:

Tampering with a witness, victim, or an informant

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so,

with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

* * * * *

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.